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THE OKLAHOMA BAR
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Insurance Law

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Leadership Traits Mirror Lawyer Skills

By Linda S. Thomas

Ever notice that many leaders in community and state government, social and religious groups, companies, universities and nonprofit organizations are lawyers? What is it about being a lawyer that makes leadership almost second nature to us?

Research suggests a common theme about what qualities – apart from our legal expertise – make lawyers worthy leaders. Skills and attributes good lawyers possess in their everyday tasks are the exact skills and attributes of effective leaders – good judgment, trust building, high ethical standards, vision, diplomacy and strong communication, negotiation, persuasion and conflict resolution skills, to name a few. Good lawyers, as with good leaders, lead by example with high standards and core values motivating others to succeed.

People look to leaders skilled at things they themselves value, so it is no wonder lawyers are leaders in various aspects of our society.

People follow leaders who consistently demonstrate good character and competence. Various definitions of "character" include traits like honesty, integrity, reliability, kindness and generosity, and "competence" is basically utilizing the requisite knowledge to do something successfully. Not surprisingly, the OBA Standards of Professionalism, to which we are accountable, begins with "Professionalism for lawyers and judges requires honesty, integrity, competence, civility and public service."

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Not all "experts" agree on what effective leadership is but we all know it when we see it. People look to leaders skilled at things they themselves value, so it is no wonder lawyers are leaders in various aspects of our society. While technique and style may vary, these same principles remain constant across all generations.

I'm not saying leadership is simple for us just because we are lawyers, quite the contrary. While lawyers generally have the personality traits associated with leadership, leadership takes commitment, creativity, knowledge and so much more. I paint "leadership" with a broad brush. Leadership can be as complex as being OBA president or as simple as occasionally giving the children's sermon at church. It may be demonstrated in a highly public arena or by reading to school children in a small classroom. Leaders, in my mind, use their expertise, knowledge and power to positively impact others.

Commenting on leadership in the 21st century, Bill Gates said, "As we look ahead into the next century, leaders will be those who empower others." The OBA is dedicated to empowering our members to take on leadership roles in the future. Under the leadership of our own lawyer leader, Susan Damron, 23 of our best and brightest members have just begun their journey through the sixth Leadership Academy. They are learning professional skills that will enhance the way they incorporate service and leadership into their practice and their personal lives.

It was the forward-looking vision of past presidents, Stephen Beam and the late Bill Conger, that gave the Leadership Academy the momentum that has successfully prepared more than 125 lawyer leaders, most of whom are now serving in significant leadership roles throughout their communities, our state and our association. The vision and core values of our past, present and future OBA leaders have strengthened our association to take on the enormous challenges facing bar associations and the legal profession in the future. Your bar association is in good hands for years to come.

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THE OKLAHOMA BAR Journal

Volume 88 – No. 27 – 10/21/2017

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

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

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

Insurance
LAW

Oklahoma's Uninsured Motorist Coverage Statute – An Overview

By Dawn M. Goeres

This article discusses the current version of Oklahoma's Uninsured Motorist Coverage Statute, 36 O.S. §3636 (the statute).[1, 2] Many of the subsections of the statute discussed below could easily be the subject of independent articles, as the case law discussing uninsured/underinsured motorist (UM) coverage[3] – as well as the statute itself – is constantly evolving. As such, this article provides only a cursory discussion of the statute and select cases discussing same.

Generally, subject to the terms and conditions of a specific insurance contract, UM coverage will indemnify an insured who is "legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom."[4] An uninsured motor vehicle is – again, generally – a vehicle which has no liability coverage or has liability coverage in an amount less than the damages an insured is legally entitled to recover from the tortfeasor.[5]

If counsel is involved in the presentation or defense of a UM claim, counsel should be certain to look closely at the language of the policy at issue, the relevant sections of the statute and applicable case law. Also keep in mind that the version of the statute which is in effect at the time of a policy's issuance or last renewal will govern any issues relating to UM claims made under that policy.[6]

OKLAHOMA PUBLIC POLICY AND THE STATUTE

In 2009, the 10th Circuit Court of Appeals certified to the Oklahoma Supreme Court certain questions regarding an automobile insurance liability exclusion that was deemed to violate Oklahoma public policy, resulting in imputation of liability coverage onto the policy in the statutorily mandated minimum amount. One of the questions presented addressed a UM insurer's duty to an individual who became an "insured" for purposes of liability coverage by operation of Oklahoma law.[7] The insured argued if she became an insured for purposes of the policy's liability coverage by operation of Oklahoma law, she also became an insured for purposes of the policy's UM coverage.[8] The Oklahoma Supreme Court performed an exhaustive review of Oklahoma's UM public policy and determined Oklahoma law, at that time, did "not provide a conclusive answer" to the question of whether an insurer was required to provide UM coverage to an individual who became an "insured" under the policy for purposes of liability coverage because an exclusion violated Oklahoma public policy governing automobile liability insurance.[9] The *Ball* court went on to state as follows:

> In short, a review of our extant UM jurisprudence reveals (1) a public policy that is protective of UM coverage for Class One

> insureds and (2) a willingness to uphold UM exclusions which by their express terms are limited to individuals who own a vehicle and who have thus had an opportunity to purchase their own UM coverage. We have not yet addressed whether the public policy expressed in §3636 is offended by an exclusion that applies to Class Two insureds regardless of vehicle ownership.[10, 11]

This articulation of Oklahoma's UM public policy is the most recent detailed analysis by the Oklahoma Supreme Court on the matter. Courts consider Oklahoma's UM public policy when interpreting and applying UM coverage provisions,[12] as well as when there are choice-of-law/conflict-of-law issues present in a UM claim.[13]

INSURANCE POLICIES GOVERNED BY THE STATUTE

The statute dictates no automobile liability insurance policy "shall be issued, delivered, renewed, or extended in this state with respect to a motor vehicle registered or principally garaged in this state unless the policy includes the coverage described in subsection B of this section."[14] The Oklahoma Supreme Court has acknowledged the statute does not apply to every policy of insurance that could be enforced in Oklahoma.[15] Rather, the statute only applies to those policies "issued, delivered, renewed, or extended in [Oklahoma] with respect to a motor vehicle registered or principally garaged in [Oklahoma]."[16, 17]

In accordance with this rationale, it is important to identify whether the policy of insurance under which a UM claim arises was "issued, delivered, renewed, or extended" in Oklahoma. It is also important to ascertain whether the policy at issue insures a "motor vehicle" as that term is defined by 36 O.S. §3635, or if it has been issued to provide coverage to farm equipment or another type of vehicle designed for principally off-road use that is not subject to motor vehicle registration. Generally, this statutory language will determine whether the policy at issue is subject to the statute and Oklahoma's UM public policy.

Last year, the Oklahoma Supreme Court held Oklahoma UM law governing "stacking" of the coverage limits (discussed more fully further in the article) would apply to a UM claim arising from a 2008 accident despite the fact the policy was issued in Kansas for a vehicle garaged in Kansas.[18] While a cursory reading of the *Leritz* opinion would seem to call the language of 36 O.S. §3636(A) cited above and the *Bernal* case into question, it did not. Instead, it reinforced the need to know and understand the applicable policy language. The policy in *Leritz* stated 1) the insurer would "interpret [the] policy to provide any broader coverage required by" the compulsory laws of other states to which the insured became subject and 2) the issue of whether policy limits could be stacked would be "[s]ubject to the law of the state of occurrence."[19] The Oklahoma Supreme Court found there was no choice-of-law issue present nor was the statute implicated, as the policy's language dictated the law of the state of the occurrence would govern the question of whether the UM policy limits could be "stacked."[20]

DUTY TO OFFER/RIGHT TO REJECT UNINSURED MOTORIST COVERAGE

When an insurer issues an automobile liability policy, it is required to offer UM coverage.[21] The amount of coverage cannot be less than the statutorily mandated minimum limits of liability coverage and an insured may purchase higher limits as long as those limits do not exceed the liability limits provided by the policy.[22] The statute also states the insured may reject UM coverage or select limits of UM coverage which are lower than the liability limits.[23] Since Nov. 1, 2009, a named insured's written rejection of UM coverage is effective as to all insureds under the policy for the life of the policy and changes to the policy do not require an insurer to obtain a new UM selection/rejection form from the insured.[24] Further, any statutory change in the mandatory minimum limits of liability coverage will not require an insurer to obtain new UM selection/rejection forms from its insureds.[25]

The statute states "the uninsured motorist coverage shall be upon a form approved by the Insurance Commissioner as otherwise provided in the Insurance Code" and includes template form language.[26] The UM form used by the insurer is required to "read substantially" like the language set forth in the statute, and must be "filed with and approved by the Insurance Commissioner."[27] However, the statute also dictates the "Insurance Commissioner shall approve a deviation from the form described in subsection H of this section if the form includes substantially the same information."[28] The Oklahoma Court of Civil Appeals has held that an insurer's use of an unapproved UM/UIM

rejection/selection form did not render the insured's written rejection of UM coverage (memorialized on that form) invalid.[29] If an insurer cannot produce a written UM selection/rejection form, Oklahoma UM public policy requires UM coverage in an amount equal to the statutorily mandated minimum limits of liability coverage be imputed onto the policy.[30]

STATUTORY EXEMPTION FROM UM COVERAGE

> On Nov. 1, 2004, the following section of the statute became effective:
>
> For purposes of this section, there is no coverage for any insured while occupying a motor vehicle owned by, or furnished or available for the regular use of the named insured, a resident spouse of the named insured, or a resident relative of the named insured, if such motor vehicle is not insured by a motor vehicle insurance policy.[31]

The first published decision that expressly addressed this section of the statute was issued by the Oklahoma Court of Civil Appeals.[32] In *Conner,* the plaintiff owned a motorcycle for which he had obtained liability insurance and rejected UM insurance.[33] Because he resided with his parents, he sought to recover UM benefits from their policy.[34] The insurer for the claimant's parents denied UM coverage on the basis of an exclusion that barred UM coverage for an insured who was operating a vehicle he owned, but which was not insured for UM coverage.[35] The plaintiff claimed the exclusion violated Oklahoma public policy, but the appellate court upheld the trial court's entry of summary judgment in favor of the insurer.[36]

> **"'Stacking' generally refers to a situation in which multiple vehicles are identified on a policy..."**

Not long after *Conner* was decided, the United States District Court for the Western District of Oklahoma certified questions to the Oklahoma Supreme Court seeking clarification of case law concerning a UM exclusion that seemed to align with the language of 36 O.S. §3636(E).[37] The plaintiff, who resided with his mother, was involved in an accident while driving his commercial vehicle. He had purchased UM coverage for his personal automobiles, but rejected it on the commercial vehicle he was driving at the time of the underlying accident. The plaintiff's own UM insurer paid him its UM limits.[38] The plaintiff then sought benefits from his mother's UM insurer, even though his commercial vehicle was not listed on his mother's policy.[39] In reliance on the undisputed fact the plaintiff had his own UM coverage, the Oklahoma Supreme Court found that application of the exclusion in that particular case violated Oklahoma public policy.[40] The Oklahoma Supreme Court found *Conner* distinguishable, stating, "The *Conner* case holds that where a resident relative of a named insured insures his vehicle with liability insurance, but rejects uninsured motorist coverage, then an insurance company, with the proper exclusion, may preclude UM coverage from extending to such a vehicle."[41]

UM LIMITS NOT SUBJECT TO 'STACKING'

The current version of the statute became effective on Nov. 1, 2014, and it contained, for the first time, the following language: "Policies issued, renewed or reinstated after November 1, 2014, shall not be subject to stacking or aggregation of limits unless expressly provided for by an insurance carrier." Prior to the enactment of the current version of the statute, in certain factual scenarios, Oklahoma UM insureds were permitted to "stack" UM limits. "Stacking" generally[42] refers to a situation in which multiple vehicles are identified on a policy and the insured pays separate UM premiums for each, thereby permitting the insured to recover the UM limit for each listed vehicle rather than the single UM limit identified on the policy.[43] With this recent addition to the statute, however, it appears the practice of "stacking" will not be permitted unless an insurer expressly provides for aggregation of UM limits in the language of the policy.

CONCLUSION

If counsel assists a client with a UM claim, it is important to 1) know the specific, unique facts which gave rise to the UM claim; 2) identify and read the relevant policy provisions; 3) confirm whether the statute applies to the policy that potentially provides UM coverage for the claim; 4) ascertain which provisions of the statute are relevant to the UM claim; and 5)

review any jurisprudence that has interpreted and applied the statute to UM claims involving similar facts. While the statute is but one of many which may apply to any particular UM claim, it underpins the body of Oklahoma case law that articulates UM public policy. Accordingly, anyone practicing in this area should become very familiar with, and stay abreast of changes to, the statute.

1. 36 O.S. §3636 has undergone two revisions since August of 2008, (the last time the *Oklahoma Bar Journal* published an issue addressing insurance law), one on Nov. 1, 2009, and one on Nov. 1, 2014.

2. As is the case with any insurance coverage, an insurer providing UM coverage has a duty of good faith and fair dealing when handling a UM/UIM claim. *Christian v. American Home Assurance Co.*, 1977 OK 141, 577 P.2d 899. While certain cases involving an insurer's alleged breach of this duty in the context of UM claims are cited, this article focuses on the interpretation and application of 36 O.S. §3636 to UM claims as opposed to an insurer's duty of good faith and fair dealing.

3. Unlike some states, the statute classifies a single type of coverage: uninsured motorist coverage. The concept of "underinsured" motorist coverage is included within uninsured motorist coverage for purposes of the statute. *See* 36 O.S. §§3636(C) and (D).

4. 36 O.S. §3636(B).

5. *See* Endnote 3.

6. *May v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 1996 OK 52, ¶7, 918 P.2d 43, 45.

7. *Ball v. Wilshire*, 2009 OK 38, 221 P.3d 717.

8. *Ball* at ¶24, 725.

9. *Ball* at ¶20, 724.

10. *Ball* at ¶36, 730.

11. "Class One" insureds are the named insureds and resident relatives of the named insureds, while "Class Two" insureds are individuals who are afforded coverage because they are an occupant or permissive user of a vehicle that has UM/UIM coverage. *American Economy Ins. Co. v. Bogdahn*, 2004 OK 9, ¶12, 89 P.3d 1051, 1054-55.

12. *Ball* at ¶¶23-36, 725-730.

13. *Bernal v. Charter Co. Mut. Ins. Co.*, 2009 OK 28, 209 P.3d 309.

14. 36 O.S. §3636(A).

15. *Bernal* at ¶18, 317.

16. The term "motor vehicle" as used in 36 O.S. §3636 is defined in 36 O.S. §3635, and "means and includes a self-propelled land motor vehicle designed for use principally upon public roads or streets but does not mean or include crawler or farm-type tractors, farm implements and, if not subject to motor vehicle registration, any equipment which is designed for use principally off public roads and streets."

17. *Bernal v. Charter Co. Mut. Ins. Co.*, 2009 OK 28, 209 P.3d 309.

18. *Leritz v. Farmers Ins. Co.*, 2016 OK 79, 385 P.3d 991.

19. *Leritz* at ¶3, 993.

20. *Leritz* at ¶4, 993.

21. 36 O.S. §§3636(A) and (B).

22. 36 O.S. §3636(B).

23. 36 O.S. §3636(G).

24. 36 O.S. §3636(G).

25. 36 O.S. §3636(J).

26. 36 O.S. §§3636(B) and (H).

27. 36 O.S. §3636(H).

28. 36 O.S. §3636(I).

29. *Davis v. Progressive Northern Ins. Co.*, 2012 OK CIV APP 98, 288 P.3d 270.

30. *May v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 1996 OK 52, 918 P.2d 43.

31. 36 O.S. §3636(E).

32. *Conner v. American Ins. Co.*, 2009 OK CIV APP 61, 216 P.3d 850.

33. *Conner* at ¶8, 851.

34. *Conner* at ¶¶1-2, 850.

35. *Conner* at ¶5, 851.

36. *Conner* at ¶7, 851, stating "Even though Plaintiff did obtain liability insurance on his motorcycle through AIG, because UM coverage is mandatory unless waived, the presumption exists that he also had recourse to some UM benefits. Thus, the policy exclusion which does not allow UM coverage from extending to a vehicle which Defendant does not insure and which is not otherwise covered for UM by any other insurer is not inconsistent with the purpose of §3636(E)."

37. *Morris v. America First Ins. Co.*, 2010 OK 35, 240 P.3d 661.

38. *Morris* at ¶¶2-6, 662.

39. *Morris* at ¶¶2-6, 662.

40. *Morris* at ¶13, 663.

41. *Morris* at ¶18, 664.

42. *Keel v.MFA Ins. Co.*, 1976 OK 86, 553 P.2d 153.

43. *Keel v. MFA Ins. Co.*, 1976 OK 86, 553 P.2d 153.

ABOUT THE AUTHOR

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Strategic Advisor to Lawyers and Law Firms

Roy Ginsburg, a practicing lawyer for more than 30 years, is an attorney coach and law firm consultant. He works with individual lawyers and law firms nationwide in the areas of business development, practice management, career development, and strategic and succession planning. Roy also runs a part-time solo practice that focuses on legal marketing ethics.

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Insurance and Risk Management Considerations in Indian Country

By Daniel E. Gomez

While on the campaign trail in August of 2004, President George W. Bush attended the UNITY Conference, a convention of diverse journalists. He was asked by Mark Trahant, former president of the Native American Journalists Association, to comment on tribal sovereignty. He said, "Tribal sovereignty means that. It's sovereign. You're a ... you're a ... you've been given sovereignty and you're viewed as a sovereign entity."[1] Aside from the misnomer that tribes were "given" sovereignty – a distinction that rightfully caused a firestorm of criticism from Indian country[2] – the president's response exemplified that tribal sovereignty is often not well-understood.

Modern day Indian tribes and nations are "self-governing sovereign political communities."[3] Tribes, however, lack the ability to raise revenues by traditional means enjoyed by other sovereign governments such as income, sales or property taxes, and they therefore rely on commercial activities to raise revenues to support programs for the benefit of tribal citizens.[4] Some tribes have been extraordinarily successful in their business enterprises and economic development initiatives. The Oklahoma Indian Gaming Association's *Economic Impact Report for 2016* reported that tribal government gaming output was $4.75 billion in 2015, representing 3 percent of private production in the Oklahoma economy, and had an overall impact of $7.2 billion when both direct and indirect impacts are taken into account.[5] In 2012, an OCU report on the statewide impact of Oklahoma tribes found the total output impact of all tribal activities, including gaming and nongaming activities, exceeded $10 billion.[6] The Cherokee Nation reports that in 2016, the overall economic impact of its governmental and business activities, including, but not limited to, gaming, exceeded $2 billion, representing a 23 percent increase from 2014.[7]

A key attribute of tribal sovereignty is immunity from lawsuits and legal process.[8] Nontribal businesses that regularly do business in Indian country often retain counsel versed in Indian law to address how sovereign immunity affects their relationship. However, what happens when people interact with tribes or tribal businesses involuntarily or tangentially, such as car accidents with tribal employees that occur outside of Indian land, injuries at tribal gaming properties or through employment with a tribal business enterprise? Are tribes required to carry liability insurance even though they cannot be sued? Do tribal employers carry workers' compensation insurance for occupational injuries? Can casino patrons sue a

tribe if they are injured and, if so, in what court? Do tribal gaming enterprises have insurance to cover tort claims? What types of insurance coverage are tribes required to have, and what types of insurance do they typically obtain voluntarily?

This article addresses some of these questions and situations that arise frequently in Indian country. However, it is first helpful to understand some basic concepts of tribal sovereign immunity and its unique status under federal law.

INDIAN TRIBES' 'SPECIAL BRAND' OF SOVEREIGNTY

Tribal sovereign immunity is based on tribes' status as "distinct, independent political communities, retaining their original natural rights" and "separate sovereigns pre-existing the Constitution[.]"[9] Because of this unique status, tribal sovereign immunity is not congruent to immunity enjoyed by the federal government or the states.[10] For example, states can sue other states because they surrendered their immunity for such suits at the Constitutional Convention; however, states cannot sue Indian tribes because "it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties."[11] Tribal sovereign immunity, ultimately, is a matter of federal law and is not subject to diminution by the states.[12] Due to these unique attributes, the Supreme Court recently acknowledged tribal sovereign immunity as a "special brand" of sovereignty.[13]

Sovereign immunity applies not only to the tribes in their exercise of traditional governmental functions but to tribes' business activities as well.[14] A tribally owned business enterprise enjoys the same immunity as the tribe itself if it is an "arm of the tribe," meaning that it is owned by the tribe and its profits are used to support the tribe's governmental functions.[15] To determine whether a business entity is an arm of the tribe, factors to be considered are 1) its method of creation; 2) its purpose; 3) its structure, ownership and management, including the amount of tribal control; 4) the tribe's intent with respect to the sharing of its sovereign immunity; and 5) the financial relationship between the tribe and the entity.[16] Tribal gaming enterprises are presumed to satisfy these requirements because the Indian Gaming Regulatory Act requires tribal ownership and that profits be used solely for the benefit of the tribes.[17] Tribal enterprises also enjoy immunity because, as noted, their profits are a substitute for traditional government revenues, and immunity therefore "directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general."[18]

Tribal sovereign immunity can be waived by consent or by Congress, but any such waiver must be "clear."[19] Waivers "cannot be implied, but must be unequivocally expressed."[20] "Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government."[21] Statutes that are alleged to waive tribal sovereign immunity must also be interpreted under the Indian Canons of Construction, which provide that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[22] Under these strict standards, the Supreme Court has never found a statutory waiver of sovereign immunity unless Congress has explicitly referred to Indian tribes in the legislation.[23]

ACCIDENTS IN THE COURSE AND SCOPE OF TRIBAL EMPLOYMENT

Tribal sovereign immunity was tested in the Supreme Court's most recent term. In *Lewis v. Clarke*, it was alleged that an employee of a tribal gaming enterprise caused an off-reservation automobile accident while acting within the course and scope of his employment.[24] The defendant, Clarke, was a limo driver for the Mohegan Sun Casino, a gaming enterprise of the Mohegan Tribe of Connecticut, and allegedly caused the accident injuring the Lewises.[25] The Lewises sued Clarke in Connecticut state court for negligence. It was not disputed that Clarke was acting within the course and scope of his employment. Clarke moved to dismiss claiming tribal sovereign immunity, which was denied by the trial court, but granted by the Connecticut Supreme Court. The U.S. Supreme Court reversed, holding that Clarke was sued in his individual capacity and that he – not the tribe – was the real party in interest.[26] Clarke argued that the tribe was liable, even though it was not named as a defendant, because it had enacted a statute that indemnified him for on-the-job accidents. The court held that the tribe's voluntary indemnification did not extend its sovereign immunity to its employees because the sovereign immunity defense did not otherwise apply to employees in their individual capacities.[27]

The court, however, left open the door for tribal employees to assert personal defenses – including official immunity – a form of governmental immunity afforded to tribal officers and employees when they act within the scope of their employment and the liability results from a discretionary act.[28] The court cited its earlier decision in *Westfall v. Erwin*, which held that a "discretionary act" occurs "when officials exercise decision making discretion[.]"[29] The purpose of official immunity is "to insulate the decision making process from the harassment of prospective litigation[.]"[30] Future litigation may concern what constitutes a "discretionary act" for purposes of official immunity. For example, it has been held that an employee's ordinary operation of a motor vehicle does not invoke official immunity, but a police officer who causes an accident while pursuing a suspect often can assert official immunity.[31] It seems likely that tribal employees would be treated on equal footing in official immunity cases.

Overall, the *Lewis* decision is considered narrow because it ruled solely on tribal sovereign immunity and placed tribes in the same position as states and the federal government.[32] It is generally believed that the decision will not cause any major shift in Indian law policy, but it calls attention to the often unclear bounds of liability that tribes and tribal businesses face when their employees have on-the-job accidents, and the impact of tribal sovereign immunity. As a practical matter, even before the *Lewis* decision, many tribes obtained automobile insurance policies, and these policies often include liability coverage. While tribes themselves are still entitled to immunity, tribes often will allow claims against their liability insurance to foster goodwill with the nontribal public and to avoid bad publicity. They can do so on a case-by-case basis, or, like the Navajo Nation, enact tribal law to allow such claims. The Navajo Nation's Sovereign Immunity Act waives sovereign immunity for claims brought in tribal court where insurance is available to cover the claim, but only to the limits of insurance.[33]

Tribes also sometimes secure automobile liability insurance voluntarily to protect their employees from liability – and after *Lewis*, it is now clear they can be sued individually. Tribes compete with nontribal employers for employees, and protecting employees from individual capacity suits for course and scope automobile accidents puts them on equal footing with private employers. At a minimum, tribes and tribal employers – especially those involved in business activities – should review their insurance policies to determine if their employees are covered for a potential new wave of litigation directly against tribal employees as a result of *Lewis* and, if not, to make an informed decision whether to secure such coverage. The duty to defend is perhaps the most important coverage in this area because even a "slam dunk" case of official immunity will require litigation to assert the defense and obtain dismissal if a plaintiff tests its bounds. Plaintiff's counsel should inquire about coverage and study tribal law to determine whether their clients have recourse against the tribe and/or if such accidents are covered by voluntary or mandatory insurance.

"The modern boom of tribal gaming in Oklahoma began with passage of State Question 712, which the state's voters approved in 2004."

CASINO TORTS UNDER TRIBAL-STATE GAMING COMPACTS

For tribes that operate gaming facilities, their most common interaction with the general public usually comes from visitors and gaming patrons. In 2015, tribal gaming operations in Oklahoma had 45.9 million visits, including 18.7 million from out of state.[34] Inevitably, patrons will suffer injuries through slip-and-fall accidents or otherwise through interactions with casino staff and other guests. The process for asserting tort claims against tribal gaming facilities in Oklahoma was the subject of many years of litigation, but the key issue has finally been resolved: Casino patrons must first submit a tort notice to the tribe or gaming enterprise, and if the claim is not paid, the patron can sue but only in tribal courts.

The modern boom of tribal gaming in Oklahoma began with passage of State Question 712, which the state's voters approved in 2004. This law authorized the state to enter into gaming compacts with tribes for class III gaming

pursuant to the federal Indian Gaming Regulatory Act. Class III includes most casino style gaming such as slot machines and card games. The state Legislature drafted a model compact, which is published at Okla. Stat. tit. 3A, §281. All tribes in Oklahoma that conduct class III gaming do so pursuant to a compact with the state in the statutory form.

The model compact addresses tort claims at Part 6. Under the compact, tribal gaming enterprises must maintain public liability insurance to cover tort claims in amounts not less than $250,000 for any one person and $2 million for any one occurrence involving personal injury, and $1 million for any one occurrence involving property damage.[35] The compact also includes a limited waiver of tribal sovereign immunity provided that the claimant follows all required processes and satisfies the time limitations, and no award can exceed the required insurance limits.[36] As noted, a patron initiates a tort claim by filing a notice with the tribe or gaming enterprise, which must be filed within one year of the date of injury, but claims filed more than 90 days after the injury are subject to a 10 percent reduction in damages.[37] The tribe or enterprise should investigate the claim and respond to the claimant within 90 days or can obtain agreed extensions.[38] The tribe or enterprise can also refuse to respond at all, in which case the claim is deemed denied.[39] In many circumstances, the tribe or gaming enterprise will accept or deny the claim based on an insurance administrator's evaluation and decision.

The model compact further provides that a lawsuit may be filed against the tribe or gaming enterprise if the claim is denied, in which case the lawsuit must be filed within 180 days of the denial.[40] The immunity waiver requires that the claim be filed in "a court of competent jurisdiction."[41] In *Cossey v. Cherokee Nation Enterprises*, the Oklahoma Supreme Court in 2009 held that state courts were "courts of competent jurisdiction" under the compact and that compacting tribes had waived immunity for state court lawsuits involving torts at gaming facilities.[42] A group of compacting tribes demanded arbitration under the compact to challenge the decision, arguing that only tribal courts could hear such cases based on the compact's provision providing that "[t]his Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction."[43] The tribes prevailed in arbitration and a federal court issued an injunction that precluded state courts from exercising jurisdiction over tribal gaming facility tort claims.[44] In *Sheffer v. Buffalo Run Casino, PTE, Inc.*, decided in 2013, the Oklahoma Supreme Court overruled its holding in *Cossey* consistent with the federal court injunction.[45]

Thus, it is now clear that casino tort claims that are denied by the gaming enterprise and/or by the insurance administrator can be brought only in tribal courts, and only to the extent of the insurance limits set forth in the tribal-state gaming compacts. Plaintiffs' attorneys would be wise to study the procedures set forth in the compact to avoid improperly filing in the wrong court and to ensure that all the time limitations are met to avoid dismissal of the claim on procedural and/or jurisdictional grounds. Failure to meet these requirements could result in the loss of the claim, including access to insurance coverage that would otherwise be available for casino torts.

WORKERS' COMPENSATION FOR OCCUPATIONAL INJURIES

Another common interaction between tribes and the public is through tribal employment. In 2015, Oklahoma tribal gaming facilities had an average annual employment of 27,944, of whom 43.2 percent were Native American and 56.8 percent were non-Native American.[46] In 2012, it was reported that the total employment impact of tribes in both gaming and nongaming employment (including tribal government administration jobs) was 87,174.[47] This large population of employees inevitably leads to occupational injuries akin to those compensable under the Oklahoma Workers' Compensation Act. The questions presented are whether tribes are subject to the Oklahoma Workers' Compensation Act and, if not, if they hold insurance to respond to occupational injuries.

In *Waltrip v. Osage Million Dollar Elm Casino*, an injured employee sued in Oklahoma Workers' Compensation Court for benefits under the casino's "sovereign nation workers' compensation insurance."[48] The claimant invoked the "estoppel act," Sections 65.2 and 65.3 of the Oklahoma Workers' Compensation Code, for the proposition that an insurer that collects premiums is estopped to deny coverage to an injured tribal employee.[49] The policy expressly excluded risks covered by state workers' compensation law, but agreed to cover only claims brought in tribal court pursuant to tribal law.[50]

The Osage Tribe, however, had not enacted its own tribal occupational injury law, so the question arose whether the insurer could refuse to participate in a claim in the state's workers' compensation court based on the tribe's sovereign immunity.

The Oklahoma Supreme Court held that the tribe itself could not be sued for recovery on the occupational injury in the state's workers' compensation court, but that the workers' compensation insurer was subject to the court's jurisdiction pursuant to the estoppel act.[51] However, the court made clear that if a tribe has enacted its own occupational injury law, the state cannot exercise jurisdiction; jurisdiction lies solely in the tribal court. The law on workers' compensation has been relatively stable since *Waltrip* was decided in 2012. Tribes that have enacted their own occupational injury laws can avoid state jurisdiction, while tribes that do not have such laws cannot. The first question an attorney representing an injured tribal employee must ask is whether a tribal occupational injury law is in effect, because that will determine where to pursue the remedy. Tribes, of course, are immune from suit, including from their employees in most instances, and are not required to purchase workers' compensation insurance – however many tribes will purchase such coverage to compete with private employers who offer such benefits, or will otherwise provide mechanisms to pay for occupational injuries.

FEDERAL PROGRAMS AND THE FEDERAL TORTS CLAIMS ACT

The Indian Self-Determination and Education Assistance Act (ISDEA) authorizes tribes to enter into contracts with the federal government to administer programs and services that the federal government would otherwise provide.[52] As of 2015, it was reported that over 50 percent of all federal Indian programs were being carried out by tribes pursuant to self-governance contracts.[53] Such programs include healthcare, education, law enforcement, housing, family protection and other forms of social welfare.[54] Tribes initially faced trouble in performing these tasks due, in part, to the costs of liability insurance (particularly medical malpractice insurance) and it was determined that funding was inadequate.[55]

In response to this problem, Congress amended the ISDEA to provide that any tort committed by a tribe or tribal employee in the course of administering an ISDEA contracted program would be covered by the Federal Tort Claims Act (FTCA).[56] It was initially contemplated that the amendment would be temporary while the federal government assisted tribes in obtaining insurance, but the ultimate result was to make FTCA coverage permanent.[57] Thus, a member of the general public who is injured by a tribal employee during the administration of a federal program can look to the FTCA for remedy, and a suit against the tribe is unnecessary and would be dismissed.

