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THE OKLAHOMA BAR Journal

Volume 88 — No. 30 — 11/18/2017

Administrative Law

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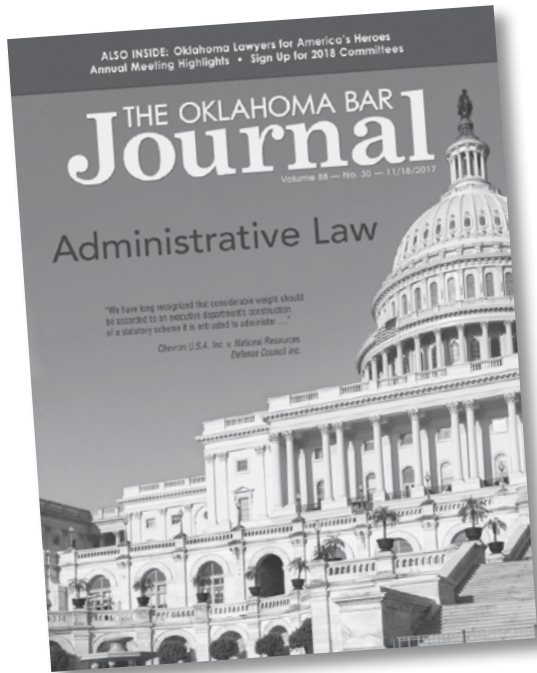
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THEME:
ADMINISTRATIVE LAW
EDITOR: MARK H. RAMSEY

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Generosity Deserves an Award

By Linda S. Thomas

I love being a lawyer. I've said this every chance I get this year. It's true, and the OBA Annual Meeting reinforced my love for the profession and my fellow lawyers. If you were there, you know what I mean, and if you weren't, you missed a great event.

Reflecting on this year's Annual Meeting, the word "generosity" comes to my mind. One definition of generosity is "the willingness to give others something of value in portions greater than is necessary." Generosity goes beyond giving money or material goods to something much more meaningful. I prefer to think of generosity as "continuous acts of selflessness." I've been so fortunate to work with remarkably generous leaders who selflessly give their time and expertise to the OBA. They're models of inspiration, and while I'd like to share with you the thousands of acts of generosity shown by lawyers from all over the state, there are simply not enough pages in the bar journal.

Each year at Annual Meeting, the OBA president has the privilege of giving President's Awards to a select few. This year my President's Awards went to six lawyers who fit my definition of generous leaders and selfless servants.

Jennifer Castillo is not only the best vice president I could ask for, she was instrumental in the success of the Annual Meeting. Early this year, she volunteered to take on this task, and her classiness touched almost every aspect of the meeting. Her creative style turned the Thursday night reception into a magical evening at the Oklahoma Jazz Hall of Fame, where we honored OBA section and committee leaders and our 50-, 60- and 70-year members.

Mack Martin did not hesitate to say "yes" when asked to chair the Task Force on Standards for Defense of Capital Punishment Cases. He and 10 other superstar lawyers devoted their time and expertise, studying all the

related issues resulting in the passage of a resolution by the House of Delegates to send the recommendations to the Rules of Professional Conduct Committee for further consideration.

Angela Ailles Bahm took over as chair of the Legislative Monitoring Committee after many years of dedicated service from Duchess Bartmess. Among other significant things, Angela created a new outreach to state legislators to aid in research on bills and other important matters, plus had the biggest turnout for Legislative Reading Day in known history.

Susan Damron, director of Educational Programs, is a master at putting on the Leadership Academy. Because of Susan's expertise and commitment, the academy is developing future OBA leaders by giving 23 elite attorneys training in the core principles of effective leadership.

Jim Calloway, a familiar name in tech circles all over the country, serves every member of our bar as Management Assistance Program director. He blogs, he tweets, he posts, all to assist lawyers better organize and operate the business side of practicing law. He keeps us current on the rapidly changing technology that is reshaping the processes of the traditional law office.

John Morris Williams, OBA executive director, I couldn't begin to tell you all he does for our association. To sum it up in just a few short words, John's dedicated leadership and selfless service to our members is the backbone of the OBA.

Thank you to these, and so many more Oklahoma lawyers, whose generosity of spirit makes the Oklahoma Bar Association an institution that works.

One definition of generosity is "the willingness to give others something of value in portions greater than is necessary."



Linda S. Thomas
President Thomas
practices in Bartlesville.
linda@thomasfamilylaw.com
918-336-6300

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JOURNAL STAFF

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

CAROL A. MANNING, Editor
carolm@okbar.org

MACKENZIE SCHEER
Advertising Manager
advertising@okbar.org

LACEY PLAUDIS
Communications Specialist
[laceyp@okbar.org](mailto:laceyplaudis@okbar.org)

LAURA STONE
Communications Specialist
lauras@okbar.org



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Navigating Administrative Hearings From Start to Finish

Kevin D. Gordon and Elizabeth Scott

Imagine your client has received an agency letter alleging statutory violations and threatening to revoke her professional license. Where do you start?

Whether a licensing proceeding or some other administrative hearing, these types of agency actions have become increasingly common. As the U.S. Supreme Court has noted, the administrative state “wields vast power and touches almost every aspect of daily life.”¹ This gradual expansion of the “fourth branch”² of government has occurred both on the federal and state level. For practitioners in Oklahoma, a keen understanding of the Oklahoma Administrative Procedures Act (OAPA) proves invaluable when clients inevitably face issues with state agencies. This article examines Article II of the OAPA, which generally governs agency hearings and adjudications. By navigating from notice of an agency complaint to the judicial review of a final agency order, this article seeks to familiarize practitioners with the basic contours of agency hearings as well as common pitfalls to avoid when a client is haled into an administrative proceeding.

AGENCY AUTHORITY

While Article II of the OAPA³ generally applies to state agencies, it exempts several agencies either in whole or part.⁴ So the logical first step in any agency proceeding is to determine which statute provides the agency’s authority and procedure. Begin by analyzing the enabling statute, meaning the statute by which the legislature created the agency. If the enabling statute does not contain a hearing procedure, then review Article II of the OAPA and determine

whether it exempts the agency from its default procedure. If not, follow the procedure outlined in Article II. Further, you should refer to the Oklahoma Administrative Code (OAC) to identify relevant agency rules that may control in your proceeding. And, of course, consider any constitutional requirements of due process that may apply if the hearing implicates property or liberty rights.⁵ Understanding these sources of authority will not only help you better defend your client in the agency hearing, but will also prepare you on possible grounds for reversal if you seek judicial review.

NOTICE OF THE VIOLATION

After determining which sources of law apply, review the agency complaint (also referred to as a notice). The complaint must set forth the time, place and nature of the hearing, as well as the legal authority, jurisdiction and factual and legal issues involved.⁶ The case will be assigned to either an administrative law judge or a hearing examiner depending on the agency. The OAPA guarantees those who receive an agency complaint the opportunity “to respond and present evidence and argument” on all issues raised in the complaint.⁷ While the timeline for answering the complaint differs by agency, 20 days is common.⁸ Hearing examiners typically grant extensions for additional time to respond if requested. Though hearing examiners are employed by the agency, they may not communicate *ex*

parte with the agency's investigators, which helps ensure a fair hearing.⁹ Like a trial judge, the hearing examiner rules the roost, issuing subpoenas, ruling on motions and granting orders. Prior to those actions, however, the hearing examiner typically issues a scheduling order, which includes discovery deadlines.

DISCOVERY

You may find that the agency enjoys quite the upper hand in gathering information. To illustrate why, consider an agency's broad investigatory power. Depending on its enabling statute, an agency may have the power to search and seize, issue subpoenas and employ full-time investigators who are commissioned peace officers.¹⁰ Further, agencies sometimes consult with other agencies or leverage other state resources to develop a case. Much of this information gathering may occur before the agency has issued a complaint to your client. And after your client receives a complaint, agencies may not be required to disclose the reports or initial complaints that prompted the investigation.¹¹ In light of this imbalance, the limited discovery that does exist in an administrative hearing becomes all the more important.

No standard discovery scheme exists for administrative hearings: some agencies have adopted the Oklahoma Discovery Code, some follow hybrid, agency-specific rules located in the OAC, and others rely solely on the limited discovery provisions of the OAPA.¹² Here too, knowledge of the agency's enabling statute proves crucial. If the agency has authority to promulgate rules, determine if it has adopted the Oklahoma Discovery Code in whole or part. If not, the OAPA controls and allows for depositions and subpoenas "to compel the production of books, records, papers or other objects."¹³ The OAPA does not contemplate other discovery tools, such as interrogatories. The availability of other discovery devices depends on agency-specific practice.¹⁴ Following discovery, the parties exchange witness and exhibit lists, and may also file prehearing motions. Further, the agency may offer to settle at this time.¹⁵ While timing varies by agency, the hearing usually occurs around one month after the close of discovery.

THE HEARING AND FINAL ORDER

Agency hearings somewhat mirror a civil trial, but on a much more compressed timeline; most last less than a day. These hearings vary in structure and scope depending on the specific rights involved. For purposes of this article, consider an administrative board hearing to revoke a professional license. A typical licensing hearing begins with opening statements from both sides and then proceeds to the agency's case-in-chief, the respondent's defense, closing statements, a call for executive session, a board vote and ultimately a final order. The agency bears the burden of proof and typically must prove its case by clear and convincing evidence.¹⁶ While you may use expert witnesses, the board can take notice of "recognized technical or scientific facts within the agency's specialized knowledge."¹⁷ Other witnesses can be compelled to testify through subpoena.¹⁸ You may have a court reporter transcribe the proceeding at your own expense.¹⁹

“ Agency hearings somewhat mirror a civil trial, but on a much more compressed timeline... ”

Note that the evidentiary rules are relaxed in a hearing.²⁰ Most notably, the board can hear and rely on hearsay evidence without committing reversible error.²¹ Though the evidentiary rules are relaxed, they are not abandoned. For example, traditional privilege protections apply.²² When necessary, raise evidentiary objections and argue why a particular evidentiary rule *should* apply. Further, you should continue to object if not only to preserve the record for judicial review. Because this administrative hearing offers your only trial *de novo* on the matter, make every effort to fully develop the record in your client's favor. After the presentation of evidence and cross-examination, parties make closing statements. Further, some agency rules allow a party to submit proposed findings of fact prior to deliberation.²³ If available, take advantage of this opportunity as it may provide a ground for reversal under judicial review. After closing statements, the board will most likely move for executive session and deliberate privately.²⁴ Once it reaches a decision, the board will move to end the executive session and invite back in the licensee and anyone else attending the hearing. The board members then publicly cast

their individual votes and pronounce a final order.

Though the board may orally pronounce a final order at the hearing, the OAPA requires the agency to issue a *written* final order that separately sets forth findings of fact and conclusions of law.²⁵ The agency must also serve this final order on parties personally or by certified mail.²⁶ Though a party may hear the final order during the hearing, the timer for appeal will not begin until that party properly receives the written notice.²⁷ Imagine that your client does receive an adverse final agency order (you can't win them all). If you wish to challenge the final agency order, two options remain: ask the agency to reconsider or seek judicial review.

REQUEST FOR REHEARING

You may request a rehearing, reopening or reconsideration of the final order within 10 days of its entry.²⁸ In doing so, you must point to at least one of five grounds listed in the statute: 1) newly discovered or available evidence, 2) need for additional evidence to develop essential facts, 3) probable error committed by the agency that would provide a ground for reversal under judicial review, 4) need for further consideration in the public interest or 5) a showing that issues ought to be taken into account that were not previously considered.²⁹ Outside of these five grounds, an agency may at any time reconsider a matter on the ground of fraud perpetrated by the prevailing party or on the ground that the order resulted from perjured testimony or fictitious evidence.³⁰ If you convince the agency to reconsider, the hearing is limited to the grounds listed in the order granting rehearing or reconsideration.³¹ Seeking a rehearing will not affect the period in which you can seek judicial review: that period is tolled until the agency decides on the application for rehearing.³²

JUDICIAL REVIEW

If the agency denies rehearing, you may file a petition in district court to seek judicial review.³³ Of course, you may do so immediately if you choose not to ask for a rehearing. Judicial review becomes available upon entry of the final agency order. Consequently, a party cannot appeal an interlocutory agency action.³⁴

Once you have decided to file a challenge in court, pay close attention to the jurisdictional timing requirements: if a party brings an un-

timely action, the court has no power to hear the case.³⁵ First, you must file the petition within 30 days after receiving notice of the final order.³⁶ As to venue, you must file in either 1) the county in which the party resides or 2) where the property affected is situated if a property right is in question.³⁷ Once you have filed the petition, you must notify the agency and all other parties of record by serving them with copies of the petition.³⁸ Note that the statute does not require a summons with this service.³⁹ After serving the required parties, you must then provide the court proof of service within 10 days of filing the petition.⁴⁰ The agency has 60 days after receiving service of the petition to send the administrative record to the court.⁴¹

After meeting these timing and venue requirements, consider asking the district court to stay enforcement of the agency decision. The OAPA allows the district court to do so "as it deems proper."⁴² But, where enforcement would result in "present, continuous, and irreparable impairment of ... constitutional rights," the district court *must* stay enforcement of the order and may require the appellant to post a supersedeas bond to secure compensation for any loss a party may suffer in the interim if the court ultimately affirms the agency action.⁴³ As to the record before the court, the parties may stipulate to shorten the record and court may "require subsequent corrections or additions to the record when deemed desirable."⁴⁴ Additionally, ask for oral argument and briefing as the statute requires the court do so *upon request*.⁴⁵

STANDARD OF REVIEW

A court reviewing a final agency order may 1) "set aside or modify the order" or 2) "reverse it and remand it to the agency for further proceedings."⁴⁶ While this seems like broad power, courts confine their review to the agency record and typically grant the agency considerable deference.⁴⁷ This underscores the importance of developing a full record at the agency hearing so that a reviewing court has more to consider on appeal. The OAPA allows the reviewing court to take the above measures when agency actions or findings are:

- (a) in violation of constitutional provisions;
- (b) in excess of statutory authority or jurisdiction;
- (c) made upon unlawful procedures;
- (d) affected by error of law;

- (e) clearly erroneous in view of reliable, material, probative and substantial competent evidence as defined in [the OAPA];
- (f) arbitrary or capricious; or
- (g) lacking findings of fact after such findings were requested.⁴⁸

At first glance, this list can cause more confusion than clarity. A careful review, however, offers insight. First, subsections (a)-(d) are grounded in errors of *law*.⁴⁹ Recall that agencies exist solely as a product of statute. Consequently, when an agency acts beyond the bounds of the constitution, the enabling statute, or the OAPA, the court can reverse that action as *ultra vires*. Again, a mastery of the applicable statutes allows you to make nuanced arguments on this front. While courts will defer to agency expertise, argue that these grounds represent pure questions of law entitled to *de novo* review.⁵⁰

The next two statutory grounds, listed in subsections (e) and (f), relate to an agency's findings of *fact*, and thus "require an enhanced burden for reversal."⁵¹ Subsection (e) applies the clearly erroneous standard, under which an agency's factual finding will not be reversed "unless the reviewing court upon examination of the complete record is left with a 'definite and firm conviction that a mistake has been committed.'"⁵² Further, the OAPA itself guides that the court must review the factual findings "without otherwise substituting its judgment as to the weight of the evidence for that of the agency."⁵³

Subsection (f) also relates to factual findings, but does so differently than subsection (e). The "arbitrary or capricious" standard of subsection (f) is "defined as action which is willful and unreasonable without consideration or in disregard of facts or without determining principle."⁵⁴ While subsection (e) examines the adequacy of factual findings, subsection (f) determines whether the agency's factual findings adequately fit the conclusions. Finally, subsection (g) allows a court to reverse agency action when the agency fails to make a finding of fact that the appellant requested. Recall that some agency rules allow a party to propose findings of fact to the hearing examiner. This ground for reversal highlights the importance of leveraging all available procedures during the agency hearing. If you fail at the district court level, you may appeal to the Oklahoma Supreme Court in the same manner as other district court appeals.⁵⁵

CONCLUSION

The thought of exhausting your client's administrative remedies can be, well, exhausting. But as agency regulation continues to expand, proficiency in the OAPA grows more and more valuable. This area of law offers ample opportunity for practitioners willing to delve into the intricacies of the statute.

Author's Note: *The authors acknowledge and thank attorneys Evan Way and Ryan Wilson for their assistance with this article.*

1. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010).
2. *See, e.g., Process Gas Consumers Grp. v. Consumer Energy Council of America*, 463 U.S. 1216, 1219 (1983) (White, J., dissenting) ("[I]ndependent agencies, once created, for all practical purposes are a fourth branch of the government.").
3. Okla. Stat. tit. 75, §§308a-323.
4. Okla. Stat. tit. 75, §250.4.
5. The constitutional requirement of due process in agency proceedings falls beyond the scope of this article. For authority on that issue, *see Matthews v. Eldridge*, 424 U.S. 319 (1976).
6. Okla. Stat. tit. 75, §309(B)(1-4).
7. *Id.* §309(C).
8. *See* Okla. Admin. Code §775:15-3-6; *id.* §435:3-3-8; *id.* §510:1-5-5; Okla. Stat. tit. 59, §503.
9. Okla. Stat. tit. 75, §313; *see also Barnes v. Univ. of Oklahoma*, 1995 OK CIV APP 14, ¶16, 891 P.2d 614, 618.
10. Okla. Stat. tit. 75, §315; Okla. Admin. Code §475:40-1-2; *id.* §475:40-1-3.
11. *See, e.g.,* Okla. Stat. tit. 59, §698.29.
12. *State ex rel. Protective Health Servs. v. Billings Fairchild Ctr., Inc.*, 2007 OK CIV APP 24, ¶7, 158 P.3d 484, 488 ("For example, the Department of Environmental Quality incorporated the Oklahoma Discovery Code. Okla. Admin. Code §252:4-9-38 (2001). The Oklahoma Department of Mines makes special provisions for interrogatories. Okla. Admin. Code §460:2-5-1. The Department of Commissioners of Land Office merely references the APA. Okla. Admin. Code §385:1-1-9(4) (2005). The Oklahoma Corporation Commission procedures are not covered by the APA, but that agency makes special provisions for interrogatories in its rules. Okla. Admin. Code §165:5-11-1(c) (1999).").
13. Okla. Stat. tit. 75, §315.
14. *Id.* §315.
15. *Id.* §309(E).
16. Okla. Admin. Code §510:1-5-6.1(c); *id.* §775:15-3-10(c).
17. Okla. Stat. tit. 75, §310 (4).
18. *Id.* §315(B)(1).
19. *Id.* §309(G).
20. *See Moore v. Oklahoma Emp't Sec. Comm'n*, 2013 OK CIV APP 46, ¶10, 301 P.3d 885, 888; *see also McDonald's Corp. v. Oklahoma Tax Comm'n*, 1977 OK 74, ¶8, 563 P.2d 635, 637 ("It has been held that the strict rules of evidence are not necessarily applicable to an administrative hearing.").
21. *Mobilfone Serv., Inc. v. Corp. Comm'n*, 1978 OK 98, ¶8, 580 P.2d 995, 997 ("Hearsay evidence is not grounds for reversible error in an administrative hearing where the order is supported by other competent evidence."); *Oklahoma Dep't of Pub. Safety v. McCrady*, 2007 OK 39, ¶10, 176 P.3d 1194, 1201.
22. Okla. Stat. tit. 75, §310.
23. *See id.* §312(A)(2).
24. *Id.* §309(D).
25. *Id.* §312(A).
26. *Id.* §312(B).
27. *See Hummer v. Lehmbek*, 2010 OK CIV APP 133, ¶¶7-8, 245 P.3d 1244, 1247.
28. Okla. Stat. tit. 75, §317(A).
29. *Id.* §§317(A)(1)-(5).
30. *Id.* §317(C).
31. *Id.* §317(D).
32. *Id.* §317(E).
33. Note that some agency actions, such as licensing decisions by the Oklahoma Medical Board, may be appealed directly to the Oklahoma Supreme Court. *See, e.g.,* Okla. Stat. tit. 59, §513.

34. *Ricks Expl. Co. v. Oklahoma Water Res. Bd.*, 1984 OK73, ¶15, 695 P.2d 498, 501-02.

35. *Conoco, Inc. v. State Dep't of Health*, 1982 OK 94, ¶11, 651 P.2d 125, 128.

36. Okla. Stat tit. 75, §318(B)(2).

37. *Id.* §318(B)(2).

38. *Id.* §318(C).

39. See *Choices Inst. v. Oklahoma Health Care Auth.*, 2010 OK CIV APP 117, ¶7, 241 P.3d 705, 708 (holding that even prior, less explicit version of the statute did not require summons).

40. Okla. Stat. tit. 75, §318(C).

41. *Id.* §320.

42. *Id.* §319(1).

43. *Id.* §319(2).

44. *Id.* §320.

45. *Id.* §321.

46. *Id.* §322.

47. See, e.g., *Dewey v. State ex rel. Oklahoma Firefighters Pension & Ret. Sys.*, 2001 OK 40, ¶12, 28 P.3d 539 (“[T]he district court must confine its review to the record made before the administrative tribunal.”).

48. Okla. Stat tit. 75, §322(1)(A).

49. Harvey D. Ellis, Jr. & Clyde A. Muchmore, *Oklahoma Appellate Practice* §24:17 (2016-17 ed.).

50. See The Honorable Justice John F. Reif, “A Discussion of Jurisdiction and Standards of Review,” 81 *Okl. Bar Journal* 102 (Jan. 16, 2010), available at [www.okbar.org/members/BarJournal/archive2010/Jan archive10/obj812rev.aspx](http://www.okbar.org/members/BarJournal/archive2010/Jan%20archive10/obj812rev.aspx).

51. Ellis & Muchmore, *supra* note 49, §24:17.

52. *Indep. Sch. Dist. No. 4 of Harper Cty. v. Orange*, 1992 OK CIV APP 145, ¶11, 841 P.2d 1177, 1181 (internal citations omitted).

53. Okla. Stat. tit. 75, §322(1)(e).

54. *State ex rel. Bd. of Trustees of Teacher's Ret. Sys. v. Garrett*, 1993 OK CIV APP 29, ¶6, 848 P.2d 1182, 1183 (internal quotations removed).

55. Okla. Stat tit. 75, §323.

ABOUT THE AUTHORS



Kevin Gordon has practiced law with Crowe & Dunlevy since 1984. He is the immediate past president and CEO, and now chairs the firm's Litigation Department. Mr. Gordon represents a wide range of clients in complex litigation and regulatory matters. For eight years, he also served as an adjunct professor at the OU College of Law. For more than 15 years, he organized and moderated the OBA's Insurance Law Update, receiving the Earl Sneed Award.