CONCLUSION

The foregoing addresses some of the most common areas of interplay between tort liability, insurance coverage and tribal sovereign immunity. A basic understanding should help to guide tribes in their evaluation of coverage and plaintiffs in determining where and how to seek a remedy. It may turn out that insurance coverage is available and that the remedy is not so dissimilar to those existing in the private sector.

1. A clip of the full exchange is available at www.youtube.com/watch?v=kdimK1onR4o.

2. Lewis Kamb, "Bush's Comment on Tribal Sovereignty Creates a Buzz," *Seattle Post-Intelligencer* (Aug. 12, 2004) (available at www.seattlepi.com/local/article/Bush-s-comment-on-tribal-sovereignty-creates-a-1151615.php).

3. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring).

4. In her concurring opinion in *Bay Mills Indian Community*, Justice Sotomayor explained using the most prominent example of tribal business enterprises as follows:

> "[T]ribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions. A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding. And tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues. This is due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means.
>
> For example, States have the power to tax certain individuals and companies based on Indian reservations, making it difficult for Tribes to raise revenue from those sources. States may also tax reservation land that Congress has authorized individuals to hold in fee, regardless of whether it is held by Indians or non-Indians. As commentators have observed, if Tribes were to impose their own taxes on these same sources, the resulting double taxation would discourage economic growth. Fletcher, "In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue," 80 *N.D. L. Rev.* 759, 771 (2004); *see also* Cowan, "Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues," 2 *Pittsburgh Tax Rev.* 93, 95 (2005); Enterprise Zones, Hearings before the Subcommittee on Select Revenue Measures of the House Committee On Ways and Means, 102d Cong., 1st Sess., 234 (1991) (statement of Peterson Zah, President of the Navajo Nation) ("[D]ouble taxation interferes with our ability to encourage economic activity and to develop effective revenue generating tax programs. Many businesses may find it easier to avoid doing business on our reservations rather than ... bear the brunt of an added tax burden").

Id. at 2043-44 (some internal citations have been omitted).

5. The full report is available at oiga.org/wp-content/uploads/2015/11/OIGA-2015-Annual-Impact-Report-singlepg.pdf.

6. The full report is available at sovnationcenter.okstate.edu/sites/default/files/documents/Tribal%20Impact%20Report.pdf.

7. The full report is available at www.cherokeenationimpact.com/images/economic_impact_report_2016.pdf.

8. *Bay Mills Indian Community*, 134 S. Ct. at 2030.

9. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S. Ct. 1970, 1675 (1978) (quoting *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L. Ed. 483 (1832)).

10. *See Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890, 106 S. Ct. 2305, 2313 (1986).

11. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782, 111 S. Ct. 2578, 2583 (1991).

12. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756, 118 S. Ct. 1700, 1703 (1998).

13. *Bay Mills Indian Community*, 134 S. Ct. at 2037.

14. *Id*. at 2031 (citing *Kiowa Tribe*, 523 U.S. at 760, 118 S. Ct. at 1705).

15. *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1191 (10th Cir. 2010).

16. *Id*. at 1187.

17. 25 U.S.C. §2701 *et seq.; Cohen's Handbook of Federal Indian Law* §21.02[2], at 1328 (2012 ed.) (citing *Allen v. Gold Country Casino*, 464 F.3d 1044, 1146-47 (9th Cir. 2006)).

18. *Allen*, 464 F.3d at 1047 (citing *Alden v. Maine*, 527 U.S. 706, 750, 119 S. Ct. 2240, 1264 (1999)); *see also Breakthrough Management*, 629 F.3d at 1191.

19. *Bay Mills Indian Community*, 134 S. Ct. at 2031.

20. *Santa Clara Pueblo*, 436 U.S. at 58, 98 S. Ct. at 1677.

21. *Bay Mills Indian Community*, 134 S. Ct. at 2032.

22. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 2403 (1985).

23. *Buchwald Capital Advisors, LLC v. Papas (In re Greektown Holdings, LLC)*, 532 B.R. 680, 693 (E.D. Mich. 2015) (noting that "there is not one example in all of history where the Supreme Court has found that Congress intended to abrogate tribal sovereign immunity without expressly mentioning Indian tribes somewhere in the statute.").

24. *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017).

25. *Id*.

26. *Id*. at 1291.

27. *Id*.

28. *Id*. at 1292, n.2.

29. *Westfall v. Erwin*, 108 S. Ct. 580, 584 (1988).

30. *Id*. at 583.

31. *United States v. Gaubert*, 499 U.S. 315 (1991); *McBride v. Bennett*, 764 S.E.2d 44 (Va. 2014).

32. *Lewis*, 137 S. Ct. at 1292 ("The protection offered by tribal sovereign immunity here is no broader than the protection offered by state or federal sovereign immunity.").

33. Navajo Nation Code Annotated, Title 1, Chapter 1, §554(F), available at www.navajonationcouncil.org/Navajo%20Nation%20Codes/V0010.pdf.

34. *See* Oklahoma Indian Gaming Association *2016 Annual Impact Report*, *supra*, n.5.

35. Okla. Stat. tit. 3A, §281 Part 6(A)(1).

36. *Id*. at Part 6(A)(1), Part (A)(2), and Part 6(C).

37. *Id*. at Part 6(A)(4).

38. *Id*. at Part 6(A)(8).

39. *Id*.

40. *Id*. at Part 6(A)(9).

41. *Id*. at Part 6(C).

42. *Cossey v. Cherokee Nation Enterprises*, 212 P.3d 447, 460 (Okla. 2009); *see also Griffith v. Choctaw Casino of Pocola*, 230 P.3d 488, 498 (Okla. 2009); *Dye v. Choctaw Casino of Pocola*, 230 P .3d 507, 510 (Okla. 2009).

43. Okla. Stat. tit. 3A, §281 Part 9.

44. *Choctaw Nation of Okla. v. Oklahoma*, No. CIV-10-50-W, 2010 WL 5798663, at *4 (W.D. Okla. June 29, 2010).

45. *Sheffer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359 (Okla. 2013).

46. *See* Oklahoma Indian Gaming Association *2016 Annual Impact Report*, *supra*, n.5.

47. *See* The Statewide Impact of Oklahoma Tribes, *supra*, n.6.

48. *Waltrip v. Osage Million Dollar Elm Casino*, 290 P.3d 741, 742 (Okla. 2012).

49. *Id*. at 743.

50. *Id*. at 744.

51. *Id*. at 746-47.

52. 25 U.S.C.§§450 & 450a.

53. Strommer, "The History, Status, and Future of Tribal Self-Governance under the Indian Self-Determination and Education Assistance Act," 39 *Am. Indian L. Rev.* 1, at 1 (2014).

54. *Id*.

55. *Coverage Issues Under the Indian Self-Determination Act*, 22 U.S. Op. Off. Legal Counsel 65, 1998 WL 1751077 (Office of Legal Counsel, U.S. Department of Justice, 1998).

56. *Id*. at *3.

57. *Id*.

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‘Fines or Penalties’ Exclusions in Professional Liability Policies

Possible Exclusion of Coverage for Discovery or Other Sanctions Imposed Against an Insured During an Otherwise Covered Claim

By Andrew Jayne

Professional liability insurers have, with varying degrees of success, denied coverage for sanctions imposed against their insured under “fines or penalties” exclusions (FP exclusions) in professional liability policies. There are no Oklahoma or 10th Circuit cases discussing FP exclusions in the context of sanctions and scant case law from other jurisdictions addressing the issue. This article 1) explains FP exclusions in professional liability policies; 2) summarizes relevant case law from other jurisdictions; and 3) analyzes whether various types of discovery sanctions imposed pursuant to Section 3237 of the Oklahoma Discovery Code are likely to be excludable under an FP exclusion.

Oklahoma practitioners, insurers and insureds should be aware that, even if a professional negligence claim is covered by the policy, discovery sanctions imposed during the course of litigation may be excluded. If an insurer takes the position that a discovery or other sanction is a fine or penalty, the insured could end up individually paying a significant monetary sum for litigation sanctions. This could be an important consideration in advising both insureds and insurers during the course of any claim covered under a professional liability policy.

FP EXCLUSIONS

The types of professional liability insurance policies that commonly include an FP exclusion include: errors and omissions policies (referred to as E&O policies); policies covering liability of corporate directors and officers (referred to as D&O policies); malpractice policies; and other professional liability coverage forms which are part of a commercial package policy. FP exclusions sometimes appear as an expressly enumerated exclusion. Other times, the definition of “loss” or “damages” excludes coverage for “fines and penalties.” There are also slight variations in the wording of the

exclusion. For instance, some policies exclude coverage for "fines or penalties" while others exclude coverage for "fines or penalties imposed by law."

CASE LAW

There is no case law addressing the application of FP exclusions when sanctions are imposed during the defense of an otherwise covered claim. However, there is some case law addressing FP exclusions where an insured has submitted a sanction to the professional liability carrier as a stand-alone claim. As explained below, those cases have developed a test which examines whether the sanction is punitive or compensatory in nature to determine whether it qualifies as a "fine or penalty," and therefore whether it is excluded under the policy.

EARLY CASES

Three relevant decisions were issued in the early 1990s. In *Wellcome v. Home Insurance Co.*, a Montana Supreme Court decision, an attorney had previously been sanctioned for violating a motion in limine ruling during closing arguments.[1] The attorney sought coverage for the sanction from his malpractice carrier. The policy excluded from the definition of "damages" any "fines or statutory penalties imposed by law or otherwise."[2] The insurer denied the claim on the basis that the sanction was a "fine" and therefore excluded from the definition of covered "damages." The attorney argued that the term "fine" in the policy was limited to criminal fines or penalties and that sanctions are not fines, penalties or any other type of punishment.[3] In rejecting the insured's argument, the *Wellcome* court relied on *Black's Law Dictionary* and explained that "a fine is a pecuniary punishment, and that this meaning is clear and well understood."[4] The court found that the exclusion was not ambiguous and that it was an enforceable exclusion under the policy.[5]

In *O'Connell v. Home Insurance Company,* the insurer denied defense and indemnity for Rule 11 sanctions previously imposed against three attorneys (its insureds), for filing a frivolous lawsuit.[6] The insurer took the position that Rule 11 sanctions were "fines or penalties whether imposed by law or otherwise," and therefore excluded from the policy's definition of damages.[7] The District Court for the District of Columbia held that the policy was ambiguous as to whether it excluded coverage because not all Rule 11 sanctions "are meant to be punitive, or should be construed as a fine or penalty."[8] Construing the ambiguity in favor of the insured, the court held that the policy covered all costs arising out of the Rule 11 sanction.[9]

The North Carolina Supreme Court, in *Collins & Aikman Corp. v. Hartford Accident & Indemnity Co.*, considered whether an award of punitive damages against an insured trucking company could be excluded under an FP exclusion.[10] The insurer had denied the claim for punitive damages because the policy provided that "damages" did not include fines or penalties. The *Collins* court rejected that argument, and held that the term "penalty" was ambiguous as to whether it included punitive damages, and ultimately construed the provision in favor of the insured.[11]

> **"There is no case law addressing the application of FP exclusions when sanctions are imposed during the defense of an otherwise covered claim."**

CAREY V. EMPLOYERS MUTUAL CASUALTY COMPANY

In 1999, the United States Court of Appeals for the 3rd Circuit became the first and only federal circuit court to extensively examine an FP exclusion in *Carey v. Employers Mutual Casualty Company.*[12] The plaintiffs in *Carey* were three former supervisors (supervisors) of Berwick Township, Pa. (township). In the early 1990s, township entered into a contract whereby it would pay Berwick Enterprise certain costs associated with an irrigation system. Berwick Enterprises built the irrigation system and submitted a bill to township. Supervisors determined how much Berwick Enterprises was to be reimbursed and authorized payment. Ultimately, township's Audit Committee concluded that supervisors drastically overpaid Berwick Enterprises and issued a surcharge against supervisors for the difference of what should have been paid and what was actually paid to Berwick Enterprises.[13]

Supervisors sought coverage of the surcharge from Employers Mutual Casualty Company (employers mutual) under an E&O policy purchased by township. Employers mutual denied

the claim on multiple grounds, including that the surcharge was a "fine or penalty imposed by law" and therefore excluded from coverage. The district court granted summary judgment in favor of employers mutual, holding that there was no coverage for defense or indemnity because the surcharge was a fine or penalty imposed by law.[14] Supervisors appealed to the 3rd Circuit Court of Appeals, arguing that an exclusion for a "fine or penalty imposed by law" is an ambiguous provision that must be construed in their favor.[15]

The 3rd Circuit initially noted the lack of case law addressing the scope of FP exclusions.[16] The *Carey* court reviewed various early cases, including *Wellcome* and *Collins* explained above. The court also examined cases involving administratively imposed sanctions, noting that such courts had typically "looked to the nature of the sanction in determining whether the policy excludes coverage."[17] The *Carey* court discussed two specific administrative sanction cases that warrant discussion. First, the court discussed an IRS tax penalty case, *St. Paul Fire & Marine Insurance Co. v. Briggs*, wherein the IRS sought to recover amounts owed by an employer for unpaid withholding tax from two individual officers of the company.[18] A provision in the tax code allows for recovery of amounts owed by a company in withholding tax from an individual as a "penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."[19] The individual officers made a claim under a D&O policy issued by St. Paul. St. Paul denied the claim, asserting the exclusion for "fines or penalties or other losses deemed uninsurable by law."[20] The *Briggs* court, however, found in favor of the insured in holding that the provision providing for individual tax liability was not a "penalty" within the meaning of the exclusion because the penalty was not punitive in nature.[21]

The *Carey* court also examined *Hofoc Inc. v. National Union Fire Insurance Co*., wherein an Iowa court concluded that a provision of the federal tax code imposing liability for improper dealings with an ERISA pension plan, would constitute a "fine or penalty" for purposes of insurance coverage.[22] The policy in the *Hofoc* case excluded fines and penalties from the term "loss." The court found that the policy did not cover a 5 percent excise tax imposed by the IRS because the term "penalty" in the policy, though undefined, was not ambiguous.[23] In so holding, the *Hofoc* court relied on *Black's Law Dictionary* to define penalty as "money that the law exacts as punishment for either doing a prohibited act or not doing a required act."[24] The court found that the excise tax was a penalty because it was designed to "shift the sanction for violation of the prohibited transaction provision from the trust or plan to the parties."[25]

After a thorough review of the above case law, the *Carey* court concluded:

> The available case law suggests that an exclusion for fines and penalties, where those terms are undefined in the policy, allows an insurer to deny coverage when the item to be covered is punitive, rather than compensatory.[26]

Analyzing the nature of the surcharge, the *Carey* court found it to be compensatory in nature. The court reasoned that Pennsylvania appellate courts had, on at least two occasions, sustained dismissals for a surcharge because township failed to show it sustained a financial loss, "thereby signifying that the purpose of the surcharge is to compensate for loss suffered."[27]

Ultimately, the *Carey* court held that the policy was ambiguous regarding coverage for the surcharge because it was susceptible to more than one interpretation. In finding the provision ambiguous, the *Carey* court reasoned that the policy did not define "fine" or "penalty," and that an FP exclusion may be raised in a wide variety of situations, not all of which would be excluded under the language of the policy. Therefore, construing the ambiguity in favor of the insured, the surcharge was covered by the policy.[28]

ANIMAL FOUNDATION OF GREAT FALLS V. PHILADELPHIA INDEMNITY INSURANCE COMPANY

Most recently, in 2013, the U.S. District Court for the District of Montana analyzed an FP exclusion as it applied to a contempt citation. In *Animal Foundation of Great Falls v. Philadelphia Indemnity Insurance Co*., the court considered whether a provision in a D&O policy which provided that "'[l]oss' does not include criminal or civil fines or penalties imposed by law," excluded coverage for sanctions assessed through a contempt citation.[29]

In that case, the Animal Foundation and one of its trustees received a subpoena to appear for a deposition and produce documents.

While the trustee appeared for the deposition, the trustee and the Animal Foundation failed to produce documents in response to the subpoena. Thereafter, the court found the Animal Foundation in contempt for failing to produce the documents, but further ordered that the contempt could be remedied by production of the documents without redaction. In response, the Animal Foundation and the trustee, upon the advice of their counsel, produced the documents redacted. The court found the Animal Foundation, the trustee and the attorney in contempt of court and ultimately awarded significant attorneys' fees and costs pursuant to Mont. R. Civ. P. 37(a).[30]

The Animal Foundation submitted the contempt award to its D&O carrier, Philadelphia Indemnity Insurance Company. Philadelphia Indemnity denied the claim, contending, among other things, that the matter is not a "[l]oss" under the policy because the definition of "[l]oss" in the policy did not include "criminal or civil fines or penalties imposed by law."[31]

The *Animal Foundation* court first rejected Philadelphia Indemnity's argument that the contempt proceedings did not fall within the policy's definition of a claim.[32] The court next examined whether the contempt proceedings met the definition of "[l]oss" in the policy, which excluded criminal or civil fines or penalties imposed by law. The court adopted the analysis in *Wellcome* and inquired as to whether the sanction was punitive or compensatory as the test for determining whether the sanction was excluded.[33] The court concluded that contempt sanctions imposed through the Montana Rules of Civil Procedure were a statutory penalty imposed by law and coverage for the contempt citation was therefore excluded under the policy.[34]

Interestingly, after concluding the policy excluded indemnity coverage for the fine itself, the court examined whether there was coverage for costs of defending against the contempt citation. Based on Montana's broad duty to defend, and the language in the policy, the court concluded that while there was no indemnity coverage for the contempt citation, Philadelphia Indemnity did have a duty to pay the costs of defending the contempt citation.[35]

CASE LAW SUMMARY

While some courts have found FP exclusions to be ambiguous in specific contexts, no courts have not found the exclusion facially ambiguous or invalid. Instead, courts have examined the particular penalty or sanction at issue to determine whether it is more punitive or compensatory in nature. If punitive, courts tend to find the exclusion valid and rule in favor of the insurer. If the sanction is more compensatory in nature, courts tend to find the exclusion ambiguous and rule in favor of the insured.

APPLICATION OF THE 'PUNITIVE VERSUS COMPENSATORY' TEST TO A SECTION 3237 DISCOVERY SANCTION DURING THE COURSE OF AN OTHERWISE COVERED CLAIM

Although not addressed in case law, an FP exclusion could come into play during the course of litigating an otherwise covered claim. If an Oklahoma court imposes sanctions or an award of attorneys' fees and costs to a prevailing party in a discovery dispute pursuant to Section 3237 of the Oklahoma Discovery Code, an insurer could potentially try to deny coverage for that portion of the claim.[36]

There are numerous bases upon which an Oklahoma court can impose sanctions under Section 3237. Based on the case law above, in examining whether a sanction levied under Section 3237 is excluded under a FP exclusion, courts will likely consider the nature of the sanction to determine whether it is punitive or compensatory and whether it therefore qualifies as an excluded "fine or penalty."

A sanction or award under Section 3237(A)(4) may be considered compensatory rather than punitive. Paragraph (A)(4) of Section 3237 provides that the court "shall" award the prevailing party on a motion to compel discovery reasonable expenses, including attorneys' fees, unless the making of the motion or opposition to the motion is substantially justified or other circumstances make the award unjust.[37] This provision is somewhat akin to a prevailing party fee-shifting statute. A strong argument could be made that an award of attorneys' fees and costs under this provision is to compensate the prevailing party rather than to punish the party that lost the discovery motion. However, the particular facts relating to the sanctions could change this analysis. Further, one could argue that the language giving the court an option not to shift fees and costs if there is a "substantial justification" for the discovery position or if it would be "unjust," indicates that sanctions under this provision are punitive in nature.

In contrast, certain sanctions authorized under Section 3237(B), on their face, seem more punitive in nature. For instance, Section 3237(B)(1) provides that a deponent may be held in contempt of court for failing to answer deposition questions after being ordered by the court to do so.[38] Section 3237(B)(2) authorizes the court to find parties or others in contempt of court for failing to obey court orders, and it also allows for the award of attorneys' fees and costs to remedy the contempt.[39] Finally, Section 3237(E) authorizes sanctions, including attorneys' fees and costs, for failure of a party to attend a noticed deposition, failure to answer interrogatories or failure to respond to a request for an inspection.[40]

An argument could be made that these sanctions under Section 3237(B)&(E) are more punitive than sanctions under Section 3237(A) because they go beyond fee shifting to a prevailing party. These sanctions are based on contempt of court, and they appear to require more intentional conduct. It appears that an insurance carrier would have a better argument that sanctions under Section 3237(B) or (E) are punitive in nature, and therefore, an FP exclusion applies. Case law indicates that the particular facts surrounding the sanction will be relevant to the analysis.

CONCLUSION

Even if coverage exists under a professional liability policy, an FP exclusion may exclude coverage for certain sanctions imposed during the course of litigating the claim, including certain sanctions under Section 3237 of the Oklahoma Discovery Code. Oklahoma federal and state courts will likely analyze the sanction under the "punitive versus compensatory" rubric to determine if the FP exclusion applies. Practitioners and insurers should keep this in mind and make sure their insureds are appropriately counseled and advised *prior* to the imposition of any discovery sanction.

1. 849 P.2d 190 (Mont. 1993). *Wellcome* answered a question certified by the 9th Circuit Court of Appeals in the underlying case.
2. *Id.* at 192.
3. *Id.* at 193.
4. *Id.*
5. *Id.* at 194.
6. No. 88-3523, 1990 WL 137386 (D.D.C. 1990).
7. *Id.* at *14.
8. *Id.* at *15.
9. *Id.* at *16.
10. 436 S.E.2d 243 (N.C. 1993).
11. *Id.* at 247. The FP exclusion likely would not be an issue with respect to a punitive damages award in jurisdictions such as Oklahoma which prohibit insurance coverage for punitive damages, except in very limited circumstances, as a matter of public policy. *See Dayton Hudson Corp. v. Am. Mut. Liab. Ins. Co.*, 621 P.2d 1155 (Okla. 1980).
12. 189 F.3d 414 (3rd Cir. 1999).
13. *Id.* at 415-16.
14. *Id.* at 417. Because the district court found that there was no coverage because the surcharge was a fine or penalty, it declined to address the other two policy exclusions relied upon by Employers Mutual. *Id.*
15. *Id.* Pennsylvania, like Oklahoma, requires that the court construe an ambiguous policy provision against the insurer and in favor of the insured. *Compare id.* at 417 (citing *Pennsylvania Dep't of Transp. v. Semanderes*, 531 A.2d 815, 818 (Pa. Commw. Ct. 1987), with *Max True Plastering Co. v. United States Fid. & Guar. Co.*, 912 P.2d 861, 869-870 (Okla. 1996).
16. *Carey*, 189 F.3d at 417.
17. *Id.* at 418.
18. 464 N.W.2d 535 (Minn. Ct. App. 1991).
19. *Carey,* 189 F.3d at 418 (quoting Briggs, 464 N.W.2d at 537).
20. *Id.*
21. *Carey,* 189 F.3d at 418 (citing *Briggs,* 464 N.W.2d at 539). However, the *Briggs* court went on to conclude that allowing insurance to cover nonpayment of taxes would contravene public policy and held that the insurer had no duty to defend or indemnify. *Briggs*, 464 N.W.2d at 539.
22. 482 N.W.2d 397 (Iowa 1992).
23. *Carey,* 189 F.3d at 419 (citing *Hofco*, 482 N.W.2d at 402).
24. *Id.* (citing *Hofco*, 428 N.W.2d at 402).
25. *Id.* (quoting *Hofco*, 482 N.W.2d at 402).
26. *Id.*
27. *Id.* at 420.
28. *Carey,* 189 F.3d at 420-21.
29. No. CV 13-30-GF-DLC-JCL, 2013 WL 12141485, *26 (D. Mont. Nov. 22, 2013).
30. *Id.* at *2-7.
31. *Id.* at *5, *12-13.
32. *Id.* at *10-11.
33. *Id.* at *13-16.
34. *Id.* at *20-22.
35. *Animal Found.*, 2013 WL 12141485 at *28-29.
36. Okla. Stat. tit. 12 §3237.
37. *Id.* §3237(A)(4).
38. *Id.* §3237(B)(1).
39. *Id.* §3237(B)(2).
40. *Id.* §3237(E).

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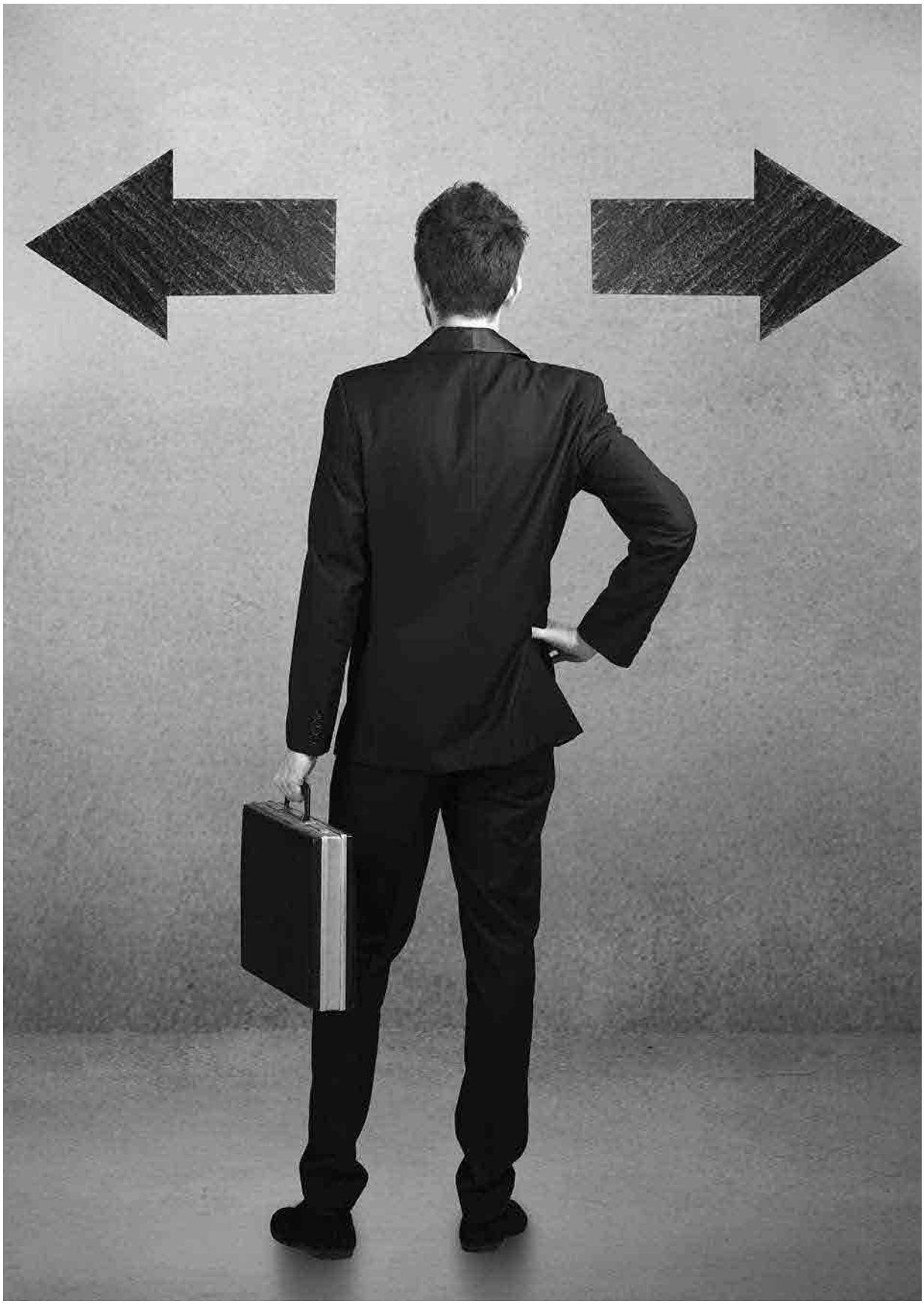

Ethical Issues in Insurance Law

By Timila S. Rother

For attorneys who practice the law of insurance, complex and difficult-to-resolve ethical issues are abundant. Conflicts of interest, issue conflicts, confidentiality dilemmas and insurers' measures to control litigation costs are regular occurrences that attorneys must resolve. In an environment where attorneys are increasingly the target of dissatisfied litigants, vigilance in complying with the Rules of Professional Conduct and the overall integrity of the profession are not only an ethical obligation, but are necessary to protect the attorney from liability claims by the insured or insurer. These issues arise most often in the relationship where attorneys are hired by insurers to defend insureds, and much of this article is so focused. However, many of the issues create conundrums in first-party insurance relationships as well. This article surveys some of the recurring attorney ethical and liability issues in both relationships.

WHO IS THE CLIENT?

An attorney cannot fulfill his or her ethical or common law duties to a client unless the attorney knows to whom those obligations are owed. When an attorney is retained to represent an insurer or insured in first-party litigation, there is no uncertainty – the attorney represents only the individual or entity that retained the attorney. If the attorney is retained by an insurer to represent its insured in third-party litigation, does the attorney represent the insured, the insurer or both? The answer to that question varies based upon the facts and the jurisdiction.

Neither the legislature nor the courts of Oklahoma have decided the full scope of the relationships and duties in this triangle.[1] There is no question that at least the insured is the client.[2] But what of the insurer? The United States District Court for the Northern District of Oklahoma recently observed "that the Oklahoma Supreme Court has yet to decide whether the attorney-client relationship extends to an insurance carrier who retains a law firm to represent its insured."[3] In *Nisson v. American Home Assur. Co.*,[4] however, the Oklahoma Court of Civil Appeals implicitly recognized the existence of at least some duties by the attorney to the insurer by holding that an insurer must provide independent counsel for its insured where the defense attorney is conflicted by defending the liability claim in a way that impacts the insurer's coverage defense.[5] A conflict would not arise if some obligation to the insurer were not owed.

In other jurisdictions, courts or ethics committees have defined the relationship so that counsel's "primary" obligation or duty of loyalty is to the insured. The word "primary" correctly implies that the lawyer also owes some duties to the insurer (as a client or otherwise), at least when the interests of the insured and the insurer do not conflict.[6] In some states, the law has evolved so that insurance defense counsel's *only* client is the insured.[7] A few states have resolved the question by rule. Florida, followed by Ohio, amended its Rules of Professional Conduct to require that lawyers undertaking the defense of certain types of claims for an insured provide the insured a comprehensive statement of the insured's rights and maintain a record that it was sent.[8] Florida also requires attorneys to determine at the outset whether they represent the insurer (as well as the insured) and to inform both of the dual representation and its limitations.[9]

The need to define the relationships in this triangle was addressed, without specific resolution, by the Restatement of the Law (Third) Governing Lawyers. The comment titled "Representing an Insured" states:

> It is clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under §14 [Formation of a Client-Lawyer Relationship].
>
> …
>
> With respect to events or information that create a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured, consistent with the lawyer's duty not to assist client fraud (see §94) and, if applicable, consistent with the lawyer's duties to the insurer as a co-client (see §60, Comment *l*). If the designated lawyer finds it impossible so to proceed, the lawyer must withdraw from representation of both clients as provided in §32 (see also §60, comment *l*).The designated lawyer may be precluded by duties to the insurer from providing advice and other legal services to the insured concerning such matters as coverage under the policy, claims against other persons insured by the same insurer, and the advisability of asserting other claims against the insurer. In such instances, the lawyer must inform the insured in an adequate and timely manner of the limitation on the scope of the lawyer's services and the importance of obtaining assistance of other counsel with respect to such matters.[10]

These authorities do not consider whether the determination of the relationship by law or rule may be modified by an engagement letter. Some courts and scholars have sharply criticized the attempt to define the relationship by rule, arguing instead that the retainer agreement with the insurer and insured should define the attorney-client relationship because it arises by consent.[11] The fact that Oklahoma law does not statutorily define this relationship, coupled with the policy arguments against establishing an inflexible legal definition, suggests that the relationship can be defined by the engagement letter, so long as not inconsistent with the Rules of Professional Conduct.[12]

Thus, in Oklahoma, the insured is a client, the insurer may be a client and an engagement letter appears to be a permissible means to establish some certainty as to any obligation owed to the insurer. As discussed below, that certainty helps determine to whom ethical duties, as well as common law duties of care, are owed.