Elizabeth “Libby” Scott is a director in Crowe & Dunlevy's Oklahoma City office and chairs the Administrative & Regulatory Practice Group. She primarily represents healthcare providers in state and federal administrative proceedings as well as all related litigation. Ms. Scott is also an active member of the Healthcare and Criminal Defense, Compliance & Investigations practice groups, handling government affairs and legislative issues.

NOTICE OF JUDICIAL VACANCY

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

Justice of the Supreme Court District Nine

The vacancy will be created by the retirement of the Honorable Joseph M. Watt effective December 31, 2017.

To be appointed to the office of Justice of the Supreme Court, an individual must have been a qualified elector of the applicable Supreme Court Judicial District, as opposed to a registered voter, for one year immediately prior to his or her appointment, and additionally, must 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, click on Programs, then Judicial Nominating Commission or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the Commission at the address below **no later than 5:00 p.m., Monday, December 15, 2017. If applications are mailed, they must be postmarked by midnight, December 15, 2017.**

Steve Turnbo, Chairman
Oklahoma Judicial Nominating Commission
Administrative Office of the Courts
2100 N. Lincoln Blvd., Suite 3
Oklahoma City, Oklahoma 73105



Administrative

LAW

A Very Brief History of Federal Administrative Law

By Jeannie Ricketts

According to Yale law professor Peter H. Schuck, “[a]dministrative law refers to the legal doctrines – a complex mixture of constitutional, statutory, regulatory, and ‘common law’ principles – that govern the structure, decision processes, and behavior of administrative agencies.”¹ Administrative agencies are created by statutes, executive orders authorized by statutes and by state constitutional provisions.² Administrative agencies are also referred to as commissions, boards, authorities, bureaus, offices, departments or divisions.³ Administrative agencies produce substantive law within their jurisdiction, such as insurance law, tax law and labor law.⁴

The three main functions of federal administrative agencies are: 1) investigating; 2) rulemaking; and 3) adjudicating.⁵ Federal administrative agencies are authorized to investigate matters within their jurisdiction.⁶ Federal administrative agencies write rules to implement policies and procedures applicable to the individuals and entities they regulate.⁷ In making rules, federal agencies are required to follow the requirements of the federal Administrative Procedure Act (APA).⁸ Agencies make adjudications, which are administrative actions that impact the rights of certain individuals.⁹ Agency staff have specialized skills in law, accounting, engineering and other areas that are crucial to effectively operate administrative agencies.¹⁰

DEVELOPMENT OF ADMINISTRATIVE LAW

George Washington Law School administrative law professor Richard J. Pierce Jr., author of *Administrative Law Treatise*, parcels the development of administrative law into four distinct phases: 1) historical development up to 1946; 2)

historical development from 1946 to 1970; 3) historical development in the 1970s; and 4) historical development in the 1980s and 1990s.¹¹

Congress created the first federal administrative agency, the Department of Foreign Affairs, on July 31, 1789, to “estimate duties payable” on imports and to perform other related duties.¹² Later that same year, Congress renamed the Department of Foreign Affairs the State Department and created the departments of treasury and war.

As Congress continued to create federal administrative agencies, including the Department of Navy, the Office of the Attorney General, the Department of the Interior, the Department of Justice and the Post Office Department, administrative law developed prior to its actual recognition as an area of the law.¹³ In 1893, Columbia University administrative law professor Frank J. Goodnow published the first-known American book on administrative law, *Comparative Administrative Law*.¹⁴

In 1828, the United States imported steam engines from Great Britain and began building its own railroads.¹⁵ Sending goods by railway was less expensive than delivering them by carriage.¹⁶ However, the swift expansion of railroads in some states led to economic problems, such as monopolies and bankruptcies.¹⁷ In response, starting in the 1840s and 1850s, some states attempted to regulate railroads by passing laws to govern the railroads' management, control and operation.¹⁸ However, such laws were mostly ineffective because the lawmakers who drafted them lacked the specialized knowledge needed for effective legislation.¹⁹ These legislative failures led states to create administrative agencies.²⁰ Known as commissions, the agencies investigated railroads and applied their specialized knowledge to drafting legislation. However, state railroad commissions were themselves criticized for being mismanaged.²¹

Because individual states were unable to adequately regulate railroads, Congress passed the Interstate Commerce Act of 1887 to address abuses by railroads, such as high rates.²² For example, despite being less expensive than carriage transports, railroads charged farmers excessive rates to ship goods to market.²³ The Interstate Commerce Act created the Interstate Commerce Commission (ICC), which was the first independent federal regulatory commission.²⁴ By 1940, the ICC regulated most common carriers, including buses, taxis, interstate trucking, passenger trains and cruise ships. The ICC set rates, consolidated railroad systems and managed labor disputes. In the 1950s and 1960s, the ICC enforced Supreme Court decisions that mandated desegregation of passenger terminal facilities. In 1995, Congress terminated the ICC and transferred its remaining functions to the National Surface Transportation Board.²⁵

Despite federal agency regulation, states continued to regulate railroads. In 1907, the first Oklahoma Legislature formed Oklahoma's first state agency, the Oklahoma Corporation Commission (OCC).²⁶ The OCC regulated telephone and telegraph companies, and railroad rates and routes.

In 1933, following the creation of more federal administrative agencies, the American Bar Association (ABA) appointed a special committee on administrative law.²⁷ In 1934, the ABA's special committee began issuing annual reports. The American Bar Association was

very critical of administrative law and wanted to curtail it.

In 1939, President Franklin D. Roosevelt requested that the U.S. attorney general form a committee to investigate whether procedural reform in administrative law was needed.²⁸ The committee included distinguished judges, practicing lawyers and professors. Administrative law was, and still is, criticized as being an unlawful, fourth branch of government that doesn't conform to the constitutional ideal of the separation of powers among the legislative, judicial and executive branches of government.²⁹

Congress enacted the federal Administrative Procedure Act to address concerns about administrative law.³⁰ On June, 11, 1946, President Harry Truman signed the APA into law.³¹ It was the result of a compromise between the American Bar Association and the Truman administration, including the attorney general's committee. The drafters of the APA intended to reform administrative law by: 1) improving the administrative process; 2) enhancing uniformity; and 3) preserving the basic limits on judicial review of administrative action.³² To ensure fairness and due process rights, the APA was drafted to make the administrative process align with the judicial process of courts.³³ Due process protections in administrative law include ensuring: 1) notice of administrative action; 2) opportunity for a hearing with cross-examination; 3) adequate records and facts; and 4) appeal rights.³⁴

In 1966, Congress enacted the Freedom of Information Act (FOIA), which required federal agencies to disclose information.³⁵ Prior to FOIA, federal agencies restricted access to information and documents.³⁶ Despite FOIA's enactment, federal administrative agencies still resisted its disclosure requirements. In 1976, Congress amended the act to allow disciplinary actions against federal employees who did not comply with FOIA.

In the 1970s, significant developments in administrative law included: 1) increased use of rulemaking; 2) concern about informal and unreviewed discretionary action; 3) changes to agency practice brought about by FOIA; 4) amendments to the APA, which abolished sovereign immunity; and 5) increases in judicial activism.³⁷

In 1974, Congress enacted the Privacy Act, which amended the APA.³⁸ The Privacy Act is based upon one's First Amendment right to

privacy.³⁹ The rationale behind the Privacy Act was to prevent the federal government from misusing individuals' personal information.⁴⁰ In 1975, the government in the Sunshine Act amended the APA to require federal agencies to hold open meetings and provide their records to the public.⁴¹ By mandating open records, the Sunshine Act was attempting to discourage collusion between federal agencies and the individuals and entities the agencies regulate.⁴²

In the 1980s and 1990s, various U.S. Supreme Court cases addressed challenges to the constitutionality of administrative agency power.⁴³ However, the court's majority upheld the status quo of administrative agency powers. The Regulatory Improvement Act of 1998 amended the APA to authorize Congress to review federal agency rules.

STATE ADMINISTRATIVE LAW

The reformation of administrative law at the federal level also occurred at the state level. The Uniform Law Commission passed the first version of the Model State Administrative Procedure Act (MSAPA) in 1946.⁴⁴ The drafters of the first version of the MSAPA communicated with the drafters of the federal APA. Since 1946, the MSAPA has been revised three times: in 1961, 1981 and 2010. The 2010 version was necessary to track changes in law at the state level over the past 28 years by legislatures who amended adjudication and rulemaking procedures and due to the internet. In 1987, Oklahoma adopted its own version of the state APA.⁴⁵

CONCLUSION

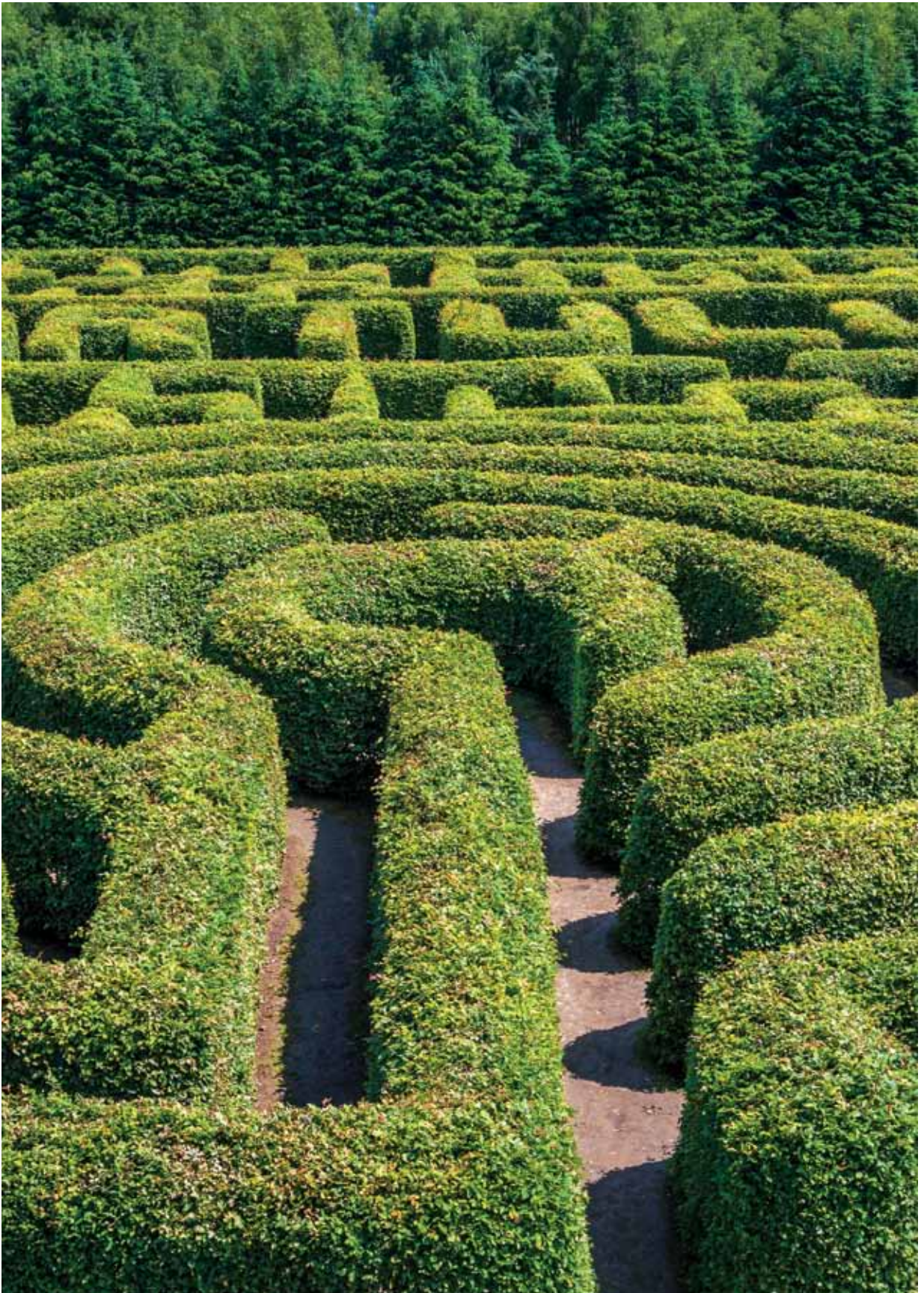
Administrative law governs the operation of agencies that perform crucial consumer protection functions. Agency employees develop subject matter expertise in the areas they regulate. The federal and state APAs have provided a strong framework with necessary amendments over time to help ensure that federal and state agencies regulate within their subject matter jurisdictions as fairly as possible. Instead of focusing on the constitutionality of administrative law, current efforts should be directed at ensuring that federal and state agencies are managed efficiently and meet their missions of effectively delivering consumer protection to citizens.

1. Peter H. Schuck, *Foundations of Administrative Law* 5 (Foundation Press 1994).
2. Kenneth Culp Davis, *Administrative Law and Government* 6 (1975).
3. *Id.*
4. *Id.*
5. Stein, Mitchell, & Mezines, *Administrative Law*, 1-29 - 1-52 (Lexis-Nexis 2013).
6. *Id.* at 1-30.
7. *Id.* at 1-35.
8. *Id.* at 1-37.
9. *Id.* at 1-42.
10. Davis, *supra* note 2, at 27.
11. Richard J. Pierce Jr., *Administrative Law Treatise*, 8-32 (4th ed. 2002).
12. *Id.* at 8.
13. *Id.*
14. Davis, *supra* note 2, at 11.
15. U.S. History, *U.S. History Pre-Columbian to the New Millennium*, www.ushistory.org/us/25b.asp.
16. *Id.*
17. Stein, Mitchell & Mezines, *supra* note 4, at 1-15.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 1-16; *See also* Davis, *supra* note 2, at 9.
23. Center for Effective Government, *supra* note 11, at 1.
24. Federal Register, Interstate Commerce Commission, www.federalregister.gov/agencies/interstate-commerce-commission (last visited Sept. 23, 2017).
25. Surface Transportation Board, www.stb.gov/stb/index.html (last visited Sept. 23, 2017).
26. Oklahoma Corporation Commission History, www.occeweb.com/Comm/commissionhist.htm (last visited Oct. 3, 2017).
27. Pierce, *supra* note 11, at 12.
28. *Id.* at 14.
29. *See e.g.* Philip Hamburger, *Is Administrative Law Unlawful?* 1-2 (2014).
30. Pierce, *supra* note 2, at 15 (noting that the American Bar Association sponsored the Walter-Logan bill to curtail the administrative process).
31. Stein, Mitchell, & Mezines, *supra* note 4, at App. 1C-3.
32. *Id.*
33. Peter Woll, *Administrative Law* 16-17, 21 (1963).
34. *Id.* at 22.
35. Pierce, *supra* note 2, at 23.
36. Stein, Mitchell, & Mezines, *supra* note 4, at 1-58.
37. Pierce, *supra* note 11, at 23.
38. Stein, Mitchell, & Mezines, *supra* note 4, at 1-67.
39. *Id.* at 1-68.
40. *Id.* at 1-68.
41. *Id.* at 1-68 - 1-69.
42. *Id.* at 1-74.
43. Pierce, *supra* note 11, at 24-26.
44. State Administrative Procedure Act, Revised Model Summary, Uniform Law Commission, The National Conference of Commissioners on Uniform State Laws, [www.uniformlaws.org/ActSummary.aspx?title=State Administrative Procedure Act, Revised Model](http://www.uniformlaws.org/ActSummary.aspx?title=State%20Administrative%20Procedure%20Act,%20Revised%20Model).
45. Oklahoma Administrative Procedures Act, ok.gov/wcc/documents/Administrative%20Procedures%20Act.pdf.

ABOUT THE AUTHOR



Jeannie Ricketts is a staff attorney at the Texas Department of Insurance. She received a B.A. from Trinity University, in San Antonio, a J.D. from the University of Houston, an M.P.H. from the University of Texas School of Public Health and is board certified in administrative law by the Texas Board of Legal Specialization.



Exhaustion of Administrative Remedies in the Bureau of Indian Affairs

By Conor Cleary

Administrative law – mere mention of the topic may send a shiver down the spine, or induce the overwhelming urge to take a nap. Practicing it can be like learning a foreign language, requiring mastery of technical terminology obscured in inaccessible administrative codes. For many law students, it was a class you desperately tried to avoid taking in law school (up there with tax law, which, of course, is largely administrative). Perhaps this is why the late Justice Scalia once jokingly remarked that “administrative law is not for sissies.”¹

Many attorneys it seems, comfortable within the confines of the courts, would prefer to avoid the administrative arena entirely, or, at a minimum, abscond with an administrative decision and seek judicial review if necessary. But even escaping the walls of an administrative agency often proves difficult, with seemingly complex rules requiring exhaustion of administrative remedies before seeking judicial review.

The purpose of this article is to help alleviate the anxiety administrative law induces, demystify the inner workings of administrative agencies and elucidate the doctrine of exhaustion of administrative remedies. Specifically, the article will examine the Bureau of Indian Affairs (BIA), an administrative agency attorneys in the state of Oklahoma will likely encounter sometime during their careers, explain the hierarchy of its decision making and explain how those decisions must be appealed inter-

nally before seeking judicial review in the federal courts.

REVIEW OF AGENCY ACTION AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

The Administrative Procedure Act (APA) waives the United States’ immunity from suit and allows judicial review of agency actions.² The APA is not a grant of federal subject-matter jurisdiction, however. To establish jurisdiction, the claimant must rely on a specific statute authorizing review of agency action³ or seek review of a “final” agency action.⁴ Many agency actions are not made reviewable by a specific statute, so judicial review typically is requested of “final” agency actions under §704 of the APA. Finality is not the same thing as exhaustion, and exhaustion of administrative remedies is not necessarily required in order for an agency action to be “final.”⁵ Rather, “an appeal to a superior agency (*i.e.*, exhaustion) is

a prerequisite to judicial review only when expressly required by statute or when agency rule requires appeal before review...⁶ Most actions by the BIA will require exhaustion of administrative remedies before judicial review because the BIA's regulations provide that "[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. §704[.]"⁷

The doctrine of exhaustion of administrative remedies provides that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."⁸ In less tautological terms: remedies available in an administrative forum must be fully pursued before seeking judicial review in a court of law. Exhaustion serves two aims. First, it protects "administrative agency authority" by allowing the agency "primary responsibility for the programs ... [it] administer[s]."⁹ Second, it "promotes judicial efficiency" by allowing agencies to correct errors which may moot controversies or avoid piecemeal appeals and developing a thorough record for those appeals that progress to judicial forums.¹⁰ So, if BIA regulations require exhaustion, how is exhaustion accomplished? A quick review of the structure of the BIA will assist in understanding the process.

STRUCTURE OF THE DEPARTMENT OF INTERIOR/BIA

The Department of the Interior (department) is headed by the secretary of the interior, who has several assistant secretaries with responsibility for specific policy areas. The assistant secretary of Indian affairs (AS-IA) has responsibility for the Bureau of Indian Affairs, whose mission is to enhance the quality of life, to promote economic opportunity and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes and Alaska Natives.¹¹

The delivery of program services to federally recognized Indian tribes and individual Native Americans and Alaska Natives is administered

by 12 regional offices¹² and 83 agencies that each have jurisdiction over specific Indian tribes and lands. In Oklahoma, there are two regional offices – Eastern Oklahoma and Southern Plains. The Eastern Oklahoma Regional Office has six agencies¹³ while Southern Plains has four.¹⁴ Each regional office is headed by a regional director and each agency is headed by a superintendent.

The Office of Hearings and Appeals (OHA) is the adjudicatory body for the department, conducting hearings and deciding appeals from decisions of the bureaus and offices of the department. The Interior Board of Indian Appeals (IBIA) is the appellate body within OHA that reviews decisions of officials within BIA.¹⁵ There are general procedural rules and regulations applicable to all proceedings on appeal before IBIA, and more specific rules and regulations that are applicable to the different kinds of cases over which the IBIA has jurisdiction. This article will discuss the most common cases reviewed by IBIA and the rules and regulations applicable thereto – administrative actions or decisions of BIA officials issued under the Indian affairs regulations found in Title 25 of the Code of Federal Regulations.¹⁶

DECISIONS BY SUPERINTENDENT, REGIONAL DIRECTOR, IBIA

The decision-making process generally begins at the BIA agency level, with decisions from the agency superintendent.¹⁷ Decisions by superintendents of BIA agencies are appealed to the regional director.¹⁸ Once the regional director renders a decision, it may be appealed to the IBIA.¹⁹ The procedure for correctly filing and litigating an appeal before the IBIA is found in the regulations in 43 C.F.R. Part 4, Subpart D.²⁰ Once the appeal is fully briefed, the IBIA will make a decision in writing, setting forth findings of fact and conclusions of law.²¹ The decision may adopt, modify, reverse or set aside any proposed finding, conclusion or order of a BIA official.²² Unless otherwise stated in the decision, the IBIA's decision is final for the department.²³ No further appeal will lie within the department from a decision

“... ‘no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.’ ”

by the IBIA and the filing of a petition for reconsideration is not required to exhaust administrative remedies.²⁴ Once the IBIA issues its decision, only then may a claimant seek judicial review.

The 10th Circuit has strictly applied the BIA's exhaustion requirements, repeatedly citing 25 C.F.R. §2.6 which provides that "[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. §704."²⁵ The 10th Circuit has rejected attempts to bypass the exhaustion requirement where, for example, in lieu of a decision from IBIA, plaintiffs characterized letters from BIA officials as final agency action.²⁶ The 10th Circuit also turned away attempts by litigants to proceed directly to federal court from decisions by BIA regional directors without first appealing those decisions to, and obtaining a decision from, IBIA.²⁷ Furthermore, the 10th Circuit also declined to find final agency action where appeals were made to IBIA, but remanded for further action by BIA.²⁸ Since "the Regional Director ha[d] yet to render a decision on remand," the court concluded that "it is clear that this matter is still pending with the BIA and remains subject to administrative adjudication by the IBIA."²⁹ The court explained that until the regional director issued a decision, that plaintiffs had not suffered a legal wrong or been adversely affected, but merely were anticipating an adverse decision.³⁰

CONCLUSION

Although administrative agencies may seem mysterious and their exhaustion procedures labyrinthine, the BIA has by express regulation required appeal of most decisions to the IBIA before seeking judicial review in federal court. Attorneys will save their clients time and money by following the procedures laid out in 25 C.F.R. Part 2 and 43 C.F.R. Part 4 Subpart D which provide clear guidance on how to appeal decisions by BIA officials to IBIA and thereby seek judicial review in federal court if necessary.