CONFIDENTIAL INFORMATION

Under Oklahoma Rule of Professional Conduct 1.6, the confidentiality obligation is owed to the client. Thus, identifying all of the clients in the insurance defense relationship is also necessary for the attorney to determine to whom the duty of confidentiality is owed. What if the attorney learns facts as part of the insured's defense that creates a coverage issue, may he or she disclose those facts to the insurer? Certainly, that temptation is strong as the attorney would like to maintain the business of the insurer, which is paying the bills, for representation of its insureds in the future. Nevertheless, the weight of authority holds that no such disclosure to the insurer may occur, even if the insurer is also considered a client.

Parsons v. Continental Nat'l Am. Group,[13] highlights the dilemma. In *Parsons*, the attorney hired by the insurer to defend the insured learned facts presenting a coverage defense and informed the insurer of the facts. The insurer then issued a reservation of rights letter

and subsequently rejected a (reasonable) settlement offer within policy limits based on the coverage defense. The insurer thereafter refused to pay a judgment in excess of policy limits against the insured. The insured sued both the attorney and the insurer. The court held 1) the attorney breached his duty of confidentiality to the insured by revealing information contrary to the insured's interest, whatever its source; 2) the insurer's participation in the improper conduct estopped it from denying coverage or liability; and, 3) the insurer acted in bad faith and was liable for the excess judgment.[14]

Obligations of confidentiality are also put in peril where the insurer or the insured request the attorney's file for use in subsequent litigation, such as a bad faith claim by the insured against the insurer. Setting aside the different question of how much of an attorney's file a client is entitled to obtain generally, the existence of an attorney-client relationship with the insurer will not prevent discovery of the communications directly between insurer and attorney about the insured's case. The Oklahoma Evidence Code specifically excepts from privilege any communications between parties who are jointly represented, if those communications are offered into evidence or otherwise sought in the context of a subsequent action between those same parties.[15] Oklahoma courts[16] have not yet applied this "joint representation" exception to the tripartite attorney-insured-insurer relationship, but the majority of the courts in other jurisdictions to consider the issue have done so.[17]

Under Oklahoma law, these layers of analysis lead to the conclusion that no confidential information detrimental to the insured may be shared with the insurer. Further, the insured will presumptively have access to not only how the insurer instructs the attorney to proceed in the representation for which the insurer is paying, but will also have access to how the attorney responds to those instructions and what information of the insured the attorney is providing to the insurer. As discussed in the following sections, these confidentiality dilemmas are a symptom of a broader problem – a conflict of interest that may not be curable after a joint representation is undertaken.

CONFLICTS OF INTEREST

Unfortunately, a plethora of issues may arise which place the interests of the insured and the insurer at odds which in turn are likely to create a conflict of interest for the attorney who has undertaken the matter with both as clients. Such conflicts may cause the attorney to have to withdraw unless he or she has an engagement letter under which the parties agree how any such conflict will be resolved. Some of the most likely conflict scenarios are discussed below.

Reservation of Rights

Chief among the recurring conflict of interests confronting attorneys is the insurer's undertaking of the defense with a reservation of the insurer's right to later deny coverage. The problem for defense counsel is not only that investigation and discovery in the case may yield information on the coverage issue disadvantageous to the insured, but also the constraints an attorney may feel in his or her strategy or preparation because of its impact on the coverage decision.[18] This situation presents a conflict of interest under Rule 1.7 which will ordinarily require that the attorney limit his or her representation to the insured or insurer. If the representation of both is already underway, the attorney may be required to withdraw from both. The insurer also may potentially be required to pay for independent counsel for the insured.

The Oklahoma Court of Appeals addressed essentially this issue in *Nisson v. American Home Assur. Co*.[19] The underlying litigation in *Nisson* involved a professional malpractice action against a psychologist who was accused of sexual misconduct with a client. The petition was later amended to include the psychologist's partners, and to allege both sexual and nonsexual acts of negligence against the psychologist. The psychologist and her partners were insured by American Home under a policy which had a limit of $25,000 for claims of sexual misconduct and $1 million for other claims of malpractice. American Home hired counsel to defend the psychologist and her partners but took the position that the psychologist had only $25,000 in coverage based upon the sexual acts limit. Perceiving a conflict of interest, the psychologist hired independent counsel to represent her. Upon inquiry by independent counsel, counsel hired by American Home to defend the action admitted a desire to take a position "potentially detrimental" to the psychologist's interest. At the conclusion of that lawsuit, the psychologist sued American Home for recovery of the fees she paid for independent counsel. The trial court granted

summary judgment to American Home. The Court of Appeals reversed, holding:

> We agree, in part, with both parties. In that regard, an insured should not be allowed to unilaterally reject the insurer's offer to defend then demand counsel of his choice at the insurer's expense in every instance in which the insured perceives his interests are not being fully served. However, neither should the insurer be allowed to rely on a reservation of rights provision regarding coverage while subjecting its insured to a possible half-hearted defense by an attorney whose interests are subservient to that of the insurer and which could place such an attorney in an ethically untenable position.[20]

The court reviewed the law of other jurisdictions and found the "common theme" to be that "not every perceived or potential conflict of interest automatically gives rise to a duty on the part of the insurer to pay for the insured's choice of independent counsel."[21] So long as the issue of coverage is separate from the issue of liability, there is no divided loyalty and no need for independent counsel.[22] American Home was thus not required to provide independent counsel when a potential conflict arose over the extent of coverage. However, it was so required when it recognized that a "potentially detrimental conflict of interest existed regarding the strategy to be used in defending the underlying lawsuit" and there was a prospect of defending under some but not all available defenses.[23] American Home was obligated to pay the reasonable fees for independent counsel from the time that conflict arose.[24]

"It is plainly in the best interest of the insured for an action against him or her to be resolved within policy limits."

The courts and bar associations of other jurisdictions have also addressed the conflict created by a reservation of rights, including the obligation to provide independent counsel.[25] The majority have held that a conflict of interest exists but with variations in the resolution of the conflict.[26] And, like *Nisson*, a significant number of authorities hold that not every reservation of rights creates a conflict requiring independent counsel.[27]

Discovery or Development of Facts Creating a Coverage Defense

Similarly, an attorney may learn facts as part of his defense of the insured, either through confidential information revealed by the insured or through discovery, which establish a coverage defense. In those instances, the attorney who represents both insurer and insured has a Rule 1.7 conflict as the action that is in the best interest of the insurer – disclosure of the coverage defense – is absolutely contrary to the interests of the insured. As set forth above, an attorney also violates the confidentiality provisions of Rule 1.6 if the attorney reveals that information to the insurer.[28]

Actions Seeking Damages in Excess of Coverage Limits/Settlement Demands

It is plainly in the best interest of the insured for an action against him or her to be resolved within policy limits. It is in the insurer's interest to develop defenses which, separate from any coverage issues, defeat the liability claim against the insured entirely. The insurer also wants to pay as little of the policy limits as possible. As soon as a settlement offer is made by a plaintiff within policy limits, the attorney providing the defense in this tripartite relationship finds him or herself caught in the middle of these competing interests.[29]

Claims for punitive damages may also raise conflict issues if the policy excludes them, though this conflict is infrequent. In most instances, it is in the insurer's best interest to defend any claim of wrongdoing by the insured vigorously as the insurer will not benefit from pursuing a theory that establishes that the insured acted maliciously or recklessly and the punitive damage defense is benefitted by this over-arching motivation.[30] If a conflict develops, it is not likely attributable to the punitive damage claim, but rather to a coverage issue, *e.g.*, facts showing the insured acted intentionally (which may be excluded) rather than negligently (which may be covered).[31] Therefore, punitive damage claims do not usually present a disqualifying conflict.

LIABILITY AND MALPRACTICE CLAIMS AGAINST THE ATTORNEY

As a general rule, violations of the Rules of Professional Conduct do not give rise to a cause of action by the client or a third-party against the attorney.[32] And most courts hold that nonclients to the relationship may not sue for malpractice. However, an attorney may nonetheless have liability in contract, tort or equitable theories for breaches of duty or standards of care arising out of a conflict of interest or breach of a duty of confidentiality. The possible scope of such liability is what was decided by the court in *Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco, P.C. v. Oceanus Insurance Company*.[33]

In *Atkinson, Haskins*, the court determined that an insurer could not sue the law firm it hired to represent three insureds on a theory of legal malpractice because there was no attorney-client relationship between the law firm and insurer.[34] The court determined that the insurer had alleged insufficient facts to show it was identified as the client of the law firm in the retainer agreement, or that it was the intended beneficiary of the agreement.[35] However, citing *Atlanta International*,[36] the court predicted that the Oklahoma Supreme Court would allow a claim for equitable subrogation to be brought by an insurer against the law firm it had hired to represent its insureds.[37] In *Atlanta International*, the court held that, though the insurer which retained counsel to defend its insured was not a client of the retained attorney, the insurer was "equitably subrogated" to the insured's rights because it had paid the judgment caused by the attorney's malpractice.[38] The court found that *Atlanta International* was consistent with the Oklahoma principles underlying equitable subrogation.[39] Additionally, permitting a claim for equitable subrogation would address the insurer's concerns that the law firm would not be held accountable for its alleged malpractice.[40]

Defense counsel are also at risk from suit by reinsurers and excess insurers on subrogation theories.[41] Again, however, a number of courts hold to the contrary, finding that the absence of an attorney-client relationship or privity of contract defeats even the subrogation claim.[42]

Atkinson, Haskins and the other cases highlight the importance of the engagement letter to attempt to avoid the suggestion of an attorney-client relationship under these circumstances. Such writing making clear that the insurer is not the client, though it may not prevent an equitable subrogation claim, may negate a malpractice claim and the associated tort liability – punitive damages – that accompany such claims.

Attorneys have likewise been held to have an obligation to investigate and advise the insured of other insurance coverage that may be available to the insured, including excess coverage. In *Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*,[43] the court concluded that a law firm hired by an insurer to defend a policyholder may have an obligation to investigate whether there is excess coverage available and advise the insured. Such obligations of the attorney may also be limited or defined in the engagement letter.

Thus, while violation of the Rules of Professional Conduct does not give rise to a private right of action, such violations may be the evidence used by the insured client and, if such representation is not negated by an engagement letter, the insurer client in a malpractice claim against the attorney. In any event, the absence of client status does not negate potential equitable claims by the insurer against the attorney, if the insurer is obligated to pay a judgment based upon the negligence of the attorney.

ISSUE CONFLICTS

Issue or positional conflicts arise when an attorney advocates contrary positions on behalf of different clients in unrelated matters. Unlike most of the ethical issues discussed herein, issue conflicts are not peculiar to insurance defense. Indeed, they are more likely to occur in an attorney's first-party representation of an insurer or an insured. The proliferation of bad faith insurance litigation in Oklahoma over the past 30 years has led attorneys who traditionally represented only insurers to now simultaneously represent insureds in unrelated cases. Under these circumstances, attorneys or their firms may find themselves arguing the opposite side of the same legal issue, with the ultimate risk of making law disadvantageous to an existing client.

Issue conflicts are governed by Rule 1.7(a)(2) of the Rules of Professional Conduct which prohibits an attorney from representing a client if there is a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to

another client…"[44] As to issue conflicts, the Comment to Rule 1.7 states that an attorney may as general matter "take inconsistent legal positions in different tribunals at different times on behalf of different clients."[45]

> A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyers must refuse one of the representations or withdraw from one or both matters.[46]

The ABA Standing Committee on Ethics and Professional Responsibility addressed issue conflicts in Formal Opinion 93-377 and rejected previously liberal treatment of the issue. The committee identified the concerns raised by such representation as: 1) the dilution of the lawyer's advocacy when the matters will be argued to the same judge; 2) the effect that the first decision rendered may have in terms of being either precedential or persuasive on the other matter; 3) the concern that a lawyer may favor one client over the other in the "race" to be first; and, 4) client concern that the law firm has divided loyalties.[47] The committee concluded:

> The Committee is therefore of the opinion that if the two matters are being litigated in the same jurisdiction, and there is a substantial risk that the law firm's representation of one client will create a legal precedent, even if not binding, which is likely materially to undercut the legal position being urged on behalf of the other client, the lawyer should either refuse to accept the second representation or (if otherwise permissible) withdraw from the first, unless both clients consent after full disclosure of the potential ramifications of the lawyer continuing to handle both matters.[48]

Even if the matters are not in the same jurisdiction, the lawyer has an obligation to determine whether his representation of either client will be limited by the lawyer's (or the firm's) representation of another client.[49] In making this determination, the lawyer should consider whether: 1) the issue is of such importance that its determination is likely to affect the ultimate outcome of at least one of the cases; 2) the determination of the issue in one case will likely have a significant impact on the determination of that issue in the other case; 3) there will be any tendency to "soft pedal" any issue which would otherwise be vigorously pursued to avoid negative impact on the other case; and, 4) there would be any tendency within the firm to alter arguments so that the positions in the two cases could be reconciled.[50] Under these circumstances, the representation of at least one client would be adversely affected in violation of Rule 1.7.[51] However, if the lawyer reasonably concludes that although there is a potential for one representation to adversely affect the other, that such will not likely occur, the lawyer may proceed with both representations provided both clients consent after full disclosure.[52]

Although the committee's analysis was based on an assumption that the positional conflict was immediately apparent, the committee believed that the same analysis applied to conflicts which emerged after the second representation was underway, potentially requiring the attorney to withdraw from one of the representations.[53] In deciding from which of the matters to withdraw, the committee concluded that "the lawyer should determine which of the representations would suffer the least harm as a consequence of the lawyer's withdrawal and then withdraw from that matter."[54]

The potential for issue conflicts is not limited to an attorney's work for different clients on different matters. The problem may also arise in an attorney's work as part of a lobbying group, with a bar committee or just in commentary on particular legal issues. In Opinion No. 1997-3 of the New York Committee on Professional and Judicial Ethics,[55] the committee considered the extent to which attorneys in New York may speak out or work in favor of or against particular legislative change, in that instance, tort reform. Attorneys were being pressured by clients not to express public opinions about such issues. The committee held that "[a]s long as client confidences and zeal-

ous advocacy in a pending matter are not compromised, a lawyer is entitled to participate in bar association activities and speak publicly on issues which may be contrary to the interest of a former or current client without obtaining client consent."[56]

Issue conflicts are often overlooked by attorneys. However, they lend themselves to occurrence in the insurance practice area and, in particular, in bad faith insurance litigation where the scope of the law continues to evolve and attorneys represent both insureds and insurers with regard to the tort and coverage issues that arise in those cases.

BILLING AND LITIGATION GUIDELINES

Billing and litigation guidelines are now a common part of insurers' efforts to control the cost of outside legal services. Such guidelines may include limits on research, discovery, experts and staffing of a matter. Those guidelines may also require that an attorney submit its bills to a third-party auditor hired by the insurer. These guidelines present several ethical dilemmas for the attorney.

Submission of Bills to Outside Auditors

The Oklahoma Bar Association Legal Ethics Committee issued an opinion on outside bill review in 2000.[57] The issue framed by the committee was whether an attorney hired by an insurer to represent its insured could submit his or her bills to an outside auditor for review without violating the Oklahoma Rules of Professional Conduct.

The committee first analyzed to whom the attorney's ethical obligations are owed, concluding that the insured was certainly the client and whether the insurer was also a client depended on the circumstances.[58] If both are clients, the direct adversity analysis of Rule 1.7 applies. If only the insured is the client, the material limitation analysis of Rule 1.7 applies.

Also applicable is Rule 1.8(f) which prohibits an attorney from accepting compensation for representing a client from one other than the client unless 1) the client gives informed consent; 2) "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;" and, 3) information relating to the representation is protected by Rule 1.6. Rule 1.6 prohibits a lawyer from revealing information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized to carry out the representation.

In applying the confidentiality obligation of Rule 1.6(a), the committee considered whether disclosure to auditors designated by the insurer with whom the insured had a contractual relationship was "impliedly authorized" by this contractual arrangement. The committee concluded that while disclosure to the insurer may be impliedly authorized, disclosure to an outside auditor was not because that disclosure had everything to do with an insurer's cost containment efforts and nothing to do with the evaluation and defense of a claim.[59] The committee also focused on the growing number of cases in which the courts held that the disclosure of billing statements to outside auditors, including governmental auditors, waived the attorney-client privilege.[60]

The committee held:

> [I]t would be unethical for Attorney to seek Client's consent to the audit procedure because to do so would place Attorney in a conflict between Client's interests and those of a third party, Insurer, and Attorney's own self interest in getting paid by Insurer.
>
> …
>
> The informed consent provisions of Rules 1.6, 1.7 and 1.8(f) are mandatory. Attorney could not ethically agree to representation of Client knowing that Insurer will submit Attorney's fee statements to an outside auditor without obtaining Client's informed consent. In order to ethically agree to the representation, the Attorney would be required, at the outset of formation of the attorney-client relationship, to advise the Client that the Insurer is paying Attorney for the Client's representation and that Attorney therefore has a personal financial interest in the auditing procedure which interest may be adverse to Client's interest. *See* Rule 1.7(b), Rule 1.8(a), (f)(1). Attorney would also be required at the outset to advise Client that invoices for services rendered would contain detailed descriptions of Attorney's work and that confidential information, as reflected in the narrative of services in the Attorney's invoices to the Insurer, would be revealed to a third party Auditor under the terms of representation as proposed by the Insurer. *See* Rule 1.6(a). Informed consent would also require that

the Client be informed of all of the risks and consequences associated with disclosure to an outside Auditor, including the Attorney's opinion whether the disclosure to the Auditor is a waiver of the attorney-client privilege.[61]

The ABA Standing Committee on Ethics and Professional Responsibility has also concluded that an attorney may not provide bills containing information protected by Rule 1.6 to outside auditors for insurers without first obtaining the consent of the client insured after consultation.[62] The substantial majority of other state bar associations have reached the same conclusion, though with varying conclusions on what is sufficient to be informed consent.[63]

Other Insurer Guidelines

In addition to the request that bills be reviewed by outside auditors, insurers impose other guidelines that place limits on an attorney's control of the representation.[64] Where the attorney represents the insurer directly without the existence of an insured who is also a client, then these guidelines present no problem because the client – the insurer – has consented to the restrictions by imposing them. However, where the attorney represents the insured (or both insurer and insured) and the insurer guidelines restrict the attorney's work on behalf of the insured client, an ethical issue may exist.[65] Limits on legal research or the use of electronic research, restrictions on travel for the purpose of discovery, limits on the use of experts and similar restrictions may impact an attorney's efforts to thoroughly represent the insured's interest. In addition to Rule 1.8(f) prohibiting an attorney from accepting compensation for representation of a client from a person other than the client except in prescribed circumstances, the rules most implicated by such guidelines are Oklahoma Rules of Professional Conduct 1.1 (competence), 1.2 (scope of representation), 1.3 (diligence), 1.4 (communication) and 5.4(c) (professional independence).

> **"…an attorney may not provide bills containing information protected by Rule 1.6 to outside auditors…"**

Rule 5.4(c) applies directly to this issue and controls the analysis of it. Rule 5.4(c) prohibits an attorney from permitting a person who pays the lawyer to render legal services for another to "direct or regulate the lawyer's professional judgment in rendering such legal services." Almost by definition, an insurer's guidelines "direct or regulate the lawyer's professional judgment." Many of the guidelines are narrow and do not unreasonably control an attorney's professional judgment. Others, such as limits on research or discovery, may result in more control than ethically permitted, depending on the facts of each case. In those circumstances, the attorney is ethically obligated to nonetheless perform all work that, in his or her professional judgment, is required to thoroughly and completely represent the client's interest.

Rule 1.1 requires that "[a] lawyer shall provide competent representation to a client" which requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Therefore, if an attorney believes that some task is necessary to advance the insured's case and it is not allowed by the guidelines or otherwise approved by the insurer, Rule 1.1 requires that the work be undertaken, even if not paid by the insurer. The duty of competence, preparation, thoroughness and loyalty runs to the insured client. "Professional competence for ethical and malpractice purposes does not depend on insurers' guidelines, the reimbursement of professional expenses, or the payment of fees."[66]

Rule 1.2 requires an attorney to abide by a client's decisions as to the objectives of a representation and to consult with the client as to the means to carry out the objective. Where an insurer's guidelines limit the attorney with regard to the representation, the attorney must consult with the client about those restrictions and, to the extent it impacts the objectives of the representation, abide by the client's decision as to whether to follow them.

"A lawyer shall act with reasonable diligence and promptness in representing a client."[67] "A defense attorney who unreasonably delays or postpones activities because of litigation guidelines may violate Rule 1.3."[68] Rule 1.3 may also be violated by failing to perform a task because it is not allowed by the guidelines.[69] An attorney who allows himself or herself to be limited

by these guidelines, though a reasonable attorney would conclude that the limitation should not be followed, commits an ethical violation even if the client suffers no injury.[70]

Under Rule 1.4, an attorney must keep the client reasonably informed about the matter and must explain a matter "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Thus, to the extent an insurer's guidelines in any way interfere with an attorney's representation of an insured, the attorney must inform and discuss the matter with the client.

ABA Formal Opinion No. 01-421, cited previously for its conclusions regarding an insurer's requirement that a defense attorney submit bills to an outside auditor, also opined on the ethical issues raised by an insurer's other guidelines. The opinion concludes:

> If the lawyer reasonably believes his representation of the insured will be impaired materially by the insurer's guidelines or if the insured objects to the defense provided by a lawyer working under insurance company guidelines, the lawyer must consult with both the insured and the insurer concerning the means by which the objectives of the representation are being pursued. "If the lawyer is to proceed with the representation of the insured at the direction of the insurer, the lawyer must make appropriate disclosure sufficient to apprise the insured of the limited nature of his representation as well as the insurer's right to control the defense in accordance with the terms of the insurance contract." If the insurer does not withdraw or modify the limitation on the lawyer's representation and the insured refuses to consent to the limited representation, the resulting conflict implicates Rule 1.7(b) and unless the lawyer is willing to represent the insured without compensation from the insurer, requires the lawyer to terminate the representation of both clients.[71]

CONCLUSION

Every case is different and a myriad of issues may arise which require a different ethical and risk avoidance analysis. Vigilance in every circumstance is not only required by the Rules of Professional Conduct, but will protect clients, insurers and the attorney from the uncertainty, and perhaps the litigation, that may arise from a failure to adhere closely to the rules.

1. *See. e.g. Scott v. Peterson*, 2005 OK 84, ¶7, 126 P.3d 1232.

2. *See Church v. Hofer, Inc.*, 1992 OK CIV APP 148, 844 P.2d 887, 888 (Where an insurance company hires an attorney to defend the company's insured, the insured becomes a client "with all the ethical considerations that are part of the attorney-client relationship."). *See also e.g. Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco P.C. v. Oceanus Ins. Co.*, No. 13-CV-762-JED-PJC, 2016 WL 5746210 (N.D. Okla. Sept. 30, 2016).

3. *Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco, P.C.*, 2016 WL 5746210, *4.

4. 1996 OK CIV APP 40, 917 P.2d 488, 489.

5. *See also* OBA Legal Ethics Committee Opinion 314 (2000) (finding that the insured is unquestionably the client and entitled to all ethical considerations which are part of the attorney-client relationship, but recognizing that the insurer may also be a client depending upon the facts of each case).

6. *See, e.g., Nevada Yellow Cab Corp. v. Eighth Judicial District Court ex rel. County of Clark*, 152 P.3d 737 (Nev. 2007) (where no conflict exists, lawyer's primary client is the insured, but lawyer owes duties of confidentiality and care to the insurer); *State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.*, 86 Cal. Rptr. 2d 20 (Cal. Ct. App. 1999) (where no conflict exists between insured and insurer, the insurer is co-client of defense counsel); *Am. Nat'l Prop. & Cas. Co. v. Ensz & Jester, P.C.*, 358 S.W.3d 75, 83 (Mo. Ct. App. 2011) (recognizing that a lawyer can owe duties both to the insurer and the insured); *see also Hartford Ins. Co. of the Midwest v. Koeppel*, 629 F. Supp. 2d 1293 (M.D. Fla. 2009) (allowing insurance company to sue lawyer representing insured); *Unigard Ins. Group v. O'Flaherty & Belgum*, 45 Cal. Rptr. 2d 565 (Cal. Ct. App. 1995) (same); *American Casualty Co. of Reading, Pa. v. O'Flaherty*, 67 Cal. Rptr. 2d 539 (Cal. Ct. App. 1997) (same); *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593 (Ariz. 2001) (*en banc*) (whether or not insurer is always a client, insurer may sue defense counsel for failure to tender policy claim to coinsurer, which would have been in interests of both insured and insurer).

7. *See* Virginia Opinion 1863 (Sept. 26, 2012) (case law "strongly suggest[s] that the defendant/insured is the only client of the lawyer"); *See, e.g., In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806 (Mont. 2000); *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294 (Mich. 1991); *cf. Continental Cas. Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103 (2d Cir. 1991); *In re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir. 1989); *Essex Ins. Co. v. Tyler*, 309 F. Supp. 2d 1270 (D. Colo. 2004); *Gibbs v. Lappies*, 828 F. Supp. 6 (D.N.H. 1993); *Emons Industries, Inc. v. Liberty Mut. Ins., Co.*, 747 F. Supp 1079 (S.D.N.Y. 1990); *First American Carriers, Inc. v. Kroger Co.*, 787 S.W.2d 669 (Ark. 1990); *Higgins v. Karp*, 687 A.2d 539 (Conn. 1997); *Employers Cas. Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973).

8. *See* Florida Rule of Professional Conduct 1.8(j); Ohio Rule of Professional Conduct 1.8(f)(4).

9. *See* Fla. R. Prof. Conduct 4-1.7(e). *See also* Wisconsin R. of Prof. Conduct for Attorneys 1.2(e) (requiring attorney retained by insurer to represent insured to inform the insured client in writing of the terms and scope of the representation).

10. Rest. of Law Governing Lawyers, §134, *Comment f.* Section 134 covers payment of an attorney's fees by a third person. The Oklahoma Rules of Professional Conduct deal with the issue of the payment of an attorney's fees by a third-party in Rules 1.8(f) and 5.4(c).

11. *See* Ellen S. Pryor & Charles Silver, "Defense Lawyers' Professional Responsibilities: Part I – Excess Exposure Cases," 78 *Tex. L. Rev.* 599, 607-08 (2000); Charles Silver & Kent Syverud, "The Professional Responsibilities of Insurance Defense Lawyers," 45 *Duke L.J.* 255, 273-75 (1995).

12. *See e.g., Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco, P.C. v. Oceanus Insurance Company*, No. 13-CV-762-JED-PJC, 2016 WL 5746210 (N.D. Okla. Sept. 30, 2016) (implying attorney-client relationship between an insurer and the law firm it hired to defend its insured can be defined by the retainer agreement.).

13. 550 P.2d 94 (Ariz. 1976) (*en banc*).

14. *Id. See also Allstate Ins. Co. v. Madden*, 601 S.E.2d 25 (W. Va. 2004); *Brandon v. West Bend Mut. Ins. Co.*, 681 N.W.2d 633 (Iowa 2004); *Hutchinson v. Farm Family Cas. Ins. Co.*, 867 A.2d 1 (Conn. 2005).

15. 12 Okla. Stat. §2502(D)(6) (2011 & Supp. 2017) ("There is no privilege under this section … [a]s to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between or among any of the clients.").

16. *See* 3 Leo H. Whinery, *Oklahoma Evidence: Commentary on the Law of Evidence* §36.07 & n.10 (2d ed. 2000) (citing *Hall v. Goodwin*, 1989 OK 88, 775 P.2d 291). Even before the codification of the joint representation exception in §2502 of the Oklahoma Evidence Code, the Oklahoma Supreme Court recognized its applicability in other contexts. *See,*

e.g., Bush v. Bush, 1930 OK 117, ¶31, 286 P. 322 (finding communications between jointly represented parties not privileged as between one party and the other party's heirs for purposes of determining the validity of deed which purported to transfer real property from one party to the other).

17. *See* Annotation, Charles C. Marvel, "Applicability of attorney-client privilege or testimony in subsequent action between parties originally represented contemporaneously by same attorney, with reference to communication to or from one party," 4 *A.L.R.* 4th 765 §5[a] (1981).

18. *See e.g. CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113 (Alaska 1993).

19. 1996 OK CIV APP 40, 917 P.2d 488.

20. *Nisson*, 917 P.2d at 489.

21. *Id.* at 490.

22. *Id*.

23. *Id*.

24. *Id*.

25. *See e.g. Couch on Insurance* 3d, §202:26 (2003).

26. *See e.g. State Farm Mut. Auto. Ins. Co. v. Hansen*, 357 P.3d 338 (Nev. 2015) (concluding that Nevada requires insurer to provide independent counsel at insurer's expense where reservation of rights letter presented an actual conflict, but finding a reservation of rights letter does not create a per se conflict); *Twin City Fire Ins. Co. v. City of Madison, Mississippi*, 309 F.3d 901, 907 (5th Cir. 2002) (Under Mississippi law, "[w]hen an insurer is defending under a reservation of rights, the carrier 'should afford the insured ample opportunity to select his own independent counsel to look after his interest'."); *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133 (Wash. 1986) and *L & S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 521 So.2d 1298, 1304 (Ala. 1987) (resolving the conflict by imposing an "enhanced" standard of good faith upon an insurer which reserves its rights, requiring 1) a thorough investigation of the Plaintiff's claim; 2) retaining competent defense counsel who understands that the insured is the sole client; 3) fully informing the insured of all coverage issues and progress of the case; and 4) taking no action which puts the insurer's financial interest ahead of the insured); *Shelby Steel Fabricators, Inc. v. United States Fid. & Guar. Ins. Co.*, 569 So.2d 309 (Ala. 1990) (estopping insurer from denying coverage where the insurer failed to meet this enhanced standard of good faith because it failed to keep the insured informed of the progress of the defense); California State Bar Committee on Professional Responsibility Formal Opinion No. 1995-139 (1995) (An attorney hired by an insurer to defend an insured owes her loyalty to the insured, not the insurer, and if the attorney becomes aware of information that changes the coverage situation or otherwise affects the insurer's position, she may not reveal the information, but must withdraw from representing the insured.); Illinois State Bar Association Opinion No. 92-02 (July 17, 1992) (A lawyer retained by an insurance company to defend its insured under a reservation of rights may not disclose information to the insurer which might prejudice the insured's coverage rights.).

27. *See State Farm Mut. Auto. Ins. Co. v. Hansen*, 357 P.3d 338, 343 (Nev. 2015) (a reservation of rights letter does not create a per se conflict of interest, instead, "[c]ourts must inquire, on a case-by-case basis, whether there is an actual conflict of interest."); *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of South Carolina, LP*, 433 F.3d 365 (4th Cir. 2005) (insurer's reservation of rights letter disclaiming coverage as to some claims did not create per se conflicts of interest so as to require insurer to cover attorney's fees of insured's chosen counsel); *Dynamic Concepts, Inc. v. Truck Ins. Exchange*, 71 Cal. Rptr. 2d 882, 887 (Cal. Ct. App. 1998) ("A mere possibility of an unspecified conflict does not require independent counsel. The conflict must be significant, not merely theoretical, actual, not merely potential."); *Native Sun Inv. Group v. Ticor Title Ins. Co.*, 235 Cal. Rptr. 34, 40 (Cal. Ct. App. 1987) (insurer not required to pay for independent counsel where resolution of third-party claim would not affect coverage dispute); *Blanchard v. State Farm Fire & Cas. Co.*, 2 Cal. Rptr. 2d 884, 887 (Cal. Ct. App. 1991) (because the coverage issue involved only damages, there was no conflict because insurer and thus defense counsel had no incentive to attach liability to the insured); *Hansen v. State Farm Mut. Auto. Ins. Co.*, No. 2:10-cv-01434-MMD, 2012 WL 6205722, at *10 (D. Nev. Dec. 12, 2012) ("[W]hether or not an insurer's reservation of rights creates a conflict of interest must be determined by looking to the particular facts of each case.").