Author's Note: *The opinions expressed are my own and do not necessarily represent the views of the Office of the Solicitor or the Department of the Interior. Any errors or omissions are my own.*

1. Antonin Scalia, "Judicial Deference to Administrative Interpretations of Law," 1989 *Duke L.J.* 511.

2. 5 U.S.C. §702.

3. *Id.*

4. *Id.*, §704.

5. *Darby v. Cisneros*, 509 U.S. 137, 144 (1993) ("[T]he judicial doctrine of exhaustion of administrative remedies is conceptually distinct from the doctrine of finality[.]").

6. *Id.*, at 154. The underlying decision being appealed must also be rendered "inoperative," *id.*, meaning that "it has no positive effect" and "the status quo before the decision continues." *Osage Producers Ass'n v. Jewell*, 191 F.Supp. 3d 1243, 1252 n.7 (N.D. Okla. 2016) (citing *Manny Indus. v. Sec'y of Labor*, 432 F. Supp. 88, 89 (C.D. Cal. 1977), *aff'd*, 596 F.2d 409 (9th Cir. 1979)).

7. 25 C.F.R. §2.6(a). There are a few limited exceptions to the exhaustion requirements. *See, generally, Nulankeyutmonen Nkihtaqmikon v. Impson*, 573 F. Supp. 2d 311, 316 (D. Me. 2008). One common exception is where exhaustion would be futile. *See id.* (identifying "'exceptional circumstances,' such as futility, 'where exhaustion may not be required.'"); *see also Gardner v. Salazar*, 2013 U.S. Dist. LEXIS 44953, *8 n.3 (D. Utah March 27, 2013), *aff'd, In re Gardner*, 2013 U.S. App. LEXIS 19172 (10th Cir. Sept. 17, 2013). Exhaustion may be futile where the BIA has preannounced its decision, denied the claimant access to administrative remedies or has shown undisputed evidence of bias. *See Impson*, 573 F. Supp. 2d at 320. The futility exception is extremely narrow and available only on rare occasions. *See id.* (citations omitted). Another exception to the exhaustion rule exists where "the plaintiff asserts a colorable constitutional claim that is collateral to the substantive issues of the administrative proceeding." *Harline v. DEA*, 148 F.3d 1199, 1203 (10th Cir. 1998). A constitutional claim is not colorable if it is "immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial or frivolous." *Id.* (internal quotation and ellipses omitted). In other words, a litigant cannot avoid the exhaustion requirement by simply alleging a constitutional violation for "[i]f the mere allegation of a denial of due process could suffice to establish subject-matter jurisdiction, then every act of an agency would be immediately judicially reviewable[.]" *Id.*

8. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938).

9. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).

10. *Id.*

11. www.bia.gov/WhoWeAre/BIA/index.htm (last accessed July 26, 2017).

12. Alaska, Eastern Oklahoma, Midwest, Northwest, Rocky Mountain, Southwest, Eastern, Great Plains, Navajo, Pacific, Southern Plains and Western.

13. Chickasaw Agency, Miami Agency, Okmulgee Agency, Osage Agency, Tahihina Agency and Wewoka Agency.

14. Anadarko Agency, Pawnee Agency, Concho Agency and Horton Agency.

15. There are other appellate bodies for other bureaus in the department. For example, the Interior Board of Land Appeals (IBLA) reviews decisions of officials within the Bureau of Land Management. For a recent 10th Circuit decision on exhaustion of administrative remedies before the IBLA *see Farrell-Cooper Mining Co. v. United States*, No. 16-7061, 2017 U.S. App. LEXIS 13396 (10th Cir. July 25, 2017).

16. www.doi.gov/oha/organization/ibia/Appeals-from-Administrative-Decisions-Issued-by-the-Bureau-of-Indian-Affairs (last accessed July 20, 2017). There are separate rules and regulations for appeals to the IBIA from decisions by administrative judges regarding the probate of Indian trust property. *See* 43 C.F.R. §4.320 *et seq.* A discussion of those procedures, and the exhaustion thereof, is beyond the scope of this article.

17. Examples of issues that will first be decided by the agency superintendent include: approval of various kinds of leases of Indian land (*see* 25 C.F.R. §162.010(a)(3) ("Prospective lessees ... must submit the lease ... to the BIA office with jurisdiction over the lands covered by the lease ...")); rights-of-way over Indian land (*see* 25 C.F.R. §169.101 ("To obtain a right-of-way across tribal or individually owned Indian land[,] ... you must submit a complete application to the BIA office with jurisdiction over the land covered by the right-of-way.")); and oil, gas and other mineral leases (*see* 25 C.F.R. §211.20 (Indian mineral owners may, with the approval of the superintendent[,] ... lease their land for mining purposes.")). Although the majority of decisions by BIA begin at the agency level, not all do. For example, American Indian groups seeking to be recognized as tribes begin by filing a letter of intent with AS-IA. *See* 25 C.F.R. §83.4.

18. 25 C.F.R. §2.4(a). The IBIA does not have jurisdiction over appeals from decisions of agency superintendents; appeals must be made to the regional director first. *See* 43 C.F.R. §4.331(a) ("Any interested party affected by a ... decision of an official of the Bureau of Indian Affairs ... may appeal to the Board of Indian Appeals, except ... that decisions which are subject to appeal to a higher official within the Bureau of Indian Affairs must first be appealed to that official."); *see also Northern Cheyenne Livestock Ass'n v. Acting Superintendent, Northern Cheyenne Agency*, 43 IBIA 24 (2006).

19. There are a few subject areas in which the IBIA does not have jurisdiction over decisions made by a regional director, unless permitted by the secretary of the interior or the assistant secretary – Indian Affairs. For example, the IBIA does not have jurisdiction over a regional director’s decision regarding tribal enrollment disputes or matters decided by the BIA through exercised of its discretionary authority. See 43 C.F.R. §4.330(b). Moreover, there are certain decisions of superintendents and regional directors that are appealed to the AS-IA rather than the IBIA. See, e.g., 25 C.F.R. §23.61 (providing appeal from decision of agency superintendent or regional director to AS-IA regarding grants to Indian tribes for the establishment and operation of Indian child and family service programs under the Indian Child Welfare Act).

20. The procedures include important timing, notice and service requirements that must be followed. See 43 C.F.R. §4.330 *et seq.*

21. 43 C.F.R. §4.312.

22. *Id.*

23. *Id.*

24. *Id.*, §4.314(b)-(c).

25. See, e.g., *Jech v. Dep’t of Interior*, 483 Fed. Appx. 555, 558 (10th Cir. 2012); *Blackbear v. Norton*, 93 Fed. Appx. 192, 193 (10th Cir. 2004).

26. See *Jech*, *supra*, at 559 n.3 (“We determine that the letters from the BIA do not constitute final agency action.”).

27. See *Blackbear*, 93 Fed. Appx. at 193 (“Neither those plaintiffs whose appeal to the IBIA is pending nor those who chose not to appeal can point to a final agency action upon which to base their claim.”).

28. See *Fort Berthold Land and Livestock Assn. v. Anderson*, 361 F.Supp. 2d 1045 (D.N.D. 2005); *Guimont et al. v. Acting Great Plains Regional Director, Bureau of Indian Affairs*, 40 IBIA 47, 48 (2004).

29. See *Anderson*, *supra*, at 1052.

30. Even where administrative remedies have been exhausted initially, further exhaustion may be required if the court reverses and remands to the agency for further action consistent with the opinion and new legal issues arise in the BIA’s subsequent decision. See *Miami Tribe of Oklahoma v. United States*, 2005 U.S. Dist. LEXIS 29468 (D. Kan. Nov. 23, 2005).

ABOUT THE AUTHOR



Conor P. Cleary is a trial attorney with the Office of the Solicitor, U.S. Department of the Interior. His practice involves advising and representing administrative agencies within the Department of the Interior, and focuses primarily on federal Indian law. He graduated from the OU College of Law in 2010, where he served as articles editor of the *Oklahoma Law Review*.

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An Adjunct Professor, Negotiation at Arizona State University College of Law from 1995 to 2005, Latz has also negotiated for the White House nationally and internationally on the White House Advance Teams.

Latz, a Harvard Law cum laude graduate, is the author of *Gain the Edge! Negotiating to Get What You Want* and has appeared as a negotiation expert on CBS' *The Early Show* and such national business shows as *Your Money* and *Fox Business*. He writes a monthly negotiation column that appeared for many years in *The Arizona Republic* and that now is e-mailed to almost 40,000 readers per month.

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Should ‘Junk Science’ Have a Place in Agency Decision Making?

By Jason T. Seay

History is littered with scientific debate regarding what exists and how things interact with each other. The intersection between that debate and the law presents some of the most difficult and important, yet routine, questions lawyers may face. Science is no “truth machine.” What is scientifically sound may not be legally sound, and vice versa, because “[s]cientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly.”¹ Although scientific understanding of phenomena is constantly evolving, the legal analysis for determining the admissibility of scientific evidence in court is well known to most lawyers. Yet, an open question remains as to whether the legal framework for determining the admissibility of scientific or technical evidence should apply to state agencies acting in a judicial capacity. Should “junk science” have a place in hearings before Oklahoma agencies, but not in Oklahoma trial courts?

The court, in *Sanchez-Munoz v. State of Oklahoma, ex rel. Oklahoma Horse Racing Commission*,² applied – without deciding whether it should do so – an analysis resembling the *Daubert* standard to expert evidence presented to an administrative agency acting in a judicial capacity.³ It also applied the abuse-of-discretion standard of review to the issue on appeal.⁴ However, *Sanchez-Munoz* does not provide guidance on whether *Daubert* and its progeny should apply to administrative agencies acting in a judicial capacity. This short article attempts to present the basic issues of applying *Daubert* to agencies acting in a judicial capacity and suggests state agencies should inquire as to the

relevance and reliability of scientific or technical evidence in hearings before them.

BRIEF OVERVIEW OF THE DAUBERT TRILOGY

For 70 years, *Frye v. United States*⁵ governed the admissibility of scientific evidence in federal court. It permitted such evidence only if it was “generally accepted.”⁶ In *Daubert*,⁷ the court clarified the role of the trial judge as being a gatekeeper responsible for determining the admissibility of evidence.⁸ “[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”⁹ Under *Daubert*, the expert’s

testimony must be “scientific knowledge,” not simply generally accepted, in order to be deemed relevant.¹⁰ The court identified four factors to determine the admissibility of scientific evidence.¹¹

In 1997, the Supreme Court revisited *Daubert* in *General Electric Co. v. Joiner*.¹² The court held that abuse of discretion is the standard of review for reviewing a district court’s evidentiary ruling, regardless of whether the ruling allowed or excluded expert testimony.¹³

In *Kumho Tire Co. v. Carmichael*,¹⁴ the Supreme Court extended *Daubert* to all forms of expert testimony – not just scientific testimony – and further clarified the flexibility of the *Daubert* factors.¹⁵

We conclude that *Daubert*’s general holding – setting forth the trial judge’s general “gatekeeping” obligation – applies not only to testimony based on “scientific” knowledge, but also to testimony based on “technical” and “other specialized” knowledge. We also conclude that a trial court may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony’s reliability. But, as the Court stated in *Daubert*, the test of reliability is “flexible,” and *Daubert*’s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.¹⁶

DAUBERT IN OKLAHOMA

In *Taylor v. State*,¹⁷ the Oklahoma Court of Criminal Appeals adopted the *Daubert* standard for admissibility of expert testimony.¹⁸ “*Daubert* makes clear that trial judges must continue to act as gatekeepers, ensuring that all novel scientific evidence is both reliable and relevant.”¹⁹ In *Gilson v. State*,²⁰ the court extended *Daubert* to testimony based on technical and other specialized knowledge.²¹

In *Christian v. Gray*,²² the Oklahoma Supreme Court adopted “*Daubert* and *Kumho* as appropriate standards for Oklahoma trial courts in deciding the admissibility of expert testimony in civil matters.”²³ The Oklahoma Supreme Court developed a two-step analysis for determining the proper standard of review for “*Daubert* challenges.”²⁴

NECESSITY OF EXPERT TESTIMONY IN ADMINISTRATIVE PROCEEDINGS²⁵

Before determining what standard expert evidence may be tested for purposes of determining admissibility, it should be asked whether expert evidence is necessary for purposes of the administrative proceeding. Although it is generally accepted that expert testimony before an administrative agency is permissible, courts “which have considered the issue have reached conflicting views on the issue of whether expert testimony is required ...” for purposes of administrative action.²⁶ On one hand, some courts do not require expert testimony over scientific or technical matters on the grounds that the expertise of the administrative body regulating a profession is sufficient alone.²⁷ However, in doing so, the agency must give notice of its opinion before any proceeding with an opportunity to rebut it.²⁸

On the other hand, most courts that require expert testimony over scientific or technical matters in administrative proceedings focus upon the requirements for judicial review of the decisions.²⁹ These courts reason judicial review of agency rulings cannot effectively determine the basis for the decision of the agency and evaluate the adequacy of the evidentiary support for that decision in the absence of expert testimony.³⁰ However, the majority view does not require expert evidence regarding: 1) official notice of facts where permissible; 2) notice of stipulations; 3) matters where expert evidence is not useful; and 4) acts considered *malum in se*.³¹

“ Before determining what standard expert evidence may be tested for purposes of determining admissibility, it should be asked whether expert evidence is necessary for purposes of the administrative proceeding. ”

THE USE OF *DAUBERT* IN ADMINISTRATIVE PROCEEDINGS

“Given that expert testimony is crucial to modern civil and criminal litigation, the emergence of the *Daubert* reliability test for expert testimony is probably the most radical, sudden, and consequential change in the modern history of the law of evidence.”³² Yet, “[n]o court has yet required an administrative agency to exclude expert testimony based upon *Daubert* ...”³³

Debate concerning the use of *Daubert* in administrative proceedings in reality concerns the discretionary limits of administrative agencies – *i.e.*, how much deference should be afforded to administrative agencies when acting on scientific or technical information.

The conclusion reached on this point depends partly on the role one believes administrative agencies should play. For instance, if the overriding purpose of administrative agencies and regulations is to be proactive in protecting the public from perceived harms ... policy considerations likely weigh against applying *Daubert* standards in administrative proceedings On the other hand, if agencies are not prohibited from acting on unreliable evidence, then arguably unnecessary and overly restrictive regulations could be adopted, requiring the expenditure of substantial monetary sums and costly compliance efforts.³⁴

‘Regulatory *Daubert*’ – The Minority View

On one side of this spectrum, some urge a stringent reliability test should be applied to the judicial review of administrative agency actions.³⁵ Such views are colloquially referred to as “regulatory *Daubert*.”³⁶ Those who favor regulatory *Daubert* argue that good science is good science, regardless of the context, and courts should not allow administrative agencies to rely upon dubious scientific evidence in making administrative decisions. “[I]f private litigants are entitled to rules requiring sound science to protect parochial interests, certainly the public should be equally assured that good science is the foundation for [government] ... action.”³⁷

Administrative Discretion – The Majority View

On the opposite end of the spectrum, opponents of regulatory *Daubert* object to an exten-

sion of a strict application of the reliability test.³⁸ Some object, at least in part, on the grounds that the *Daubert* test should not be applied by judges in any context.³⁹ Others urge that regulatory *Daubert* would have an unwelcome deregulatory impact through judicial decision rather than legislation.⁴⁰

Other objections rest upon the purpose of administrative bodies.

[T]he reason *Daubert* does not technically apply in administrative proceedings is because regulatory agencies are largely supposed to be forward-thinking and not held to the standards applicable to ‘courtroom science.’ In other words, regulatory agencies do not always wait (and, depending on your viewpoint, may not be able to wait) to act until the science under consideration satisfies the *Daubert* standard.⁴¹

There is also concern that applying *Daubert* in the administrative realm encroaches upon separation of powers issues.⁴²

So far, federal courts have consistently rejected regulatory *Daubert*, because Rule 702 does not strictly apply to judicial review of agency decision making,⁴³ and at least one court has expressed concern regarding separation-of-powers values.⁴⁴ Federal agencies have also rejected appeals to implement *Daubert*-like standards when reviewing scientific evidence.⁴⁵

‘Spirit of *Daubert*’ – The Middle-of-the-Road View Taken by the 7th Circuit

Just as the Federal Rules of Evidence do not technically apply to federal agencies,⁴⁶ the Oklahoma Evidence Code technically does not apply to state agency proceedings by virtue of Article II of the Oklahoma Administrative Procedures Act, which provides a general, operational framework for agencies acting in a judicial capacity when conducting individual proceedings.⁴⁷ However, whether evidence is admissible under the rules of evidence may “support the conclusion that the admission of the evidence comports with due process.”⁴⁸

Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit observed that even though the *Daubert* standard is based on the Federal Rules of Evidence and therefore does not directly apply to federal agency decisions, the spirit of *Daubert* does apply to administrative proceedings, and

junk science has no more place in administrative proceedings than in judicial ones.⁴⁹

Judge Posner first expressed this view in *Niam v. Ashcroft*,⁵⁰ where the court observed that federal agencies are not bound by the Federal Rules of Evidence but only “the looser standard of due process of law.”⁵¹ As such, the “spirit of *Daubert*” should apply to review the scientific or technical evidence supporting agency action, and the court opined that it would be odd for an agency to use a standard for expert testimony that is more rigorous than *Daubert*.⁵² The supporters of this view stress that “[j]unk science’ has no more place in administrative proceedings than in judicial ones[.]”⁵³ but also recognize that a stringent standard of reviewing agency action based on scientific or technical evidence is not mandated by any law.

Like the majority of courts that require expert evidence in administrative proceedings, supporters of the spirit of *Daubert* recognize the need for agencies to clearly explain their reasons for action. “[T]he idea that experts should use reliable methods does not depend on Rule 702 alone, and it plays a role in the administrative process because every decision must be supported by substantial evidence.”⁵⁴ “In order to ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable, the factfinder must act as gatekeeper. Proposed [scientific] testimony must [therefore] be supported by appropriate validation – i.e., good grounds, based on what is known.”⁵⁵ As such, the spirit of *Daubert* requires the agency to make some inquiry into validity of the scientific or technical facts proffered into evidence, with the *Daubert* factors providing guidance.⁵⁶ This view has not received much reception outside of the 7th Circuit.⁵⁷

APPLYING DAUBERT TO STATE AGENCIES

Some state administrative agencies are tasked with enforcing various state laws through a process whereby the agency acts in a judicial capacity to determine if any person or entity within its purview violated statutes or regulations it is tasked with enforcing – professional licensing boards being the obvious example.⁵⁸ When conducting such hearings, the agency is generally authorized to consider any probative and relevant evidence.⁵⁹ When scientific or technical evidence is appropriate in an administrative proceeding, the question arises as to whether *Daubert*, as adopted by the Oklahoma

Supreme Court in *Gray*, should apply to determine the admissibility of the evidence at issue. As discussed above, views vary.

Specific agency regulations and statutes should be reviewed to determine if the Oklahoma Evidence Code is binding or guiding when the agency is acting in a judicial capacity. If it is binding, the agency may have incorporated, by way of regulation or statute, a strict application of *Daubert* to individual proceedings conducted before it. If it is guiding, it is suggested that the spirit of *Daubert* approach at an agency hearing provides the most balanced view and presents a good “hedge bet” should appeal issues arise concerning such evidence.

A compelling policy reason justifies application of the spirit of *Daubert*. It promotes transparency in agency decision making while also helping to present the record in a manner appellate courts are accustomed to seeing and analyzing.⁶⁰ It further aides to clearly separate scientific determinations and policy decisions made by agencies.⁶¹

[C]ourts should compel the visibility of methods by ensuring that the agencies provide answers to two deceptively simple questions: (1) Have the agency’s methods of inference been identified? and (2) Does the agency explain how its methods are appropriate to the information on hand and how they support the ultimate inference used by the agency? Unless an agency can respond to both these questions in the affirmative, then the agency’s science-based decisions should risk reversal or remand by the courts. Courts already require an “explanation” of the agency’s choices. [Such] ... requires that the agency describe how it drew its inferences and identify the specific assumptions it made in the course of assembling the scientific evidence.⁶²

CONCLUSION

There is no hard-and-fast rule as to whether *Daubert* should apply to determine the admissibility of scientific or technical evidence in proceedings before administrative agencies in Oklahoma. Most would agree that junk science serves no place in the courtroom or in an agency’s hearing room. The spirit of *Daubert* provides a balanced approach to the issue. It does not infringe upon administrative authority and meets legitimate policy concerns to ensure transparency of agency action while also ensur-

ing junk science has no place in agency decision making.

1. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).
2. 2015 OK CIV APP 87, 360 P.3d 1267.
3. *Id.* at 1270-71.
4. *Id.* at 1270.
5. 293 F. 1013 (D.C. Cir. 1923).
6. *Id.* at 1014.
7. *See* n. 1, *supra*.
8. *Id.* at 597.
9. *Id.* at 589.
10. *Id.* at 589-90.
11. *Id.* at 593-94 (The four key factors are: 1) whether the theory has been tested; 2) whether the theory has been subjected to peer review publication; 3) whether the theory has a known potential rate of error; and 4) whether the theory has been accepted in the relevant scientific community).
12. 522 U.S. 136 (1997).
13. *Id.* at 142.
14. 526 U.S. 137 (1999).
15. *Id.* at 147.
16. *Id.* at 141-42 (internal cites omitted).
17. 1995 OK CR 10, 889 P.2d 319.
18. *Id.* at 328.
19. *Id.* at 329.
20. 2000 OK CR 14, 8 P.3d 883.
21. *Id.* at 907 (quoting *Kumho*, 526 U.S. at 147).
22. 2003 OK 10, 65 P.3d 591.
23. *Id.* at 600.
24. *Id.* at 611; *see id.* at 612 (reviewing the trial court's ruling in *Christian* not as one of admissibility or inadmissibility of an expert's opinion but as a sufficiency of evidence issue, concluding the trial court did not sufficiently apply *Daubert* as a matter of law); *but see Covell v. Rodriguez*, 2012 OK 5, 272 P.3d 705, 710 (holding *Daubert* challenge to expert testimony made on directed verdict waived where issue was not raised prior to trial; opining a *Daubert* challenge may not be recast as an "insufficiency of evidence" issue); *see also Nelson v. Enid Med. Associates, Inc.*, 2016 OK 69, 376 P.3d 212, 217 (explaining the multifaceted standard of review).
25. For the sake of brevity, the scope of this discussion is limited solely to individual proceedings before administrative agencies and does not concern rule-making.
26. James J. Watson, "Necessity of Expert Evidence in Proceeding for Revocation or Suspension of License of Physician, Surgeon, or Dentist," 74 A.L.R.4th 969 (West, Supp. 2014) (Originally published in 1989).
27. *See e.g. Jaffe v. State Dept. of Health*, 135 Conn. 339, 64 A.2d 330 (Conn. 1949); *Arlen v. Ohio State Medical Bd.*, 399 N.E.2d 1251 (Ohio 1980); *Davidson v. State*, 657 P.2d 810 (Wash. App. 1983); *Weiss v. New Mexico Bd. of Dentistry*, 110 N.M. 574, 798 P.2d 175 (N.M. 1990); *Reaux v. Louisiana Bd. of Medical Examiners*, 850 So. 2d 723 (La. Ct. App. 2003); *Watkins v. North Carolina State Bd. of Dental Examiners*, 593 S.E.2d 764 (N.C. 2004); *Doe v. Virginia Bd. of Dentistry*, 652 S.E.2d 794 (Va. App. 2007); *Pastorek v. Louisiana State Bd. of Medical Examiners*, 4 So. 3d 833 (La. Ct. App. 4th Cir. 2008); *In re Miller*, 989 A.2d 982 (Vt. 2009); *Appeal of Boulard*, 75 A.3d 1151 (N.H. 2013).
28. *Franz v. Bd. of Med. Quality Assurance*, 642 P.2d 792 (1982).
29. *See generally* n. 26, *supra*, at §4.
30. *See e.g. McKay v. State Bd. of Med. Examiners*, 86 P.2d 232 (Colo. 1938) (reversing order for lack of expert evidence); *see Smith v. Dept. of Registration & Ed.*, 106 N.E.2d 722 (Ill. 1952); *N.J. St. Bd. of Optometrists v. Nemitz*, 90 A.2d 740 (N.J. 1952); *Hake v. Arkansas St. Med. Bd.*, 374 S.W.2d 173 (Ark. 1964); *Dotson v. Tex. St. Bd. of Med. Examiners*, 612 S.W.2d 921 (Tex. 1981); *Arthurs v. Bd. of Registration in Medicine*, 418 N.E.2d 1236 (Mass. 1981); *Datley v. N.C. St. Bd. of Dental Examiners*, 309 S.E.2d 219 (N.C. 1983); *Med. Licensing Bd. v. Ward*, 449 N.E.2d 1129 (Ind. App. 1983); *Re Appeal of Schramm*, 414 N.W.2d 31 (S.D. 1987).
31. *See generally* n. 26, *supra*, at §§5-8 (providing illustrative cases).
32. David E. Bernstein, "The Unfinished *Daubert* Revolution," 10 *Engage: J. Federalist Soc'y Prac. Groups* 35 (2009).
33. Claire R. Kelly, "The Dangers of *Daubert* Creep in the Regulatory Realm," 14 *J.L. & Pol'y* 165, 183 (2006).
34. David G. Ries, Joseph R. Brendel, Jerri A. Ryan, "*Daubert* in *Administrative Proceedings*," 31 E. Min. L. Found §1.08 (footnotes omitted) (available at 2010 WL 6440928).
35. *See* Alan Charles Raul, Julie Zampa Dwyer, "'Regulatory *Daubert*': A Proposal to Enhance Judicial Review of Agency Science by Incorporating *Daubert* Principles into Administrative Law," 66 *Law & Contemp. Probs.* 7 (2003); Charles D. Weller, David B. Graham, "New

Approaches to Environmental Law and Agency Regulation: The *Daubert* Litigation Approach," 30 *Envtl. L. Rep.* 10557 (July 2000) ("As a matter of policy and statutory interpretation, the *Daubert* reliability standard should apply to federal environmental agencies in rulemaking and adjudication."); D. Hiep Truong, "*Daubert* and Judicial Review: How Does an Administrative Agency Distinguish Valid Science from Junk Science?," 33 *Akron L. Rev.* 365 (2000) ("by using *Daubert* standards, the Court is not second-guessing the agency's decision[]making, but is simply ensuring ... that the evidence relied upon by the agency meets the same threshold requirements that a federal litigant is already subjected to."); Andrew Trask, "*Daubert* and the EPA: An Evidentiary Approach To Reviewing Agency Determinations of Risk," 1997 *U. Chi. Legal F.* 569 (1997) ("Applying the *Daubert* gatekeeping function thereby allows courts to check the validity of the agency's reasoning while maintaining the proper amount of deference to the agency's rulemaking and adjudicative powers").

36. Emily Hammond Mezell, "Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science," 109 *Mich. L. Rev.* 733, 753-54 (2011).

37. *Regulatory Daubert*, n. 35, *supra*, at 8.

38. *See* Thomas O. McGarity, "On the Prospect of 'Daubertizing' Judicial Review of Risk Assessment," 66 *Law & Contemp. Probs.*, 155, 156 (Autumn 2003) ("Assigning a *Daubert*-like gatekeeper role to courts engaged in judicial review of agency risk assessments is a profoundly bad idea."); *see also* Thomas O. McGarity, Sidney A. Shapiro, "Unifying the Weight of the Evidence Approach," 3 *Wake Forest J.L. & Pol'y* 65, 96 (2013).

39. *See* 66 *Law & Contemp. Probs.*, n. 38, *supra*, at 156 ("Judges' limited competence in areas involving scientific data and analysis, complex modeling exercises, and large uncertainties is well recognized in administrative law and has been effectively demonstrated by the courts themselves in post-*Daubert* toxic torts opinions").

40. *See id.* ("judicial adoption of regulatory *Daubert* will likely result in unconstrained regulatory policymaking by unaccountable and scientifically illiterate judges and in a much higher incidence of judicial remand of important regulations").

41. *Daubert in Administrative Proceedings*, n. 31, *supra*, at §1.08, (footnotes omitted).

42. *See* J. Tavener Holland, "Regulatory *Daubert*: A Panacea for the Endangered Species Act's 'Best Available Science' Mandate?," 39 *McGeorge L. Rev.* 299, 320-21 (2008) ("[W]hen a reviewing court increases its scrutiny of agencies' science and policy decisions, judicial power *vis-à-vis* the coordinate branches of government is increased in a manner not implicated by the *Daubert* scheme in private litigation").

43. *See e.g. Lobsters, Inc. v. Evans*, 346 F. Supp. 2d 340, 344 (D. Mass. 2004) ("*Daubert* and its progeny interpret the Federal Rules of Evidence, however, and the federal rules of evidence do not apply to NOAA hearings."); *Stewart v. Potts*, 996 F. Supp. 668, 678 n.8 (S.D. Tex. 1998) ("[*Daubert*] does not apply to APA review of agency action.... The agency in this case is the factfinder, and the Court must give a high degree of deference to its expertise").

44. *See Sierra Club v. Marita*, 46 F.3d 606, 622 (7th Cir. 1995) ("While such a proposal might assure better documentation of an agency's scientific decisions, we think that forcing an agency to make such a showing as a general rule is intrusive, undeferential, and not required").

45. *See* Claire R. Kelly, "The Dangers of *Daubert* Creep in the Regulatory Realm," 14 *J.L. & Pol'y* 165, 187-89 (2006).

46. *Bouchikhi v. Holder*, 676 F.3d 173, 180 (5th Cir. 2012).

47. *See* 75 O.S. 2011, §310.

48. *Holder*, n. 46, *supra*, at 180 (quotes omitted). *Id.*

49. Mark C. Rutzick, "Junk Science and Climate Change: Thoughts from the Federalist Society's 1997 Colloquium on 'Junk Science, the Courts, and the Regulatory State,'" 11 *Engage: J. Federalist Soc'y Prac. Groups* 39 (2010) (internal quotes, augmentation and footnote omitted).

50. 354 F.3d 652 (7th Cir. 2004).

51. *Id.* at 659.

52. *Id.*

53. *Id.*; *see also Lobsters, Inc.*, n. 39, *supra*, at 344 (NOAA hearings); *Libas, Ltd. v. U.S.*, 193 F.3d 1361, 1367 (Fed. Cir. 1999) (customs proceedings).

54. *Donahue v. Barnhart*, 279 F.3d 441, 446 (7th Cir. 2002) (noting "[e]vidence is not 'substantial' if vital testimony has been conjured out of whole cloth").

55. *Elliott v. CFTC*, 202 F.3d 926, 933 (7th Cir. 2000) (Commodity Futures Trading Commission proceedings) (citations, internal quotations omitted).

56. *See WorldNet Telecommunications, Inc. v. Telecommunications Regulatory Bd. of Puerto Rico*, 707 F. Supp. 2d 163, 214 (D.P.R. 2009); *Natl. Taxpayers Union v. U.S. Soc. Sec. Admin.*, 302 Fed. Appx. 115, 121-22 (3rd Cir. 2008) (unpublished); *Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005); *Lobsters, Inc.*, 346 F. Supp. 2d 340.

57. See *Brault v. Soc. Sec. Admin., Commr.*, 683 F.3d 443, 449-50 (2nd Cir. 2012) (collecting cases and discussing the issue).
58. See e.g. 59 O.S. §489, *et seq.* (regarding the Oklahoma Board of Medical Licensure and Supervision).
59. See n. 47, *supra*.
60. See e.g. *Hodges v. Sec'y of Dep't of Health & Human Servs.*, 9 F.3d 958, 961-62 (Fed. Cir. 1993).
61. See *Regulatory Daubert*, n. 42, *supra*, at 321.
62. Pasky Pascual, et. al., "Making Method Visible: Improving the Quality of Science-Based Regulation," 2 *Mich. J. Env'tl. & Admin. L.* 429, 469 (2013) (footnote omitted).

ABOUT THE AUTHOR



Jason T. Seay is an attorney of Doerner, Saunders, Daniel & Anderson LLP in Oklahoma City. He maintains a broad civil litigation practice with a focus upon data security and privacy matters, healthcare law, regulatory compliance and administrative law, and coverage disputes. His practice

includes indemnity disputes, complex litigation, appeals and election and campaign finance law compliance. Mr. Seay also assists with transactions unique to entrepreneurs, government contracting, construction contracting and internal and government investigations.

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Changing Exhaustion of Administrative Remedies in Employment Lawsuits

The Case Law and Its Implications for Both Plaintiffs' and Defense Counsel

By Kimberly Lambert Love and Jason L. Callaway

In many types of employment claims, a plaintiff must first exhaust administrative remedies, typically by filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). Until a few years ago, federal courts in the 10th Circuit treated the failure to exhaust administrative remedies as a jurisdictional basis for dismissal, meaning both that the court was required to dismiss when the basis for dismissal was shown and that the court could dismiss *sua sponte* at any time during the proceedings. Recently, however, the 10th Circuit has set in motion jurisprudential changes to the exhaustion of administrative remedies doctrine, reclassifying failure to exhaust in some circumstances from a jurisdictional failure to a “condition precedent” to bringing suit. This change in the law has resulted in practical and technical challenges for both plaintiff and defense counsel.

THE LEGAL BACKDROP AND IMPORTANT DECISIONS OUTLINING THE CHANGES

Prior to 2015, the 10th Circuit repeatedly stated that “exhaustion of administrative remedies is a jurisdictional prerequisite to suit.”¹ As a result, the failure to exhaust argument was routinely made through a Rule 12(b)(1) motion to dismiss at the pleading stage.² However, in *Gad v. Kansas State University*,³ the 10th

Circuit put some wrinkles in this otherwise simple rule.

The plaintiff in *Gad*, a former professor at Kansas State University, filed a charge of discrimination with the EEOC alleging the university discriminated against her on the basis of religion, sex and national origin by failing to promote her.⁴ Although an EEOC investigator gave the plaintiff a copy of the charge to sign, the plaintiff did not sign or otherwise verify

her charge.⁵ After the EEOC issued a right-to-sue notice, the plaintiff brought suit, and the university moved to dismiss for lack of subject-matter jurisdiction on the basis that the plaintiff had failed to verify her EEOC charge.⁶ Since verification is a statutory requirement for an EEOC charge,⁷ the question before the 10th Circuit was whether the plaintiff's failure to verify the charge precluded the district court from having subject-matter jurisdiction.

Citing several recent Supreme Court decisions, including *Arbaugh v. Y&H Corp*⁸ and *United States v. Kwai Fun Wong*,⁹ the 10th Circuit found the failure of verification was not jurisdictional. In reaching its conclusion, the 10th Circuit distilled several key principles from these cases:

First, a Title VII statutory requirement's classification as jurisdictional or non-jurisdictional turns in large part on whether it is located in Title VII's jurisdictional subsection – 42 U.S.C. §2000e-5(f)(3) ... Second, recognizing that non-lawyers are initiating Title VII processes, the courts should be careful in interpreting procedural rules to cause inadvertent forfeiture of rights. Third, verification should protect employers from the burden of responding to frivolous claims or later finding themselves in court over claims of which they had no notice. Finally, ... a failure to verify as required by a federal rule will not render the document in question fatally defective.¹⁰

Applying these principles, the 10th Circuit recognized that the verification requirement did not appear in the jurisdictional subsection and that there is no "clear statement" that it should be treated as jurisdictional.¹¹

Nevertheless, the 10th Circuit confirmed that the verification requirement *is* a "condition precedent" to bringing suit.¹² Under the statutory framework of Title VII, the requirement to verify a charge is "a 'duty [Title VII] imposes' that 'serves as a necessary precondition to filing a lawsuit'"; it is not merely an affirmative defense to be raised by an employer.¹³ In other words, the plaintiff must both meet the verifi-

cation requirement and properly plead that the requirement has been met.¹⁴

By calling the exhaustion requirement a "condition precedent," however, the 10th Circuit opened the prospect of equitable waiver, which is available for failure to meet a condition precedent but not available to satisfy a jurisdictional flaw. While the 10th Circuit did not address the contours of waiver in its opinion, it implied that no "rigid rule" regarding waiver would suffice.¹⁵ There could be times when an employer waives the requirement, such as by "fail[ing] to raise a known verification defect."¹⁶ Equitable waiver could also apply to save a plaintiff's cause of action in "extreme circumstances where negligent EEOC conduct would mislead a reasonable layperson into thinking he need not verify."¹⁷

“...the 10th Circuit opened the prospect of equitable waiver, which is available for failure to meet a condition precedent but not available to satisfy a jurisdictional flaw.”

Various panels of the 10th Circuit have subsequently analyzed *Gad* and held, in unpublished opinions, that other types of failure to exhaust arguments are not jurisdictional but rather conditions precedent to suit. One panel found that a plaintiff's failure to disclose a particular factual basis for a discrimination claim to the EEOC, where that factual basis would not easily be discovered by the EEOC's investigation, meant that the plaintiff had not exhausted remedies for that factual basis, although the claim could proceed on the bases that had been disclosed to the EEOC.¹⁸

Another panel concluded that a plaintiff's failure to cooperate with the EEOC by following the orders of an administrative judge resulted in the failure to exhaust remedies, precluding suit entirely.¹⁹ And most recently, a panel held that the failure to identify a particular claim, in that case retaliation, in a timely filed charge was a failure to exhaust that acted as a precondition to suit.²⁰ Although no case has put it bluntly, these cases imply that the true "condition precedent to suit" is not a set of strict statutory requirements but is instead simply completing the administrative review process for each claim subsequently brought in federal court in a way that provides notice to the employer and the EEOC of the claim and its supporting facts.

Of course, these cases stating that certain exhaustion requirements are nonjurisdictional raise the question of what acts *are* jurisdictional bases for dismissal. As noted above, the jurisdictional grant for Title VII appears in 42 U.S.C. §2000e-5(f)(3). Under that provision, a Title VII claim is jurisdictionally appropriate in any of the following judicial districts: where the unlawful employment practice allegedly occurred; where relevant employment records are maintained; where the claimant would have worked but for the unlawful practice; or, if none of those apply, where the employer has its principal office. There are no other requirements included in the statute, meaning that the jurisdictional grounds for dismissing a Title VII claim appear to have been substantially limited to venue-type considerations. It is also worth noting that this analysis would apply equally to claims under any act that adopts the procedures established in Title VII, like the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act.²¹

IMPACT ON PARTIES, THEIR COUNSEL AND MOTION PRACTICE

The impact of this doctrinal shift in litigation varies depending on the party. For plaintiffs, there should be no changes at the administrative review stage, as counsel should already be ensuring that the proper claims are being submitted to the EEOC and supported by sufficient facts for each claim set out in the charge and supporting documentation. In cases where the client handled the administrative proceedings *pro se*, plaintiffs' attorneys should be cautioned that, following *Wickware* and *Arabalo*, any claims made in court will be limited to those supported by facts presented to the EEOC. If facts supporting the claims asserted in a complaint do not appear in an EEOC charge, defendants may likely move to dismiss those claims as unexhausted. Moreover, under Fed. R. Civ. P. 9(c), counsel must plead the satisfaction of conditions precedent in the complaint, including exhaustion of remedies. While this has been characterized as a "loose" requirement at best that requires only a general statement,²² it remains a requirement. In *Martin v. Mt. St. Mary's Univ. Online*²³ for example, the plaintiff's complaint was dismissed because the plaintiff failed to attach a right-to-sue letter to an amended complaint despite a court order to do so, demonstrating the seriousness of failing to meet the Rule 9 pleading standard. For plaintiffs' counsel, the changes in how failure

to exhaust is treated appears more a matter of dotting the i's and crossing the t's than any major change.

From a defense perspective, the *Gad* court's discussion of equitable waiver illustrates that the employer should raise any failure to exhaust argument at the first available moment or run the risk that the argument is waived. In addition, a defendant will now likely raise failure to exhaust arguments in motions to dismiss brought under Rule 12(b)(6) or 12(c) instead of Rule 12(b)(1). While counsel may be concerned that a Rule 12(b)(6) motion will not allow presentation of evidence outside the complaint without converting the motion to one for summary judgment, at least one district court addressing that question has considered an EEOC charge as part of a Rule 12 motion on the ground that courts "may consider documents referred to in the complaint if the documents are central to the plaintiff's claim, and the parties do not dispute the documents' authenticity."²⁴ Moreover, even absent this precedent, a charge would likely be the type of document of which courts would be willing to take judicial notice.²⁵ Although the substance of a motion to dismiss for failure to exhaust will not change, the 10th Circuit's treatment of failure to exhaust as a condition precedent requires defense counsel to be more proactive in identifying those types of errors early in the case.

In sum, with its decision in *Gad*, the 10th Circuit made what would seem to be a merely technical change to the requirements for some types of employment lawsuits, but that change does have ramifications for counsel. Because exhausting administrative remedies remains a condition precedent to suit and because courts are strongly enforcing those requirements, plaintiffs and their counsel must be detail-oriented at the administrative review stage. Because exhaustion of remedies is no longer a jurisdictional precondition to suit, employers and defense counsel will need to be on guard against the possibility of waiver and be prepared to make any failure to exhaust argument early in the case.²⁶

1. *Jones v. UPS, Inc.*, 502 F.3d 1176, 1183 (10th Cir. 2007) (referring to the ADA); see also *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1317 (10th Cir. 2005) (referring to Title VII).

2. See, e.g., *Hung Thai Pham v. James*, 630 F. App'x 735 (10th Cir. 2015).

3. *Gad v. Kansas State University*, 787 F.3d 1032 (10th Cir. 2015).

4. *Gad*, 787 F.3d at 1034.

5. *Id.*

6. *Id.* at 1035.

7. See 42 U.S.C. §2000e-5(b).

8. *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006).
9. *United States v. Kawai Fun Wong*, 135 S. Ct. 1625 (2015).
10. *Gad*, 787 F.3d at 1038.
11. *Id.* at 1038-39.
12. *Id.* at 1041.
13. *Id.* (quoting *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015)).
14. *See id.* at 1042.
15. *Id.* at 1042.
16. *Id.* at 1042-43.
17. *Id.* at 1042-43.
18. *Arabalo v. City of Denver*, 625 F. App'x 851 (10th Cir. 2015).
19. *Hung Thai Pham v. James*, 630 F. App'x 735 (10th Cir. 2015).
20. *Wickware v. Johns Manville*, 676 F. App'x 753 (10th Cir. 2017).
21. *See* 42 U.S.C. §§2000ff-6(a)(1), 12117(a).
22. *See Kiernan v. Zurich Cos.*, 150 F.3d 1120, 1124 (9th Cir. 1998); *see also Anderson v. United Tel. Co.*, Civil Action No. 86-2511-O, 1989 U.S. Dist. LEXIS 6046, at *7 (D. Kan. May 22, 1989) (describing the Rule 9(c) standard as "minimal and perhaps even perfunctory").
23. *Martin v. Mt. St. Mary's Univ. Online*, 620 F. App'x 661 (10th Cir. 2015).
24. *Munoz v. Navistar Int'l Corp.*, No. 13-CV-357-JED-FHM, 2015 U.S. Dist. LEXIS 133271, at *7 n.2 (N.D. Okla. Sept. 30, 2015) (quoting *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002)).
25. *See Tal v. Hogan*, 453 F.3d 1244, 1265 (10th Cir. 2006); *see also Chaney v. Wal-Mart Stores Inc.*, No. CIV-15-592-R, 2015 U.S. Dist. LEXIS 148560, at *3 n.2 (W.D. Okla. Nov. 3, 2015) (taking judicial notice of an EEOC charge).
26. The authors would like to thank Chris Davis of Johnson & Jones PC and Miles McFadden of Titus Hillis Reynolds Love for their contributions to this article.

ABOUT THE AUTHORS



Kimberly Lambert Love is a partner with Titus Hillis Reynolds & Love. With more than 30 years of experience, Ms. Love practices in all areas of employment law. She is a past chairperson of the OBA Labor and Employment Law Section and regularly contributes to the *Oklahoma Bar Journal*.



Jason L. Callaway is an associate with Johnson & Jones PC. He attended the OU College of Law, where he served as managing editor of the *Oklahoma Law Review* and received the Order of the Coif. Following graduation, he clerked for District Judge Claire V. Eagan, Northern District of Oklahoma.

His practice focuses primarily on general civil litigation, employment litigation and insurance defense.

NOTICE OF JUDICIAL VACANCY

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

**Associate District Judge
Fourth Judicial District
Blaine County, Oklahoma**

This vacancy is due to the retirement of Honorable Mark A. Moore effective December 31, 2017.

To be appointed an Associate District Judge, an individual must be a registered voter of the applicable judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, the appointee must have had a minimum of two years experience as a licensed practicing attorney, or as a judge of a court of record, or combination thereof, within the State of Oklahoma.