28. *See Parsons, supra; Employers Cas. Co. v. Tilley,* 496 S.W. 2d 552 (Tex. 1973) (where insurer hired attorney to represent insured and as part of his discovery the attorney developed facts to support the insurer's coverage claim of lack of notice including taking statements from the insured's employees to support that claim, the court held it would be "untenable" for the insurer to disclaim its defense obligation; the late notice defense was improperly developed and violated the guiding principles in the insurer-insured relationship.); *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 2 P.3d 663, 667 (Ariz. Ct. App. 1999), *vacated in part,* 24 P.3d 593 (2001) (insured whose confidential information was disclosed by his attorney to the insurance company who hired counsel and used to assert a coverage defense may sue counsel for malpractice).

29. *See Mid-America Bank & Trust Co. v. Commercial Union Ins. Co.*, 587 N.E.2d 81, 82-83 (Ill. App. Ct. 1992) (where insurer and defense counsel for insured twice rejected $50,000 policy limits offer and made a $30,000 counteroffer without informing the insured and the plaintiff later obtained a $911,563.50 judgment against the insured, the insurer and attorney were found liable for the excess judgment in the amount of 75% and 25%, respectively); *Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin*, 828 P.2d 745, 750-51 (Alaska 1992) (insured sued his insurer and defense counsel after they offered a $50,000 policy limits settlement but refused to agree on a statutorily permitted attorney fee and then persuaded the insured to confess judgment in the amount of $3 million and file bankruptcy with this potentially non-dischargeable judgment. The insured recovered a $6,139,544.94 verdict with 40 percent liability attributed to the insurer and 60 percent to the attorney). Massachusetts Bar Association Opinion No. 1991-5 (an actual conflict arises and counsel is thereby prevented from expressing an opinion to the insurer as to the settlement value of the case where there is a potential liability defense but counsel knows the case can be settled within policy limits). *But see Allstate Ins. Co. v. Campbell*, 639 A.2d 652, 659 (Md. 1994) (unlike the cases where coverage is in dispute, potential excess liability alone does not create a conflict of interest requiring independent counsel; any conflict is mitigated by the insured's ability to file a bad faith claim against the insurer if it mishandles his claim and thus the insured retains the right to control the defense in an excess liability case).

30. *See Foremost Ins. Co. v. Wilks*, 253 Cal. Rptr. 596, 602 (Cal. Ct. App. 1988).

31. *See Illinois Municipal League Risk Mgmt. Ass'n. v. Siebe*rt, 585 N.E. 2d 1130 (Ill. App. Ct. 1992).

32. *Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco, P.C. v. Oceanus Ins. Co.*, No. 13-CV-762-JED-PJC, 2016 WL 5746210 (N.D. Okla. Sept. 30, 2016), citing Atlanta Int'l Ins. Co. v. Bell, 475 N.W.2d 294 (Mich. 1991).

33. *Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco, P.C.,* 2016 WL 5746210.

34. *Id*.

35. *Id*. at *4.

36. 475 N.W.2d 294, 298-299 (Mich. 1991).

37. *Id*. at *5.

38. *Atlanta Int'l*, 475 N.W.2d at 298-299. *See also Walter & Shuffain, P.C. v. CPA Mutual Ins. Co.*, No. CIV A06CV10163-NG, 2008 WL 885994 (D. Mass. Mar. 28, 2008) (insurer that was sued by insured accounting firm for negligently defending the firm could seek contribution from law firm the insurer had hired to defend the accounting firm in malpractice case, but could not sue law firm for indemnity); *Great Am. E & S Ins. Co. v. Quintairos, Prieto, Wood, & Boyer, P.A.*, 100 So.3d 420, 424 (Miss. 2012) (plurality opinion) ("We hold only that, when lawyers breach the duty they owe to their clients, excess insurance carriers, who – on behalf of the clients – pay the damage, may pursue the same claim the client could have pursued. Holding otherwise would place negligent lawyers in a special category of protection."); *Allstate Ins. Co. v. American Transit Ins. Co.*, 977 F. Supp. 197 (E.D.N.Y 1997); *American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480 (Tex. 1992).

39. *Id*.

40. *Id*. at *6.

41. *See e.g. National Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 F. Supp. 2d 1013 (N.D. Ill 1998) (federal district court predicting that Illinois would allow an excess insurer to assert a malpractice action against the insured's defense lawyer under the doctrine of equitable subrogation).

42. *See e.g. Zenith Ins. Co. v. Cozen O'Connor,* 55 Cal. Rptr. 3d 911 (Cal. Ct. App. 2007) (though reinsurer reinsured 100% of insured's liability and therefore would benefit or suffer from work of firm hired by insurer to defend insured, and though the reinsurer had many conversations with defense counsel as a result of this relationship, these facts did not establish an attorney-client relationship under which the reinsurer could sue); *Querrey & Harrow, Ltd. v. Transcontinental Ins. Co.*, 861 N.E.2d 719 (Ind. Ct. App. 2007), *opinion adopted by*, 885 N.E.2d 1235 (Ind. 2008) (subrogation is the equivalent of an assignment and Indiana does not permit assignments of legal malpractice claims); *Federal Ins. Co. v. North Am. Specialty Ins. Co.*, 847 N.Y.S.2d 7 (N.Y. App. Div. 2007) (excess carrier could not sustain malpractice claim because no privity existed between the excess insurer and the firm, whose duty ran only to its client).

43. 827 N.Y.S.2d 231 (N.Y. App. Div. 2006).

44. 5 Okla. Stat. Ch. 1, App. 3-A, Rule 1.7(a).

45. Comment 24, Rule 1.7.

46. *Id*.
47. Formal Op. 93-377, pp. 1-2.
48. *Id*. at 3-4.
49. *Id*. at 4.
50. *Id*.
51. *Id*. at 4-5.
52. *Id*.
53. *Id*.
54. *Id*. at 5 n. 6. For cases generally following the Comment and/or ABA Formal Opinion 93-377, *see Advanced Display Systems, Inc. v. Kent State University*, No. 3-96-CV-1480-BD, 2001 WL 1524433 (N.D. Tex. Nov. 29, 2001); *Estates Theatres, Inc. v. Columbia Pictures Industries, Inc.*, 345 F. Supp. 93 (S.D.N.Y. 1972); Virginia Opinion 1476 (Aug. 24, 1992); Michigan Informal Opinion RI-108 (Dec. 3, 1991); Arizona Opinion 87-15 (July 27, 1987). *But see* California Opinion 1989-108 (undated) (not unethical, but imprudent, to argue opposite sides of same issue before same judge).
55. 1997 WL 1724483 (March 1997)
56. *Id*. at *4.
57. *See* Ethics Opinion No. 314 dated Dec. 15, 2000.
58. OK Adv. Op. 314, p. 3, citing *Church v. Hofer, Inc.*, 1992 OK CIV APP 148, 844 P.2d 887, 888.
59. *Id*. at 5.
60. *See U.S. v. Massachusetts Inst. of Tech.*, 129 F.3d 681, 683 (1st Cir. 1997) (MIT waived attorney-client privilege by disclosing billing statements of firms representing MIT to defense department auditors); *In Re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806 (Mont. 2000) (rejecting argument that disclosure was impliedly authorized by insurance relationship, the court held that the disclosure of attorney invoices by defense counsel to an outside auditor of the insured without obtaining contemporaneous informed consent from the insured violates the Montana Rules of Professional Conduct protecting client confidentiality); *In re Columbia/HCA Healthcare Corp. Billings Practices Litig.*, 192 F.R.D. 575 (M.D. Tenn. 2000) (disclosure of documents to federal government during government investigation waives attorney-client privilege as to all adversaries despite agreement with government that such disclosure would not constitute a waiver); *U.S. v. South Chicago Bank*, No. 97-CR 849-1, 97-CR 849-2, 1998 WL 774001, *3 (N.D. Ill. Oct. 30, 1998) (as a general rule, confidential information may not be shared with an outside auditor without destroying the attorney-client privilege).
61. Ethics Opinion No. 314 dated Dec. 15, 2000, at 5-7, citing Pennsylvania Bar Association, Committee on Legal Ethics and Professional Responsibility, Formal Opinion No. 97-119 (1997).
62. ABA Formal Opinion 01-421 (Feb. 16, 2001).
63. Alabama Ethics Opinion No. RO-98-02; Alaska State Bar Ethics Opinion 99-1 (1999); Arizona State Bar Formal Opinion 99-08 (Sept. 1999); Cincinnati Bar Association, Op. 98-99-02; Colorado Bar Association Ethics Committee Formal Opinion 107 (Sept. 18, 1999); Connecticut Bar Association Formal Ethics Opinion No. 00-20 (Sept. 25, 2000); D.C. Bar Legal Ethics Committee Opinion 290 (April 20, 1999); Florida Bar Staff Opinion 20762 (March 3, 1998); Georgia State Bar Proposed Advisory Opinion No. 99-R2 (Jan. 2000); Hawaii Formal Ethics Commission Opinion 36 (March 25, 1999); Idaho State Bar Formal Ethics Opinion 136 (Oct. 1, 1999); Indiana State Bar Opinion No. 4 of 1998; Iowa Supreme Court Board of Ethics and Conduct Opinion 99-01 (Sept. 8, 1999); Kentucky Opinion KBA E-404 (June 1998); Louisiana Bar Ethics Opinion, 45 LA. B.J. 438 (Feb. 1998); Maine Bar Association Ethics Opinion 164 (Dec. 2, 1998); Maryland State Bar Association Committee on Ethics, Opinion 99-7 (Dec. 18, 1998); Massachusetts Bar Ethics Opinion 2000-4 (Sept. 13, 2000); Mississippi State Bar Association Opinion No. 246 (April 8, 1999); Missouri Informal Opinion Summary No. 980188; New Mexico State Bar Formal Advisory Opinion 2000-02 (June 20, 2000) New York State Bar Association Committee on Professional Ethics Opinion 7160 (March 3, 1999); North Carolina Proposed Formal Ethics Opinion 17 (Oct. 14, 1998); Ohio Supreme Court Opinion 2000-02 (June 1, 2000); Oregon Formal Opinion No. 1999-157 (June 1999); Pennsylvania Informal Opinion No. 97-119 (Oct. 6, 1997); Rhode Island Ethics Advisory Panel Opinion 99-17 (Oct. 27, 1999); South Carolina Ethics Advisory Opinion 97-22 (Dec. 1997); State Bar of South Dakota Ethics Opinion 99-2 (April 16, 1999); Tennessee Supreme Court Board of Professional Responsibility Formal Op. 99-F-143 (June 14, 1999); Utah State Bar Ethics Advisory Opinion 98-03 (April 17, 1998); Vermont Bar Association Ethics Opinion 98-7; Virginia Bar Legal Ethics Opinion 1723 (Nov. 23, 1998; Dec. 10, 1998); Washington Bar Informal Opinion (no number assigned April 29, 1997); West Virginia Lawyer Disciplinary Board Opinion LEI 99-02 (April 30, 1999); Wisconsin State Bar Ethics Opinion E-99-1 (1999).
64. The "ethical implications of the use of billing guidelines" were beyond the scope of Ethics Opinion 314. Opinion 314 at 2.
65. *See e.g. Givens v. Mullikin*, 75 S.W.3d 383, 394 (Tenn. 2002) ("[a]ny policy, arrangement or device which effectively limits, by design or operation, the attorney's professional judgment on behalf of or loyalty to the client is prohibited by the [Professional Responsibility] Code, and, undoubtedly, would not be consistent with public policy.") (quotations and citations omitted).
66. Richmond, "Lost in the Eternal Triangle of Insurance Defense Ethics," 9 *Geo. J. Legal Ethics* 475, 533 (1996). *See also e.g. Finley v. Home Ins. Co.*, 975 P.2d 1145, 1156 (Haw. 1998) (an attorney may be liable for malpractice and the insurer for bad faith where the insurer induces the attorney to provide a defense that does not meet the standards of the applicable rules of professional conduct).
67. Rule 1.3 of the Oklahoma Rules of Professional Conduct.
68. *Richmond* at 534.
69. *Id*.
70. *Id*.
71. *See also* Alabama Ethics Opinion No. RO-98-02 (restrictions on discovery or similar litigation restrictions violate Rules 5.4(c) and 1.8(f) and may not be followed without full disclosure and informed consent from the client); Utah State Bar Ethics Advisory Opinion 20-03 (Feb. 27, 2002) (lawyer hired by insurance company cannot follow the insurer's litigation guidelines if it would compromise the lawyers duties of confidentiality and competency).

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Some Considerations in Insuring Against Cyber Loss

By Derek Cowan

The purpose of any insurance policy is to manage or transfer the risk of unfavorable occurrences away from the insured. For millennia, insurance policies have existed to transfer the risk of hazards which cause damage to property. For centuries, policies have existed to transfer the risk of injuries or damages arising from individuals' negligent acts.

However, because of the relative infancy of electronic data *qua* property and the accelerating pace at which bad actors can surreptitiously access this immensely valuable data, insurance products suitable for adequately managing the risks of loss in this *sui generis* realm are playing a frustrating and expensive game of "catch-up." Individuals and entities are wise to cautiously explore their specific risks in this arena and the ways in which they can effectively "insure away" their exposures. In the 1990s, insurance carriers began to address this need by issuing dedicated cyber insurance policies to help businesses and individuals protect themselves from internet-based risks associated with information technology activities.

Generally, the hazards that can befall electronic data are threats to privacy: customers entrust private health, financial or identity information with a vendor or service provider, and miscreants, typically motivated by illicit profit, access, disseminate or otherwise exploit the private information. Other risks are the direct compromise or loss of an individual's or enterprise's own confidential information or intellectual property.

Cyber insurance policies frequently provide both first- and third-party coverages. First-party losses involve direct loss suffered by the insured, while third-party claims are for damages claimed by another for which the insured may be answerable. The first-party losses insured include: property damages to a business' intangible assets, such as software or electronic date; theft of a company's proprietary information or its consumer data; costs associated with business interruption resulting from a breach; damages to other company assets caused by viri or malware; expenses incurred in restoring an entity's systems following a breach, including both software and hardware replacement; reimbursement for the fraudulent transfer of the company's money, property, securities, etc. and "crisis management" expenses necessary to rehabilitate the insured's reputation and goodwill.[1]

Predictably, a cyber insurance policy's third-party coverages involve losses realized by other parties who have entrusted, implicitly or explicitly, their valued electronic data with the insured. Typical third-party losses include: damage to the property of a third party; denial of access of the third party to its own data held by the insurer; losses arising from unau-

thorized use of the third-party's confidential information; claims against the insured of instituting insufficient measures to protect the third-party's confidential information; expenses thereafter incurred by the third party in defending against regulatory actions or its own third-party suits.[2]

As another interesting facet of potential third-party exposure, some companies provide "conduit liability coverage," which covers losses for which one insured may be found partially or wholly liable as a result of cybercriminals using a breach into that insured's network to then directly access the network of the insured's vendor or customer.[3] As computer networks of corporate allies become increasingly interconnected, one otherwise-impregnable system can be easily compromised if the system of a less-vigilant vendor, partner, subsidiary or customer has gaps. An example that illustrates this appropriated access to confidential information was a 2013 breach of retailer Target's protected electronic data. Hackers first accessed the computer system of a company that provided heat and air services to Target. For reasons that must have seemed necessary to a (certainly) now-former Target decisionmaker, inadequately-protected connections between the HVAC contractor's system and that of Target's existed. Hackers' access to an obscure mechanical contractor's data system yielded entry to a massive cache of Target's information, including customer names, addresses, dates of birth and account numbers.[4] Conduit coverage was designed to address liability concerns for this unique scenario.

"Predictably, a cyber insurance policy's third-party coverages involve losses realized by other parties who have entrusted, implicitly or explicitly, their valued electronic data with the insured."

Still another consideration related to liability for breaches arising from the acts or omissions of business partners of the insured is the interplay between the frequently present indemnity clauses in contracts with independent contractors and the insurer's rights to subrogation. Under such coverages as conduit liability coverage and the like, an insurer may cover third-party liability claims for losses occurring as a result of lax electronic security of the insured's independent contractors or other service providers. Under conventional tenets of insurance, the insurer would thereafter have a right of subrogation to recover the benefits paid under the policy from the party that actually caused the loss, *i.e.*, the independent contractor. However, many contracts between principals and their independent contractors contain indemnification clauses, under which the principals (insureds) contractually agree to shift liability for independent contractor's acts or omissions back to the principal. Thus, the insured's contract may jeopardize its cyber coverage if the carrier is prohibited from seeking subrogation from the protected contractor. Insureds who frequently deal with independent contractors must evaluate their existing subcontracts to determine if this potentially coverage-nullifying condition exists. If so, they may need to renegotiate their contracts.[5]

HOW TO BEGIN AN ANALYSIS OF SPECIFIC CYBER EXPOSURES

As more cyber insurance policies come to market, more specialized options become available to insureds. Therefore, the savvy risk manager must answer an increasing number of questions suited to her company's particular custody and use of electronic data, whether that data is the company's own or that of a vendor, partner or customer, what levels of protection the company is expected (or required) to maintain for that data, and, of course, what coverage can the enterprise afford. Among the growing number of questions necessary to begin the analysis are:[6]

1) How does the policy define a breach? Because of the occasional lag-time between a breach and confirmation thereof, the value of the exposure increases as time goes by. Additionally, the complexity of computer systems and the forensic examinations necessary to confirm a breach add to the discovery time. As such, the spectrum of coverage for a breach may run from when the breach is "reasonably suspected" to when the breach is definitively confirmed. Such timetables institute obligations upon the insured to maintain adequate protection and notification mechanisms, respond timely and

meaningfully to potential threats and address actual breaches immediately.

2) Does the policy have "minimum security requirements" or the like that must be implemented and maintained on the company's system and, if so, does it clearly define those requirements? As noted above, that an insured will have some form of firewall or other mechanisms in place to safeguard electronic data is not merely assumed, it can be required by the policy. More and more carriers are not simply insuring against a breach, but are making demonstrable, baseline network security measures conditions precedent to coverage for a breach. By adhering to a uniform level of minimum system security across the board of insureds, carriers can better anticipate the kinds of losses insureds will suffer and can better estimate the severity of those losses for underwriting purposes.[7]

3) Does the policy provide retroactive coverage and can more-distant retroactive coverage be purchased if desired? The retroactive date is the date before which a policy will not extend coverage for a breach, even if the breach is discovered or reported during the policy period. As described above, an effective breach is one that goes unnoticed for some length of time. It is common for a breach to occur months or years before discovery. When incepting a policy, the insured must take this potentiality into account and must determine how much retroactive coverage is needed (or, more likely, how much can be afforded). Clearly, the more remote the retroactive date, the greater the uncertainty of risk, hence, the higher the cost. The policy will be of no utility, however, if the triggering event occurred on a date before the policy is in force.[8]

4) How does the policy treat mobile devices used to access the company's data? Again, as so many systems become more intertwined, the "weak link" theory becomes more pressing and more problematic. As with conduit liability exposure, the proliferation of mobile devices used by a company's employees (or, frighteningly, also by those of its vendors, partners or customers) create innumerable possible access points to a company's vault of confidential data. Some policies may provide coverage for breaches facilitated through mobile or peripheral devices; others may not.

5) In the likely case the company's jurisdiction enforces regulatory requirements to notify third parties potentially affected by a breach, does the policy provide coverage for costs incurred in notification pursuant *only* to those requirements, or for all notifications? Oklahoma is one of the 48 states with statutory or regulatory requirements that the custodian of confidential or encrypted personal data must notify the affected owners of such data in the event of a breach.

> "An individual or entity that owns or licenses computerized data that includes personal information shall disclose any breach of the security of the system following discovery or notification of the breach of the security of the system to any resident of this state whose encrypted and unredacted personal information was or is reasonably believed to have been accessed and acquired by an unauthorized person and that causes, or the individual or entity reasonably believes has caused or will cause, identity theft or other fraud to any resident of this state."[9]

While Oklahoma's Security Breach Notification Act does not allow a private right of action to an aggrieved citizen, it does provide that the attorney general or a district attorney may bring action against the entity failing to abide by the notification requirements, and may recover either actual damages or a civil penalty not exceeding $150,000 *per breach*.[10] Oklahoma's notification requirements are relatively broad, requiring immediate notification to affected residents following "access" that the entity maintaining the breached system "reasonably believes…will cause [] identity theft or other fraud[.]" Therefore, any cyber policy providing coverage for notification costs in-curred in furtherance of the statute by an entity holding personal information of Oklahoma residents would likely respond to the vast majority of circumstances under which the entity might need to provide notification, notwithstanding statutory requirements. However, other jurisdictions' notification requirements may be more relaxed; they may require notification only after some showing of exploitation of the protected data. (Oregon's counterpart statute defines a security breach as an "unauthorized acquisition of computerized data *that materially compromises* the security, confidentiality or integrity of personal information."[11] Washington's statute also requires the breach to "compromise[] the secu-

rity, confidentiality or integrity of personal information" before requiring notification).[12] The astute risk manager will either review the notification standard(s) for the state(s) of residency of the owners of the protected information they will hold and will purchase coverage consistent with those notification requirements, or will err on the side of caution by obtaining coverage for notification costs based upon the most inclusive definition of "security breach" available.

CONCLUSION

As with any emerging trend in jurisprudence, what is wise counsel one day may appear foolhardy the next. But the fallback position of "We aren't entirely sure what this stuff is, so you'd better buy every kind of coverage you can" may be unnecessarily alarmist. Individuals or entities who maintain confidential electronic data are well-advised to incorporate risk management techniques to protect the enterprise from what is, unfortunately, becoming the "when, not if" probability of a breach by unauthorized persons. Companies should be careful not to rely upon a clause in their commercial general liability policy with the heading "Cyber Risk Coverage" and hope it will adequately address their specific needs. On the other hand, companies need not indiscriminately check every box on the cyber policy application to ward off the unknown, nor should they shy away from seeking cyber coverage on the assumption tailored coverage will be prohibitively expensive. As market players' sophistication increases, refinement of the insurance products offered to suit this new need will also progress. Soon, decision makers will be equally accomplished in calculating and managing cyber risks as they currently are with property or liability risks.

Author's Note: The author expresses his gratitude to Maegan Murdock for her research assistance on this topic.

1. Bailey, Liam M.D., "Mitigating Moral Hazard in Cyber-Risk Insurance," 3 *J.L. & Cyber Warfare* 1 (Spring, 2014).
2. *Id*.
3. Pinguelo, Fernando M.; Stio, Angelo A. III; and Ibrahim, Hasan, *Crisis Management: Electronic Data and Cyber Security Considerations, eDiscovery for Corporate Counsel*, §17.8 (March, 2017).
4. Podolak, Gregory D., "Insurance for Cyber Risks: A Comprehensive Analysis of The Evolving Exposure, Today's Litigation, and Tomorrow's Challenges," 33 *Quinnipiac L. Rev.* 369.
5. Pinguelo, Stio III, and Ibrahim, *Id*.
6. Pinguelo, Stio III, and Ibrahim, *Id*.
7. Greenwald, "Insurer Cites Cyber Policy Exclusion to Dispute Data Breach Settlement," *Business Insurance* (May 15, 2015).
8. Wood and Gold, "When it Comes to Cyberinsurance, Buyer Beware: 10 Tips for Upping Recovery Odds from Cyber and D&O Policies." *Metropolitan Corporate Counsel* (July 17, 2015).
9. 24 O.S. §163(A).
10. 24 O.S. §165(A) and (B).
11. Oregon Rev. Stat. §646A.600 et seq.
12. Wash. Rev. Code §42.56.590 et seq.

ABOUT THE AUTHOR

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Wednesday, November 1, 2017 - 12:00-1:15

Mayo Hotel, Tulsa, Oklahoma

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- **JUDGES CLANCY SMITH AND ARLENE JOHNSON.** The Criminal Law Section of the OBA will honor Judges Smith and Johnson with **The Criminal Law Section of the OBA Lifetime Award** for their service to the legal profession. They will have an opportunity to discuss some "interesting highlights" and fun anecdotes related to their respective legal careers.

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[ ] $35 for anyone after Oct. 20 or at the door **$_____ Total Enclosed**

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Discovery in ERISA: The Exception, Not the Rule

By J. Wesley Pebsworth

The Employee Retirement Income Security Act of 1974 (ERISA) set minimum federal standards for employer-sponsored retirement, health and other welfare benefit plans.[1] Although ERISA does not apply to all employer-provided benefit plans, when it does apply, the plan and claim administrators must adhere to "various uniform procedural standards concerning reporting, disclosure, and fiduciary responsibility."[2] An ERISA participant or beneficiary who believes these standards have not been met may bring a civil action to enforce or determine his rights under the plan. [3]

Courts presented with these cases must base their standard of review on the specific language of the plan at issue. Unless the plan specifically "gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan," the court should conduct a *de novo* review of the administrator's decision.[4] On the other hand, when the plan gives the administrator discretionary authority to interpret the plan, the court's review is limited to determining whether the administrator abused its discretion under the "arbitrary and capricious" standard. [5]

Regardless of the standard of review to be applied, courts in the 10th Circuit generally confine their review to the administrative record that existed before the administrator when it made its decision.[6] Courts recognize that permitting parties to supplement the administrative record in litigation would interfere with ERISA's goal of "provid[ing] a method for workers and beneficiaries to resolve disputes over benefits *inexpensively and expeditiously*."[7] Accordingly, ERISA requires plan participants and fiduciaries to develop the record with facts and information pertinent to a claim before the administrator's final determination is made. Only under specific circumstances will the court permit supplementation of the administrative record in litigation. One such circumstance is the existence of an inherent conflict of interest.

In *Metropolitan Life Insurance Company v. Glenn,* the U.S. Supreme Court acknowledged that a dual-role conflict of interest exists "when the entity that administers the plan, such as an employer or an insurance company, both determines whether an employee is eligible for benefits and pays the benefits out of its own pocket."[8] Although the existence of a conflict of interest does not change the standard of review to be applied by a reviewing court,[9] it is one factor the reviewing court may weigh in deter-

mining whether an administrator has abused its discretion. The weight given to that factor depends on the seriousness of the conflict.[10] A conflict of interest will "prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision … It should prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy."[11]

Because courts may weigh a conflict of interest in evaluating whether an administrator abused its discretion, courts, including the 10th Circuit Court of Appeals, have recognized that "discovery related to the scope and impact of a dual role conflict of interest *may, at times*, be appropriate."[12] The 10th Circuit has not, however, recognized an automatic right to conflict-of-interest discovery.[13] Indeed, in *Murphy,* the court recognized that discovery related to a conflict of interest may often prove inappropriate, and it is the "party moving to supplement the [administrative record] or engage in extra-record discovery [who] bears the burden of showing its propriety."[14] To carry this burden, the party seeking discovery must show that the proposed discovery balances "the need for a fair and informed resolution of the claim and the need for a speedy, inexpensive, and efficient resolution of the claim."[15] The party must also show that the benefits of extra-record discovery outweigh its inherent burdens and costs.[16]

"Courts have identified some specific situations in which the burden of extra-record discovery outweighs its potential benefit."

Courts have identified some specific situations in which the burden of extra-record discovery outweighs its potential benefit. For example, when "the dual role conflict makes [the administrator's] financial interest obvious," discovery is not necessary.[17] The same is true when "the substantive evidence supporting denial of a claim is so one-sided that the result would not change even giving full weight to the alleged conflict."[18] The court should also deny a request for extra-record discovery when the administrative record specifically addresses the conflict of interest, or when the court can otherwise "evaluate the effect of a conflict of interest on an administrator by examining the thoroughness of the administrator's review … based on the administrative record."[19] Thus, before it permits discovery based on an alleged conflict of interest, the court should conduct some level of preliminary analysis to determine if the discovery is even necessary. The existence of a conflict, by itself, will not justify the burden and expense of discovery.

Moreover, even when conflict-of-interest discovery is permitted, it is governed by Fed. R. Civ. P. 26(b), which limits the permissible discovery to only those matters relevant to the conflict of interest and proportional to the needs of the case. Courts will not permit unlimited discovery, but must limit a party's proposed discovery to the scope and impact of the dual-role conflict of interest. Discovery "relate[d] to a claimant's eligibility for benefits" will not be allowed, as such discovery is not relevant to the potential effect of the conflict of interest.[20]

Discovery will also not be allowed when the burden of the discovery promises to outweigh its usefulness. For example, discovery related to an administrator's handling of comparable or similar claims "could create a morass of secondary and remote arguments going to which other cases are comparable and relevant to showing prejudice or bias … The utility of such expensive discovery is likely in all but the most unusual cases to be outweighed by the burdensomeness and costs involved."[21] Courts in the 10th Circuit have also held that discovery seeking the personnel files of specific insurance company employees is overly burdensome and "raises the specter of a fishing expedition, rather than a reasoned request for discovery."[22] Likewise, discovery seeking "any and all documents regarding or reflecting communications … relating in any way to" the plaintiff or his claims are "overbroad, irrelevant and/or improperly seeking discovery into the merits of the claim."[23] Because conflicts of interest only "affect[] the outcome at the margin, when [the Court] waiver[s] between affirmance and reversal," the burdens of discovery will often outweigh its benefits.[24]

It is clear that *Glenn* and *Murphy* opened the door for some ERISA claimants to conduct some limited discovery beyond the administrative record, but the opening was only a crack. Judicial review of most ERISA cases should still be limited to the administrative record as it existed at the time the administrator made its final decision. When a plan gives the plan administrator the authority to construe the terms of the plan, thereby triggering a review of the court's use of the "arbitrary and capricious standard," extra-record discovery should only be allowed if there is a dual-role conflict of interest, *i.e.* when the administrator is vested with responsibility for both determining participants' eligibility for benefits and paying those benefits. Even then, however, the party seeking discovery in an ERISA case bears the heavy burden of showing it is both necessary and properly limited so that the burdens and expense of the proposed discovery will not outweigh its utility. While courts *"may, at times"* find conflict-of-interest discovery is appropriate, that discovery should not be permitted to interfere with ERISA's primary purpose of allowing parties to "resolve disputes over benefits inexpensively and expeditiously."[25]

1. 29 U.S.C. §§1001, *et seq*.
2. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985).
3. 29 U.S.C. §1132(a)(1)(B).
4. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).
5. *Weber v. GE Grp. Life Assur. Co.*, 541 F.3d 1002, 1010 n.10 (10th Cir. 2008).
6. *Hall v. UNUM Life Ins. Co. of Am.*, 300 F.3d 1197, 1201 (10th Cir. 2002); *Geddes v. United Staffing Alliance Emp. Med. Plan*, 469 F.3d 919, 928 (10th Cir. 2006).
7. *Sandoval v. Aetna Life & Cas. Ins. Co.*, 967 F.2d 377, 380 (10th Cir. 1992) (emphasis added) (quoting *Perry v. Simplicity Eng'g*, 900 F.2d 963, 967 (6th Cir. 1990)).
8. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 108 (2008).
9. *Murphy v. Deloitte & Touche Grp. Ins. Plan*, 619 F.3d 1151, 1158 n.1 (10th Cir. 2010).
10. *Id*. at 1162.
11. *Foster v. PPG Indus., Inc.*, 693 F.3d 1226, 1232 (10th Cir. 2012) (quoting *Glenn*, 554 U.S. at 117.)
12. *Murphy*, 619 F.3d at 1162 (emphasis added).
13. *Williams v. Metro. Life Ins. Co.*, No. 10-1504, 459 Fed. Appx. 719, 728 (10th Cir. 2012) (explaining that *Murphy* "acknowledge[s] extra-record evidence is not appropriate in every case involving bias or a conflict of interest").
14. *Murphy*, 619 F.3d at 1163.
15. *Id*. at 1164.
16. *Id*. at 1163.
17. *Id*. *See also Hurley v. Dyno Nobel, Inc.*, No. 2:08-cv-415-CW-PMW, 2011 WL 587591, *3 (D. Utah Feb. 9, 2011) (finding "the benefit of [extra-record] discovery is outweighed by the potential burden and cost because 'the inherent dual role conflict makes [the Plan's] financial interest obvious'").
18. *Murphy*, 619 F.3d at 1163.
19. *Id*.
20. *Id*. at 1162. *See also Sandoval*, 967 F.2d at 377 (holding that insured "is not entitled to a second chance to prove his disability"); *Paul v. Hartford*, No. 08-cv-890-REB-MEH, 2008 WL 2945607, *3 (D. Colo. July 28, 2008) (rejecting proposed discovery "into the merits of the claim"); *Kohut v. Hartford Life & Acc. Ins. Co.*, 710 F. Supp. 2d 1139, 1152 (D. Colo. 2008) (recognizing "prohibition on extra-record discovery…directed at uncovering additional evidence of a claimant's eligibility for benefits").
21. *Gundersen v. Metro. Life Ins. Co.*, No. 2:10-CV-50 DB, 2011 WL 487755, *3 (D. Utah Feb. 7, 2011). *See also Martinez v. Standard Ins. Co.*, CV-14-00758 JAP/WPL, 2015 WL 12806492, *2 (D.N.M. Jan. 23, 2015) (denying discovery into administrator's "interpretation and application of the alcohol exclusion in other cases and statistical data concerning the number of files sent to the [reviewing] physicians and the number of times the physicians found claimants not entitled to benefits" because the benefit was outweighed by the cost and burden) and *Rivera v. Unum Life Ins. Co. of Am.*, No. 11-CV-02585-WYD-KLM, 2012 WL 2709138, at *4 (D. Colo. July 9, 2012) (denying discovery of administrator's "internal guidelines and procedures" when administrator agreed to produce its claims manual and additional discovery would be "duplicative").
22. *Rivera*, 2012 WL 2709138, at *4.
23. *York v. Prudential Ins. Co. of Am*., No. 13–cv–03289–REB–MJW, 2014 WL 1882475, *2 (D. Colo. May 12, 2014).
24. *Hancock v. Metro. Life Ins. Co*., 590 F.3d 1141, 1155 (10th Cir. 2009).
25. *Sandoval*, 967 F.2d at 380.