Application forms can be obtained on line at www.oscn.net by following the link to the Oklahoma Judicial Nominating Commission or by contacting Tammy Reaves, Administrative Office of the Courts, 2100 North Lincoln, Suite 3, Oklahoma City, OK 73105, (405) 556-9300, and should be submitted to the Chairman of the Commission at the same address **no later than 5:00 p.m., Friday, December 15, 2017. If applications are mailed, they must be post-marked by midnight, December 15, 2017.**

Deborah A. Reheard, Chair
Oklahoma Judicial Nominating Commission

Oklahoma Lawyers for America's Heroes Program's Donated Legal Services Exceed \$3 Million

By Carol Manning

"Thank you is not enough" continues to be the battle cry for 779 volunteer attorneys who support the Oklahoma Bar Association's Oklahoma Lawyers for America's Heroes Program by giving free legal advice to active duty servicemen and women and veterans.

Since the program was launched on Veterans Day 2010, Oklahoma lawyers throughout the state have helped 4,542 people with free legal advice totaling \$3,216,000.

OBA President Linda Thomas of Bartlesville said, "Our mission is to offer one-on-one legal advice and assistance to veterans and active or reserve members of the U.S. armed forces who are or have honorably served this nation and who otherwise cannot afford or do not have access to the legal services they need."

To qualify for legal assistance through the program, a "hero" must 1) be a veteran of the U.S. armed forces, currently active or on reserve duty for the U.S. armed forces; 2) if on active duty or a member of the guard or reserves, the hero's pay grade must be an E-6 or below; 3) if a veteran, the hero's gross income per year cannot exceed \$40,000. All income is considered; 4) if a veteran, the hero must have an honorable discharge; and 5) have a legal issue within the state of Oklahoma and cannot be currently represented by counsel.

Nearly half of the legal problems service members face involve domestic issues such as

divorce, adoption and paternity. About 15 percent of legal services given are a combination of civil issues including employment and military-related issues. Criminal issues represent about 13 percent and debt issues such as foreclosures, garnishments and bankruptcies are about 8 percent. Other legal needs are disability, real estate, tort/personal injury and estate planning and probate.



OKLAHOMA LAWYERS FOR AMERICA'S HEROES

TYPES OF CASES		DOMESTIC	DEBT ISSUES	REAL ESTATE
ESTATE PLANNING	CRIMINAL	49%	8%	3%
3%	13%	5%	PERSONAL INJURY	MISCELLANEOUS
			3%	16%

SINCE ITS START IN 2010

779 VOLUNTEER
LAWYERS
HAVE HELPED **4542**
HEROES

BY DONATING MORE THAN
\$3.2 MILLION
IN FREE LEGAL SERVICES

Also lawyers on the OBA Military Assistance Committee partner with other organizations to give free legal advice at legal clinics held before a unit deploys and again when they return.

NEED FOR VOLUNTEER LAWYERS CRITICAL

Program Coordinator Margaret Travis said, "Our greatest need is for family law attorneys. Of course, we need them in the big counties – Tulsa, Comanche and Oklahoma counties – but also in the smaller counties. I currently have a hero in Sequoyah County who has been on my list for more than a year, and she lives in fear her ex-boyfriend will take her baby. Because there is no custody order in place, she won't be

able to stop him. I also have a hero in McIntosh County who hasn't seen his kids in more than a year because his ex-wife stopped bringing them to their meeting place for their visitation. The help our attorneys give to our heroes is irreplaceable."

An updated website at www.okbarheroes.org makes it easy to sign up online as a volunteer. Another option is to call Ms. Travis at 405-416-7086 or email her at heroes@okbar.org.

Program founder and 2011 OBA President Deborah Reheard said, "Handling a case for one of America's heroes or their family will be one of the most rewarding experiences you will have as an attorney. You will never feel more rewarded or more proud of your profession than when you help one of America's heroes."

Ms. Manning is OBA communications director.



WANT TO HELP AMERICA'S HEROES?

To volunteer, visit
www.okbarheroes.org or
contact Heroes Program
Coordinator Margret Travis
at 405-416-7086 or
heroes@okbar.org.



I WANT YOU

To get your free listing on the OBA's
lawyer listing service!

Email the Membership Department
at membership@okbar.org

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House of Delegates Actions

The following resolutions and title examination standards report were submitted to the House of Delegates at the 113th Oklahoma Bar Association Annual Meeting at 10:30 a.m. Friday, Nov. 3, 2017, at the Hyatt Regency in Tulsa. Actions are as follows:

RESOLUTION NO. 1: LAWS GOVERNING TRUSTS

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its legislative program, as published in *The Oklahoma Bar Journal* and posted on the OBA website at www.okbar.org, proposed legislation creating a new section of law to be codified in the Oklahoma Statutes as Section 175.58 of Title 60, unless there is created a duplication in numbering, which relates to choice of law relating to trust instruments. (Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5) (Submitted by the Estate Planning, Probate and Trust Section. Adoption recommended by the OBA Board of Governors.)

ADOPTED

RESOLUTION NO. 2: TRUST DECANTING

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its legislative program, as published in *The Oklahoma Bar Journal* and posted on the OBA website at www.okbar.org, proposed legislation creating a new section of law to be codified in the Oklahoma Statutes as Sections 175.700 through 175.718 of Title 60, unless there is created a duplication in numbering, which relates to decanting, or discretion and power to make distribution of money or property held in trust. (Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5) (Submitted by the Estate Planning, Probate and Trust Section. Adoption recommended by the OBA Board of Governors.)

ADOPTED

RESOLUTION NO. 3: NON-JUDICIAL TRANSFER OF TRUST

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its legislative program, as published in *The Oklahoma Bar Journal* and posted on the OBA website at www.okbar.org, proposed legislation creating a new section of law to be codified in the Oklahoma Statutes as Sections 175.801 through 175.803 of Title 60, unless there is created a duplication in numbering, which relates to administration of trusts and transfer of trust assets to different place of administration. (Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5) (Submitted by the Estate Planning, Probate and Trust Section. Adoption recommended by the OBA Board of Governors.)

ADOPTED

RESOLUTION NO. 4: CHANGES IN MEMBER CLASSIFICATIONS

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association to adopt as part of its legislative program to recommend to the Supreme Court amendments to Article II, Section 2 of the Rules Creating and Controlling the Oklahoma Bar Association, as published in *The Oklahoma Bar Journal* and posted to the OBA website www.okbar.org, relating to changes in the member classifications. (Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5) (Submitted by the OBA Strategic Planning Committee. Adoption recommended by the OBA Board of Governors.)

ADOPTED

RESOLUTION NO. 5: STANDARDS FOR DEFENSE OF CAPITAL PUNISHMENT CASES

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Report of the Standard for the Defense of Capital Punishment Cases Task Force be adopted and that such report be submitted to the Rules of Professional Conduct Committee for the creation of proposed rules consistent with the intent of the Report, and that said proposed rules be brought before the House of Delegates at a future date for approval for submission to the Oklahoma Supreme Court with an application requesting adoption of rules that would have the force and effect of law. (Submitted by the OBA Board of Governors.) (Majority vote required for passage. Adoption recommended by the OBA Board of Governors.)

ADOPTED

RESOLUTION NO. 6: AMENDMENT TO BYLAWS ADDING SPECIAL JUDGE AS OKLAHOMA JUDICIAL CONFERENCE REPRESENTATIVE TO HOUSE OF DELEGATES

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association amend Art. I Sec. 2 of the Bylaws of the Oklahoma Bar Association, as published in *The Oklahoma Bar Journal* and posted on the OBA website at www.okbar.org to add a Special Judge as an additional representative of the Oklahoma Judicial Conference to the House of Delegates. (Requires two-thirds affirmative vote for passage. OBA Bylaws Art. XI Sec. 1) (Submitted by Judge Emmitt Tayloe and the Oklahoma Judicial Conference. Adoption recommended by the OBA Board of Governors.)

Action: ADOPTED with the below amendment

“...one associate district judge as delegate and one associate district judge as alternate, and one special district judge as a delegate and one special district judge as an alternate who shall have, respectively, all the rights, duties and powers of delegates and alternate delegates.”

ADOPTED

TITLE EXAMINATION STANDARDS

Action: The Oklahoma Title Examinations Standards revisions and additions published in *The Oklahoma Bar Journal* 88 2022 (Oct. 21, 2017) were approved in the proposed form. The revisions and additions are effective immediately.

ADOPTED

2018 OBA Officers and New Board Members

Officers

President
Kimberly K. Hays, Tulsa

President-Elect
Charles W. “Chuck” Chesnut, Miami

Vice President
Richard Stevens, Norman

Board of Governors

Supreme Court Judicial District One
Brian T. Hermanson, Newkirk

Supreme Court Judicial District Six
D. Kenyon Williams Jr., Tulsa

Supreme Court Judicial District Seven
Matthew C. Beese, Muskogee

Member At Large
Brian K. Morton, Oklahoma City

Young Lawyers Division Chair
Nathan D. Richter, Mustang

OBA 113TH ANNUAL MEETING



LOVE YOUR LAW PRACTICE
OKLAHOMA BAR ASSOCIATION
ANNUAL MEETING 2017
NOVEMBER 1-3 | TULSA



Executive Director John Morris Williams and 2018 President-Elect Chuck Chesnut enjoy a warm cup of coffee.



Executive Director John Morris Williams and 2018 OBA President Kimberly Hays celebrate the end of the House of Delegates meeting.



From Left OBA President Linda Thomas presents Mack Martin, Susan Damron and Jim Calloway with President's Awards. Other recipients were Angela Ailles Bahm, Jennifer Castillo and John Morris Williams.



Executive Director John Morris Williams and Annual Meeting attendees congratulate Linda Thomas on a successful year as OBA president.



OBA President Linda Thomas presents the Outstanding Service to the Public Award to Rep. Jason Lowe, one of 22 OBA Award recipients.



From left Jennifer Castillo, Roy Tucker and Linda Thomas pose for a photo at the Show Your Love event sponsored by the OBA Family Law Section and Oklahoma Bar Foundation.



Attorney coach Nora Riva Bergman presents "40 Tips in 40 Minutes" at the Annual Luncheon.



Linda Thomas presents Carolyn Thompson with the Alma Wilson Award at the Annual Luncheon.



Kimberly Hays, Linda Thomas and Jennifer Castillo at the President's Reception

Members of the Custer County Bar Association attend the Annual Luncheon to support Award of Judicial Excellence-winner Judge Jill Weedon (center front).





Past and present Judicial Nominating Commission (JNC) members celebrate the 50th anniversary of the creation of the JNC at the President's Reception.



Celeste England, Amber Godfrey and Roger Nayar at the President's Reception.



Civil Court of Appeals Judge Jane Wiseman presents "Ten Things Every New Lawyer Needs to Know and What Others May Have Forgotten" during Wednesday morning CLE.



Limited edition Rustic Cuff bracelets were sold at the Annual Meeting with proceeds benefiting Lawyers Helping Lawyers and the Heroes Program.

Jill Donovan, founder of Rustic Cuff, speaks to attendees at the Delegates Breakfast.

**View more photos from
Annual Meeting events on the
OBA Facebook page at
www.facebook.com/okbarassociation**

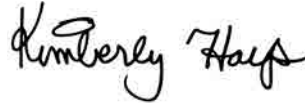


Invest in Your Practice – Join a Committee

I'm a solo practitioner who, I admit, is a very active "bar association junkie." If you have been holding back from getting involved in the state bar because you can't afford the time out of the office, you are missing out on a great marketing opportunity. The contacts you make by being involved only help your practice grow.

As your 2018 president, I'm asking members with fresh ideas to step forward and serve on a committee. We need you! The time commitments vary from a few meetings a year to monthly meetings. New remote meeting technology called BlueJeans makes geography a nonissue – you can attend a meeting from your own desk or even your mobile device. It doesn't get any easier or more convenient. I challenge you to become involved with YOUR state bar association.

Sign up today. That's easy too. Option #1 – online at www.okbar.org, scroll down to the bottom of the page. Look for "Members" and click on "Join a Committee." Options #2 & #3 – Fill out this form and mail or fax as set forth below. I'll be making appointments soon, so please sign up by Dec. 22.



Kimberly Hays, President-Elect

Note: An email has been sent if your term is expiring. There is no need to sign up again if your current term has not expired.

Please Type or Print

Name _____

Telephone _____ OBA # _____

Address _____

City _____ State/Zip _____

FAX _____ E-mail _____

Committee Name

1st Choice _____

2nd Choice _____

3rd Choice _____

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

1st Choice Yes No _____

2nd Choice Yes No _____

3rd Choice Yes No _____

Please assign me to one two or three committees.

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

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

Fax: (405) 416-7001

Standing Committees

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

In Memoriam

By John Morris Williams

Every year at the Annual Meeting we read the list of our colleagues who have passed away in the last year. Unfortunately, many of you are not able to attend the Annual Meeting. In lieu of my article this month, I simply want to say how much I will miss some of the people on the list who were close friends. I have asked to have it republished here so that you too might be made aware of the passing of a friend.

For younger lawyers, I hope the list doesn't contain any of your peers. For those of us who are beginning to be old-timers, each year brings more names of people we studied with, socialized with and practiced with. Let us each take a moment as we read this list and reflect upon our individual and collective loss. Below is the list as published for the 2017 Annual Meeting:

Robert D. Allen, *Oklahoma City*
 Daniel Frank Allis, *Tulsa*
 Lewis Bebout Ambler, *Bartlesville*
 Robert Wright Amis, *Dallas, TX*
 Robert Lee Bainbridge, *Tulsa*
 George Crocker Baldrige, *Joplin, MO*
 F. Leroy Ball Jr., *Terrytown, LA*
 Rufus Y. Bandy Jr., *Bartlesville*
 Stephen Price Barker, *Shreveport, LA*
 James Luther Barrett, *Edmond*

Thomas McCann Bartheld, *McAlester*
 Charley William Barton, *Arnett*
 Anna Goodwin Benn, *Tulsa*
 Joseph M. Best, *Skiatook*
 Charles Edward Biederman, *Tulsa*
 James S. Boese, *Tulsa*
 Charles E. Brown, *Owasso*
 Hubert Hale Bryant, *Tulsa*
 Brian Nathaniel Buie, *Tulsa*
 Melissa Shelton Burget, *Oklahoma City*
 Charles E. Campbell, *Boerne, TX*
 Robert James Campbell Jr., *Oklahoma City*
 N. Franklyn Casey, *Tulsa*
 Roy William Chandler, *Oklahoma City*
 William Wesley Choate, *Seminole*
 Lana Cohlmiia, *Oklahoma City*
 Robert D. Craig, *Luther*
 John Michael Curney, *San Antonio, TX*
 John E. Deas, *Tulsa*
 James Franklin Deaton, *Okemah*
 Don L. Dees, *Owasso*
 Larry D. Derryberry, *Oklahoma City*
 Jack W. Dickey, *Thomas*
 Stephen Paul Dixon, *Midwest City*
 Anna Elizabeth Dovedan, *Norman*
 Hilma Duey, *Tulsa*
 James Carl Elder, *Norman*
 Frank Elkouri, *Norman*
 Stephen Wilson Elliott, *Oklahoma City*
 Broc Lee Elmore, *Norman*

James Meegan Erikson, *Oklahoma City*
 Walter Dale Felzke, *Tulsa*
 John Thomas Filbeck, *Sapulpa*
 Coleman Bartow Fite Jr., *Muskogee*
 Kathryn Lyle Flood, *Norman*
 James D. Foliart, *Oklahoma City*
 Leamon Freeman, *Oklahoma City*
 Richard Warren Gable, *Tulsa*
 Robert Leslie Garbett, *Honolulu, HI*
 Merle K. Garrette, *Miami*
 Ivan Dee Geddie, *Palm Desert, CA*
 James Wylie George, *Oklahoma City*
 Hyla Hyde Glover, *Oklahoma City*
 Richard Hugh Goldwyn, *Tulsa*
 John Edwin Green, *Oklahoma City*
 Robert Bruce Green, *Muskogee*
 John Thomas Hall, *Oklahoma City*
 Robert Joseph Hampton, *Tulsa*
 Philip D. Hart, *Oklahoma City*
 John D. Hastie, *Norman*
 Leslie S. Hauger Jr., *Tulsa*
 Kelly Anthony Hays, *Oklahoma City*
 Barry A. Heaver, *Tulsa*
 H. T. Hendren, *Sand Springs*
 Jack Hugh Herndon, *Midwest City*
 John William Hron IV, *Ponca City*
 Thomas Lee Hulett, *Okmulgee*
 James Dean Hull, *Spring Branch, TX*
 Brian Husted, *Norman*
 James A. Hyde, *Oklahoma City*
 David W. Jackson, *Broken Arrow*

Robert Allen Jackson,
Oklahoma City
John McClellan Jacobsen, *Edmond*
H. Allen Johnson Jr., *Tulsa*
Samuel Houston Johnson, *Norman*
Raymond Bartholomew Kelly,
Tulsa
Jack G. Kennedy, *Sherman, TX*
Neal Robert Kennedy,
Oklahoma City
Donald Arthur Kihle, *Tulsa*
David W. Kirk, *Oklahoma City*
Franklin Jay Kivel, *Oklahoma City*
Mark T. Koss, *Oklahoma City*
Edwin Kronfeld, *Tulsa*
Caesar Cooleridge Latimer, *Tulsa*
Robert Dell Lemon, *Oklahoma City*
Kenneth Earl Limore, *Stilwell*
John J. Livingston, *Tulsa*
Thomas W. Lynch, *Dallas, TX*
William E. Maddux, *Nowata*
Gary D. Mallow, *Grove*
Hugh Alan Manning, *Spencer*
Ronald Ray Mason, *Edmond*
Anthony M. Massad, *Frederick*
John R. McCandless, *Edmond*
Daniel C. McClung, *Blackwell*
Tommy Richard McConnell,
Norman
Lawrence P. McMahan, *Tulsa*
George Edward Meisel Jr.,
Pauls Valley
Charles Joseph Migliorino,
Bromide
Val Ray Miller, *Oklahoma City*
Lisa Louise Flusche' Moran, *Tulsa*
William S. Myers Jr.,
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Robert R. Nigh Jr., *Tulsa*
Amy Northcutt, *Falls Church, VA*
Serge Novovich, *Tulsa*

Edwin Wiley Parker II, *Tulsa*
Kevin Hunter Pate, *Norman*
Billy Ray Perceful, *Pocola*
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Vicki Lynn Robertson, *Edmond*
Adelbert Carl Robinson, *Muskogee*
Robert J. Roesler, *Cypress, TX*
Mark Woodworth Rollins, *Tulsa*
John W. Russell Jr., *Ponca City*
Robert Ralph Scroggins, *Tulsa*
Susan Gail Seamans,
Oklahoma City
Larry Edmond Seward, *Tulsa*
Fred J. Shaeffer, *Norman*
Benjamin E. Smith, *Oklahoma City*
Robert Ben Smith, *Edmond*
Steven E. Smith, *Tulsa*
R. Jane Spahn, *Grand Island, NE*
Herbert Norton Standeven,
Kimberling City, MO
Jon Tom Staton, *Edmond*
Neal E. Stauffer, *Tulsa*
Ellen Colclasure Steely, *Duncan*
Clifford Oscar Stone Jr.,
Leawood, KS
Barney Delano Taylor,
Oklahoma City
Larry W. Tedder, *Oklahoma City*
Michael K. Templeton,
Oklahoma City
Charles B. Tetrick, *Tulsa*

Dan C. Thomas, *Tulsa*
Elizabeth Cynita Thomas, *Tulsa*
Gerald W. Thomas, *Mooreland*
John Sherman Thomas, *Enid*
Emma Palmer Vaughan, *Edmond*
Keith Robert Verges, *Dallas, TX*
Dino E. Viera, *Gonzales, LA*
Richard Dan Wagner,
Broken Arrow
Mark Thomas Walker, *Tulsa*
Jerry A. Warren, *Oklahoma City*
Larry Michael Weber,
LaQuinta, CA
Carl Frederick Wemhoener,
Roanoke, VA
John Joseph White,
Burkburnett, TX
Dale F. Whitten, *Tulsa*
Rhett Henry Wilburn, *Glenpool*
Allan Cade Wilcox, *Joplin, MO*
James Matthew Williams,
Oklahoma City
Nancy J. Wills, *Tulsa*
James Chas. Winterring, *Shawnee*
Matthew Grant Wofford, *Tulsa*
H. W. Wright Jr., *Wewoka*
Alan Dean Wurtz, *Cypress, TX*
Willis Ray Yarbrough, *Tulsa*
Richard F. Yates, *New London, NH*
Thomas Edward York, *Tulsa*
Bryan Barry Young, *Norman*
James B. Zongker, *Wichita, KS*
*Author's Note: The list was current
as of Oct. 16, 2017.*



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

A Risky Business: Managing Law Firm Risks

By Jim Calloway

Disaster recovery for law firms, cyberattacks, backing up data and protecting digital client security are all things I have discussed in this space during the preceding year. This month I want to cover law firm risk management more generally.

Managing and mitigating risk is a key element of much legal work, even though many lawyers do not think of their delivery of services in those terms. A contract ensures the terms of an agreement are clear and enforceable. A cliché about litigation is that cases are often settled “on the courthouse steps” right before the trial is set to commence. One reason for that is that once all evidence and witness testimony is known, parties to litigation and their attorneys can forecast a range of results so both the high-end risk and the low-end risk can be quantified.

Lawyers and law firms must manage their own risks. Historically, those risks were easily understandable. There was the risk of a grievance filed against a lawyer or firm alleging failure to comply with appropriate ethical standards. There was the possibility of a malpractice case brought against the firm – and there were a range of physical loss and liability issues similar to

other businesses which are normally addressed by purchasing insurance.

Without a doubt, managing risks in today’s business environment involves a wider and more complex set of issues.

“...managing risks in today’s business environment involves a wider and more complex set of issues.”

CYBER-ATTACKS

In last month’s column, I discussed disaster recovery plans and why every law firm needs one. One subset of disaster planning involves a discrete incident response plan (IRP) for quick response to cyber-attacks.

Risks associated with cyber-attacks, malware and ransomware have been discussed in the pages of this publication and other places for several years. Several months ago, there were reports of a Providence, Rhode Island, law firm

held hostage by ransomware blackmailers for 90 days while the criminals demanded \$25,000 in ransom paid in bitcoin to restore access. The news item involved 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.

The idea of a law firm’s computer network and workstations being offline for a few days, much less 90, is a chilling thought for all lawyers and law firm administrators. Now the experts tell us it may be impossible to guard against all forms of evolving cyber-attacks. This creates the need for an IRP that focuses on detection response and recovery as well as protection against threats. All businesses need an IRP section of their overall risk management planning. Internet searches will locate some form of 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.

If your law firm has neither an IRP nor a disaster response plan, it is well past time to

begin those projects. If the firm has them, then the question is how long it has been since they have been reviewed and updated.

But there are other types of cyber risks. In an era of rapid change, regular training for staff on email threats and other cyber risks is important, but regular training is also needed for issues like individual social media posts referencing the law firm and what to do if physical access to the workplace is blocked.

Law firms also have business risks as they prepare to move into a rapidly changing and uncertain future.

TECHNOLOGY AND FUTURE TRENDS

Technology advances and automation tools are replacing many workers in the American economy today. Clients are exerting pressure for legal fees to be reduced with no corresponding reduction in the quality of services. Firms that cater to the individual consumer market are seeing challenges from competing online delivery services. This type of risk is unprecedented. Sometimes the term unprecedented is used to refer to looming disasters of huge magnitude. Here the term is used in its dictionary sense to mean we have not experienced these types of changes in our profession before.

At the OBA Annual Meeting, I presented a program touch-

ing on blockchain, artificial intelligence and other future trends in the law. I told the attendees that today a “smart contract” means one that is automated to be quickly prepared using document assembly methods. Soon a “smart contract” will mean something that will not be fully contained in a paper document, but will encompass a process that will be largely self-executing, blockchain connections will note delivery of goods and any quality control testing before automatically transferring previously escrowed funds through a blockchain powered process. Just think, a smart contract may mean that there cannot be a breach of the contract – or at least that any breach will be automatically handled by the software rather than litigation. That will be a major change!

AVOID THE LOSS OF CLIENTS

What about key clients? Does your firm have one or more clients you cannot afford to lose? All clients expect and deserve a high level of service. Your days may be crowded with deadlines, decisions and projects, but for those clients whose loss would imperil the firm or an entire practice group, it should be an ongoing project to demonstrate to those clients that you are as indispensable to them as they are to you.

Losing key lawyers is an ongoing concern. Lawyers

moving between firms is a reality today. A firm likely cannot avoid loss of some clients when a lawyer or practice group bolts, but there should be constant messaging to clients that they are represented by the entire firm.

PREPARING FOR THE UNEXPECTED

We are all mortal. The death or temporary disability of a lawyer can have a profound effect on a law firm.

Larger law firms have infrastructure in place to step in when a lawyer dies or becomes temporarily disabled. For solo and small firms, significant planning is typically required. So, for the second month in a row, let me mention that all lawyers should log into MyOKBar and download the OBA-provided publication “Protecting Your Clients in the Event of Your Death or Disability.”

Your clients have supported you financially throughout your professional career. You have an obligation to make certain that the impact of your death or disability on them is minimized to the extent possible.

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, 800-522-8065 or jimc@okbar.org. It's a free member benefit!

Oklahoma Rules of Professional Conduct Changes

By Gina Hendryx

On June 19, the Oklahoma Supreme Court adopted several changes to the Oklahoma Rules of Professional Conduct (ORPC) with regards to prospective clients, nonlawyer assistance and the solicitation of clients. These changes address the ongoing use of electronic means that lawyers employ to interact with the public and with their clients. The following is a synopsis of the changes and the full text can be found at 2017 OK 52.

ORPC 1.18: DUTIES TO PROSPECTIVE CLIENTS

The amendment to Rule 1.18 begins with an update to the definition of a “prospective client.” A prospective client is now defined as a person who has “consulted” with a lawyer about the possibility of forming an attorney-client relationship. A prospective attorney-client relationship may be formed even when no oral discussion between the two has taken place. The word “consulted” replaced “discussed” in this rule because of the ways lawyers interact with the public and potential clients. Lawyers are increasingly using the internet and websites to reach new clients. ABA Formal Opinion 10-457 (2010) gives guidance to lawyers who use their websites to communicate with the public. The opinion reminds attorneys that: “Websites that invite

inquiries may create a prospective client-lawyer relationship under Rule 1.18. Lawyers who respond to website initiated inquiries about legal services should consider the possibility that Rule 1.18 may apply.”

The changes to the comments of Rule 1.18 give lawyers more instruction on how to avoid the creation of an inadvertent attorney-client relationship and confirms that the unilateral sharing of information from a member of the public is not sufficient to give rise to an attorney-client relationship. A portion of the rule reflecting some of the key changes is set forth below:

- (a) A person who discusses consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with learned information from a prospective client shall not use or reveal that information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

Comments

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A per-

son becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer’s advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer’s education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is

thus not a “prospective client.” within the meaning of paragraph (a). Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a “prospective client.”

ORPC 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

The amendments to Rule 5.3 can be found in the rule’s comments. The guidance is to assist lawyers who employ nonlawyer assistance both within and outside the firm. These changes are in response to the more frequent use of outsourcing work to nontraditional resources. Comment [3] was added to give additional information to lawyers using nonlawyers outside the firm to assist in the rendering of legal services to the client. Examples include investigators, document management companies and copies services. So, whether the work is done in house or sent to a third-party vendor, the lawyer must employ methods to assure that the nonlawyers will act in a way that is compatible with the professional obligations of the lawyers.

Comment

[21] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters will act in a way compatible with the professional obligations of the lawyer. with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b)

applies to lawyers who have supervisory authority over the work of a nonlawyer. such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of a nonlawyer such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confi-

dentality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer.

AMENDMENTS TO ADVERTISING RULES

The amendments to the advertising rules do not reflect any new restrictions on lawyer advertising. Rather, the amendments seek to clarify the applicability of the rules to current marketing trends such as online lawyer advertisements.

ORPC 7.1: COMMUNICATIONS CONCERNING A LAWYER’S SERVICES

Marketing to prospective clients has drastically changed since the days of the telephone book yellow pages and ads in the local newspaper. Rule 7.1’s prohibition against false and misleading communications is applicable to all forms of attorney advertising including online and electronic communications. Comment [3] was amended to encourage attorneys to use appropriate disclaimer language when comparing a lawyer’s services or achievements because such statements may create an unjustified expectation or mislead the public.

Comment

[3] An advertisement that truthfully reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expecta-

tion that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public, a prospective client.

ORPC 7.2: ADVERTISING

The amendments to Rule 7.2 are found in the comments and seek to give the lawyer guidance on the types of internet-based marketing tools and to assist in any ambiguity regarding the prohibition against paying others for a "recommendation."

Comment

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for channeling professional work recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permit-

ted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio air time, domain-name registrations, sponsorship fees, ~~banner ads,~~ Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 for the (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another). ~~who prepare marketing materials for them.~~

ORPC 7.3: SOLICITATION OF CLIENTS

The amendments to Rule 7.3 clarify when a lawyer's online communications are "solicita-

tions" within the meaning of this rule. These changes identify that such communications through electronic media will be governed by the advertising rules on solicitations. New Comment [1] defines "solicitation" as a "targeted" communication by the lawyer toward a specific person. A lawyer's solicitation directed toward the general public does not constitute a "solicitation" as defined by the rule. The comment examples of advertising that do not rise to the level of a Rule 7.3 solicitation are billboards, television commercials or website commercials.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet search.

Changes to the Rules of Professional Conduct begin with recommendations from the American Bar Association that are then vetted by the Oklahoma Rules of Professional Responsibility Committee. Any proposed changes are then reviewed by the OBA Board of Governors before being forwarded to the Oklahoma Supreme Court. The ultimate decision to make changes to any of these rules is within the sole discretion of the court.

These changes were in response to the expansive changes in technology and the manner in which lawyers market their practices to the public and employ nontraditional assistance in representing their

clients. The amendments are aimed to give assistance and guidance to the lawyer regardless of the manner of advertising they choose to attract new clients.

Ms. Hendryx is OBA general counsel. Contact Ms. Hendryx at ginah@okbar.org or 405-416-7007.

HEY!

When's the last time you checked out OBA member perks?

Every OBA member has access to free and discounted services and programs, like insurance, top-ranking technology and even travel. Don't miss out! See all your benefits at [**www.okbar.org/members/**](http://www.okbar.org/members/) **Members/Benefits.**

Meeting Summaries

The Oklahoma Bar Association Board of Governors met on Friday, Sept. 15, at the Oklahoma Bar Center in Oklahoma City.

REPORT OF THE PRESIDENT

President Thomas attended the OBA Audit Committee meeting, OBA Budget Committee meeting, OBA Leadership Academy and OBF/OBA joint dinner at Topgolf. She also worked on Annual Meeting planning and events in addition to sending letters to newly appointed OBF Trustees.

REPORT OF THE PRESIDENT-ELECT

President-Elect Hays participated in 2017 Annual Meeting planning, participated in OBA Family Law Section Annual Meeting planning, designated appointments for the House of Delegates committees, chaired the Strategic Planning Committee meeting and chaired the Budget Committee meeting. She attended the OBA/OBF joint dinner event at Topgolf and Legislative Monitoring Committee meeting via BlueJeans.

REPORT OF THE VICE PRESIDENT

Vice President Castillo reported she attended the OBA Awards Committee meeting, Oklahoma County Bar Association Corporate Counsel lunch, OBA Budget Committee meeting, OBA Law Day Committee meeting, Annual Meeting planning meeting, Oklahoma Bar Foundation Executive Committee meeting, OBF Board of

Trustees meeting and joint OBF/OBA dinner.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended meetings of the OBA Audit Committee, Budget Committee, Young Lawyer Division Board of Directors and Legislative Monitoring Committee in addition to the monthly staff celebration.

REPORT OF THE PAST PRESIDENT

Past President Isaacs reported he delivered juror appreciation plaques and posters to courthouses in Hughes, Pawnee and Seminole counties.

BOARD MEMBER REPORTS

Governor Coyle reported he attended the Oklahoma County Bar Association meeting/dinner and Oklahoma County Criminal Lawyers meeting/seminar. **Governor Gotwals** reported he attended the Inns of Court fall kickoff reception/meeting at the Living Arts Center, OBA Audit Committee meeting by telephone and OBA/OBF joint event at Topgolf. **Governor Hennigh** reported he attended the OBA Audit Committee meeting and Garfield County Bar Association meeting. **Governor Hicks** reported he participated in the Clients' Security Fund meeting and attended the joint OBA/OBF board dinner. **Governor Hutter** reported she attended the Cleveland County Bar Association Executive

Committee meeting, CCBA regular meeting, OBA/OBF joint dinner event at Topgolf and Cleveland County bench and bar meeting. **Governor Kee** reported he contacted all county bar presidents in his district asking them to notify him of upcoming events so he can attend. He attended the OBA/OBF joint event at Topgolf. **Governor Oliver** reported he attended the Payne County Bar Association September meeting that featured General Counsel Hendryx speaking on ethics. **Governor Porter** reported she attended the OBA Appellate Section's meeting/CLE, opening banquet for the William J. Holloway Jr. Inn of Court and joint OBA/OBF board dinner. **Governor Tucker** reported he attended the Muskogee County Bar Association monthly meeting, OBA Law Day Committee meeting, Audit Committee meeting and Budget Committee meeting. He also testified as part of an interim study before the House General Government Oversight and Accountability Committee. **Governor Weedn** reported he chaired the OBA Audit Committee meeting and attended the Ottawa County Bar Association meeting. **Governor Will** reported he attended the YLD monthly meeting via BlueJeans, Law-Related Education Committee meeting and joint OBA/OBF board dinner.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Lane Neal reported he chaired the August YLD

board meeting via BlueJeans and attended the Strategic Planning Committee meeting via BlueJeans, Budget Committee meeting and OBA/OBF joint dinner event at Topgolf.

BOARD LIAISON REPORTS

Governor Will reported the Law-Related Education Committee assisted with contest materials for the Law Day Contest. The committee is considering a plan to educate legislators as bills of interest are introduced in the next legislative session. In addition to traditional meetings with legislators, committee members want to be part of Legislative Monitoring Committee meetings. President-Elect Hays said the Budget Committee met, and she will present a report at the November meeting. President-Elect Hays and Executive Director Williams reported the Legislative Monitoring Committee has scheduled Legislative Reading Day for Jan. 27, 2018, repeating the format of 10 bills in 10 minutes. Day at the Capitol will be March 6, and Attorney General Mike Hunter has agreed to speak. OBA Legislative Liaison Clay Taylor will speak to board members at their March 5 meeting. Governor Tucker reported at its August meeting the Law Day Committee selected the theme "Separation of Powers: Framework of Freedom," discussed TV show topics and finalized contest promotion postcards to teachers. In the September meeting, TV topics were finalized, a new *Ask A Lawyer* TV show logo was selected and contest materials were posted to the Law Day website. Governor Hicks reported the Clients' Security Fund Committee met and is up to date on reviewing claims with no backlog.

AUDIT COMMITTEE REPORT

Governor Weedn, Audit Committee chair, introduced Leah Logan of accounting firm Smith Carney. She presented the audit report for 2016 and answered questions. The board approved the audit report.

REPORT OF THE GENERAL COUNSEL

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

RESOLUTION NO. TWO – TRUST DECANTING

Estate Planning, Probate and Trust Section Co-Legislative Liaisons James Milton and Clint Swanson presented details and reasoning for proposing the resolution. The board voted to send the resolution to the House of Delegates with a recommendation to pass.

RESOLUTION NO. ONE – LAWS GOVERNING TRUSTS

Estate Planning, Probate and Trust Co-Legislative Liaisons James Milton and Clint Swanson reviewed the details and reasoning in proposing the resolution. The board voted to send the resolution to the House of Delegates with a recommendation to pass.

RESOLUTION NO. THREE – NON-JUDICIAL TRANSFER OF TRUSTS

Estate Planning, Probate and Trust Section Co-Legislative Liaisons James Milton and Clint Swanson presented details of the resolution. The board voted to send the resolution to the House of Delegates with a recommendation to pass.

PROPOSED ESTATE PLANNING, PROBATE AND TRUST SECTION BYLAWS AMENDMENT

Section Chairperson Emily Crain reviewed the details of changes requested by the section. The board approved the section bylaws amendments.

DEMONSTRATION OF NEW VPO VIDEO

Bench and Bar Committee Co-Chairpersons Judge David Lewis and professor David Swank presented the history and need for a victim protective order video. They answered questions from board members, and OBA Communications Specialist Lacey Plaudis presented the video she helped the committee create. There was no board objection to making the video available to district courts and the public. The video will be posted to the OBA's website.

REPORT OF THE STANDARDS FOR DEFENSE OF CAPITAL PUNISHMENT CASES TASK FORCE

Chairperson Mack Martin presented the report, and Governor Gotwals provided additional details and clarification. The board accepted the report with the recommendation a resolution for the House of Delegates be drafted forwarding the report to the Rules of Professional Conduct Committee for the drafting of proposed rules consistent with the intent of the task force report. Executive Director Williams will draft the resolution.

STRATEGIC PLANNING COMMITTEE RECOMMENDATIONS RE: PUBLICATION OF OBJ COURT EDITIONS

President-Elect Hays, who serves as committee chairperson, presented the reasons the

subcommittee is recommending that beginning Jan. 1, 2018, *Oklahoma Bar Journal* court issues be distributed in electronic format only – ceasing printing and mailing. Executive Director Williams provided additional details and clarification. The board approved the recommendation.

AMENDMENT TO OBA PERSONNEL POLICY

President Thomas presented proposed new language for Section “Q. DISMISSAL” in the personnel policy regarding dismissal or resignation of a director, coordinator, administrator or department head. Current language requires Board of Governors’ approval, and the amendment removes that requirement. Discussion resulted in striking the second sentence of paragraph 1 in the draft submitted retaining the first sentence that reads, “The Executive Director shall inform the President as soon as possible about the dismissal or resignation of any director or department head.” The board approved the amendment with the modification.

RESOLUTION NO. FOUR – CHANGES IN MEMBER CLASSIFICATIONS

President-Elect Hays, as Strategic Planning Committee chairperson, reviewed the reasons the subcommittee is recommending changing the senior member classification and creating a new retired classification. Executive Director Williams provided additional clarification. The board voted to send the resolution to the House of Delegates with a recommendation to pass.

AWARDS COMMITTEE RECOMMENDATIONS

As Awards Committee chairperson, Vice President Castillo

presented the recommendations for award recipients from the Awards Committee. The committee recommends the Fern Holland Courageous Lawyer and Trailblazer Awards not be awarded this year. The board voted to accept the recommendation of the committee with the addition of one additional recipient.

INFORMATION TECHNOLOGY STRATEGIC PLANNING ANNUAL REPORT

IT Director Watson and Executive Director Williams reviewed recent updates to OBA information technology systems and services. Next year the OBA will upgrade to the latest version of NetForum, the association management system. Also, cloud-based Windows 365 will be implemented for staff, which will allow staff to work off-site should the building experience a power outage and eliminate the need to have an in-house exchange server.



The Oklahoma Bar Association Board of Governors met on Friday, Oct. 27, via BlueJeans.

REPORT OF THE PRESIDENT

President Thomas welcomed the new members of the OBA Leadership Academy, spoke to new OBA members at the admissions and swearing-in ceremony and reception, welcomed attendees to the Women in Law Conference, wrote and mailed 500-plus letters and invitations to special guests inviting them to the OBA Annual Meeting, emailed all delegates and alternate delegates regarding the Delegates Breakfast and other OBA Annual Meeting events, presented an overview of the find-

ings of the Death Penalty Review Commission to a local civic group, emailed all judges attending the 2017 Fall Judicial Education Program in Tulsa regarding OBA Annual Meeting events and worked with Rustic Cuff to finalize special OBA bracelet for Annual Meeting. She attended the Boiling Springs Institute, Women in Law Conference and luncheon, dedication of the Pittsburg County Judicial Center to Retired Justice Taylor, numerous meetings with officers and staff related to the 2017 OBA Annual Meeting and Southern Conference of Bar Presidents meeting in Memphis, Tennessee.

REPORT OF THE PRESIDENT-ELECT

President-Elect Hays reported she participated in 2017 Annual Meeting planning, OBA Family Law Section Annual Meeting planning and 2018 budget planning. She attended the OBA FLS meeting, OBA Women in Law CLE at which she presented Mona Salyer Lambird Spotlight Awards, Southern Conference of Bar Presidents in Memphis, Tennessee, and Tulsa County Bar Association pre-House of Delegates meeting. She also worked on 2018 committee leadership appointments.

REPORT OF THE VICE PRESIDENT

Vice President Castillo reported she attended the OBA Women in Law Conference luncheon and participated in multiple conference calls and emails regarding various aspects of Annual Meeting.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the Boiling Springs Institute, MCLE

Commission meeting, new member admission ceremony, staff celebration, Women in Law Conference luncheon, YLD board meeting, dedication of Pittsburg County Judicial Center to Retired Justice Steven Taylor, several meetings related to the 2017 Annual Meeting, Oklahoma County Bar Association delegate meeting, end of the year preparation staff meeting and Southern Conference of Bar Presidents. He presented CLE for the Comanche County Bar Association, spoke to OBA Leadership Academy and hosted an Open World delegation from the country of Georgia.

REPORT OF THE PAST PRESIDENT

Past President Isaacs reported he attended the Law Day Committee meeting, Oklahoma County Criminal Defense Lawyers Association luncheon and Luther Bohanan Inn of Court.

BOARD MEMBER REPORTS

Governor Coyle reported he attended the Oklahoma County Bar Association meeting and delegate caucus. **Governor Fields** reported he attended the OBA Member Services Committee meeting. **Governor Gottwals** reported he attended the Board of Governors has been planning meeting, Tulsa County Bar Association Litigation Section mediation panel, TCBA Board of Directors meeting, Tulsa Central High School Foundation meeting, Inns of Court Pupilage Group 5 presentation on judicial pet peeves planning meeting, Tulsa County Bar Foundation budget meeting, July bar swearing-in ceremony in Oklahoma City, two Inns of Court meetings/presentations, two Quality Assurance Panel meetings, Professionalism Committee meet-

ing (via legal assistant), TCBF meeting and TCBA delegate planning/preparation meeting. **Governor Hicks** reported he attended the Tulsa County Bar Foundation meeting, OBA Access to Justice Committee meeting and TCBA House of Delegates pre-convention meeting. **Governor Hutter** reported she attended the OBA Diversity Committee meeting, two Cleveland County Bar Association Executive Committee meetings, CCBA regular meeting and Cleveland County Bench and Bar Committee meeting. **Governor Kee** reported he spoke at the Oklahoma County Criminal Defense Lawyers Association luncheon on how to handle a no-win case and shared war stories. **Governor Oliver** reported he attended the Payne County Bar Association October meeting. **Governor Porter** reported she attended the swearing in of new OBA members, Appellate Law Section meeting, Canadian County Bar Association monthly meeting at which she presented CLE and the William J. Holloway Jr. Inn of Court program. She participated in a focus group for the OCU School of Law Dean Search Committee and judged a round of OU Law's Calvert Moot Court Competition. **Governor Tucker** reported he attended the Muskogee County Bar Association meeting and Annual Meeting planning meeting. **Governor Will** reported he distributed ballots to all Oklahoma young lawyers for the 2017 YLD Board of Directors election in addition to attending the law-related education young adult guide work day and ABA YLD Fall Conference in Denver.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Lane Neal reported he chaired the September YLD board meeting in addition to attending the ABA YLD Fall Conference and YLD service project at the Oklahoma Regional Food Bank.

BOARD LIAISON REPORTS

Governor Coyle reported the Lawyers Helping Lawyers Assistance Program Committee will hold a breakfast with a guest speaker at the Annual Meeting. Communications Director Manning reported the Diversity Committee Awards Dinner was well attended with about 100 people at the event held at the Oklahoma Judicial Center. Governor Fields reported the Member Services Committee has approved some practice management software tools as new OBA member benefits. Management Assistance Program Director Calloway reported the committee reviewed several practice management tools and the new benefit agreements should be completed before the end of the year so OBA members can obtain discounts on new initial purchases. Communications Director Manning reported the Law Day Committee is working on segments for the *Ask A Lawyer* TV show. Governor Will reported the Law-Related Education Committee discussed its educational contributions to the Law Day contests.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported the OBA is not involved in any litigation. A written report of Professional Responsibility Commission actions and OBA disciplinary

matters for September was submitted to the board for its review.

**RESOLUTION NO. SIX –
AMENDMENT TO
BYLAWS ADDING
SPECIAL JUDGE AS
OKLAHOMA JUDICIAL
CONFERENCE
REPRESENTATIVE
TO HOUSE OF DELEGATES**

Executive Director Williams shared the background on the resolution proposed by the Oklahoma Judicial Conference. He said an amendment is expected. The board voted to recommend the resolution be

adopted by the OBA House of Delegates.

**RATIFICATION OF EMAIL
VOTE ON RESOLUTION
NO. FIVE – STANDARDS
FOR DEFENSE OF CAPITAL
PUNISHMENT CASES**

The board voted to ratify the email vote to send Resolution No. Five to the House of Delegates with a recommendation for its adoption.

**SOUTHERN CONFERENCE
OF BAR PRESIDENTS**

President Thomas reviewed the programming offered at the recent meeting in Memphis,

Tennessee, that focused on Martin Luther King and Elvis Presley. She and others who attended commented about the high quality of the presentations.