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J. Wesley Pebsworth is an associate in the Tulsa office of GableGotwals. He advises clients in a variety of areas, including insurance law, general commercial litigation and multidistrict litigation. He is admitted to practice in all state and federal courts in Oklahoma, the 10th Circuit Court of Appeals and North Dakota state courts.

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HIGHLIGHTS

Delegates Breakfast

Be inspired to love what you do at the Delegates Breakfast with keynote speaker Jill Donovan, founder and creative genius of the iconic Rustic Cuff jewelry and accessories company. She will share her story of passion and love as head of a fast-growing company. As an OBA member and a former TU College of Law professor, she brings a familiar perspective and keen insight to members of the bar. This year's Friday morning breakfast will be a ticketed event, free for delegates or only $30 for nondelegates.

Jill Donovan

Rustic Cuff is also working with the OBA to design a unique piece of jewelry for the meeting, and President Linda Thomas will be making further announcements soon.

President's Reception

Join President Linda Thomas on Wednesday evening to celebrate the 50th anniversary of the Judicial Nominating Commission. Free with Annual Meeting registrations, and each participant can enjoy free food and two complimentary drink tickets.

Annual Luncheon

Attorney Coach Nora Riva Bergman will share "For the Love of Productivity: 40 Tips in 40 Minutes" at Thursday's Annual Luncheon. Tickets are available with or without meeting registration; sponsored by the OBA Family Law Section.

Show Your Love at the Jazz Hall of Fame

Dress in your best Roaring 20s attire and show your love to section and committee chairs and celebrate 60- and 70-year members at the Oklahoma Jazz Hall of Fame on Thursday evening. Free admission to all; sponsored by the OBA sections and OBF.

REGISTRATION

Don't miss out! Meeting registration includes Annual Luncheon keynote speaker Nora Riva Bergman's popular productivity book *50 Lessons for Lawyers*, plus admission to social events and 20% off Annual Luncheon tickets.

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OBA CLE SPEAKERS ANNOUNCED

Fall in love with our topics, presenters and CLE options during this year's Annual Meeting. Three tracks of continuing legal education programs will be offered on both Wednesday morning and afternoon, Nov. 1, and a plenary session will be available Thursday morning, Nov. 2.

For the most up-to-date information, including updated speakers and room assignments, visit the CLE section of the Annual Meeting website at www.amokbar.org/cle.

NAKED AND AFRAID IN THE DIGITAL AGE: SURVIVAL OF THE FITTEST

Wednesday morning and afternoon

This track will include information on technology trends, security and digital client files. It will also feature Britt Lorish, a recognized expert in law office finance, billing, trust accounting and paperless office concepts. She will teach you everything you need to know about time, billing and accounting software as well as provide the IRS Audit Survival Manual for law firms.

COME AND GO ETHICS

Wednesday morning

This track's ethics presenters include Oklahoma Court of Civil Appeals Judge Jane Wiseman and OBA General Counsel Gina Hendryx. Also, back by popular demand, the American Board of Trial Advocates will present "Civility Matters."

THE CROSSROADS BETWEEN FAMILY LAW AND ...

Wednesday morning

If you practice family law, you won't want to miss this track, focusing on the relationship and crossroads between family law and other areas of practice such as mediation and criminal law, as well as examining family law and finances.

WHAT HAVE THEY DONE TO ME NOW? SIGNIFICANT DECISIONS FOR YOU AND YOUR PRACTICE

Wednesday afternoon

This track will feature panel discussions by distinguished judges and legislators moderated by Karen Grundy of the TU College of Law. Also, Kieran Maye Jr. will review U.S. Supreme Court decisions and coming attractions.

LIFE & LAW PLAN

Wednesday afternoon

Heather Hubbard, founder of The Language of Joy, created the Life & Law Plan framework to help lawyers intentionally design a career and life of meaning and purpose. Learn the framework of an integrated plan, explore the areas of your career and life that need the most attention, establish priorities and outline your strategy for success.

PLENARY: RESETTING YOUR LAW FIRM FOR A CHANGING ECONOMY AND MARKETPLACE

Thursday morning

You will love Thursday morning's plenary session. Annual Luncheon keynote speaker Nora Riva Bergman will kick off the morning with her two-hour presentation, "Earn More. Stress Less. Be Awesome. 12 Simple Strategies to Help You Fall in Love ... With Your Law Practice" based on her book *50 Lessons for Lawyers*. She will share her strategies for helping lawyers achieve a sound balance in their personal and professional lives. OBA MAP Director Jim Calloway will follow Ms. Bergman with a presentation on "Marketing Your Practice in the Digital Age."

WEDNESDAY MORNING

Time	Naked and Afraid in the Digital Age: Survival of the Fittest	Come and Go Ethics	The Crossroads Between Family Law and ...
9 a.m.	From Limited Scope Services to Artificial Intelligence: Cutting Edge Trends Important to the Practice of Law *Jim Calloway, OBA*	Ten Things Every New Lawyer Needs to Know and What Others May Have Forgotten (1 ethics) *Judge Jane Wiseman, Court of Civil Appeals*	Mediation *Collin Walke, Oklahoma House of Representatives*
10 a.m.	Everything You Need to Know About Time, Billing and Accounting Software *Britt Lorish, Affinity Consulting*	Civility Matters (1 ethics) *American Board of Trial Advocates (ABOTA)*	Criminal Law *Emily Virgin, Oklahoma House of Representatives*
11 a.m.	Utilizing Client Portals for Increased Security and Better Client Service *Darla Jackson, OBA*	The Ten Most Common Bar Complaints: How to Avoid Becoming a Statistic! (1 ethics) *Gina Hendryx, OBA General Counsel*	Finances: All About Money! *Aaron Arnall and Dan Buckelew, Tulsa*

WEDNESDAY AFTERNOON

Time	Naked and Afraid in the Digital Age: Survival of the Fittest	What Have They Done to Me Now? Significant Decisions for You and Your Practice	Heather Hubbard Life & Law Plan
2 p.m.	The IRS Audit Manual for Law Firms – What You Must Know to Survive *Britt Lorish, Affinity Consulting*	Significant Legislation Panel *Moderator: Karen Grundy, TU College of Law* *Panel: Terry O'Donnell, Collin Walke, Chris Kannady and Emily Virgin, Oklahoma House of Representatives*	Create Your Life & Law Plan, *Heather Hubbard The Language of Joy*
3 p.m.	Don't Be Afraid: How You and Your Practice Will Benefit from Digital Client Files *Jim Calloway and Darla Jackson, OBA*	Significant Case Law Panel *Moderator: Karen Grundy, TU College of Law* *Panel: Justice John Reif, Oklahoma Supreme Court; Retired Judge Clancy Smith, Court of Criminal Appeals; and Jane Wiseman, Court of Civil Appeals*	Create Your Life & Law Plan, cont'd *Heather Hubbard, The Language of Joy*
4 p.m.	Like It or Not ... Automated Document Assembly Is in Your Future *Jim Calloway, OBA*	A Review of Recent U.S. Supreme Court Decisions and Coming Attractions *Kieran D. Maye Jr., Edmond*	Create Your Life & Law Plan, cont'd *Heather Hubbard, The Language of Joy*

THURSDAY MORNING

Time	Plenary: Resetting Your Law Firm for a Changing Economy and Marketplace
9 a.m.	Earn More, Stress Less, Be Awesome. 12 Simple Strategies to Help You Fall in Love... with Your Law Practice *Nora Riva Bergman, Attorney Coach and Author, Annual Luncheon Keynote Speaker*
10 a.m.	Marketing Your Practice in the Digital Age (.5 ethics) *Jim Calloway, OBA*

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NOVEMBER 1-3 | TULSA

PROGRAM OF EVENTS

All events will be held at the Hyatt Regency Tulsa unless otherwise specified. Meetings are added as requests are received so rooms are subject to change. The list below was up-to-date as of time of press. Check www.amokbar.org/program for the most recent schedule, including room assignments. Submit meeting room requests to Craig Combs at craigc@okbar.org.

WEDNESDAY, NOV. 1

Oklahoma Fellows of the American Bar Foundation..... 8 a.m. – 9 a.m.

OBA Hospitality..... 8 a.m. – 5 p.m.

Board of Bar Examiners .....8:30 a.m. – Noon

OBA CLE .....9 – 11:50 a.m.
See CLE article for speakers and complete agenda

OBA Registration ..... 11 a.m. – 5 p.m.

Criminal Law Section Luncheon.....Noon – 1:30 p.m.
Mayo Hotel
115 W. 5th St.

OU College of Law Alumni Luncheon ..... Noon – 1:30 p.m.

TU College of Law Alumni Luncheon.....Noon – 1:30 p.m.

OCU School of Law Alumni Luncheon.....Noon – 1:30 p.m.

Law Day Committee.....2 – 3:30 p.m.

Indian Law Section.....2 – 4 p.m.

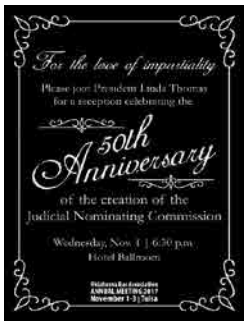
Board of Governors.....2 – 4 p.m.

OBA CLE .....2 – 4:50 p.m.
See CLE article for speakers and complete agenda

Legal Aid Reception.....5 – 6:30 p.m.

TU College of Law Reception.....5 – 6 p.m.

President's Reception.....6:30 – 8:30 p.m.



Free for everyone with meeting registration; Full bar, hors d'oeuvres and nonalcoholic beverages available

Past Presidents Dinner..... 7:30 – 9 p.m.

THURSDAY, NOV. 2

OBA Registration ..... 8 a.m. – 5 p.m.

OBA Hospitality..... 8 a.m. – 5 p.m.

Judicial Training..... 8 a.m. – 4 p.m.

Family Law Section ..... 8 a.m. – 4:40 p.m.
Cox Convention Center

Robert Spector
Professor Emeritus of Law, OU College of Law

Sari de la Motte
Trial Consultant, FORTE, Portland, Oregon

Oklahoma Fellows of American College of Trial Lawyers..... 8:30 – 9:30 a.m.

Credentials Committee..... 9 – 9:30 a.m.

Section Leadership Council ..... 9 – 10 a.m.

OBA CLE ..... 9 – 11:50 a.m.
See seminar program for speakers and complete agenda

Rules and Bylaws Committee .... 10 – 10:30 a.m.

Law School Committee ..... 10 – 11 a.m.

Business and Corporate Law Section .....10 a.m. – Noon

Janis Meyer
Hinshaw & Culbertson LLP, New York

TOPIC: *Ethics in a Wireless World: The Perils Posed by Lawyers' Use of Technology*

MCLE Commission..... 10:30 – 11:30 a.m.

Resolutions Committee ..... 10:45 – 11:45 a.m.

OBA Annual Luncheon ..... Noon – 1:45 p.m.
$50 without meeting registration; $40 with meeting registration
SPONSOR: *Family Law Section*

Nora Riva Bergman
Author, Attorney Coach Certified Atticus Practice Advisor

TOPIC: *For the Love of Productivity: 40 Tips in 40 Minutes*

Leadership Academy..... 2:30 – 4:45 p.m.

Juvenile Law Section..... 2 – 4 p.m.

Health Law Section..... 2 – 4 p.m.

David Cade
American Health Lawyers Association, Washington, D.C.

TOPIC: *Health Law Update*

Bankrupty and Reorganization Law Section..... 2 – 4 p.m.

Mark Bonney
Chapter 13 Trustee for the Eastern District of Oklahoma

and

Lonnie Eck
Chapter 13 Trustee for the Northern District of Oklahoma

TOPIC: *The New Chapter 13 Plan and Related Local Rules*

A representative from the Office of the U.S. Trustee will also present Tips from the United States Trustee.

Real Property Section..... 2 – 4 p.m.

Vice Chief Justice Noma Gurich
Oklahoma Supreme Court

Estate Planning/Taxation Sections joint meeting..... 2 – 6 p.m.

Turner P. Berry
Tarrant & Combs, Louisville, Kentucky

TOPIC: *Incorporating New Uniform Acts, and Their Principles, Into Your Practice*

Oklahoma Bar Journal Board of Editors..... 2:30 – 4 p.m.

Oklahoma Bar Foundation Executive Committee..... 2:30 – 3:30 p.m.

Immigration Law Section..... 3 – 4 p.m.

Oklahoma Bar Foundation Board of Trustees..... 3:30 – 5 p.m.

Young Lawyers Division..... 4 – 5 p.m.

Disability Law Section..... 4 – 6 p.m.

Law Office Management and Technology Section..... 4:30 – 5:30 p.m.

International Law Section..... 4:30 – 5:30 p.m.

Energy and Natural Resources Law Section..... 4:30 – 6:30 p.m.

Show Your Love at the Jazz Hall of Fame .....5:30 – 8:30 p.m.

SPONSOR: *Oklahoma Bar Foundation and OBA Sections*

No Annual Meeting registration required! Dress in your best Roaring 20s attire. Full bar, hors d'oeuvres and nonalcoholic beverages available.

FRIDAY, NOV. 3

Lawyers Helping Lawyers Breakfast..... 7:30 – 8:30 a.m.

Delegates Breakfast.....8 – 9 a.m.
$30 for nondelegates; free for delegates

Jill Donovan
Founder of Rustic Cuff Tulsa

TOPIC: *Loving What You Do*

OBA Registration ..... 8 – 11 a.m.

OBA Hospitality..... 8 – 11 a.m.

Oklahoma Bar Association General Assembly.....9:30 – 10:30 a.m.

Alternative Dispute Resolution Section..... 10 – 11:30 a.m.

Oklahoma Bar Association House of Delegates..... 10:30 a.m. – Noon

Tellers Committee.....10:30 a.m. – Noon

NOTICE OF MEETINGS

CREDENTIALS COMMITTEE

The Oklahoma Bar Association Credentials Committee will meet Thursday, Nov. 2, 2017, from 9-9:30 a.m. in Room 1 of Director's Row on the second floor of the Hyatt Regency Hotel, 100 E. Second Street, Tulsa, Oklahoma, in conjunction with the 113th Annual Meeting. The committee members are: Chairperson Luke Gaither, Henryetta; Jeff Trevillion, Oklahoma City; Lane Neal, Oklahoma City; and Jennifer Castillo, Oklahoma City.

RULES & BYLAWS COMMITTEE

The Rules & Bylaws Committee of the Oklahoma Bar Association will meet Thursday, Nov. 2, 2017, from 10-10:30 a.m. in Room 1 of Director's Row on the second floor of the Hyatt Regency Hotel, 100 E. Second Street, Tulsa, Oklahoma, in conjunction with the 113th Annual Meeting. The committee members are: Chairperson Judge Richard A. Woolery, Sapulpa; Roy D. Tucker, Muskogee; Billy Coyle, Oklahoma City; Gretchen Garner, Tulsa; and Ron Gore, Tulsa.

RESOLUTIONS COMMITTEE

The Oklahoma Bar Association Resolutions Committee will meet Thursday, Nov. 2, 2017, from 10:45-11:45 a.m. in Room 1 of Director's Row on the second floor of the Hyatt Regency Hotel, 100 E. Second Street, Tulsa, Oklahoma, in conjunction with the 113th Annual Meeting. The committee members are: Chairperson Molly A. Aspan, Tulsa; Kendall A. Sykes, Oklahoma City; Ruth Calvillo, Tulsa; Clayton Baker, Grove; Courtney Briggs, Oklahoma City; and Mark Fields, McAlester.

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OKLAHOMA BAR ASSOCIATION
ANNUAL MEETING 2017
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2018 TRANSITIONS

2017 President
Linda S. Thomas, Bartlesville

Linda S. Thomas is a solo practitioner in Bartlesville, focusing her practice in all areas of law associated with children and family. She received a J.D. from the TU College of Law, was admitted to the OBA in 1994 and is a member of the Washington County Bar Association, American Bar Association and Texas Bar Association. She is also licensed to practice in the Northern District of Oklahoma.

Ms. Thomas served on the OBA Board of Governors as OBA vice president and served on the OBA Professional Responsibility Commission. She has served as the OBA Leadership Academy Task Force chair or co-chair since 2007 and on several other committees and task forces. She is a member of the Family Law Section, a volunteer for Oklahoma Lawyers for America's Heroes and Legal Aid Services of Oklahoma, is an Oklahoma Bar Foundation Charter Benefactor Fellow, former OBF trustee, a YLD Fellow and an American Bar Foundation Oklahoma Life Fellow.

Ms. Thomas is the recipient of two OBA President's Awards, the Mona Salyer Lambird Spotlight Award and was named as one of Oklahoma's pioneering women lawyers in *Leading the Way: A Look at Oklahoma's Pioneering Women Lawyers.*

Ms. Thomas is also active in her community working with the local domestic violence shelters, serving as a court-approved guardian *ad litem,* a trained mediator, parenting coordinator in domestic cases and has served on the boards for several local organizations.

2018 President
Kimberly K. Hays, Tulsa

Kimberly Hays is a solo practitioner in Tulsa. She has practiced exclusively in the area of family law since 1993. She received her B.A. in 1990 from OSU. She graduated from the University of Kansas School of Law with her J.D. in 1993 and is a member of the Tulsa County and Creek County bar associations and American Bar Association.

Ms. Hays served on the OBA Board of Governors, District 6 Tulsa, in 2012-2014 and served as the OBA Section Leaders Council chair. She is the past chair of the OBA Family Law Section and has also served as the section's chair-elect, secretary, CLE chair and budget chair. Ms. Hays is on the faculty of the OBA FLS Trial Advocacy Institute. She has co-chaired the OBA Solo & Small Firm Conference and served as the Women in Law Committee co-chair and chair. She has served on numerous OBA committees including the Budget Committee, Strategic Planning Task Force, Communications Committee, Law Day Committee, Professionalism Committee and Bench and Bar Committee.

Ms. Hays is also active in the Tulsa County Bar Association, having served as a director at large, chair of the TCBA Family Law Section, as a member of the Professionalism Committee and the Professional Responsibility Committee. She is a volunteer attorney for Legal Aid Services, DVIS and Oklahoma Lawyers for America's Heroes. Ms. Hays is the recipient of the OBA FLS Family Law Attorney of the Year, Mona Salyer Lambird Spotlight Award and OBA FLS Chair Award.

2018 NEWLY ELECTED BOARD OF GOVERNORS

Pursuant to Rule 3 Section 3 of the Oklahoma Bar Association Bylaws, the following nominees have been deemed elected due to no other person filing for the position.

President-Elect
Charles W. Chesnut, Miami

Charles W. "Chuck" Chesnut is a solo practitioner in Miami. He is a third-generation Oklahoma lawyer. He was born and raised in Miami and upon graduation from high school, he attended OU where he received his bachelor's degree in business administration in 1974. He graduated from the OU College of Law in 1977. His main areas of practice are real estate, probate and estate planning.

He is a member and past president of the Ottawa County Bar Association. He served as U.S. magistrate judge (part-time) for the U.S. District Court, Northern District of Oklahoma from 1983-1987 and was a temporary panel judge for the Oklahoma Court of Appeals in 1991-1992. He is a past member of the OBA YLD Board of Directors, a sustaining member of the Oklahoma Bar Foundation, was a trustee of the OBF from 1993-2000 and served as OBF president in 1999. He also served on the OBA Board of Governors from 2009-2011. He is a member of the Real Property Law, Estate Planning and Probate and Law Office Management and Technology sections and has been a member of a number of OBA committees, currently serving on the Budget Committee.

He is active in his community having served as a member of the Miami Board of Education for 17 years and as its president for a number of those years. He is a member and past president of the Miami Chamber of Commerce. He also volunteers as a mentor to a fifth-grade elementary school class one afternoon per week during the school year.

He is married to Shirley Murphy Chesnut and has four children and one grandson.

Vice President
Richard Stevens, Norman

Richard Stevens is a solo practitioner in Norman. He retired from the District 21 District Attorney's Office in 2016 after 33 years as a prosecutor. He received both his B.A. (1978) and J.D. (1982) from OU.

He is a member of the OBA Criminal Law Section and the Rules of Professional Conduct Committee. Mr. Stevens served as an at-large governor on the OBA Board of Governors from 2013-2015. He is currently on the Professional Responsibility Commission.

He has been active with both the OBA and the Cleveland County Disaster Response and Relief committees and the OBA Lawyers for America's Heroes Program.

He is an active member of the Cleveland County Bar Association, having served on its Executive Committee from 2010-2012. He served as the district attorney's liaison to the Cleveland County Community Sentencing Council and served on the Cleveland County Board of Law Library Trustees.

He is also a member of The Florida Bar.

Supreme Court Judicial District One
Brian T. Hermanson, Newkirk

Brian Hermanson is the district attorney for Kay and Noble counties. He received his B.A. from Carroll College (Wisconsin) and his J.D. from the OU College of Law. He is a member of the Kay and Noble County bar associations, having served as president of the Kay County Bar Association in 1989 and the Noble County Bar Association in 2016 to the present.

Mr. Hermanson was vice president of the OBA in 1988, Oklahoma Bar Foundation president in 1993 and chair of the OBA Young Lawyers Division in 1982. He has served as chair of the OBA General Practice, Law Practice Management and Technology and Criminal Law

sections and served three terms as chair of the Litigation Section. He has also served as Oklahoma Chapter of the America Board of Trial Advocates and Oklahoma Criminal Defense Lawyers Association president, served on the OBA Board of Editors and as the Oklahoma District Attorneys Association secretary/treasurer.

Mr. Hermanson was awarded the David Moss Memorial Award for Outstanding District Attorney in 2016, the Clarence Darrow Award in 1986, the Earl Sneed Award in 1998, the University of Oklahoma Regents Award in 1994 and was named Sole Practitioner of the Year by the Solo, Small Firm and General Practice Division of the ABA.

Mr. Hermanson has served on the Oklahoma Court of Criminal Appeals Committee for Uniform Criminal Jury Instruction since 1994, as the ABA Standing Committee on Gavel Awards chair for three years, president of the Ponca City Rotary Club, Ponca City YMCA, Ponca Playhouse, is an ex officio member of the Ponca City Chamber of Commerce Board of Directors and is an elder and past chairman of the board of Community Christian Church.

Mr. Hermanson lives in Ponca City with his wife, Ruslyn. He is the proud father of two grown daughters.

Supreme Court Judicial District Six

D. Kenyon Williams Jr., Tulsa

D. Kenyon Williams Jr. is a shareholder of the law firm of Hall, Estill, Hardwick, Gable, Golden & Nelson PC in Tulsa. During his 40 years of practice, Mr. Williams has predominately assisted and defended businesses and communities in regulatory compliance or litigation matters in the areas of environment, natural resources, real estate and renewable energy. He is licensed to practice in all Oklahoma courts and the United States District Courts for the Northern, Eastern and Western Districts of Oklahoma. He is also licensed to practice in all Arkansas courts.

He is serving his second appointment to the Professional Responsibility Tribunal and has served as chair of the Environmental Law Section. He speaks frequently on environmental and energy topics and in 2013 received the Earl Sneed Award for his contributions to continuing legal education.

Mr. Williams currently serves as co-chair of the Tulsa County Bar Association Professionalism Committee and served as president of the TCBA in 2014-2015, one of the years the TCBA was awarded the OBA Outstanding County Bar Association Award. He also served as the TCBA Law Day Committee chair in 2012-2013, another year the TCBA was awarded the OBA Outstanding County Bar Association Award.

A Tulsa native, he received a B.S. in petroleum engineering and a J.D. from the TU College of Law. An Eagle Scout Award recipient from the Boy Scouts of America, Mr. Williams served as scoutmaster for BSA Troop 89 in Skiatook from 1990 through 1995.

Supreme Court Judicial District Seven

Matthew C. Beese, Muskogee

Matthew C. Beese, was raised in Miami where, prior to attending law school, he spent three years as a high school teacher. In 1999, he moved to Illinois and following law school his law practice focused on family law where he was frequently appointed to represent the interests of children in high conflict custody matters. In 2009, he returned to Oklahoma and now serves as the deputy city attorney for the City of Muskogee and has been in that position since 2011. He is actively engaged in both local and state professional organizations, including having served as the Muskogee County Bar Association president in 2014 and as vice president in 2013. He has been a trainer for the Oklahoma Forensic Academy and an instructor for the Council on Law Enforcement Education and Training (CLEET), providing training to law enforcement agencies and has instructed Business Law at Bacone College. Mr. Beese has been trained and certified as a court appointed mediator and arbitrator, and has served as the chair for numerous arbitration panels.

He holds an Associate of Arts from Northeastern Oklahoma A&M, a Bachelor of Science in education from Missouri Southern State Col-

lege and a J.D. from Northern Illinois University College of Law. He is licensed to practice law in Oklahoma and Illinois, and admitted to practice before the Eastern District of Oklahoma, the Northern District of Illinois, the 10th Circuit Court of Appeals and the United States Supreme Court.

Member At Large
Brian K. Morton, Oklahoma City

Brian K. Morton was raised in Ada. After serving eight years in the U.S. Coast Guard as a marine science technician, he obtained his undergraduate degree from UCO in May 1997. He then graduated from the OU College of Law in 2000. After law school, he worked as an assistant district attorney in Sequoyah County, and then as a criminal defense attorney throughout eastern Oklahoma.

Wanting to have a positive impact on the lives of young students, he obtained his teaching certification in 2005, and taught history and government for three years at Central High School outside of Sallisaw. He also served as the coach for the school's mock trial team and sponsored the school's Fellowship of Christian Athletes club.

In 2008, he moved to Oklahoma City and worked for the Legal Division of the Department of Public Safety. For the past three years he has handled all driver's license revocation cases for the Hunsucker Legal Group in Oklahoma City and the Edge Law Firm in Tulsa where he has secured a number of landmark appellate cases that had statewide implications for thousands of Oklahoma citizens. He has been requested on a number of occasions by the OBA, county bar associations and Criminal Defense Lawyers Association to provide CLE in the area of DUI law, driver's license revocations and issues involving Commercial Driver's Licenses (CDL).

He currently resides in southwest Oklahoma City with his wife Jennifer, and two daughters, Emily and Ashley. In his spare time, he serves on the Westmoore High School Band Boosters Executive Board.

OBA YLD Chair
Nathan D. Richter, Mustang

Nathan D. Richter was born in Oklahoma City. He is a graduate of Mustang High School (1996), OU (B.S. 2000) and the OCU School of Law (2007). Before beginning his legal career, he served in the Oklahoma Army National Guard for 10 years. He was deployed in support of Operation Enduring Freedom to Afghanistan in 2003 where he received the Joint Forces Commendation Medal and numerous other awards.

Mr. Richter is a trial lawyer currently working for the Denton Law Firm located in Mustang. He has an active trial practice in the areas of personal injury, product liability, trucking and auto collisions, criminal defense and domestic relations. He is very active in the profession as a former president of the Canadian County Bar Association (2012), a volunteer with Trinity Legal Clinic providing pro bono legal services to Oklahoma's indigent population, a volunteer with the Oklahoma Bar Association's Lawyers for America's Heroes Program, a member of the Robert J. Turner American Inn of Court and the current treasurer for the OBA Young Lawyers Division. He is also very active in his community. He serves as a board member for Youth & Family Services Inc. in Canadian County and is a member of Life Church, Mustang.

In his spare time, he enjoys golfing, cycling and spending time with his family. He is married to Kristin Richter, and they have two children: Harrison (7) and Kailyn (6).

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2017 HOUSE OF DELEGATES

Delegate certification should be sent to OBA Executive Director John Morris Williams.