NEXT MEETING

The Board of Governors met Nov. 1 at the Hyatt Regency Tulsa in conjunction with the OBA Annual Meeting. A summary of those actions will be published after the minutes are approved. The next board meeting will be at 10 a.m. Friday, Dec. 8, at the Oklahoma Bar Center in Oklahoma City.



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Scholarship Recipient Highlights

OBF FELLOWS SCHOLARSHIP



Madeline Coffey

Hometown: Oklahoma City
Law School: OU College of Law
Graduation Date: May 2018
Field of Law: Criminal Law
Undergrad: OU
Undergrad Major: Biology

What are your short-term and long-term goals?

My short-term goals are of course to graduate and pass the bar exam. Long term, I want a career I find both interesting and rewarding and I have found that with criminal prosecution.

What made you decide to attend law school?

Coming from a family with two attorney parents, the decision to go to law school was not a difficult one to make. Growing up, I always admired my parents' careers because it was obvious that their work was fulfilling. When I first started college I knew I wanted to choose a major that would prepare me for the medical field. After three semesters of science classes and becoming more familiar with the medical profession, I realized what I had known all along in the back of my mind, that I wanted to be an attorney.

Are there any laws or social rules that completely baffle you?

I think it's shocking voters are expected to make informed decisions on complex state questions with the very limited information they are provided.

What historical figure inspires you and why?

Ada Lois Sipuel Fisher is so inspiring because she chose to apply to OU law, knowing that she was qualified to be admitted, but that she would be rejected solely for her race. Even after years of legal battles for equality that finally resulted in her admission, she still was forced to sit in designated areas of the classrooms separate from the white students. Her story is incredible to me because I was nervous coming in to law school as a white student and those nerves aren't even comparable to how she must have felt. Further, the best resource I've had in law school is help from classmates, and for her, she was physically separated from that resource. Her story reminds me both to be thankful for all the opportunities I have and to work toward even those goals that seem impossible.

What is the most important thing you have learned in law school or undergrad?

I've had the opportunity to take such a variety of classes in my higher education. The lesson that applied across the board is that the harder I worked and invested myself, the more enjoyable the material became. That being said, I also learned that the appropriate work-life balance is crucial to my happiness and productivity.

OBF W.B. CLARK MEMORIAL SCHOLARSHIP



Priscilla Jean Jones

Hometown: Ponca City
Law School: TU College of Law
Graduation Date: 2018
Field of Law: General Practice (though I am qualified to take the Patent Bar)
Undergrad: OSU
Undergrad Major: Fire Protection and Safety Engineering

What are your short-term and long-term goals?

I have been very fortunate to have been offered a position at Hudson Law Office PLLC in Pawnee. I absolutely love it there and am looking forward to passing the bar, becoming a full-fledged attorney at Hudson Law and eventually buying some land in the area.

What made you decide to attend law school?

I was working as a loss control representative for an insurance company. The job was a wonderful opportunity but not something that I knew I wanted to do for the rest of my life. I have wanted to be an attorney for as long as I can remember, so when an opportunity presented itself I took it.

Are there any laws or social rules that completely baffle you?

I have been very fortunate to not come across laws as an intern that I could not understand or could not find someone to help my understanding. However, trying to understand all of the exceptions to hearsay gives me a headache, though I am hoping that the more I work with them the better I will become at understanding all of the nuances.

What historical figure inspires you and why?

I have always been inspired by President Franklin Delano Roosevelt. In the face of extreme medical conditions, President Roosevelt did not let his condition cripple his drive, ambition, personal life or career. He fought to lead this country through not only the Great Depression but also World War II. In his first hundred days, he was able to spearhead immense legislation to produce jobs for the unemployed and farmers, revitalize the economy, protect our natural environment, boost labor unions that protect employees and their rights, protect those less fortunate and implement badly needed regulation of the financial and transportation industries. He was an incredibly strong leader and was able to make fundamental changes to protect those who needed it most in one of our darkest hours.

What is the most important thing you have learned in law school or undergrad?

The most important thing that I have learned is that everyone has something important to teach you, and that as long as you keep your heart and mind wide open and always fight for what you believe in, you will do just fine. Also, you might not end up where you thought you would be, doing what you thought you would be doing, and that's okay.

OBF CHAPMAN-ROGERS SCHOLARSHIP



Robert Stevens

Hometown: Sulphur
Law School: OCU School of Law
Graduation Date: 2019
Field of Law: I'm currently not focused on a single area of law
Undergrad: OSU
Undergrad Major: Electrical Engineering
Graduate: Northeastern State University
Graduate Degree: MBA

What are your short-term and long-term goals?

My short-term goal is to take and pass the USPTO exam this December and to pass the Oklahoma Bar Exam in 2019. My long-term goal is to become an intellectual property attorney in the Oklahoma City area. I'm also interested in spending more time with my family after graduation.

What made you decide to attend law school?

I wanted to have flexibility in my career, while still being able to provide for my family. I also wanted to prove that I could do it. I dropped out of high school in the 10th grade and I'm the first person from my family to graduate with a four-year degree. I want to set an example for others to follow.

Are there any laws or social rules that completely baffle you?

Yes, most all of them. The more I learn about both, the more I realize how little I know. Also, as an engineer and an introvert I tend to shy away from social events as much as possible. I see the relevance, and I know how to interact, but I feel so drained afterward.

What historical figure inspires you and why?

It is a tossup between Thomas Edison and Sir Isaac Newton. They were both brilliant men, but each had something unique that made them stand out. Thomas Edison is known for failing over 10,000 times in his venture to invent the first long-lasting incandescent light bulb. He inspires me because I know each time I miss, I'm only learning a new way not to successfully complete my goal. Sir Isaac Newton, when questioned about how a single man could accomplish so much, stated, "If I have done anything, it is because I stand on the shoulders of giants who came before me." This to me says that he was a humble man, but he was resourceful because he learned from other's successes and mistakes.

What is the most important thing you have learned in law school or undergrad?

That graduation is not the end, but the beginning of my education. Once I graduate and pass the bar, my real education will begin. Also, there are few black and white answers in the real world.

Thank You, Welcome and Congratulations

By Lane Neal

In late October, the YLD spent a Saturday morning volunteering with the Oklahoma Regional Food Bank. We worked for three hours sorting and packaging food that was to be distributed to food banks around the state. The Regional Food Bank informed us that we processed 6,525 pounds of food that would provide 5,437 meals for Oklahomans. It was a great experience volunteering for a truly worthy and, unfortunately, necessary organization. A special thanks to YLD board members Brandi Nowakowski and Dylan Erwin for coordinating the project.

YLD AT THE ANNUAL MEETING

The OBA Annual Meeting in Tulsa was another success. The meeting fulfilled its expectations of providing great opportunities to see old friends and make new ones. The YLD Board of Directors' election results were announced at the YLD's November meeting, which was held in conjunction with the OBA Annual Meeting. They were as follows:

Chair: Nathan D. Richter, Mustang
 Chair-Elect: Brandi Nowakowski, Shawnee



YLD Secretary Jordan Haygood, Leslie Gile and Tony Morales pack boxes at the food bank.

Treasurer: Jordan Haygood, Oklahoma City
 Secretary: April Moaning, Oklahoma City
 Immediate Past Chair: Lane R. Neal, Oklahoma City
 District 3: Dylan D. Erwin, Oklahoma City
 District 6: Caroline M. Schaffer, Tulsa
 District 8: Garrett "Blake" Jackson, Ada
 At-Large: Jordan Haygood, Oklahoma City
 At-Large: Laura Talbert, Oklahoma City
 At-Large Rural: Clayton Baker, Grove

The YLD is pleased to welcome three new directors on to the board as a result of the elections. The new board members will no doubt continue the success of the board for years to come.

YLD AWARDS

Awards were also presented at the YLD's November meeting for Fellow to the YLD, Friend to the YLD, YLD Officer of the Year and YLD Board Member of the Year. Congratulations to all of the award winners!

Fellow to the YLD

The Fellow to the YLD award is a lawyer who has practiced more than 10 years and has been instrumental to YLD success.

LeAnne McGill, Edmond

(continued on next page)

Friend to the YLD

The Friend to the YLD award is presented annually to a nonlawyer who has shown tremendous support to the YLD.

Robbin Watson,
Oklahoma City

Officer of the Year

Bryon Will, Yukon

Board Member of the Year

Brittany Byers,
Oklahoma City
Melanie Christians,
Oklahoma City

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.

YLD Chair Lane Neal presents LeAnne McGill with the Fellow to the YLD Award.



Melanie Christians (left) and Brittany Byers receive the Outstanding Board Member Award from YLD Chair Lane Neal.



At the Oklahoma Regional Food Bank are (back row) Tony Morales, YLD Chair-Elect Nathan Richter, Director Clayton Baker, Andre Farinha, Chair Lane Neal, Director Dylan Erwin (front row) Director Brittany Byers, Director Melanie Christians and Leslie Gile

Leslie Gile, YLD Chair Lane Neal, Andre Farinha and directors Brittany Byers and Melanie Christians sort produce at the food bank.



OU College of Law Assistant Dean Confirmed to Federal Bench

The U.S. Senate confirmed Scott Palk, assistant dean of students for the OU College of Law, to the federal bench to serve as a U.S. district court judge for the Western District of Oklahoma.

Mr. Palk was nominated in May by President Donald J. Trump.

“Everyone at the OU College of Law is very proud of our friend and colleague, Scott Palk,” said OU Law Dean Joseph Harroz Jr. “He is a person of remarkable character and judgment, and I am confident that he will serve as a fair and honorable judge for the Western District of Oklahoma.”

Mr. Palk joined the OU College of Law as assistant dean of students in 2011 after serving nearly 20 years as a state and federal prosecutor. He was assistant district attorney for Cleveland County where he prosecuted a variety of crimes and death penalty cases; coordinator of the Multi-County Drug Task Force, directing wire interception drug investigations culminating in the successful prosecution of a significant multi-county methamphetamine distribution organization; an assistant U.S. attorney, prosecuting violent crimes, gangs and domestic terrorism; and deputy criminal chief of the U.S. Attorney’s Office.



Scott Palk

Scott Rowland Named to Court of Criminal Appeals



Scott Rowland

Gov. Mary Fallin announced the appointment of Scott Rowland of Oklahoma City to the Court of Criminal Appeals. Mr. Rowland succeeds Judge Arlene Johnson, who resigned.

Mr. Rowland has served nearly 11 years as first assistant district attorney for Oklahoma County. Since becoming a prosecutor in 1994, he has served as general counsel to the Oklahoma Bureau of Narcotics and Dangerous Drugs Control, and is a former assistant attorney general for the state of Oklahoma, where he served as a white-collar crime prosecutor from 1994 to 1996.

“I’m humbled by Gov. Fallin’s confidence in me,” Mr. Rowland said. “Although much of my career has been spent in trial and other litigation work, I’ve also spent much time studying the growth of the law through appellate court decisions. An appellate judge must protect our physical safety from crime and violence on the one hand and our sacred constitutional rights on the other. The indelible right of all to be safe in their homes and on the streets must be protected without abridging or sacrificing the constitutional rights of the accused. To have either of these without the other fails to serve a basic aim of our democracy.”

Mr. Rowland has a bachelor’s degree in journalism/political science from OU and a J.D. with honors from the OCU School of Law.

Member Dues Statements Available Online

In an effort to save money and cut down on the cost of printing and postage, the OBA Membership Department has posted member dues statements online at ams.okbar.org. As a follow up, a paper statement will be mailed around the first of December to those members who have not yet paid. Please help the OBA in this effort by paying your dues today!

Members can pay their dues three different ways. They can pay by credit card online at ams.okbar.org, by calling 405-416-7000 or by mailing a check to the OBA Membership Department, P.O. Box 960101, Oklahoma City, OK 73196. Dues are due Tuesday, Jan. 2, 2018.

OBA Member Reinstatement

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

Michael David Collins
OBA No. 13469
4300 Rogers Ave., Suite 45
Fort Smith, AR 72903

OBA Diversity Committee Hosts Law School Admissions Boot Camp

On Oct. 21, the Oklahoma Bar Association Diversity Committee hosted a Law School Admissions Boot Camp. The event was geared toward undergraduate students and others interested in applying to law school and featured an LSAT preparation presentation by attorney Adam Holcomb and a panel discussion with students and admissions staff from the OCU School of Law, OU College of Law and TU College of Law. The purpose of the law school admissions event was to inform and educate those interested in attending law school about the realities of applying to law school. The attendees also participated in a networking lunch with attorneys from the Oklahoma Bar Association.



Thirty undergraduate students listen as Adam Holcomb presents tips for preparing for the LSAT.

OBA Member Resignations

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

David P. Helbert
OBA No. 4054
4845 N. Blackwelder Ave.
Apt. 129
Oklahoma City, OK
73118-2010

Delmer W. Porter
OBA No. 7226
21 Church Way
Oklahoma City, OK
73139

Michael Lee Riggs
OBA No. 11975
6418 Cottonwood
Park Lane
Houston, TX 77041

LHL Discussion Group Hosts December Meeting

“Knowing When to Ask for Help” will be the topic of the Dec. 7 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 oneline@plexisgroupe.com are encouraged to ensure there is food for all.

Important Upcoming Dates

Don't forget the Oklahoma Bar Center will be closed Thursday and Friday, Nov. 23-24, in observance of Thanksgiving and Monday and Tuesday, Dec. 25-26, in observance of Christmas. The bar center will also be closed Monday, Jan. 1, for New Year's.

Kudos

Steven A. Novick was honored by the Oklahoma Institute for Child Advocacy by naming its Dedication Award after him. The Steven A. Novick Dedication Award will be given annually to those who have made significant contributions in the field of children's advocacy.

J.T. Petherick was named as divisional vice president, Government Relations & Public Affairs for Blue Cross and Blue Shield of Oklahoma. He received his J.D. from the OU College of Law.

Timothy R. Michaels-Johnson was named assistant executive director of Tulsa Lawyers for Children. Prior to the promotion he served as a staff attorney for the organization.

Sharon G. Fore has been selected as a director of the Pioneer Alumni Chapter of Tau Beta Pi National Engineering Honor Society.

Mike McBride III was selected as first vice president of International Masters of Gaming Law (IMGL). Mr. McBride previously served as second vice president, treasurer and director of membership of the IMGL.

The OBA Family Law Section presented **Ann Keele** with the Attorney of the Year Award, **Laura Baysinger** with the Guardian *ad Litem* of the Year Award, **Collin Walke**

with the Mediator of the Year Award and **Judge Barry Hafar** with the Judge of the Year Award. The awards were presented Thursday, Nov. 2, at the Family Law Section meeting.

On The Move

Leslie D. Gile, Kayla M. Lkuri, Aaron C. Tiftt and Katie N. Wagner joined Hall Estill as associates. Ms. Gile will practice family law in the firm's Oklahoma City office. Ms. Kuri will practice tax and real estate law in the firm's Tulsa office. Mr. Tiftt will practice in the firm's litigation section in the Tulsa office. Ms. Wagner will practice in the Oklahoma City office's litigation section.

Kristopher K. McVay and Kristen L. Palfreyman joined the Tulsa-based firm of Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco. Mr. McVay is a recent graduate of the TU College of Law. Ms. Palfreyman practices civil litigation with an emphasis in research.

Mark E. Hornbeek joined the Oklahoma City-based firm of Phillips Murrah as an associate in the firm's litigation practice group. Mr. Hornbeek is a recent graduate of the OU College of Law.

Simon W. Bright, Hannah Scline Shoss, Emma Land, Russell Lissuzzo III, Mack-

enzie Smith, Nick Coffey and Elizabeth Isaacs joined McAfee & Taft's Oklahoma City office. **Andrew M. King** and **Standon Yeakley** joined the firm's Tulsa office. Mr. Lissuzzo, Ms. Smith, Mr. Yeakley, Mr. Coffey and Ms. Isaacs all practice in the area of civil litigation. Mr. Bright and Ms. Shoss practice corporate law and Ms. Land practices transaction law.

Micah Adkison, Hayley Scott, Evan Way and Ryan K. Wilson joined the Oklahoma City office of Crowe and Dunlevy as associates. Mr. Adkison practices energy and environmental law. Ms. Scott practices administrative and bankruptcy law. Mr. Way practices administrative law. Mr. Wilson practices Indian and administrative law.

Kelly Lynn Offutt joined the Oklahoma City-based firm of Fenton, Fenton, Smith, Reneau & Moon as an associate. She will practice in the firm's Insurance Litigation Department.

Amy Newton joined the Tulsa-based firm of Aston, Mathis, Jacobson, Campbell, Tiger PLLC as an associate. Ms. Newton is a recent graduate of the TU College of Law.

Andrew R. Polly, Ashley A.E. Quinn and Steve Lake joined GableGotwals. Mr. Polly joins the firm's Tulsa office practicing commercial law as an associate. Ms. Quinn joins the firm's Oklahoma City office practicing state and federal litigation as

an associate. Mr. Lake joins the firm's Tulsa office practicing corporate law as a shareholder.

Jason T. Seay joined the Oklahoma City offices of Doerner, Saunders, Daniel & Anderson LLP. Mr. Seay's practice focuses on data security and privacy matters, healthcare law, regulatory compliance and administrative law and coverage disputes.

Brian J. Kuester was sworn in as the U.S. attorney for the Eastern District of Oklahoma. The district serves 26 counties from Adair to McCurtain on the east and Wagoner to Love on the west. Prior to this appointment he served as a district attorney for Oklahoma's 27th Prosecutorial District.

Dave Stockwell opened a new office located at 111 N. Peters, Suite 490, Norman, 73069. His phone number has been corrected from the October edition of the *OBJ*. It is 405-217-0207.

At The Podium

Lesley Smith March presented "Victim's Rights: Where We Are Today and Where We Must Be in The Future" at the Annual National Organization Victim Assistance (NOVA) Conference Aug. 14 in San Diego.

Wyatt D. Swinford presented a CLE at the September meeting of the Oklahoma City Mineral Lawyers Society on conflicts between oil and gas operations and wind farms.

Tulsa attorneys **Lou Reynolds** and **Nathalie Cornett** presented "Legal Aspects of Land Use & Planning: The Future's Not What It Used to Be" at the American Planning Association Oklahoma Chapter Conference.

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 January issue must be received by Dec. 7.



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Edward John Eagleton of Tulsa died Oct. 16. He was born on Jan. 22, 1932, in Tulsa. He attended Horace Mann Junior High and Central High School in Tulsa, where he wrestled and played football. Mr. Eagleton entered OU on a wrestling scholarship where he was a four-year letterman and two-year All-American. He received his bachelor's degree in accounting in 1955 and his J.D. from the OU College of Law in 1956. Mr. Eagleton obtained his CPA license and worked as a CPA for many years. He then moved to New Orleans where he worked as a lawyer for the U.S. Treasury, Internal Revenue Service. In 1961, he returned to Tulsa where he practiced complex tax litigation and estate planning. Honorable donations may be made to Henry's Lake Foundation, P.O. Box 1389, West Yellowstone, MT 59758.

James Carl Elder of Norman died Oct. 13. He was born March 11, 1947, in Detroit. He was active in scouting, receiving his Eagle Scout in 1962. Mr. Elder graduated from Norman High School in 1965, OU in 1969 and received his J.D. from the OU College of Law in 1972. He practiced law in Oklahoma City until his retirement in 2013. He was an active member of First Presbyterian Church in Norman where he served as a church elder. He volunteered his time as president of the Norman Public School Foundation Board of Directors, president of Beta Theta Pi Corporation of Oklahoma and served from 2004 to 2013 on the board of United Way of Central Okla-

homa. Honorable donations may be made to Boy Scouts of America Last Frontier Council, 3031 NW 64th St. OKC, 73116 or Norman Public School Foundation, 131 S Flood, Norman, 73069.

Donald Raymond Hackler of McAlester died Oct. 12. He was born Aug. 3, 1929, in Stigler. He graduated from Wewoka High School in 1947. In 1955, he received a Bachelor of Science in business from East Central Oklahoma University. In 1960, he earned his LL.B. from the OCU School of Law. Mr. Hackler served as the associate district judge for Pittsburg County from 1969 to 1970. He served as city attorney for the city of McAlester from 1972 to 1985. He worked at Hackler and Hackler with his daughter for the last 24 years of his life. Mr. Hackler was a member of the Oklahoma and Pittsburg County bar associations. He was also a member of the McAlester Lions Club, McAlester Valley Scottish Rite Masonic Center and a member and elder of the First Presbyterian Church of McAlester. Honorable donations may be made to First Presbyterian Church of McAlester and the Goodland Academy.

Neal Robert Kennedy of Oklahoma City died Oct. 13. He was born Aug. 31, 1945, in Oklahoma City. He held a bachelor's degree in mechanical engineering from OU, M.S. in mechanical engineering from the University of Arizona and a J.D. from the OCU School of Law. He was an adjunct professor at the OCU School of Law. He also taught intellectual property

matters for continuing legal education programs. He was a member of the American Bar Association and Phi Delta Phi. Mr. Kennedy served as chairperson of the OBA Patent, Trademark and Copyright Section. He was a partner with the law firm of Dougherty, Hessin and Beavers, and of counsel with McAfee & Taft. He was chief engineer of Corken International Corporation and was an engineer with IDEX Corporation.

Gretchen L. Loard of Dallas died Oct. 10. She was born April 15, 1967, in Oklahoma City. She graduated from Edmond Memorial High School in 1985. Ms. Loard attended OU where she was a member of Delta Delta Delta sorority. After graduating from OU, she started law school at the OU College of Law. She graduated from the OU College of Law in 1993. Honorable donations can be made to the Hurricane Harvey Relief fund at Henderson Hills Baptist Church in Edmond.

Robert R. Nigh Jr. of Tulsa died Sept. 24. He was born on Nov. 1, 1959, in Enid. He graduated from Enid High School in 1978 and later earned his B.A. from William Jewell College in 1982. In 1985, he earned his J.D. from the OU College of Law. Mr. Nigh was a criminal defense attorney for 30 years. From 1989 to 1995, he served as an assistant public defender in the Tulsa County Public Defender's Office and in the Federal Public Defender's Office for the Northern District of Oklahoma and the District of Nebraska. In 1996,

he went into private practice and later joined Brewster & De Angelis PLLC. While in private practice, he continued his work in the defense of the indigent and capital litigation in federal court. In 2014, he became interim chief public defender for Tulsa County. He served as the chief public defender for Tulsa County from March 2015 until he resigned in July 2017. He then went back to work at Brewster & De Angelis PLLC.