COUNTY	DELEGATE	ALTERNATE
Adair Co.	Ralph F. Keen II	Jeffrey Jones
Alfalfa Co.		
Atoka Co.		
Beaver Co.	Todd Trippet	Abby Cash
Beckham Co.		
Blaine Co.	Daniel G. Webber	Judge Mark Moore
Bryan Co.	Chris D. Jones	Don Michael Haggerty II
Caddo Co.		
Canadian Co.	Alex Handley	Mark W. Osby
	Nathan D. Richter	Judge Barbara Hatfield
	B. Curtis Chandler	Sandra Steffen
	Harold Drain	Matthew Wheatley
Carter Co.	Michael Mordy	Alexa Stumpff
	David Blankenship	Fred Collins
Cherokee Co.	Grant Lloyd	
	Bill Baker	
Choctaw Co.	J. Frank Wolf III	Thomas J. Hadley
Cimarron Co.	Judge Ronald L. Kincannon	Stanley Ed Manske
Cleveland Co.	Rebekah Taylor	Catherine E. Butler
	Kristina Bell	Blake Virgin
	Holly Lantagne	Holly Iker
	Emily Virgin	Donnie G. Pope
	Peggy Stockwell	Rick Knighton
	Richard Stevens	Dave Batton
	Judge Stephen Bonner	Judge Lori Walkley
	Jan Meadows	Debra Loeffelholz
	Alissa Hutter	Kevin Finlay
	Ben Odom	Betsy Brown
	Richard Vreeland	David Swank
	Judge Thad Balkman	Dick Smalley
	Gary Rife	Tyson Stanek
	Micheal Salem	John Sparks
	Rod Ring	Donna Compton
	Rick Sitzman	Julia Mettry
	Jeanne M. Snider	Kristi Gundy
	David Poarch	Bethany E. Stanley
	Dave Stockwell	Tina J. Peot

	Judge Jeff Virgin	Christopher C. Lind
	Amelia Sue Pepper	Weldon E. Nesbitt
Coal Co.	Johnny Sandmann	
Comanche Co.	Robin Rochelle	Kade McClure
	Dietmar Caudle	Kathryn McClure
	Tyler C. Johnson	
Cotton Co.		
Craig Co.	Kent Ryals	Leonard M. Logan IV
Creek Co.	Carla R. Stinnett	Kelly Allen
	G. Gene Thompson	Laura Farris
Custer Co.	Donelle Ratheal	Luke Adams
Delaware Co.	Clayton Baker	John W. Thomas
Dewey Co.	Judge Rick Bozarth	
Ellis Co.	Judge Laurie E. Hays	Joe L. Jackson
Garfield Co.	Eric N. Edwards	Amber Gill
	Julia C. Rieman	Glenn Devoll
	Judge Paul Woodward	Ben Barker
Garvin Co.	Dan Sprouse	Logan Beadles
Grady Co.		
Grant Co.	Judge Jack D. Hammontree	Steven A. Young
Greer Co.	Kelli Rae Woodson	Corry Kendall
Harmon Co.	David L. Cummins	Jim Moore
Harper Co.		
Haskell Co.		
Hughes Co.	John Baca	Jeff Whitesell
Jackson Co.	Grant Kincannon	
Jefferson Co.		
Johnston Co.		
Kay Co.	Guy P. Clark	
	Brian T. Hermanson	
Kingfisher Co.	Matthew R. Oppel	Austin C. Evans
Kiowa Co.	Thomas Talley	Rick Marsh
Latimer Co.	F. Nils Raunikar	Ron Boyer
LeFlore Co.	Dru Waren	Amanda Grant
Lincoln Co.	Zachary Privott	
Logan Co.		
Love Co.	Richard A. Cochran	Kenneth L. Delashaw
Major Co.		
Marshall Co.		
Mayes Co.		
McClain Co.	Haley Dennis	Thorne Stallings
McCurtain Co.	Scott Doering	Judge Michael DeBerry
McIntosh Co.		
Murray Co.		
Muskogee Co.	Roy D. Tucker	John Hammons
	Matthew C. Beese	Matthew R. Price
Noble Co.	Shane Leach	
Nowata Co.		
Okfuskee Co.		

Oklahoma Co.	David Cheek	Ken Stoner
	Michael W. Brewer	Shanda McKenney
	Judge Sheila Stinson	Christopher Staine
	Judge Roger Stuart	Liz Oglesby
	J. W. Coyle III	Chance Pearson
	T. Luke Abel	Cindy Goble
	Angela Ailles Bahm	Coree Stevenson
	Will Hoch	Bradley Davenport
	W. Todd Blasdel	John "Jake" Krattiger
	Jeff Curran	Merideth Herald
	Daniel Couch	Michael Chitwood
	Ed Blau	Cody Cooper
	Kristie Scivally	Haylie Treas
	Bob Jackson	Justin Meek
	David Dobson	Miguel Garcia
	Richard Rose	Lorenzo Banks
	Ray Zschiesche	Kenyatta Bethea
	Billy Croll	Edward White
	W. Brett Willis	Sarah Jernigan McGovern
	Thomas E. Mullen	Jeffrey Trevillion
	Stanley L. Evans	
	Judge Don Andrews	Celeste England
	Judge Barbara Swinton	Robert Don Gifford
	Judge Richard Ogden	Richard Parr
	Lauren Barghols Hanna	Stephen Cortes
	Timothy Bomhoff	
	Chris B. Deason	Jeffrey Wise
	Judge Cassandra Williams	Elisabeth Muckala
	M. Courtney Briggs	John Heatly
	Susan Carns Curtiss	Mack K. Martin
Okmulgee Co.	Luke Gaither	Lou Ann Moudy
Osage Co.		
Ottawa Co.	John Weedn	Becky Baird
Pawnee Co.	Joshua Kidd	Robert K. Alderson
Payne Co.	Brenda Nipp	
	Jimmy Oliver	
	William Ahrberg	
Pittsburg Co.	Mark E. Fields	
Pontotoc Co.	T. Walter Newmaster	
	Lacie Lawson	
Pottawatomie Co.	Brandi Nowakowski	
Pushmataha Co.	Charlie Rowland	Gerald Dennis
Roger Mills Co.	F. Pat VerSteeg	Thomas B. Goodwin
Rogers Co.	Kassie McCoy	Tim Pickens
	Noah Sears	Melinda Wantland
	Kevin Easley	Timothy Wantland
Seminole Co.	R. Victor Kennemer	William D. Huser
Sequoyah Co.	Kent S. Ghahremani	John Cripps
Stephens Co.	James L. Kee	
Texas Co.	Douglas Dale	Cory Hicks
Tillman Co.		

Tulsa Co.	Judge Jane P. Wiseman	James C. Milton
	James R. Hicks	Tony W. Haynie
	Matthew S. Farris	Kara Pratt
	Charles R. Hogshead	Maren M. Lively
	Paul D. Brunton	Richard D. White Jr.
	Larry D. Leonard	Elizabeth Kathleen Pence
	Molly A. Aspan	Scott V. Morgan
	Julie A. Evans	Eric Clark
	Kenneth L. Brune	Luke Barteaux
	Christina M. Vaughn	Deborah A. Reed
	Kimberly K. Hays	Michael E. Esmond
	Jack L. Brown	Hans O. Lehr
	Gerald L. Hilsher	Ruth Addison
	Paul B. Naylor	Tim Rogers
	Bruce A. McKenna	Georgenia Van Tuyl
	Judge Millie Otey	Justin Munn
	Judge Martha Rupp Carter	
	Jim Gotwals	Phil Feist
	Faith Orlowski	Chris Davis
	Zach Smith	Brenna Wiebe
	Robert Sartin	Jill Walker-Abdoveis
	Ken Williams	Jeffrey Wolfe
	Leonard Pataki	Clark Crapster
	Amber Peckio Garrett	David "Mike" Thornton
	Tamera Childers	Stefan Mecke
	Rachel Mathis	
	Ron Main	
	Kara Greuel	
	Sabah Khalaf	
	Kimberly Moore	
Wagoner Co.	Richard Loy Gray Jr.	Eric W. Johnson
	Ben Chapman	Grant Huskey
Washington Co.	Linda Thomas	Scott Buhlinger
	Adair Fincher	Christiaan Mitchell
Washita Co.	Judge Christopher S. Kelly	Brooke Gatlin
Woods Co.	Jeremy Bays	Larry Bays
Woodward Co.	Bryce Hodgden	Kyle Domnick

	DELEGATE	ALTERNATE
Oklahoma Judicial Conference	Dist. Judge Emmit Tayloe	Dist. Judge Leah Edwards
	Assoc. Dist. Judge Russell Vaclaw	Assoc. Dist. Judge Dawson Engle

2017 RESOLUTIONS

The following resolutions will be submitted to the House of Delegates at the 113th Oklahoma Bar Association Annual Meeting at 10 a.m. Friday, Nov. 3, 2017, at the Hyatt Regency Hotel in Tulsa.

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

Whereas the Standards for Defense of Capital Punishment Cases Task Force was established by Oklahoma Bar Association President Linda Thomas following the Report of the Oklahoma Death Penalty Review Commission, comprised of a group of eleven prominent, bipartisan Oklahomans, who spent over a year studying the death penalty in Oklahoma. Former Oklahoma Governor Brad Henry, former Oklahoma Court of Criminal Appeals Judge Reta Strubhar, and former U.S. Magistrate Judge for the Western District of Oklahoma, Andy Lester were co-chairs of the Commission;

Whereas the Report of the Standards for Defense of Capital Punishment Cases Task Force issued its report, attached hereto, to the Oklahoma Bar Association Board of Governors on September 15, 2017;

Whereas the Report was unanimously approved by the Board of Governors of the Oklahoma Bar Association;

Whereas acceptance of the Report by the Board of Governors does not carry the force and effect of law by court rule or otherwise;

Whereas following the acceptance of the Report by the Board of Governors, it was moved that a resolution be placed before the House of Delegates to request that the Task Force Report be submitted to the Rules of Professional Conduct Committee for the drafting of proposed rules consistent with the intent of the Task Force Report;

Whereas that upon completion of Rules consistent with the Task Force Report that said Rules be submitted to the House of Delegates and upon passage of such rules that they be submitted to the Oklahoma Supreme Court with an application requesting adoption of proposed Court Rules that will carry the force and effect of law;

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.)*

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

To better ensure that individuals facing the death penalty in Oklahoma receive high-quality representation, the Oklahoma Bar Association should promulgate advisory guidelines for the appointment and performance of defense counsel in capital cases.

The purpose of this presentation is to submit standards for defense of capital punishment cases in Oklahoma, should death penalty cases continue to be filed and prosecuted in the State.

It is imperative for us to note that our committee was formed in response to the Report of the Oklahoma Death Penalty Review

Commission, a group of eleven prominent, bi-partisan Oklahomans, who spent over a year studying the death penalty in Oklahoma. Former Governor Brad Henry was the chair of the Commission.

In its executive summary the Oklahoma Death Penalty Review Commission stated:

> The Oklahoma Death Penalty Review Commission (Commission) came together shortly after the state of Oklahoma imposed a moratorium on the execution of condemned inmates. In late 2015, Oklahoma executions were put on hold while a grand jury investigated disturbing problems involving recent executions, including departures from the execution protocols of the Department of Corrections. The report of the grand jury, released in May of 2016, was highly critical and exposed a number of deeply troubling failures in the final stages of Oklahoma's death penalty.
>
> The Commission has spent over a year studying *all* aspects of the Oklahoma death penalty system, from arrest to execution, and even examined the costs of the system to taxpayers. The Commission was grateful to hear from those with direct knowledge of how the system operates – including law enforcement, prosecution, defense attorneys, judges, families of murdered victims, and the families of those wrongfully convicted.
>
> **In light of the extensive information gathered from this year-long, in-depth study, the Commission members unanimously recommend that the current moratorium on the death penalty be extended.**
>
> The Commission did not come to the decision lightly. While some Commission members had disagreements with some of the recommendations contained in this report, there was a consensus on each of the recommendations. Due to the volume and seriousness of the flaws in Oklahoma's capital punishment system, Commission members recommend that the moratorium on executions be extended until significant reforms are accomplished.

(The Report of the Oklahoma Death Penalty Review Commission, p. vii, emphasis original).

The Report contained ten chapters, with recommendations for reform in each of the categories of problems identified. The Commission recommended reforms in the areas of innocence protection, the role of the prosecution, the role of the defense, jury issues, the role of the judiciary, death eligibility, clemency, and the execution process. Only one of the categories identified applies primarily to performance of defense counsel in capital cases.

Thus, the standards we recommend for death penalty qualified defense counsel can only be effective when the Commission's other recommendations have been satisfied. The standards proposed are interdependent upon on the other recommended reforms being made. If changes to the capital punishment scheme in Oklahoma can be implemented, then these are the recommendations we make for the minimum standards of practice for the capital defense bar.

§1 *Standards and Scope of Application*

A. The American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003)*, its associated Commentary, and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008)*, are adopted as the standards of practice applicable to capital representation in the State of Oklahoma and are incorporated by reference.

B. These standards apply as soon as the person is identified as a target of prosecution and extend to all stages of every case in which the State may be entitled to seek the death penalty.

C. As promptly as possible, but in no event later than initial appearance, the Court of competent jurisdiction shall determine the defendant's eligibility for court appointed counsel. If the person is eligible for court-appointed counsel, the Court shall consult with the appropriate indigent defense office to determine whether the office may accept the appointment or, in the case of an actual or operational conflict, to identify qualified counsel available to accept the appointment.

§2 *Minimum Components of the Defense Team*

A. Requisites of Representation

1. A defense team that will provide high quality legal representation must be

assembled that includes, at a minimum, two qualified and experienced attorneys, one of whom is qualified to serve as lead counsel, an investigator, and a mitigation specialist.

2. Counsel shall have access to the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings.

B. Qualifications of counsel[1]

1. Lead counsel shall:

   a. have at least five years of criminal trial litigation experience;

   b. have prior experience as lead counsel in no fewer than nine jury trials tried to completion; of these, at least five must have involved felonies or two must have involved the charge of murder; and

   c. have prior experience as lead counsel or associate counsel in at least one case in which the death penalty was sought and was tried through the penalty phase or have prior experience as lead counsel or associate counsel in at least two cases in which the death penalty was sought and where, although resolved prior to trial or at the guilt phase, a thorough investigation was performed for a potential penalty phase.

2. Second counsel shall:

   a. have at least three years of criminal trial experience; and,

   b. have prior experience as lead counsel in no fewer than three felony jury trials which were tried to completion, including service as lead or associate counsel in at least one homicide trial.

3. The Oklahoma Supreme Court shall certify by application who is qualified to defend capital punishment cases. The qualified counsel list shall be maintained by the Oklahoma Bar Association.

   a. Counsel seeking admission to the list shall submit an application in a form to be determined by the Oklahoma Bar Association consistent with these guidelines. The application process will remain open continuously.

   b. A committee shall be appointed by the Oklahoma Supreme Court consisting of five practicing attorneys at least three of whom have served as defense counsel in criminal cases at the trial, appellate, or post-conviction level. The members of the committee will serve staggered three year terms, subject to reappointment by the Court.

4. All qualified counsel shall be required to reapply to the qualified counsel list every three (3) years. A committee shall review all renewal applications and recommend to the Oklahoma Supreme Court whether the attorney should remain in qualified counsel status.

C. Expert and Other Services

1. The defense team must include individuals possessing the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client's life history.

2. At least one member of the team must have specialized training in identifying, documenting and interpreting symptoms of mental and behavioral impairment, including cognitive deficits, mental illness, developmental disability, neurological deficits; long-term consequences of deprivation, neglect and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental and ethnic influences on behavior; effects of substance abuse and the presence, severity and consequences of exposure to trauma.

3. Additional team members shall be provided to:

   a. reflect the seriousness, complexity or amount of work in a particular case;

   b. meet legal or factual issues involving specialist knowledge or experience;

   c. ensure that the team has the necessary skills, experience and capacity available to provide high quality

representation in the particular case;

d. provide for the professional development of defense personnel through training and case experience; and,

e. for any other reason arising in the circumstances of a particular case.

§3 *Workload and Resource Management*

A. Counsel should limit their caseloads to the level needed to provide each client with high quality legal representation consistent with the ABA *Guidelines*.

B. Lead counsel should ensure that all members of the defense team have sufficient time and resources to perform their duties.

C. It is the duty of the chief of each public defense organization to ensure sufficient staff and resources are available before accepting appointment in a case. If the available resources are insufficient, the chief of the public defense organization must advise the Court of that fact and decline appointment in the case.

D. If, at any stage in a capital trial, it becomes evident that the performance of trial counsel fails to comport with the ABA Standards for effective representation, the trial judge shall immediately advise the presiding Administrative Judge or, if a conflict would be presented by such advice, to the presiding Administrative Judge of a contiguous Administrative District. The Administrative Judge shall conduct any necessary inquiry *ex parte, in camera*, and on the record to determine if substitute counsel should be appointed. The accused shall have the right to be advised by independent counsel prior to any colloquy concerning advice and waiver of rights.

§4 *Comprehensive and Continuing Training*

A. Appropriately approved Oklahoma Bar Association Continuing Legal Education Organizations shall be responsible for providing training to attorneys eligible for appointment as lead or second counsel and to attorneys seeking qualification. The comprehensive training program shall include, but not be limited to, training:

1. relevant state, federal, and international law;
2. pleading and motion practice;
3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
4. jury selection;
5. trial preparation and presentation, including the use of experts;
6. the investigation, preparation, and presentation of mitigating evidence;
7. investigation, preparation, and presentation of evidence bearing upon mental status, including intellectual disability;
8. ethical considerations particular to capital defense representation;
9. preservation of the record and of issues for post-conviction review;
10. counsel's relationship with the client and his family;
11. post-conviction litigation in state and federal courts; and,
12. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;
13. training regarding plea negotiations.

B. Appropriately approved Oklahoma Bar Association Continuing Legal Education Organizations shall be responsible for providing or coordinating training for all non-attorneys participating or seeking retention to participate on capital defense teams appropriate to their areas of expertise

1. Qualifications apply to counsel whether appointed or privately retained counsel.

RESOLUTION NO. SIX: AMENDMENT TO BYLAWS ADDING SPECIAL DISTRICT 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 Emmit Tayloe and the Oklahoma Judicial Conference.)*

Art. I Sec 2. MEMBERSHIP

The House of Delegates shall be composed of one delegate or alternate from each County of the State, who shall be an active or senior member of the Bar of such County, as certified by the Executive Director at the opening of the annual meeting; providing that each County where the active or senior resident members of the Bar exceed fifty shall be entitled to one additional delegate or alternate for each additional fifty active or senior members or major fraction thereof. In the absence of the elected delegate(s) the alternate(s) shall be certified to vote in the stead of the delegate. In no event shall any County elect more than thirty (30) members to the House of Delegates. Each delegate and alternate shall be elected for a term of two years to begin with the commencement of the annual meeting following his or her election, and terminating with the commencement of the third annual meeting following his or her election or until the election and certification of his or her successor, provided, that beginning with the election of delegates and alternates following adoption of this amendment, the Board of Governors shall designate the number of delegate positions in each County which shall be for an initial one-year term and which delegate positions shall be a two-year term, providing further, that as nearly as it is mathematically possible, the one and two-year terms shall be divided equally for Counties entitled to two or more delegates, the respective County Bar Association shall determine the method of designating the delegates for one-year terms and the delegates for two-year terms.

Each member of the Board of Governors of the Association shall be an ex officio non-voting member of the House of Delegates and shall be vested with the courtesy of the floor of the House of Delegates and the right to speak therein, but shall have no right to introduce resolutions or legislative proposals or motions or to vote thereon, unless certified as a delegate from his or her county of residence. Each former President of the Oklahoma Bar Association shall be a Member at Large of the House of Delegates of said Association with the same powers, duties and voting rights as an elected delegate of the House of Delegates. Also, the Oklahoma Judicial Conference shall select from its membership one district judge as delegate and one district judge as alternate, ~~and~~ 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.

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

2017 OBA AWARDS

OBA Awards:
Individuals for Whom Awards are Named

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

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

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

JOHN E. SHIPP — John E. Shipp, an attorney from Idabel, served as 1985 OBA president and became the executive director of the association in 1998. Unfortunately his tenure was cut short when his life was tragically taken that year in a plane crash. Mr. Shipp was known for

(cont'd on page 2021)

Law School Luncheons
Wednesday, Nov. 1

OUTSTANDING SENIOR LAW SCHOOL STUDENT AWARD

OCU School of Law
Aimee Phillips, Oklahoma City

Aimee Phillips is a Hatton W. Sumners scholar at the OCU School of Law, where she has made the dean's list and faculty honor roll every semester and won several CALI awards. Ms. Phillips has created (and leads) two new student organizations, the Poverty Law Group and the Catholic Law Students Association. She was the 2016-2017 Member of the Year of the Hand Inn of the Phi Delta Phi International Legal Honor Society. She has also served as an academic fellow and a research assistant at the OCU School of Law. Ms. Phillips' paper "A Practical Guide to Ending Homelessness" has been accepted for publication by the *Seattle Journal for Social Justice* and will be published in the journal's spring 2018 issue.

Ms. Phillips was a participant on the OCU School of Law team that won the San Francisco Regional of the ABA National Appellate Advocacy Competition. She interned with the Oklahoma County Public Defender's office as well as private firms. She will be working in the civil

litigation department of Crowe & Dunlevy after graduation.

Before law school, Ms. Phillips taught theology at Bishop McGuinness High School and led the Peru Mission for several years. She graduated from Saint Mary's College of California with a bachelor's degree in theology and religious studies. Ms. Phillips is a founding member of the Oklahoma County Homeless Task Force and a volunteer with the Homeless Alliance, the Regional Food Bank of Oklahoma and Hotdogs for the Homeless.

OUTSTANDING SENIOR LAW SCHOOL STUDENT AWARD

OU College of Law
Eleanor Burg, San Antonio, Texas

Eleanor Burg is a third-year law student at the OU College of Law. She currently serves as the managing editor of the *Oklahoma Law Review* and as the director of the annual 1L Moot Court Competition. She has actively participated in advocacy competitions, being recognized as a Top 10 Speaker in the college of law's 1L Moot Court Competition and a Top 5 Speaker in the Calvert Moot Court Competition. Additionally, she achieved first place regionally and third place nationally in the International Trademark Association Saul Lefkowitz Moot Court Competition.

Ms. Burg is also a member of the Business Law Society and the Organization for the Advancement of Women in Law. During her second year, she served as the lead mentor to first-year students, working directly with students in the class of 2019 at the college of law.

She was the recipient of the J. Marshall Huser scholarship as well as the John B. and Elizabeth B. Cheadle scholarship for outstanding service to the law school. Ms. Burg has interned with the OU Office of Technology Development, the OU Office of Legal Counsel, McAfee & Taft and Phillips Murrah. After graduation, she will start her legal career as an associate at McAfee & Taft in Oklahoma City.

OUTSTANDING SENIOR LAW SCHOOL STUDENT AWARD

TU College of Law
Mary Hope Forsyth, Tulsa

Mary Hope Forsyth is a third-year student at the TU College of Law. She is the executive editor of the *Tulsa Law Review*, a student member of the Council Oak/Johnson-Sontag Inn of Court and a member of Phi Delta Phi. She has earned eight CALI Excellence for the Future Awards and the George and Jean Price Award. After graduation, she will be an associate attorney at GableGotwals in Tulsa.

During law school, she has gained experience at multiple levels of the federal court system. She interned for Chief Judge Gregory K. Frizzell, former U.S. Magistrate Judge T. Lane Wilson and U.S. Magistrate Judge Paul J. Cleary, the Northern U.S. District of Oklahoma and, this spring, will extern for 10th Circuit Senior Judge Stephanie K. Seymour.

Ms. Forsyth's law review comment, "Mutually Assured Protection: Dmitri Shostakovich and Russian Influence on American Copyright Law" will be published in the *Tulsa Law Review* spring 2018 issue. Before attending law school, her examination of the historical and current use of the word "forum" was published in *Princeton University Press*' "Digital Keywords: A Vocabulary of Information Society and Culture."

She earned a bachelor's degree *magna cum laude* in communication and media studies with minors in English and philosophy from TU, where she was also an Oklahoma Center for the Humanities research fellow, Honors Scholar, Presidential Scholar and National Merit Scholar. Outside of law school, she is an America's Test Kitchen home recipe tester and a volunteer sacramental catechist at her Catholic parish.

Annual Luncheon
Thursday, Nov. 2

AWARD OF JUDICIAL EXCELLENCE

Judge Jill C. Weedon, Arapaho

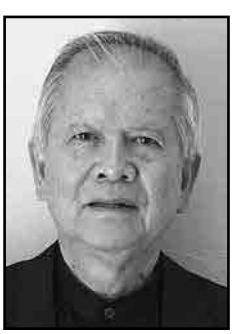
The 2017 Award of Judicial Excellence recipient is **Judge Jill C. Weedon**. Judge Weedon received a bachelor's degree from Colorado College in 1989 and a J.D. from the OU College of Law in 1991. Prior to serving on the bench, she worked in private practice. She began her judicial career in 1999 as a special judge and in 2009 was appointed by Gov. Brad Henry to serve as associate district judge in Custer County.

Judge Weedon is an experienced settlement judge and has served on the Washita-Custer County Drug Court since its inception. She enjoys working on the family farm and hiking. Along with a group of friends, she has summited five 14,000 foot peaks and hiked the Grand Canyon from rim to rim.

She is an attorney coach for the Clinton High School legal teams. Her teams have won two OBA Mock Trial championships and placed fourth at the National High School Mock Trial Championship in 2012.

LIBERTY BELL AWARD

San Nguyen, Oklahoma City



San Nguyen of Oklahoma City is this year's Liberty Bell Award recipient. Deacon Nguyen received his law degree from the Saigon University of Law. He immigrated to the U.S. from Vietnam in April 1975 before the fall of Saigon to the communist north.

In 1975, he went to work for Catholic Charities and spent the next four years attending school to become a deacon. As a deacon, he has assisted members of the Vietnamese community and members of other minority communities in obtaining legal representation in a variety of matters, including immigration, citizenship, documentation, vehicle accidents, civil and criminal justice proceedings.

His experience, Vietnamese law degree, master's degree from OCU and special student status at the OU College of Law, led him to work as an interpreter and translator at the federal court in 1980. Deacon Nguyen also served as the attorney admissions and naturalization clerk for the U.S. District Court for the Western District of Oklahoma for more than 32 years. He was also appointed as a U.S. immigration and naturalization examiner for the Dallas INS Office as a U.S. immigration inspector for the Houston INS Office.

In 2003, Deacon Nguyen began his work in prison ministry for the Catholic Archdiocese of Oklahoma City. He assisted prisoners in obtaining legal representation by coordinating with the Public Defender's Office and the U.S. District Attorney's Office. He obtained special prison ministry training from the Department of Justice and as a national prisoner chaplain, he was authorized to visit prisoners in any prison in the United States. Deacon Nguyen retired from prison ministry and federal court service in 2015. In 2016, he published *A Book on U.S. Applicable Law*, a book comparing U.S. law and Vietnamese law.

JOE STAMPER DISTINGUISHED SERVICE AWARD

Judge Jon K. Parsley, Guymon

The Joe Stamper Distinguished Service Award honors those individuals who volunteer countless hours to further the goals of the OBA. **Judge Jon K. Parsley** is this year's winner. Judge Parsley was born and raised in Guymon, only moving away briefly for school. He is a 1987 Guymon High graduate. After high school, he earned a full-ride debate scholarship to Central State University.

After receiving his undergraduate degree in 1991, he attended the OU College of Law and received his J.D. in 1994. After being admitted to the bar he returned to Guymon to practice with the Law Offices of David K. Petty. In 2003 he opened his own general law practice. Judge Parsley took the bench in 2014, and currently

serves as the district judge of Cimarron, Texas, Beaver and Harper counties.

Judge Parsley served as YLD chair in 2002 and on the OBA Board of Governors from 2003 to 2009. He was OBA president in 2009. He served on the Professional Responsibility Commission, Administration of Justice Task Force, Communications Task Force, General Counsel Hiring Committee, Bench and Bar Committee, Civil Procedure Committee, Budget Committee, Long Range Planning Committee and chaired the OBA Mentorship Task Force.

As a lifelong Guymon resident, he serves in the local food bank and in youth sports organizations. He also served on the steering committee which resulted in the establishment and opening of a Legal Aid Office in Guymon to serve the panhandle counties.

ALMA WILSON AWARD

Carolyn Thompson, Edmond

Carolyn Thompson is the 2017 Alma Wilson Award recipient. After receiving a bachelor's degree in biology from Tulane University in 1971, Ms. Thompson taught at a middle school in inner-city New Orleans. In 1983, she graduated with honors from the OCU School of Law where she taught family law as an adjunct professor from 1986-1996. She is an ongoing guest lecturer at the OU College of Law and has practiced family law in Oklahoma City for over 30 years.

Ms. Thompson serves as chair of the Advisory Board for the Academy of Law & Public Safety at Douglass High School in northeast Oklahoma City. The academy is comprised of approximately 50 students who live in difficult, low-income home situations. The academy teaches students about our legal system and helps prepare them for careers in law, law enforcement and public safety. Ms. Thompson coaches the academy mock trial team, teaches law-related classes, arranges classroom speakers, field trips, student internships and also secures grants to fund the academy program.

NEIL E. BOGAN PROFESSIONALISM AWARD

Judge Bryan Dixon, Oklahoma City

Judge Bryan C. Dixon is the 2017 recipient of the Neil E. Bogan Professionalism Award for his continued commitment to meeting high standards in the legal profession. He received a bachelor's degree in political science in 1974 from OU and in 1977, a J.D. from the OU College of Law. After admission to the bar he went into private practice. In 1981, he began his career on the bench as an associate municipal judge in Del City. From 1983 to 1985 he served as a special judge in District 7. He served as an Oklahoma County district judge until his retirement in September of this year.

He is a former president of the Oklahoma County Bar Association, Bohannon Inn of Court and the Oklahoma Law Library. He is a member of the Oklahoma Supreme Court's Information Technology Business Committee and the Del City Kiwanis Club. He served six years on the Board of Directors of the Mid-Del Youth and Family Center. The Oklahoma County Law Library was renamed in his honor in August of this year.

JOHN E. SHIPP AWARD FOR ETHICS

Judge Millie Otey, Tulsa

Judge Millie Otey is the 2017 recipient of the John E. Shipp Award for Ethics. Judge Otey received her J.D. from the TU College of Law, a master's degree from TU and a bachelor's degree in journalism from the University of Colorado.

She has served as a special district judge for the 14th Judicial District since 2000 and has continued to serve the legal profession through service to the OBA. In particular, she has served as the Grants and Awards Committee chair and president for the Oklahoma Bar Foundation and has also served as president of the Tulsa County Bar Association and Tulsa County Bar Foundation.

She currently serves as Bank of America Task Force chairperson for the Oklahoma Bar Foundation as well as an adjunct professor at TU teaching "Legal Issues for Museum Professionals." Judge Otey's dedication to serving the public is further demonstrated through the establishment of in-court pro bono and mediation programs.

General Assembly
Friday, Nov. 3

OUTSTANDING COUNTY BAR ASSOCIATION AWARD

Noble County Bar Association

The **Noble County Bar Association** (NCBA) is a 2017 recipent of the Outstanding County Bar Association Award for its continued commitment to the community by its members. As a small bar association of only nine members, the NCBA has managed to donate almost 100 percent of its dues to scholarships for local students. Over the past six years, the association has awarded approximately $10,000 in scholarships. Members also volunteer their time participating in education programs for youth in the county including educating minors on the legal ramifications of turning 18. Members have also given free legal services to law enforcement, first responders and current and former members of the military.

Oklahoma County Bar Association

The **Oklahoma County Bar Association** (OCBA) has been selected as a 2017 recipient of the Outstanding County Bar Association Award for its continued commitment to the community and its members. The OCBA consists of approximately 2,500 members including 12 committees, three sections and one division.

The association stays active in the community through Law Day celebrations, volunteering in local schools as "reading buddies," hosting book and school supply drives, fundraising to benefit the Regional Food Bank and delivering food and toys for the Salvation Army's Christmas programs. The OCBA also continues to volunteer with the Family Junction Youth Center, the Edwards Redeemer Nursing Home, Juvenile Court Probation Department and Cavett Kids Foundation.

HICKS EPTON LAW DAY AWARD

Seminole County Bar Association

The 2017 Hicks Epton Law Day Award goes to the **Seminole County Bar Association** (SCBA), for the significantly noteworthy work and organization of the Law Day Chair Judge Timothy Olsen, Co-Chairs Gordon Melson and Jack Cadenhead and all participating attorneys. Law Day continues to be a special holiday in Seminole County. The Law Day Forum Luncheon was preceded by a quality, long-standing seven-hour CLE seminar. Just as it was done in the 1950s, SCBA members began their 2017 Law Day festivities by going to all 10 county schools and speaking to junior high students about the 14th Amendment, their local county government and the roles and responsibilities of each county officer. There was also an essay contest open to all public junior high school students and high school seniors in the county.

The Annual Law Day Forum Luncheon was held at the Rudolph Hargrave Civic Center in Wewoka where the essay contest winners were recognized and received either a $500 college scholarship or a gift card. Attendees listened to OBA President Linda Thomas and Chief Justice Douglas Combs. OBA Past President Hicks Epton of Wewoka Oklahoma was the original founder of Law Day which is now recognized nationally.

EARL SNEED AWARD

Aaron Bundy, Tulsa


Aaron Bundy

Aaron Bundy, a 2006 graduate of the TU College of Law and partner at Fry & Elder, focuses his practice on trial work in both family and criminal law. His family law practice includes bench trials in divorce, paternity, protective order and adoption cases, as well as jury trials in juvenile matters and criminal cases involving allegations of abuse or neglect.