Donald R. Philbin of Oklahoma City died Oct. 6. He was born July 11, 1937, in Lubbock, Texas. He graduated from Granite High School in 1956. In 1960, he received a bachelor's degree in engineering from OSU. In 1963, he

received a master's degree in engineering. He received his J.D. from the OCU School of Law in 1966. He was an active member of Sigma Chi, including serving as its president. Mr. Philbin practiced estate planning, focusing on wills and trusts. In 1996, Gov. Frank Keating appointed him to the Oklahoma Economic Development Committee. He was a member of Westminster Presbyterian Church and served as a deacon and as an elder. He was also a member of Rotary Club #29. Honorable donations may be made to Rotary Club #29 in Oklahoma City or Trinity University in San Antonio.

Michael K. Templeton of Oklahoma City died Oct. 9. He was born May 26, 1951, in Joplin, Missouri. Upon graduating high school in 1969, he accepted a scholarship to play baseball at Connors State College in Oklahoma and then at the University of Missouri. After graduation in 1973, he moved to Oklahoma City where he worked in the abstract and title industry. In 1979, he was accepted into the OCU School of Law. He graduated in 1982. He practiced as an associate at Shapiro & Cejda LLP for over 30 years. He loved baseball and was an avid St. Louis Cardinals fan. Honorable donations may be made to Church of the Servant.

Don't let distance keep
you from getting involved



Attend your section and
committee meetings
remotely via BlueJeans.

Use a mobile device,
phone or computer. Visit
tinyurl.com/obabluejeans.

Beat Procrastination

We all are guilty of it – putting stuff off until tomorrow that we could have gotten done today. Here are 10 hacks for reducing the impact of procrastination on your life.

[Goo.gl/PCvZoc](https://www.google.com/search?q=Goo.gl/PCvZoc)



The Seven-Year Itch

It is known as the seven-year itch, the time in your career where disillusionment kicks in and you wonder how much longer you can continue doing what you are doing. Career coach Hannah Salton gives five tips for those considering if it is time to try a different career path.

[Goo.gl/9zvwy](https://www.google.com/search?q=Goo.gl/9zvwy)



Enjoy the Holidays in Oklahoma

Want to wow your out-of-town visitors this holiday season? Take them to the state's top attractions, enjoy local holiday food and treats and shop 'til you drop at these shopping destinations.

[Goo.gl/NEsHFL](https://www.google.com/search?q=Goo.gl/NEsHFL)



Keyboard Shortcuts

Many of us believe keyboards are only for creating text, but if you value faster computing, you will learn to use them for executing commands. Here's a list of time-saving shortcuts, from the obvious to the more obscure.

[Goo.gl/6J5qDg](https://www.google.com/search?q=Goo.gl/6J5qDg)



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**HANDWRITING IDENTIFICATION
POLYGRAPH EXAMINATION**

Board Certified	Court Qualified
Diplomate – ABFE	Former OSBI Agent
Life Fellow – ACFEI	FBI National Academy

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SUPERSEDEAS/APPEAL/COURT BONDS. Quick turn-around – A+ rated companies. Contact: John McClellan – MBA, Rich & Cartmill, Inc. 9401 Cedar Lake Ave. Oklahoma City, OK 73114. 405-418-8640; email: jmccllellan@rcins.com.

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OFFICE SPACE

OFFICE SPACE AVAILABLE AT TULSA'S RIVER-PARK BUILDING – Tulsa's most convenient law office location now has space available. Perfect for a single lawyer, an entire small law firm or an Oklahoma City firm seeking to establish a Tulsa presence. Fully furnished reception area, receptionist, free on-site parking, telephone, utilities, high-speed internet, fax, conference room, kitchen and janitorial are all provided. Close to the courthouse, Utica Square, the Gathering Place and all major highways. Prices negotiable depending on the amount of space leased. No long-term commitment necessary. Possible lease-purchase or purchase of entire building. Contact Keith Ward, 918-764-9011 to discuss or to view available space.

LUXURY OFFICE SPACE - One executive corner suite with fireplace (\$1,265/month). Office has crown molding and beautiful finishes. A fully furnished reception area, conference room and complete kitchen are included, as well as a receptionist, high-speed internet, fax, cable television and free parking. Completely secure. Prestigious location at the entrance of Esperanza located at 153rd and North May, one mile north of the Kilpatrick Turnpike and one mile east of the Hefner Parkway. Contact Gregg Renegar at 405-285-8118.

PREMIUM DOWNTOWN OKC OFFICE SPACE – five corporate style offices with magnificent views are available on the 27th floor in “Class-A” building (Each \$1,600 /month or other options will be considered). Walking distance to state and federal courthouses and other downtown amenities. Spaces also available for support staff. Access to secured furnished reception area, receptionist, two conference rooms, copier, high-speed internet and kitchen. Parking options available. Contact Elana at 405-778-8000.

OFFICE SPACE FOR LEASE IN ESTABLISHED FIRM. Space located in Boulder Towers at 1437 S. Boulder Ave., Suite 1080, Tulsa, OK. Space includes two conference rooms, kitchen, reception area, security and free parking. \$750 per month. Contact Christine Fugate at 918-749-5566 or cfugate@trsvlaw.com.

OFFICE SHARE

MIDTOWN LAW OFFICE SEEKING SOLO PRACTITIONER FOR OFFICE SHARING ARRANGEMENT. All bills paid including: monitored security system, wifi, free parking and comfortable waiting area. Individual office (150 sq ft) includes one wall of windows and subleases for \$500/month. Contact Harroz Law 405-568-4318.

POSITIONS AVAILABLE

THE OKLAHOMA BAR ASSOCIATION HEROES program is looking for several volunteer attorneys. The need for FAMILY LAW ATTORNEYS is critical, but attorneys from all practice areas are needed. All ages, all counties. Gain invaluable experience, or mentor a young attorney, while helping someone in need. For more information or to sign up, contact Margaret Travis, 405-416-7086 or heroes@okbar.org.

AV RATED METRO TULSA LAW FIRM WITH STATE-WIDE PRACTICE seeks new attorney. 2+ years' experience preferred, recent grads accepted. Litigation or property experience preferred. Send resume to "Box AA," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

Make a Difference as the attorney for a domestic violence survivor

Do you want to ensure that survivors of domestic violence obtain Justice and an end to violence in their lives for themselves and their children? Are you fervent about equal justice? Legal Aid Services of Oklahoma (LASO) is a nonprofit law firm dedicated to the civil legal needs of low-income persons. If you are passionate about advocating for the rights of domestic violence survivors, LASO is the place for you, offering opportunities to make a difference and to be part of a dedicated team. LASO has 20 law offices across Oklahoma, and LASO has a couple of openings for passionate Attorneys to represent domestic violence survivors. The successful candidate should have experience in the practice of Family Law, with meaningful experience in all aspects of representing survivors of domestic violence.

We are seeking Victim's Attorneys in: Tahlequah and McAlester

LASO offers a competitive salary and a very generous benefits package, including health, dental, life, pension, liberal paid time off, and loan repayment assistance. Additionally, LASO offers a great work environment and educational/career opportunities.

The online application can be found:
<https://legalaidokemployment.wufoo.com/forms/z7x4z5/>

Website
www.legalaidok.org

Legal Aid is an Equal Opportunity/Affirmative Action Employer

DISTRICT 15 (MUSKOGEE COUNTY) IS SEEKING AN ASSISTANT DISTRICT ATTORNEY with 0 to 5 years of prosecutorial experience. Send resumes or inquiries thru Dec. 7, 2017, to orvil.loge@dac.state.ok.us or Orvil Loge, District Attorney, Muskogee County District Attorney's Office, 220 State Street, Muskogee, OK 74401.

POSITIONS AVAILABLE

NORMAN LAW FIRM IS SEEKING SHARP, MOTIVATED ATTORNEYS for fast-paced transactional work. Members of our growing firm enjoy a team atmosphere and an energetic environment. Attorneys will be part of a creative process in solving tax cases, handle an assigned caseload and will be assisted by an experienced support staff. Our firm offers health insurance benefits, paid vacation, paid personal days and a 401K matching program. Applicants need to be admitted to practice law in Oklahoma. No tax experience necessary. Submit cover letter and resume to Justin@irshelpok.com.

WATKINS TAX RESOLUTION AND ACCOUNTING FIRM is hiring attorneys for its Oklahoma City and Tulsa offices. The firm is a growing, fast-paced setting with a focus on client service in federal and state tax help (e.g. offers in compromise, penalty abatement, innocent spouse relief). Previous tax experience is not required, but previous work in customer service is preferred. Competitive salary, health insurance and 401K available. Please send a one-page resume with one-page cover letter to Info@TaxHelpOK.com.

EDMOND/OKC LAW FIRM SEEKS TITLE ATTORNEY. Experience with Oklahoma title and HBP title preferred. Please submit cover letter, resume and references to Bcato@dcslawfirm.com.

THE LEFLORE COUNTY DISTRICT ATTORNEY'S OFFICE is seeking an assistant district attorney for its Poteau office. Primary responsibilities include the criminal prosecution of all domestic violence offenses, both felony and misdemeanor, and the handling of the juvenile delinquent and deprived dockets. Salary DOE. Applicant must have a J.D. from an accredited law school, legal experience in criminal law and prior courtroom experience preferred. Must be member of good standing with the Oklahoma Bar Association. Applicants may submit a resume and writing sample, postmarked no later than Dec. 1, 2017, to the following address: District Attorney's Office, 100 S. Broadway, Room 300, Poteau, OK 74953, 918-647-2245, Fax: 918-647-3209.

MUNICIPAL PROSECUTOR – Performs managerial and professional work involved in the maintenance and control of city recordkeeping, supervises employees in the municipal court and assists in providing legal assistance as needed. Professional degree (J.D., Ph.D., M.D., etc.) required with five years related experience – previous experience in municipal law, municipal court or risk management preferred. Must be licensed by Oklahoma Bar Association and possess a valid OK driver license and be insurable. Starting Salary: \$72,528 - \$79,023. Contact City of Midwest City, HR Dept., 100 N. Midwest Blvd., or www.midwestcityok.org. Applications accepted until filled. EOE.

SMALL, AV-PREEMINENT RATED, TULSA AREA FIRM seeks paralegal or legal secretary to assist with domestic litigation practice. Salary commensurate with experience. Send resume to "Box Y," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

DOWNTOWN OKC LAW FIRM SEEKS ASSOCIATE ATTORNEY. Primary duties include legal research and writing for civil litigation. Pay is commensurate with experience. Excellent benefits package. Please send cover letter, resume and writing sample to "Box FF," Oklahoma Bar Association, PO Box 53036, Oklahoma City, OK 73152.

TULSA AV RATED LAW FIRM SEEKS ATTORNEY WITH 2-5 YEARS. Prefer individual whose training has focused on legal research and writing. Must be energetic and a self-starter; good communication skills required. The firm's practice concentrates primarily on medical malpractice defense and other health care related areas. Salary commensurate with experience, compensation includes health insurance and other benefits. Email resume, writing sample, salary requirement and references to resumes@rodolftodd.com.

THE UNITED STATES ATTORNEY'S OFFICE FOR THE EASTERN DISTRICT OF OKLAHOMA is seeking an experience attorney to serve as an assistant United States attorney in our Muskogee office. Assistant United States attorneys are responsible for legal research and writing, directing investigations, case development and case presentation and resolution in civil cases. Civil cases cover a variety of affirmative and defensive civil cases such as torts, bankruptcy, medical malpractice and affirmative civil enforcement. Candidate must have a J.D. degree, be duly licensed and authorized to practice as an attorney under the laws of any state, territory of the United States, or the District of Columbia, and have at least 3 years trial attorney experience. Applicants must be active members in good standing of the bar. Applicants should have superior research, writing and oral advocacy abilities, strong academic credentials and good judgment. United States citizenship is required, as is a successful pre-employment background investigation. Announcement opens Nov. 20, 2017, and closes Dec. 1, 2017. To view this vacancy announcement visit <http://www.usajobs.gov> The U.S. Department of Justice is an Equal Employment Opportunity Reasonable Accommodation Employer.

THE CIVIL DIVISION OF THE TULSA COUNTY DISTRICT ATTORNEY'S OFFICE is seeking applicants for an assistant district attorney with 0-2 years of experience. This position includes advising and representing county officials in various matters regarding all aspects of county government. Qualified applicants must have a J.D. degree from an accredited school of law and be admitted to the practice of law in the state of Oklahoma. Candidates for the February 2018 bar examination will be considered. Excellent research and writing skills are required. Excellent state benefits. Send cover letter, resume, professional references and a recent writing sample to gmalone@tulsacounty.org.

POSITIONS AVAILABLE

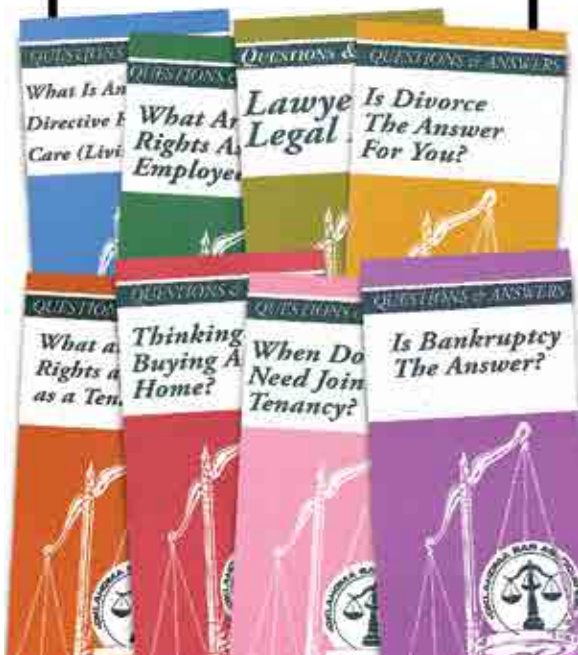
THE CITY OF TULSA IS SEEKING A SENIOR ATTORNEY- POLICE LEGAL ADVISOR STARTING JANUARY 2018. \$86,000 minimum salary plus great benefits and retirement package. Ability to advance. If you have a passion for public service, we have rewarding work that makes a difference in the lives of 400,000 Tulsans! You will advise 700+ sworn officers on challenging and fast-paced issues including civil rights, use of force, first amendment, body-worn cameras and search and seizure. You will respond on the scene to officer-involved shootings, conduct academy and in-service training on legal issues, try cases and handle expungements, forfeitures, open record requests and subpoenas. You must have at least four years trial experience, strong academic record, excellent analytical and communication skills, self-motivated and Oklahoma bar license (or obtain within reasonable period). See full job requirements at cityoftulsa.org. Submit resume with cover letter, transcript, writing sample, and references to jmakinson@cityoftulsa.org. Top candidates will be contacted to continue hiring process in January.

BEDLAM LAW IS LOOKING TO GROW OUR TEAM. We are looking for both a senior and junior associate who either has a passion for family law or a strong desire to learn and grow in the field. Applicants should be great with people and have strong time management, legal research, negotiation and writing skills. Bedlam Law is comprised of a team of top notch professionals who work hard to advocate for their clients through the divorce process. Our legal professionals are responsible for managing family law cases from beginning to end. You will benefit from a team-based approach that provides you with case support and direction in every case. Responsibilities include providing support to attorneys with research and drafting of pleadings, providing superior customer service to all clients and conducting court hearings and trials. Proactively manage family law cases from beginning to end. Work with a team of professionals to provide the best possible case strategy. Qualifications include a law degree from an accredited university, licensed to practice law in the state of Oklahoma, thrives in a team-based approach and values defined processes and procedures that lead to guaranteed results and excellent verbal and written communication skills. Salary commensurate with experience. Please send resume to info@bedlamlaw.com.

OKLAHOMA CITY UNIVERSITY SCHOOL OF LAW INVITES APPLICATIONS for the director of the Pro-Bono Housing Eviction Assistance Program. The position is a half-time grant-funded position open to attorneys with 2+ years of experience. To apply visit <http://ocuemployment.silkroad.com/>.

CONSUMER BROCHURES

The OBA has consumer brochures to help nonlawyers navigate legal issues. Many lawyers and firms find them helpful in explaining basic legal issues. Topics include landlord and tenant rights, employer and employee rights, information for jurors and much more! Only \$4 for a bundle of 25! To order, visit www.okbar.org/public/brochures.



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Love of the Law

By Nikki Baker

*Where did we all start and where will we go?
Did we wake up with the idea or just go with
the flow?*

*Being lead to the legal field, is it always
a calling?*

Or is it just something we ended up drawing.

*Each lawyer has a story of how they did begin.
Probably one where they were slow to fit in.
We all know a degree doesn't guarantee all
the answers,
But learning from those before us helps us
become masters.*

*If you take the time to see if we all had a
similar start,*

*I think you find that all lawyers have
heart.*

*Coupled with a passion for portions
of the law,
That drive our personalities maybe
to a flaw.*

*We all belong to a category that can
be so diverse,
Depending on what type of client we
tend to nurse.*

*So being an attorney can be so
convoluted,*

*Because the field has many areas that
need concluded.*

*But that is why the law is to love so much,
It has room for many spirits that just want
to touch*

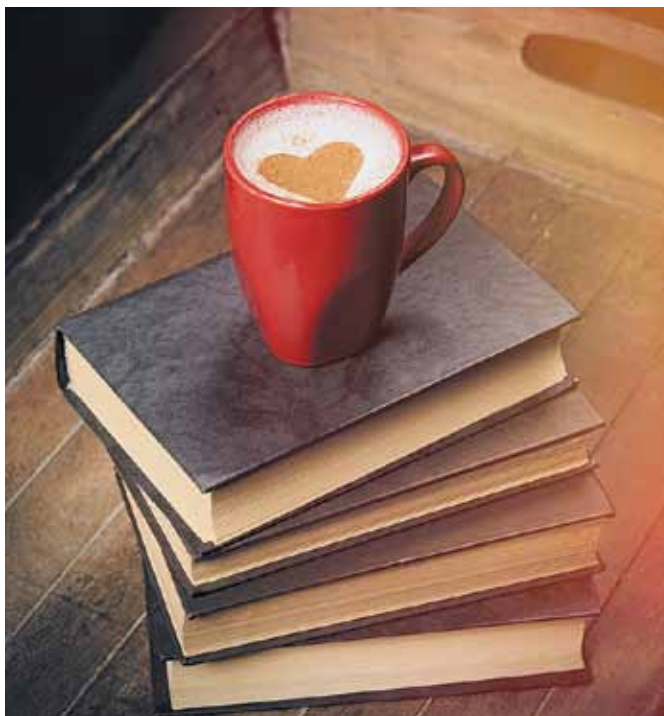
*The lives of others who need our special
talent,*

To work out life's problems and be gallant.

*Where will we end up in such a field as this?
If I were to guess your end, I'd be quite amiss.
Each of you hold the key of where your heart
will lead*

*But I am sure as your colleague that it will
be full of good deeds.*

Ms. Baker practices in Tahlequah.





DECEMBER 14

Oklahoma Bar Center - "Live" Webcast Available



PROGRAM PRESENTER:

Lenne' Eidson Espenschied

Lenne' Eidson Espenschied practiced law in Atlanta, Georgia for 25 years, focusing on corporate and transactional representation of technology-based businesses. She is the author of two books published by the American Bar Association: *Contract Drafting: Powerful Prose in Transactional Practice (ABA Fundamentals)*, and *The Grammar and Writing Handbook for Lawyers*. She has taught commercial law, contracts, and contract drafting and also is a frequent speaker at continuing legal education seminars. Her passion is helping lawyers acquire the skills they need to be successful in transactional practice.

TIPS FROM THE BENCH

7/0

How 25 Recent Cases Influence Contract Drafting

This program studies 25 recent ambiguous contract cases from jurisdictions across the country to glean practical drafting advice straight from the pens of judges who deciphered the provisions at issue. We'll consider the wording of the litigated provisions, the arguments of both parties as to the "correct" interpretation, and the ultimate judicial rendering of the parties' intended meaning. We'll discuss specific drafting techniques that would have improved the language and possibly prevented the dispute, as well as recommend substantive content changes to the language based on the judicial construction.

\$200 for early-bird registrations with payment received by December 7th. Registrations received after December 7th are \$225 and walk-ins are \$250. To receive a \$10 discount for the in-person program, register online at www.okbar.org/members/CLE. Registration for the live webcast is \$225. Members licensed 2 years or less may register for \$75 for the in-person program and \$100 for the webcast. All programs may be audited (no materials or CLE credit) for \$50 by emailing ReneeM@okbar.org to register. No other discounts apply.

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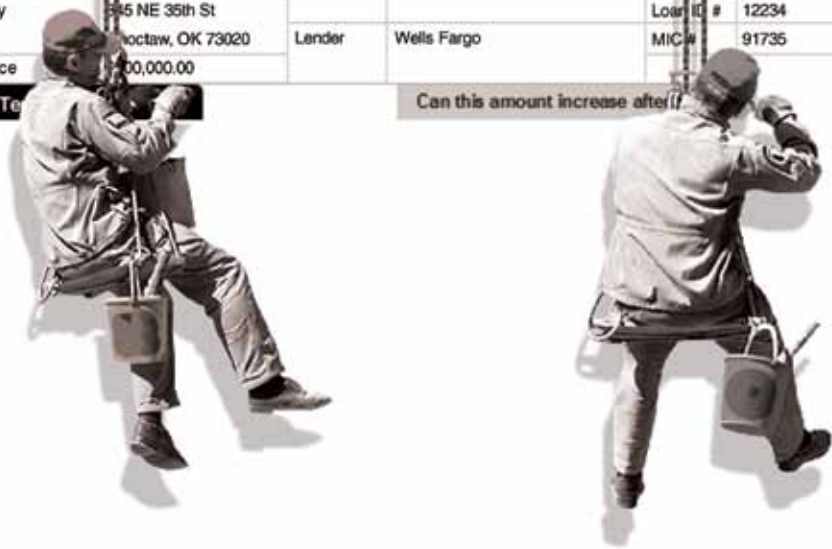
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Closing Information		Transaction Information		Loan Information	
Date Issued	10/3/2016	Borrower	Mr Stephen Russell	Loan term	29yr., 1 mo
Closing Date	10/3/2016		Mrs Stephanie Russell	Purpose	Purchase
Disbursement Date	10/3/2016			Product	7 ARM
Settlement Agent	Barlett & Bradley	Seller	Mr Merrick Burgess	Loan Type	<input checked="" type="checkbox"/> Conventional <input type="checkbox"/> FHA
File #	150204			<input type="checkbox"/> VA <input type="checkbox"/>	
Property	845 NE 35th St Tulsa, OK 73020	Lender	Wells Fargo	Loan ID #	12234
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