Mr. Bundy is an active member of the Tulsa County Bar Association (TCBA) Family Law Section, the TCBA Litigation Section, Tulsa County Criminal Defense Lawyers Association and the Oklahoma Criminal Defense Lawyers Association. He is also a member of the American Association for Justice (AAJ) and the National Association of Criminal Defense Lawyers (NACDL).

In pursuit of professional improvement as teachers and trial lawyers, Mr. Bundy and M.

Shane Henry seek out their own education from all over the country, including NACDL, Trial Lawyers College, NITA and AAJ. The two have also trained and collaborated with acclaimed attorney Roger Dodd.

Mr. Bundy and Mr. Henry speak together across the country to educate paralegals, lawyers and judges about trial-related issues and developments. Their presentations are constantly being updated based on their education and trial experience.

M. Shane Henry, Tulsa

M. Shane Henry

M. Shane Henry is a 2006 graduate of the TU College of Law and partner at Fry & Elder. Licensed to practice in both Oklahoma and Texas, his practice centers on trial work in both family and criminal law. His family law practice includes bench trials in divorce, paternity, protective order and adoption cases, as well as jury trials in juvenile matters and criminal cases involving allegations of abuse or neglect and murder.

Mr. Henry was named the 2016 Oklahoma Family Law Attorney of the Year by the OBA Family Law Section. He served as the 2014 chair of the OBA Family Law Section and is an active member of the bar, including the OBA and Tulsa County Bar Association (TCBA) Family Law sections, the TCBA Litigation Section, Tulsa County Criminal Defense Lawyers Association and the Oklahoma Criminal Defense Lawyers Association. He is also a member of the American Association for Justice (AAJ) and the National Association of Criminal Defense Lawyers (NACDL).

GOLDEN GAVEL AWARD

OBA Indian Law Section

The **OBA Indian Law Section** has been selected as the 2017 Golden Gavel recipient. The Indian Law Section was founded in 1989 after it was approved by the OBA Board of Governors. The section provides Indian law education to OBA members and offers generous scholarships to those planning to practice Indian law. After years of dwindling participation, the section has made significant changes to revamp offerings and provide better service for its members and for the greater legal community. Chris Tytanic serves as section chair.

OUTSTANDING YOUNG LAWYER AWARD

Tiece Dempsey, Oklahoma City

Tiece Dempsey

Tiece Dempsey received a bachelor's degree in business in 2001 from OSU, a master's in health administration from OU in 2004 and a J.D. from the OCU School of Law in 2012. While in law school, she served as chapter president of the National Black Law Students Association.

After law school, she worked as a policy analyst at the Oklahoma Policy Institute. She then went to work as a judicial law clerk with the U.S. District Courts. She recently took a position with the Office of the Federal Public Defender.

She is chair of the OBA Diversity Committee. Under her leadership, the committee established the annual Law School Admissions Bootcamp event in Oklahoma City. She has also led the committee to provide CLE presentations on issues like implicit bias and civil rights.

Community service continues to be important to Ms. Dempsey. She serves on The Education and Employment Ministry (TEEM) board and Northeast Academy High School Career Tech Advisory Board. She also volunteers with City Cares Whiz Kid program and is an active servant at Wildewood Christian Church.

Bryon J. Will, Yukon

Bryon J. Will

Bryon J. Will is the principal of The Law Office of Byron J. Will PLLC where he practices estate planning, business planning, real estate, oil and gas, agriculture and bankruptcy law. Mr. Will received his bachelor's degree in animal science from OSU. Before attending law school, he worked as a sales representative for an animal health supply company and then in the Commercial Agricultural Lending Department at the Bank of Oklahoma.

While working at the Bank of Oklahoma, he earned his MBA at UCO in 2005, and in 2008 he earned his J.D. from the OCU School of Law. While in law school, Mr. Will worked for the Oklahoma District Attorney's Office and as an intern. He also worked with Haupt Brooks Vandruff Cloar

on commercial and consumer bankruptcy cases. In 2008, Mr. Will opened his solo law practice which he still runs today.

He is a member of the American Bar Association, Oklahoma Bar Foundation, Noble County Bar Association, Oklahoma County Bar Association, National Academy of Elder Law Attorneys and is a past member of the Ruth Bader Ginsburg and William J. Holloway American Inns of Court. He currently serves as a governor on the OBA Board of Governors.

Since 2010, Mr. Will has been serving the OBA Young Lawyers Division (YLD) as a director from 2010 through 2014, and as an executive from 2013 to the end of 2017 consecutively in the offices of secretary, treasurer, chair-elect, chair and now immediate past chair.

OUTSTANDING SERVICE TO THE PUBLIC AWARD

Jason Lowe, Oklahoma City

Jason Lowe

Jason Lowe is a 2017 Outstanding Service to the Public Award recipient. Mr. Lowe practices criminal law and is the founding member of The Lowe Law Firm. The firm has offices in Oklahoma City and Tulsa. Mr. Lowe also serves as Oklahoma state representative for House District 97. He is the first African-American attorney from District 97 appointed to the House Judiciary Committee.

Every year Rep. Lowe hosts a Family Fun Day, a nonprofit charity event that, over the last eight years, has provided over 10,000 families with free school supplies, health screenings and haircuts so kids can be equipped to start the school year and in 2017 he gave away 30 tablets to children. He also founded the Know Your Rights forum that educates Oklahomans on legal matters and to obtain feedback on important issues facing the community. Furthermore, Rep. Lowe founded the Triple E Youth Initiative, a program that provides funds to various local youth departments, including but not limited to a $500 monthly gift that he gives to local churches to help empower, encourage and educate our teens and future leaders of tomorrow.

Most recently, Mr. Lowe has successfully secured three consecutive not guilty verdicts for wrongly accused defendants. His success in such trials has allowed him to become a resource for local news stations, including KFOR Channel 4, KOCO Channel 5 and Oklahoma City Fox 25 concerning officer-involved shootings and various legal issues.

Oklahoma Lawyers for Children Inc.

Oklahoma Lawyers for Children Inc. (OLFC) is an organization of over 1,100 specially trained volunteer attorneys who provide legal representation for abused and neglected children who have been removed from their homes. In addition to being the exclusive provider of legal representation for children at daily emergency show cause hearings, volunteer attorneys assigned to deprived cases continue to represent the child's expressed wishes or best interests until the child is safely returned home or permanently placed in a safe home. OLFC's citizen volunteers number in the hundreds and assist OLFC with coordinating meetings between attorney and child, events for foster children, tutoring, life skills trainings, mentoring, reunification celebrations, courtroom needs, toys for children in court and more. OLFC receives no taxpayer dollars thereby saving Oklahoma over $4.8 million dollars in required legal services each year.

OLFC was founded in 1997 by Don R. Nicholson II and D. Kent Meyers after the two visited the Oklahoma County Juvenile Justice Center and the Pauline Mayer Children's Shelter during a child watch tour. In 1998, Oklahoma County District Court judges signed an administrative order authorizing OLFC to be assigned cases directly from the Juvenile Public Defender's Office and the Juvenile Court. In 2011, another administrative order was signed expanding OLFC's services authorizing OLFC attorney volunteers to be appointed in special circumstance cases in the District Court of Oklahoma County. OLFC has also fulfilled other district courts requests legal services for abused and neglected children.

AWARD FOR OUTSTANDING PRO BONO SERVICE

Kendra Coleman, Mangum

Kendra Coleman is a 1994 graduate of Star Spencer High School, where she was salutatorian of her graduating class. Subsequently, she attended Fort Valley State University on a full academic scholarship, earning a bachelor's degree in accounting and later earning a MBA with an emphasis in marketing from the OCU Mendes School of Business and a J.D. from the OCU School of Law. Upon passing the Oklahoma State Bar, she formed The Gill Law Firm PLLC, where she continues to practice primarily family, criminal and juvenile law.

Ms. Coleman partners with Legal Aid Services of Oklahoma and the Mary Mahoney Medical Clinic, providing a walk-in legal clinic to the underserved of the Spencer community. Through her volunteer service at the clinic, she takes on pro bono clients that need more help than a walk-in clinic can give.

She regularly participates in voter registration drives and voter education forums. She also participates in school career days, teaching kids how attorneys can make a positive impact on the community.

MAURICE MERRILL GOLDEN QUILL AWARD

Mbilike Mwafulirwa, Tulsa

Mbilike Mwafulirwa

Mbilike Mwafulirwa is a recipient of the Maurice Merrill Golden Quill Award for his article "Autonomous Vehicles and the Trolley Problem: An Ethical and Liability Conundrum," co-authored with Spencer C. Pittman. He practices with Brewster and DeAngelis PLLC, in Tulsa. His practice focuses on general civil litigation, civil rights and appellate law both in state and federal court. Mr. Mwafulirwa received his LL.B. from the University of Wales in 2009 and his Master of Law and J.D. from the TU College of Law in 2010 and 2012. While at the TU College of Law, he was a member of the Constitutional Law National Appellate Moot Team, the *Energy Law Journal* and he was also inducted into the Order of Barristers – in recognition of excellence in advocacy.

While in practice, Mr. Mwafulirwa has achieved some notable milestones. He was appellate counsel in a number of important Oklahoma constitutional law decisions such *Steidley v. Singer, Steidley v. Community Newspapers Inc.* and *Anderson v. Wilken*.

Although Mr. Mwafulirwa's articles have frequently been published in the *Oklahoma Bar Journa*l, this latest project – "Autonomous Vehicles and the Trolley Problem: An Ethical and Liability Conundrum" – is most dear to him. That is because, as other eminent policy makers in the United States have recognized, the "self-driving car raises more possibilities and more questions than perhaps any other transportation innovation," said former Secretary of Transportation Anthony R. Foxx. To dare to do the impossible, in his opinion, is to discover the fullness of yourself.

Spencer Pittman, Tulsa

Spencer C. Pittman

Spencer C. Pittman is an attorney at Winters & King Inc. He practices in the areas of personal injury and corporate litigation and transactions. He received a bachelor's degree from OU in 2010 and a J.D. from the TU College of Law in 2013. He began his career defending national insurance companies in the areas of negligence, personal injury, trucking litigation, construction defect and both residential and commercial property damage.

Mr. Pittman is an avid writer and public speaker. He has presented on legal defense and protection of churches in litigation. He has also published several articles for the *Oklahoma Bar Journal.* His most recent article, co-authored by Mbilike Mwafulirwa, "Autonomous Vehicles and the Trolley Problem: An Ethical and Liability Conundrum," provides an interesting look into the legal side of self-driving cars and earned him the award.

Mr. Pittman is active in his community. He serves on the Board of Directors for Counseling and Recovery Services of Oklahoma (CRSOK), a behavioral health organization, and as a legal mentor to Tulsa Regional Chamber member businesses in the Forge: Bull-Pen. Mr. Pittman also serves on the Board of Adjustment for the City of Bixby and as a member on the Steering Committee for the City of Bixby Comprehensive Plan.

OBA Awards:
Individuals for Whom Awards are Named

(cont'd from page 2013)

(JOHN E. SHIPP CONT.) his integrity, professionalism and high ethical standards. He had served two terms on the OBA Professional Responsibility Commission, serving as chairman for one year, and served two years on the Professional Responsibility Tribunal, serving as chief-master. The OBA's Award for Ethics bears his name.

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

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

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

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

TITLE EXAMINATION STANDARDS

2017 Report of the Title Examination Standards Committee of the Real Property Law Section

Proposed Amendments to Title Standards for 2018, to be presented for approval by the House of Delegates, Oklahoma Bar Association at the Annual Meeting, November 3, 2017. Additions are underlined, deletions are indicated by ~~strikeout~~.

The Title Examination Standards Sub-Committee of the Real Property Law Section proposes the following revisions and additions to the Title Standards for action by the Real Property Law Section at its annual meeting in Tulsa on Thursday, November 2, 2017.

Proposals approved by the Section will be presented to the House of Delegates at the OBA Annual Meeting on Friday, November 3, 2017. Proposals adopted by the House of Delegates become effective immediately.

An explanatory note precedes each proposed Title Standard, indicating the nature and reason for the change proposed.

Proposal No. 1

The Committee proposes to add a Comment to Standard 7.1, to amend the Comments to Standard 7.2 and to amend Standard 13.7 E in order to reflect results in the holdings of Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014) and Obergefell v. Hodges 576 U.S. ___ (2015) as to same sex marriages.

7.1 MARITAL INTERESTS: DEFINITION; APPLICABILITY OF STANDARDS; BAR OR PRESUMPTION OF THEIR NON-EXISTENCE

Comment 2: Following the decisions of the Court of Appeals for the Tenth Circuit in *Bishop v. Smith* and the United States Supreme Court in *Obergefell v. Hodges*, same sex marriages are legal in Oklahoma. All standards that refer to a Marital Interest are equally applicable to same sex married couples. Any references to husband and wife, spouses, or married couples should be read to apply to all legal marriages.

Authority: *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Obergefell v. Hodges*, 576 U.S. ___ (2015)

7.2 MARITAL INTERESTS AND MARKETABLE TITLE

Comment 1: There is no question that an instrument relating to the homestead is void unless ~~husband and wife~~both spouses subscribe it. *Grenard v. McMahan*, 1968 OK 75, 441 P.2d 950, *Atkinson v. Barr,* 1967 OK 103, 428 P.2d 316, but also see *Hill v. Discover Bank*, 2008 OK CIV APP 111, 213 P.3d 835. It is also settled that ~~husband and wife~~both spouses must execute the same instrument, as separately executed instruments will be void. *Thomas v. James*, 1921 OK 414, 202 P. 499. It is essential to make the distinction between a valid conveyance and a conveyance vesting marketable title when consulting this standard. This distinction is important because the impossibility of determining from the record whether or not the land is homestead, requires the examiner, for marketable title purposes, to (1) assume that all real property is homestead, and (2) consequently, always require joinder of both spouses on all conveyances. Although a deed of non-homestead real property, signed by a title-holding married person without the joinder of their spouse, will be valid as between the parties to the deed, it cannot confer marketable record title.

Comment 2: While 16 O.S. §13 states that "The husband or wife may convey, mortgage or make any contract relating to any real estate, other than the homestead, belonging to him or her, as the case may be, without being joined by the other in such conveyance, mortgage or contract," joinder by ~~husband and wife~~both spouses must be required in all cases due to the

impossibility of ascertaining from the record whether the property was or was not homestead or whether the transaction is one of those specifically permitted by statute. See 16 O.S. §§4 and 6 and Okla. Const. Art. XII, §2. A well-settled point is that one may not rely upon recitations, either in the instrument or in a separate affidavit, to the effect that property was not the homestead. Such recitation by the grantor may be strong evidence when the issue is litigated, but it cannot be relied upon for the purpose of establishing marketability. *Hensley v. Fletcher,* 172 Okla. 19, 44 P.2d 63 (1935).

13.7 CONVEYANCES TO AND BY JOINT VENTURES

E. Due to the fact that homestead or other marital rights may attach to the interests in real property held in the name of an individual joint venturer (or held in the name of two or more joint venturers as tenants-in-common), a deed, mortgage or other instrument of record for less than ten (10) years which is executed by a married joint venturer should also be executed by the spouse of such joint venturer and should contain a recitation of the fact that such persons are ~~husband and wife~~married to each other. In the event an individual joint venturer is single, a recitation of that fact should appear within such deed, mortgage or other instrument.

Proposal No. 2

The Committee recommends amendments to Title Standards 8.1 C, and 25.5 to reflect new legislation concerning the attachment, duration and release of Oklahoma Estate Tax Liens on deaths occurring prior to January 1, 2010.

8.1 TERMINATION OF JOINT TENANCY ESTATES AND LIFE ESTATES

C. A waiver or release of the Oklahoma estate tax lien for the joint tenant or life tenant must be obtained unless:

1. A district court has ruled pursuant to 58 O.S. §282.1 that there is no estate tax liability;

2. The sole surviving joint tenant or remainder interest holder is the surviving spouse of the deceased joint tenant or sole life tenant;

3. The death of the joint tenant is on or after January 1, 2010; or

4. The Oklahoma estate tax lien has otherwise been released by operation of law. ~~See the Caveat at TES 25.5.~~

25.5 OKLAHOMA ESTATE TAX LIEN

Caveat: Generally, the Oklahoma estate tax was repealed for deaths occurring on or after January 1, 2010. No estate tax lien attaches to real property passing from the decedents dying January 1, 2010, and after, and no estate tax release is required to render such real property marketable under these title standards. 68 O.S. §804.1.

Oklahoma estate tax lien obligations for decedents dying prior to January 1, 2010, remain in effect but are extinguished ten (10) years after the date of death. 68 O.S. §804.1.

The Oklahoma estate tax survives for deaths occurring subsequent to January 1, 2010, to the extent the Oklahoma estate tax may be imposed due to the interaction of the Oklahoma statutes and the computed Federal estate tax credit for state estate and inheritances allowable in the computation of Federal estate taxes on the Federal estate tax return. 68 O.S. §804. Pursuant to 68 O.S. §804.1, no Oklahoma estate tax lien attaches to any property for deaths occurring on or after January 1, 2010.

~~Prior to the repeal effective January 1, 2010, Oklahoma statutes (former 68 O.S. §815 C) provided that "no assessment of inheritance, estate or transfer tax shall be made subsequent to the lapse of ten (10) years after the date of the death of any decedent." Oklahoma Tax Commission Regulation OAC 710: 35-3-9 provides that the Oklahoma estate tax lien is extinguished upon the expiration of ten (10) years from the date of the death of the decedent unless a tax warrant is filed. However, former 68 O.S. §815 C was repealed in its entirety effective January 1, 2010, and there appears to be no other statutory authority for the extinguishment of estate tax liens ten (10) years after death.~~

~~Upon written request, the Oklahoma Tax Commission continues to issue the ten (10) year letter which certifies that there are no unpaid assessments of Oklahoma estate or transfer taxes for a specific decedent deceased more than ten (10) years. The ten (10) year OTC letter cites the now repealed 68 O.S. §815 as authority.~~

~~The issue is under continuing review.~~

Proposal No. 3

The Committee recommends an amendment to Standard 14.10 to reflect new legislation allowing a Series in a limited liability company with series to hold title to the Series' name.

14.10 LIMITED LIABILITY COMPANY WITH SERIES

A. Prior to November 1, 2017, title to real property which is to be held under a properly created limited liability company with established series, domestic or foreign, must be acquired, held and conveyed in the name of the limited liability company, with appropriate indication that such title is held for the benefit of the specific series.

B. Beginning November 1, 2017, unless otherwise provided in the operating agreement, a series established in accordance with subsection B of 18 O.S. §2054.4 (with the exception of the business of a domestic insurer) shall have the power and capacity to, in its own name, hold title to assets including real property.

Comment 1: Prior to November 1, 2017, because a series is merely an attribute of the LLC, the series may not hold title in its own name independent of the LLC. Examples of acceptable designations of the grantor or grantee in an instrument conveying title to real property to or from a particular series would be one of the following:

A) Master, LLC, an Oklahoma limited liability company, as Nominee for its Series ABC;

B) XYZ, LLC, a Texas limited liability company, on behalf of its Series ABC;

C) DEF, LLC, a Delaware limited liability company, for the benefit of its Series 2016-A.

In the event an LLC, which has merely provided for the establishment of series, acquires property prior to the actual establishment of such series or otherwise acquires property in the name of the LLC, the LLC shall evidence such transfer of interest from the LLC itself to the LLC for the benefit of the series, by appropriate conveyance.

This standard does not address the situation of real property held by a wholly owned subsidiary LLC, which is an entity capable of acquiring, holding and conveying real property in its own name.

Comment 2: Beginning November 1, 2017, to ensure the Series has not been prohibited from holding title to real property in its own name, title examiner may rely upon an affidavit of the LLC Manager properly recorded in the land records of the county where the real property is located, stating the Series at the time it acquired title to the real property, had the power and capacity to hold title to real estate.

Authority: 18 O.S. §2054.4.B and 2054.4.C.

Proposal No. 4

The Committee recommends a new Title Standard 24.15 as a method of establishing marketable title where there is a missing assignment in a chain of mortgage assignments and the mortgage has been properly released.

24.15 MISSING ASSIGNMENTS OF MORTGAGES

A recorded affidavit, based on the affiant's personal knowledge, containing the following information shall be deemed sufficient to evidence the assignment of a mortgage in a circumstance in which a valid, recordable assignment of the mortgage is not recorded:

A. Identifying information for the mortgage, including the date of the mortgage, recording information, including book and page or document number, as applicable, and the legal description contained in the mortgage, and

B. A photocopy of the promissory note or notes which evidence the indebtedness secured by the mortgage, and

C. A photocopy of proper indorsement of the promissory note or notes in sufficient form to document the transfer of such note(s) by and between the parties who would otherwise appear on the missing assignment of the mortgage, and

D. A statement by the affiant that the promissory note(s) attached to the affidavit are true and correct copies of the promissory note(s) secured by the mortgage, and

E. A statement by the affiant that the person or entity shown on the indorsement as the current indorsee/holder on the promissory note(s) is in possession of the note(s) and that such note(s) is either payable to bearer or to such identified person or entity, or, that such person or entity is in possession of the note(s) which has not been indorsed either by special indorsement or blank indorsement, and

F. A statement by the affiant that an assignment of the mortgage by and between the parties to the promissory note(s) referenced in Paragraph E above is not recorded.

Authority:

Deutsche Bank National Trust Company v. Byrams, 2012 OK 4

Engle v. Federal National Mortgage Association 1956 OK 176; Title 16 O.S. §82, et. seq.

Proposal No. 5

The Committee proposes to amend Standard 30.10 to clarify that it is a Judicial Decree and

not simply a residuary clause in a probated will that can be a root or link in a chain of title.

30.10 QUIT CLAIM DEED OR JUDICIAL DECREE ~~Testamentary Residuary Clause~~ IN THIRTY-YEAR CHAIN

A recorded quit claim deed or a recorded judiciary decree ~~residuary clause in a probated will~~ can be a root of title or a link in a chain of title for purposes of a thirty-year record title under the Marketable Record Title Act.

Authority: 16 O.S. §§71 & 78(e) & (f); 16 O.S. §31; L. Simes & C. Taylor, Model Title Standards, Standard 4.11, at 33-34 (1960).

2018 OBA BOARD OF GOVERNORS VACANCIES

Nominating Petition deadline was 5 p.m. Friday, Sept. 1, 2017

OFFICERS

President-Elect
Current: Kimberly Hays, Tulsa
Ms. Hays automatically becomes OBA president Jan. 2018
(One-year term: 2018)
Nominee: **Charles W. Chesnut, Miami**

Vice President
Current: Jennifer Castillo, Oklahoma City
(One-year term: 2018)
Nominee: **Richard Stevens, Norman**

BOARD OF GOVERNORS

Supreme Court Judicial District One
Current: John M. Weedn, Miami
Craig, Grant, Kay, Nowata, Osage, Ottawa, Pawnee, Rogers and Washington
(Three-year term: 2018-2020)
Nominee: **Brian T. Hermanson, Newkirk**

Supreme Court Judicial District Six
Current: James R. Gotwals, Tulsa
Tulsa
(Three-year term: 2018-2020)
Nominee: **D. Kenyon Williams Jr., Tulsa**

Supreme Court Judicial District Seven
Current: Roy D. Tucker, Muskogee
Adair, Cherokee, Creek, Delaware, Mayes, Muskogee, Okmulgee and Wagoner
(Three-year term: 2018-2020)
Nominee: **Matthew C. Beese, Muskogee**

Member At Large
Current: Sonja R. Porter, Oklahoma City
Statewide
(Three-year term: 2018-2020)
Nominee: **Brian K. Morton, Oklahoma City**

NOTICE

Pursuant to Rule 3 Section 3 of the Oklahoma Bar Association Bylaws, the above nominees have been deemed elected due to no other person filing for the position.

Summary of Nominations Rules

Not less than 60 days prior to the annual meeting, 25 or more voting members of the OBA within the Supreme Court Judicial District from which the member of the Board of Governors is to be elected that year, shall file with the executive director, a signed petition (which may be in parts) nominating a candidate for the office of member of the Board of Governors for and from such judicial district, or one or more county bar associations within the judicial district may file a nominating resolution nominating such a candidate.

Not less than 60 days prior to the annual meeting, 50 or more voting members of the OBA from any or all judicial districts shall file with the executive director a signed petition nominating a candidate to the office of member at-large on the Board of Governors, or three or more county bars may file appropriate resolutions nominating a candidate for this office.

Not less than 60 days before the opening of the annual meeting, 50 or more voting members of the association may file with the executive director a signed petition nominating a candidate for the office of president-elect or vice president, or three or more county bar associations may file appropriate resolutions nominating a candidate for the office.

If no one has filed for one of the vacancies, nominations to any of the above offices shall be received from the House of Delegates on a petition signed by not less than 30 delegates certified to and in attendance at the session at which the election is held.

See Article II and Article III of OBA Bylaws for complete information regarding offices, positions, nominations, and election procedure.

Elections for contested positions will be held at the House of Delegates meeting Nov. 3, during the Nov. 1-3 OBA Annual Meeting.

Terms of the present OBA officers and governors will terminate Dec. 31, 2017.

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

REGISTRATION

YOU'RE GOING TO LOVE THIS YEAR'S ANNUAL MEETING

Learn ways to love your law practice even more with great speakers, great events and good times with great friends at this year's Annual Meeting. See what's included with your Annual Meeting registation below. Plus, choose from optional CLE courses with nationally recognized speakers and add-on luncheons.

What's included with your Annual Meeting registration:

- Conference gift: Nora Riva Bergman's book *50 Lessons for Lawyers: Earn More. Stress Less. Be Awesome.*
- Wednesday President's Reception and Thursday Show Your Love at the Jazz Hall of Fame social events
- OBA hospitality refreshments all day and continental breakfasts on Wednesday and Thursday
- 20% discount on registrants' Annual Luncheon tickets

HOW TO REGISTER

Online
Register online at www.amokbar.org

Mail
OBA Annual Meeting
PO Box 53036
Okla. City, OK 73152

Phone/Email
Call Mark at 405-416-7026
or 800-522-8065
or email marks@okbar.org

Fax
405-416-7092

DETAILS

Location

Most activities will take place at the Hyatt Regency Tulsa, 100 E 2nd St., Tulsa, 74103, unless otherwise specified.

Materials

You will receive electronic CLE materials in advance of the seminar.

Hotel

Fees do not include hotel accommodations. For reservations at the Hyatt Regency Tulsa, call 888-591-1234 and reference the Oklahoma Bar Association 2017 Convention, or **go to www.amokbar.org/registration**. A discount rate of $115 per night is available on reservations made on or before Oct. 10.

Cancellation

Full refunds will be given through Oct. 26. No refunds will be issued after that date.

Special Needs

Please notify the OBA at least one week in advance if you have a special need and require accommodation.

Name _____

Email _____

Badge Name (if different from roster) _____ Bar No. _____

Address _____

City _____ State _____ Zip _____ Phone _____

Name of Nonattorney Guest _____

Please change my OBA roster information to the information above. ☐ Yes ☐ No

Check all that apply: ☐ Judiciary ☐ Delegate ☐ Alternate

	Early Rate	Standard Rate	New Member✓ Early Rate	New Member✓ Standard Rate
Meeting Registration Circle your choice	$75	$100	$0	$25

✓*New members sworn in this year*

SUBTOTAL $_____

CLE

Annual Meeting registration not required. **Early rate valid on or before Oct. 10.** Circle your choice

	Early Rate	Standard Rate	New Member✓ Early Rate	New Member✓ Standard Rate
Wednesday*	$150	$175	$50	$75
Thursday Plenary**	$50	$75	$25	$50

✓*New members sworn in this year* ** includes 6 hours of CLE, including up to 3 ethics* *** includes 3 hours of CLE, including .5 ethics*

SUBTOTAL $ _____

LUNCHEONS AND EVENTS

Annual Meeting registration not required

Law School Luncheon ☐ OCU ☐ OU ☐ TU ____ # of tickets at $40 $ _____

Annual Luncheon with meeting registration ____ #of tickets at $40 $ _____

Annual Luncheon without meeting registration ____ # of tickets at $50 $ _____

Delegate Breakfast for nondelegates and alternates ____ #of tickets at $30 $ _____

Delegate Breakfast for delegates (no charge) ☐ (check if attending as a delegate)

SUBTOTAL $ _____

PAYMENT

☐ Check enclosed: Payable to Oklahoma Bar Association **TOTAL COST** $ _____

Credit card: ☐ VISA ☐ Mastercard ☐ American Express ☐ Discover

Card #_____ CVV#_____ Exp. Date_____

Authorized Signature _____

Six Recipients Receive Diversity Awards

By Tiece Dempsey

Six individuals and organizations were honored at the OBA Diversity Committee Awards Dinner Oct. 19 with the Ada Lois Sipuel Fisher Diversity Award, which recognizes the effort of recipients to demonstrate that diversity and inclusion matters in Oklahoma.

Desmond Meade, a former homeless returning citizen who overcame many obstacles to eventually become Florida Rights Restoration Coalition president and Florida International University College of Law graduate, was the keynote speaker at the event held at the Oklahoma Judicial Center in Oklahoma City. Mr. Meade shared his story and described his mission to lead a citizen's initiative to restore the ability to vote to over 1.68 million returning citizens in Florida.

Our annual awards are named for Ada Lois Sipuel Fisher, who was the first African-American admitted to the OU College of Law. Her tenacity to blaze a trail reflects the efforts of our award recipients to make a difference and inspire change.

AWARD RECIPIENTS

Member of the Judiciary

Judge Cindy Truong was elected to the bench by the voters of Oklahoma County on

Judge Cindy Truong

Nov. 2, 2010. She was sworn into office and began presiding on Jan. 15, 2011, as district judge of Office #7 of the Oklahoma County District Court. She received a B.S. in economics from OSU in only three years while also working in the family business. She earned her J.D. from the OCU School of Law in 2001.

Prior to taking the bench, Judge Truong served the public as a criminal prosecutor in the Oklahoma County District Attorney's Office for 10 years. She was responsible for the prosecution of cases that included death penalty murder cases, rape, robbery and drug trafficking. She has tried more than 50 jury trials to a verdict.

Currently, Judge Truong is assigned to a criminal felony crime docket. She has presided over 102 criminal jury trials. She is currently the chair for the Oklahoma Criminal Justice Reform Pretrial Release Committee appointed by Clayton Bennett. She is also a board member of the Oklahoma Supreme Court Board of Court Interpreters, appointed by then-Chief Justice Tom Colbert. She is also a member of Court on the Judiciary – Trial Division.

Attorneys

Kara I. Smith

Kara I. Smith is the chief of the Office of Civil Rights Enforcement Unit within Oklahoma Attorney General Mike Hunter's office (OAG) and leads an outstanding staff in educating the public regarding anti-discrimination rights and responsibilities, partnering with the public to positively and proactively advance the cause of civil rights for the equal benefit and enjoyment of

all Oklahomans, enforcing the Oklahoma Anti-Discrimination Act, which prohibits discrimination in employment, housing and public accommodation and enforcing other civil rights-related laws, and accepting, serving and reporting on complaints of racial profiling by state, county and municipal law enforcement.

Ms. Smith is currently the Equal Employment Opportunity officer for the OAG. Previously, she was assigned to the General Counsel Unit within the OAG and served as general counsel to the Oklahoma Department of Veterans Affairs and the Oklahoma Veterans Commission. Prior to joining OAG, she was deputy general counsel with the Oklahoma Office of Management and Enterprise Services from August 2011 to April 2014, which absorbed the Oklahoma Office of Personnel Management as a result of legislative mandate, wherein she served as general counsel from January 2007 to August 2011.

Ms. Smith is a member of the YWCA Oklahoma City Board of Directors and Oklahoma Bar Foundation Board of Trustees. She is an active member of the OBA and American Bar Association, serving on a number of committees in leadership positions – OBA Teller Committee chair, OBA Awards Committee vice chair and former OBA Diversity Committee chair. She serves the community as a member of the YWCA Board of Directors and HR Advisory Committee in addition to the OCU Law Dean's Council on Diversity, Equality and Inclusion.

She received her B.A. in political science and a minor in legal studies from the OU Price College of Business. She received her J.D. from the OCU School of Law.

Tamya Cox

Tamya Cox grew up in Des Moines, Iowa, and moved to Tulsa when she was 15. She graduated from OSU with a B.A. in journalism and a minor in French. In 2006, she graduated from the OCU School of Law. After being admitted to the bar, she worked for the American Civil Liberties Union of Oklahoma as the first legislative counsel. She is currently the regional director of Public Policy and Organizing for Planned Parenthood Great Plains, headquartered in Oklahoma City.

Committed to civil rights and civil liberties, Ms. Cox has traveled across the state and country speaking to communities regarding issues that directly impact their lives. She has served on numerous panels and presented on a variety of topics. She has received the A.C. Hamlin Award from the Oklahoma Legislative Black Caucus, John Green Community Service Award from the Association of Black Lawyers and Faith, Freedom Award from the Oklahoma Religious Coalition for Reproductive Choice and Social Justice Activator Award presented by YWCA in Oklahoma City.

Organizations

FIELDS & FUTURES
BUILD. INSPIRE. EMPOWER.

Fields & Futures was created in 2012 to help Oklahoma City Public Schools (OKCPS) grow student participation in sports, believing every child deserves the opportunity to join a team and benefit from that experience. A driving belief is, "If they play, they stay, and if they stay, they graduate."

To some, it may seem Fields & Futures builds and maintains athletic fields but to others, they know it's about something much bigger. It's about giving all children the opportunity to belong to something bigger than themselves … a motivator to go to school and stay in school – and a proven pathway to graduation.

OKCPS is Oklahoma's largest school district, serving more than 46,000 students from predominantly high poverty neighborhoods. In 2012 a small number of the district's 42 athletic fields were playable. Student participation in sports was far below the national average and thousands of young students were missing the opportunity to experience what so many others take for granted.

Fields & Futures, along with a growing base of partners, donors and supporters, is working hard to change the story. With 20 fields reconstructed and 22 to go, the finish line is in sight. And the faster Fields & Futures can finish what it started, the faster

thousands of young students can have the opportunities and school experience they deserve.

Langston University is a public historically black college enrolling a close-knit community of under 4,000 students. Founded in 1897, the university is located in rural Logan County and has urban campuses in Oklahoma City and Tulsa. LU was recently recognized as a top institution of higher learning for affordability, ranking number three among all historically black colleges and universities in the U.S., according to Affordable Schools.net. Langston offers over 40 associate, bachelors, masters and doctoral programs across six academic colleges.

The **OU-Tulsa Diversity Coalition** consists of students, faculty and staff of the OU-Tulsa Schusterman Center dedicated to promoting diversity and inclusion throughout its campus community and beyond. The group meets periodically to coordinate and execute relevant programming, seeking to further cultivate a culture that not only accepts, but celebrates diversity. In the 2016-2017 academic year, the Diversity Coalition assisted in reaching 1,229 individuals through diversity-related programming.

ABOUT THE AUTHORS

Tiece Dempsey chairs the OBA Diversity Committee and works for the Federal Public Defender Office, Western District of Oklahoma with the CJA panel administrator.

New Attorneys Take Oath

Board of Bar Examiners Chairperson Bryan Morris announces that 211 applicants who took the Oklahoma Bar Examination on July 25-26, 2017, were admitted to the Oklahoma Bar Association on Tuesday, Sept. 26, 2017, or by proxy at a later date. Oklahoma Supreme Court Chief Justice Douglas Combs administered the Oath of Attorney to the candidates at a swearing-in ceremony at OCU. A total of 279 applicants took the examination.

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

The new admittees are:

Adkison, Micah Lee
Adler, Todd Michael
Allbery, Tyler Justin
Anderson, Ryan Carter
Andrews, Jamie Rose
Armstrong, Lauren Elizabeth
Asbill, James Christian
Babcock, Stephen Christopher
Bailey, Jessica Nicole
Barnett, Jay Whitcomb
Basler, Amy Susan
Batchelor, Blake Justice
Bolitho, Jason Scott
Bond, Cedric Christian Micaiah
Bourassa, Katie Jane
Bowlin, Cody Wayne
Boyd, Joanna Lauryne
Brack, Kellynn Edward
Brackett, Kevin Christian
Brandon, Katherine Stidham
Brantley, Molly Elizabeth
Brecheen, Keith Russell
Bright, Simon William
Brooks, Melissa Ann
Brown, Amy Elizabeth
Brown, Jacob Taylor
Brown, Katie Marie
Brown, Verl James
Browning, Tiffany Nichole
Bruns, Aaron Burnet
Bryant, Mikael Deems
Butts, Zoe Elizabeth
Bynum, Susan Elizabeth
Byrne, Justin Paul
Calvert, Christopher Marvin
Campbell, Katey Noel
Cantrell, Donald Lea
Carrillo, Rodrigo
Cary, Breanna Renne
Christian, Torri Lanae
Chronister, Sonya Renea
Clifton, John David Lee
Cline, Hannah Elizabeth
Connolly, Danielle Marie
Covington, Courtni Michelle
Cox, Melanie Marie
Crowe, Tyler Douglas
Dowdell, John Wilbanks
Drusen, Haley Ann
Duran-Quintana, Stephanie Suzette
Eagon, Meagon Renee
Ellis, Genni Dawn
Ellsworth, Rachel Joy
Erickson, Robert Raymond
Ervin, Charles Austin
Fiegel, Adam Taylor
Fishburn, Graham Madison

New lawyers reciting the Oath of Attorney.

Cummings, Christopher David
Cunningham, Drew Phillip
Cunningham, Jessica Nicole
Daniels, James Fletcher
Davis, Lacey Danielle
Davis, Paul Leone
Davison, Noren Nevri
Deitch, Brittany Lauren
Dennis, Jordan Renley
Dial, Michael Allen
France, Tanner Blake
Gilbert, Natalie Jean
Gile, Leslie Dianne
Gin, Andrew Turner
Goetzinger, Jessica Blake
Goins, Ashley Renae
Goldsmith, David Ryan
Goodnight, Chase Aidan
Gordon, Jesse Willard
Gordon, Kelissa Renee

Gotwals, John Charles
Grace, Joshua Lynn
Guerra Wolf, Caroline Elizabeth
Gullett, Zoe Elizabeth
Gunkel, Preston Michael
Guziar, Monica
Hamill, Amanda Kiersten
Hamilton, Brooke Elizabeth
Hamilton, Mark Clinton
Hartwell, Caleb Alan
Hemavathi, Vineeth Shanker
Henderson, Brooke Nicole
Henderson, Evan Michael
Henry, Tessa Lynn
Hensley, Jacqueline Elizabeth
Holder, Kari Dawn
Holder, Kelsey Suzanne
Holland, Victoria Shantel
Hornbeek, Mark Edwin
Horton, Chaz Allen
Hunnicutt, Ryan Gannon
Hunter, Barrett Michael
Imgrund, Ryan Chase
Isaac, Sunil Tom
Isom, Christina Dawn
Johnson, Virginia Lynn
Kalka, Joseph Dewayne
Keathly, Austin Matthew
Keester, Brian Michael
Kerwood, Ahrens Gene Michael
King, Alyssa Laura
King, Andrew Michael
King, Hayden Ryan
Kitchens, Lance Edward
Kitchens-Moore, Lauren Ashley
Kuri, Kayla Marie
Lambert, Megan E
Land, Emma Lee
Langley, Dillon Lee
Leimbach, David Wayne
Lenker, Lyman Gilbert
Lineberry, Crystal Faith
Lissuzzo, Russell Charles
Logan, Maggie Mae
Long, Landon Christopher
Lonn, William Douglas
Lueck, Caleb Tyler
Malone, Aspen Jordan
Martin, Rebekah Rae
Matousek Ames, Katrina Margaret
Mattingly, Erika Lynne
McMahon, Kevin James
McVay, Kristopher Kaiser
Meloni, Matthew Norman

New lawyer Virginia Lynn Johnson from the OU College of Law takes a photo with her family.

Miller, Samantha Victoria
Minner, Joshua Michael
Mitzner, Zachary Clayton
Moniz, Calvin Michael
Morgan, Harlan Stewart Blake
Moser, Ryan Scott
Myers, Philip Anthony
Nash, Michael Thomas
Ngo, Cynthia Dinh
O'Brien, James Edward
Offutt, Kelly Lynn
Parker, James Michael
Patel, Krishan Veerkumar
Patrigo, William John
Penny, Raymond Ellis
Perkins, Jason Wayne
Polly, Andrew Ray
Portilloz, Lauren Nicole
Quinn, Ashley Edwards
Ramick, Jillian Tess
Ray, Stephanie Ann
Richard, Alexander Beal
Richards, Kristin Elizabeth
Riddle, Jason Dean
Rogers, Benjamin Franklin
Ross, Jeremiah Abraham
Roth, Audrey Anna
Sawyer, Kathryn Lorraine
Schmidt, Peter August
Scott, Hayley Ray
Sebastian, Alisha Caffrey
Self, Brian Manning
Sessler, Jordan Elijah
Sharp, Gabrielle Yvonne
Shelton, Megan Behr
Sherman, Robin Breann
Shirley, Alexander Matthew
Shirley, Lacey Lynn
Sides, Sherry Rae
Siex, Hunter Marano
Singer, Adam Jacob
Smith, Allie Elizabeth
Smith, Mackenzie Lee
Smythe, Scott Bradley
Snodgrass, Alexander Chase
Solimano, Nicole Alexandra
Spencer, Timothy Lawrence
Stephenson, Austin Laine
Strand, Orion Arnold
Sullivan, Molly Ann
Swanson, Lauren Frances
Takmil, Komron
Tapia, Janie Roxana
Taylor, Amy Michelle
Taylor-Qualls, Paiten Laine
Tharp, Conner Bridges
Throckmorton, Brette Alise
Tifft, Aaron Christian
Tolbert, Sean Michael
Tucker, Nicholas Ruffin
Tyler, Taylor May
Underwood, Eric Scott
Underwood, Zachary Warren
Vance, Austin Ryan
Velchik, Michael Kenneth
Ventris, Sarah Michelle
Wagner, Katie Naomi
Washeck, Andrew William
Watson, Evan Darrell
Watts, Weston Oliver
Way, Evan Hans
Weaver, Haley Robinson
West, Stanley James
Whelchel, Maegan Lee
Willey, Sarah Danielle
Willoughby, Matthew Edward
Wilson, Brian Christopher
Wilson, Ryan Keith
Wyatt, Taylor Jean
Yeakley, Stanton Ray

Why Belonging to Your County Bar Association is Important

By John Morris Williams

The Rules Creating and Controlling the Oklahoma Bar Association provide that the policy-making authority of the association is vested in the House of Delegates, subject to the controlling authority of the Oklahoma Supreme Court. The Oklahoma Bar Association Bylaws provide that each county shall have at least one delegate.

Thus, the governing body of our association is composed of delegates who are chosen by county bar associations. Not only do the delegates decide what matters go upon the legislative agenda of the association and other policy-making matters, they choose our elected leaders.

The entire system of our self-governance is dependent upon county bar associations actively participating in the choosing of delegates to the House of Delegates. As earlier stated, these delegates determine the policy of the OBA and elect our leaders. The Oklahoma Supreme Court is the final authority on matters such as dues and rule changes. However, the approval of the House of Delegates is the highest recommendation the OBA can take to the court on many important matters.

In years past I have witnessed county bar associations do some pretty incredible things. It's not only the large county associations with paid staff that accomplish significant feats. If you pay attention to the awards given at the OBA Annual Meeting, you will see that some fairly small county bar associations have Law Day and other community events that reach a large number of people.

> **"In years past I have witnessed county bar associations do some pretty incredible things."**

Unfortunately, in years past I have seen some county bar associations almost disappear. The counties that have strong county bar associations, regardless of size, have one thing in common. They have strong leaders who are insistent in bringing lawyers together to socialize and perform community service. In many cases there are one or two lawyers who are the "glue" for the county bar association. These leaders are invaluable. They make sure that delegates are elected; they communicate local issues and achievements, and most importantly, they provide a strong contact between their county bar association and the OBA. To these local leaders we all owe a debt of gratitude.

Belonging to your county bar association is imperative to stay abreast of local issues and to ensure your voice is heard in the governance of the OBA. Likewise, it provides opportunities

for networking and further developing your career and your practice. Counties with a strong county bar association generally have a greater congeniality and good bench and bar relations.

As a young lawyer, one of my greatest mentors said it was necessary for me to join and become involved in my county bar association. I believe that was some of the best advice I have ever received. Not only did it provide me an opportunity to socialize and learn from some great lawyers, it also gave me an avenue to give back to my community and my profession.

Lastly, your county bar association is the best way for substantive issues, whether they be legal, legislative or community assistance related, to be communicated to nonlawyer leaders in your community. The power of association often changes singular opinions into collective advice.

I believe that your belonging to – and being an active part of – your county bar association has the power to make you a better lawyer and a better citizen. I know your being an active member of your county bar association is essential for the OBA to maintain and continue its role in the self-governance and regulation of the practice of law. If you do not belong to your county bar association, you should.

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

OKLAHOMA BAR JOURNAL EDITORIAL CALENDAR

2017 Issues

- November
  Administrative Law
  Editor: Mark Ramsey
  mramsey@soonerlaw.com
  Deadline: Aug. 1, 2017
- December
  Ethics & Professional Responsibility
  Editor: Leslie Taylor
  leslietaylorjd@gmail.com
  Deadline: Aug. 1, 2017

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

2018 Issues

- January
  Meet Your OBA
  Editor: Carol Manning
- February
  Transactional Law
  Editor: Melissa DeLacerda
  melissde@aol.com
  Deadline: Oct. 1, 2017
- March
  Family Law
  Editor: Patricia Flanagan
  Patriciaaflanaganlawoffice@cox.net
  Deadline: Oct. 1, 2017
- April
  Law Day
  Editor: Carol Manning
- May
  Science & the Law
  Editor: C. Scott Jones
  sjones@piercecouch.com
  Deadline: Jan. 1, 2018
- August
  Education Law
  Editor: Luke Adams
  ladams@tisdalohara.com
  Deadline: May 1, 2018
- September
  Bar Convention
  Editor: Carol Manning
- October
  Sports Law
  Editor: Shannon Prescott
  shanlpres@yahoo.com
  Deadline: May 1, 2018
- November
  Torts
  Editor: Erin L. Means
  erin.l.means@gmail.com
  Deadline: Aug. 1, 2018
- December
  Ethics & Professional Responsibility
  Editor: Leslie Taylor
  leslietaylorjd@gmail.com
  Deadline: Aug. 1, 2018

What a Disaster!

By Jim Calloway

The year 2017 has been an extraordinary year for hurricanes impacting the U.S. and the Caribbean. It is heartbreaking to see pictures and videos of the destruction and devastation. Recovery will take many years for some of these areas and many families have lost photo albums and prized possessions that cannot be replaced. The number of wildfires in the northwestern part of the U.S. this year has been staggering as well.

In Oklahoma, we have experienced our own disasters from many sources including domestic terrorism, drought, wildfires and many destructive tornadoes.[1] Disaster refers to a wide-ranging event, but I've often heard the phrase "What a Disaster!" used for personal or individual misfortune such as a person taken too soon by an automobile accident or illness. If a lawyer has been working on a brief for three days and the computer's hard drive crashes the day before the deadline, it feels like a disaster.

Businesses today have business continuity plans in place. These plans often address both recovery from and prevention of damages caused by disasters. The plans are mainly for the benefit and survival of the business, with the customers being the incidental beneficiary.

For lawyers, it's a little different.

"Disaster planning is especially important for lawyers. Not only is it necessary to protect, preserve, and in extreme cases rebuild one's practice or firm, lawyers also have special obligations to their clients. Lawyers must represent the client competently and diligently, safeguard the client's property, and maintain client confidentiality and communications.

"…there is no conflict between your personal needs, your law firm's needs and your client's needs."

"These obligations are neither excused nor waived following a disaster."

– ABA Special Committee on Disaster Response & Preparedness[2]

This is direct and maybe it even sounds a little bit harsh, but it is accurate. The positive perspective of this message is that there is no conflict between your personal needs, your law firm's needs and your client's needs. The "need" for all is for your law practice to recover quickly from any disaster with no loss of client data and all systems intact. It is true that 100 percent recovery from a significant disaster is unlikely. But with advance planning and the smart use of technology-based tools, an "almost perfect" recovery is very possible.

The first step in planning for Oklahoma lawyers is to download, read and act on the advice in the OBA-provided e-book, *Planning Ahead Guide: Attorney Transition Planning in the Event of Death or Incapacity.* For OBA members, the download link is "Attorney Transition Planning Guide" at the bottom of the My Profile page after you login to our member site. This planning guide was adapted with permission from a publication of the same title from the Oregon State Bar Professional Liability Fund. Many bar associations provide a similar guide to their members.

Lawyers encourage their clients to create an estate plan and execute a last will and testament for obvious reasons. The same types of obvious reasons are why almost every lawyer in private practice should follow the advice in the planning guide and use the planning forms it contains.[3] If you are temporarily sidelined, this planning will help you return to a more stable practice. If it's not temporary, your family members and professional colleagues will thank you for making their job closing down or transferring your practice easier.

THE DISASTER RECOVERY PLAN

The key to surviving any disaster is planning in advance. Every law firm, of whatever size, should have a disaster recovery plan. It should be reviewed annually. A copy should be kept in the cloud as well as on paper. Several trusted members of the firm should also keep a paper copy at home.

The plan should contain contact information for all those individuals you may need to call on for assistance in the event of a disaster. This includes all important vendors and their contact information, copies of insurance policies and contact information and the landlord's contact information, those you would want to repair building damage and many others. This is why your disaster recovery plan (or, more formally stated, your business continuity plan) is unique to you and your firm, requiring an investment of your time to assemble.

There also should be documentation about law firm internal processes. Time, billing and accounting information are largely contained on your law firm network or computers today. But for planning, you must assume you might not have access to computers and network. If your firm uses billing codes, you will certainly want hard copies of those, so that any client work done during the recovery can be appropriately documented. A hard copy of contact information for clients might also be useful.

Having all software license numbers and installation disks is a more daunting task than it might seem at first glance. You can use tools like Belarc advisor to take a snapshot of all the installed software with the license numbers on individual machines.[4] Another category of information includes information on all hardware and office furnishings, assuming you might have to make an insurance claim.

One thing that I've repeatedly heard from many who have survived a disaster is that it is challenging just to think about what needs to be done and establish priorities. That is why it is so important to have written lists and plans that were created in a calm and reflective moment. For just one example, if you are concerned about flooding or a tornado, the office dishwasher is one handy watertight storage location. But in a rush to evacuate, no one will think of that unless it is included in the disaster planning and has been discussed in your disaster recovery staff training.

There are online resources to assist in your planning. The American Bar Association has a disaster planning webpage[5] that includes a link to *Surviving a Disaster: A Lawyer's Guide to Disaster Planning*. The guide contains a sample business continuity plan at attachment A.

PEOPLE COME FIRST

If you experience a widespread natural disaster, you will of course check on your family members first. The next step is to check in with your "work family." You should have an emergency contact list with the home and cell phone numbers for all staff, including part-time employees. This should be stored in a secure cloud location, but it also makes sense to store it on your phone so it can be accessed in a situation where there is cell phone service but no internet access.

Helping a trusted employee deal with the flooding in their home might be the most productive thing you can do in the first few hours after a disaster. But don't let the urge to do something cause anyone to compromise their personal safety post-disaster. The point of planning is to take positive steps to recover as quickly and effectively as possible.

BACKING UP DATA

Today, most experts would say it is a business requirement to have a cloud-based backup system. Multiple methods of backup are suggested. Test your backup regularly to make sure it is working. There are many reputable cloud providers – examples include Mozy, Carbonite, Backblaze, CrashPlan SMB and Acronis. For more information on backup, refer to the Law Practice Tips column of the *Oklahoma Bar Journal* from April, "Backing Up, Like Breaking Up, Is Sometimes Hard to Do."[6] As noted in the article, multiple backups are the proper standard of care today.

Instant disaster recovery and remote access are two of the reasons why the Oklahoma Bar

Association Management Assistance Program strongly recommends the use of cloud-based practice management systems, particularly for solo and small firm lawyers. One can have done all of the backups appropriately, but if you have to buy new computers before you can restore the backed-up data, there will be delays. With cloud-based practice management, you can access all of your client files and other information via your cell phone. When you have electricity, internet access and any secure computer, you are up and running for essential client services with cloud-based practice management.

Using a practice management solution to support a digital client file system means that it is easier to determine what tasks merit the most urgent priority. Some lawyers have created a portable hard drive or flash drive that contains their legal forms. This might prove handy if some things need to be done urgently and the lawyer has power and a computer and printer, but no internet access.

While we discuss using password managers to allow us to use unique long passwords for greater security, knowing the password to open your password manager also means that you could install the password manager on a different machine and then have access to all of your online assets.

POWER

We take electricity for granted – at least until our phone needs a charge. One of our rituals when power loss is imminent is to charge up all of our small handheld battery chargers and make sure all of our laptops, phones and other devices are fully charged.

All important electronic devices such as computers, servers, networking hardware, phone systems, etc. should be kept on uninterruptible power supply (UPS) devices, which are nothing more than "smart" batteries. This will protect equipment from dirty electricity, surges and outages, all of which can cause damage to equipment. A battery backup

may be able to supply the phone system with enough power during an outage to allow you to continue business operation or communicate with rescue personnel. These battery backup devices will also allow computing equipment sufficient power to shut down properly, which can help to prevent data loss or corruption of files.

CONCLUSION

After Hurricane Katrina, I had the opportunity to visit with many impacted lawyers in Louisiana and Mississippi. I was haunted by the story of the lawyer who just finished a major project, packed up his laptop to accompany him on the evacuation and then, at the last minute, decided to leave it on his secretary's desk so she could proof and print the final version of the project. Within a day, his office and his laptop were underwater. Had he spent some time in advance thinking about an overall law firm disaster plan, he likely would not have made that costly error. Spend some time creating a plan so that you can avoid costly errors if you are confronted with a disaster.

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

1. National Weather Service, *2017 Oklahoma Tornadoes*, WEATHER.GOV, www.weather.gov/oun/tornadodata-ok-2017 (last visited Sept. 20, 2017) [https://web.archive.org/web/20170714001410/https://www.weather.gov/oun/tornadodata-ok-2017].

2. David F. Bienvenu, Special Committee on Disaster Response and Preparedness, *Report Accompanying ABA House of Delegates Resolution 116* (2011), www.americanbar.org/content/dam/aba/directories/policy/2011_am_116.authcheckdam.pdf [https://perma.cc/9NH9-995J].

3. Lawyers who are paid employees of a firm may not have as many of these responsibilities. Their "planning ahead" duties to clients may be limited to accurately documenting all of their activities in the client files.

4. Jon L. Jacobi, "Capsule Review: BelArc Advisor," *P.C. World* (Aug. 14, 2009 12:00 AM PT), www.pcworld.com/article/231688/belarc_advisor.html [https://web.archive.org/web/20170102172654/https://www.pcworld.com/article/231688/belarc_advisor.html].

5. ABA Comm. on Disaster Response and Preparedness, www.americanbar.org/groups/committees/disaster.html (last visited Sept. 20, 2017) [https://perma.cc/7S2M-QHME].

6. Jim Calloway, "Backing Up, Like Breaking Up, Is Sometimes Hard to Do," 88 *Oklahoma Bar Journal* 770 (2017), www.okbar.org/members/MAP/MAPArticles/HotPracticeTips/BackingUpLikeBreakingUp.aspx [https://perma.cc/L5GC-FT3C].

Knowledge of the Ethics Rules Is Essential

By Joe Balkenbush

Lawyers continue to have a lack of familiarity with the Oklahoma Rules of Professional Conduct (ORPC). That lack of familiarity leads directly to a failure to comply with the rules, which leads to the filing of a grievance. From my perspective, based upon my contact with members of the bar, attorneys are simply not familiar with their responsibilities and duties as required by the ORPC.

There is one thing that I know for sure, no one makes a conscious decision to violate the rules. No one wants a client to file a grievance against them. Yet, the only logical conclusion is that attorneys don't know the rules. There is a clear consistency as to the ethics rules violated by lawyers which lead to the filing of grievances. Year after year, statistics show that attorneys continue to violate the same rules. The Office of the General Counsel compiles the Annual Report of the Professional Responsibility Commission.[1] Lack of diligence in prosecuting a client's case[2] and lack of communication with the client[3] are the most often violated rules, every year!

We have all heard the saying "you don't know what you don't know." Unless you have at least a basic familiarity with the ORPC, it won't even enter your mind that you might be violating one or more of the ethics rules. It is not possible to be in compliance with the rules when you don't know what they are, or what they require. Therefore, it is essential that you read and study them! The ORPC can be found in Title 5 of the Oklahoma Statutes titled "Attorneys and the State Bar."[4]

The OBA and its leadership, including the justices of the Oklahoma Supreme Court, the executive director and the Board of Governors, created the position of ethics counsel to ensure that Oklahoma attorneys can be proactive regarding ethical issues that may arise, and to enable attorneys to get answers to their questions in real time. Please take advantage of this available resource and call me with any questions.

All contact with the ethics counsel is confidential per the ORPC.[5] A record of each call is maintained along with the name of the inquiring attorney, the attorney's bar number and telephone number, a brief synopsis of the facts stated and advice or guidance given. Any advice or guidance given is advisory in nature and is not binding upon the Office of the General Counsel, the Professional Responsibility Tribunal (PRT) or the Oklahoma Supreme Court. It is not a "get out of jail free card." However, when an attorney calls for advice or guidance, their contact with the ethics counsel can be considered by the general counsel, PRT or Supreme Court as a mitigating factor when determining the discipline to be imposed.

Your knowledge of your ethical obligations under the ORPC is essential to your competent and confident practice of law. These rules are, in fact, just as important as your knowledge of the substantive law of the areas in which you practice. Your lack of knowledge of rules could result in your license being suspended or worse. Few, if any, lawyers set out to violate the rules, but again, you don't know what you don't know. *Read the rules!*

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

1. Annual report of the professional responsibility tribunal compiled by the general counsel - www.okbar.org/portals/13/pdf/2016%20prc%20annual%20report.pdf.

2. ORPC rule 1.3, diligence - www.oscn.net/applications/oscn/deliverdocument.asp?citeid=448838.

3. ORPC rule 1.4, communication - www.oscn.net/applications/oscn/deliverdocument.asp?citeid=479338.

4. link to the oklahoma rules of professional conduct – www.oscn.net/applications/oscn/deliverdocument.asp?citeid=448827.

5. ORPC rule 8.3, reporting professional misconduct - www.oscn.net/applications/oscn/deliverdocument.asp?citeid=449012.

Meeting Summary

The Oklahoma Bar Association Board of Governors met on Friday, August 25, at Woolaroc Museum in Bartlesville.

REPORT OF THE PRESIDENT

President Thomas reported she met with Justice Gurich regarding various bar issues and events, presented a CLE program to the Cleveland County Bar Association on the Death Penalty Review Commission report, met with Oklahoma Bar Foundation Executive Director Renée DeMoss and OBF staff to plan the upcoming OBF/OBA joint dinner, worked with Executive Director Williams, OBA staff and OBA officers on various OBA issues, worked with Educational Programs Director Damron on the selection of 2017-2018 Leadership Academy members, wrote letters to those selected to participate in the academy, made numerous OBA committee appointments, made recommendations for OBF Board of Trustees to present to the OBA Board of Governors for approval and appointment, worked with Washington County Bar Association President Adair Fincher to plan the board's August social event with the county bar, worked with Woolaroc personnel to plan the board meeting and lunch, worked with OBA officers on the executive director's evaluation and made 50- and 60-year membership presentations at the Tulsa County Bar Association annual luncheon. She attended OBA Past President Smallwood's bench and bar retreat, Strategic Planning Subcommittee meeting, Annual Meeting planning meeting and OBA Strategic Planning Finances Subcommittee meeting. In New York City she attended the Southern Conference of Bar Presidents, National Conference of Bar Presidents annual meeting and represented the OBA at the American Bar Association House of Delegates. She sent letters to Gov. Fallin with names for her consideration for appointment to the National Conference of Commissioners on Uniform Laws, to Jody Nathan on her appointment to the Professional Responsibility Commission and to Dwight Smith advising him of the board's unanimous support of the joint resolution of the ABA Commission on Vet-erans Legal Services and the Standing Committee on Legal Services for Military Personnel.

REPORT OF THE VICE PRESIDENT

Vice President Castillo reported she participated in the Strategic Planning Committee meeting, OBA Annual Meeting planning meeting and Strategic Planning Finance Subcommittee meeting. In New York City she attended the Southern Conference of Bar Presidents meeting, National Conference of Bar Presidents meeting and represented the OBA in the ABA House of Delegates.

REPORT OF THE PRESIDENT-ELECT

President-Elect Hays reported she participated in the Strategic Planning Dues Subcommittee, Strategic Planning Finance Subcommittee and Strategic Planning OBJ Subcommittee meetings, chaired the Strategic Planning Committee meeting, participated in the 2017 Annual Meeting planning meeting, made various OBA committee appointments, reviewed the proposed 2018 OBA budget with Executive Director Williams and Administration Director Combs, served as a mentor in the OBA Family Law Section Trial Advocacy Institute, researched issues for president-elect 2017 planning and 2018 planning, coordinated award submissions and winners for the Women in Law Committee's Mona Salyer Lambird Spotlight Award recipients and talked with the U.S. Virgin Islands president-elect regarding a possible joint CLE seminar on the island next year. She attended the Southern Conference of Bar Presidents meeting in New York City, National Conference of Bar Presidents annual meeting in New York City, OBA FLS meeting, OBA FLS Annual Meeting planning meeting and Tulsa County Bar Association annual luncheon.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended National Association of Bar Executives and National Conference of Bar President meetings in New York City, staff budget meetings, all three strategic planning subcommittee meetings, Tulsa County Bar Association annual luncheon, monthly staff celebration, a CLE online vendor presentation, OBA Past President Smallwood's bench and bar retreat, Annual Meeting planning meeting, phone conference regarding a potential 2018 spring break CLE and

meeting with Jennifer Beale regarding member benefits and group insurance for members.

BOARD MEMBER REPORTS

Governor Coyle reported he attended the Oklahoma County Bar Association meeting. **Governor Fields** reported he attended the OBA Member Services Committee meeting via BlueJeans. **Governor Gotwals** reported he attended the Tulsa County Bar Association Litigation Section meeting, two National Conference of Bar Foundations telephone conferences regarding panel member preparation for better practices for boards at the ABA convention, TCBF Golf Committee presentation of checks to beneficiaries from the golf tournament, two OBA Standards for Defense of Capital Punishment Cases Task Force meetings via BlueJeans, OBA Alternative Dispute Resolution Section meeting via BlueJeans, ABA/NCBF Annual Meeting in New York City, TCBA/TCBF annual meeting and awards luncheon and Quality Assurance Panel meeting. **Governor Hennigh** reported he attended the Strategic Planning Subcommittee meeting and Garfield County Bar Association meeting/CLE conference. **Governor Hutter** reported she attended the Cleveland County Bar Association Executive Committee meeting, county bar meeting featuring President Thomas as the speaker and retirement presentation for Judge Schumacher and Diversity Committee meeting via telephone. She organized the special presentation for Judge Schumacher's retirement. **Governor Kee** reported he reached out to county bar presidents in his district asking them to notify him if they have a meeting. He said not many county bars are meeting regularly. **Governor Oliver** reported he attended the Payne County Bar Association August meeting. **Governor Porter** reported she attended the funeral for Trooper Meyer, Board of Tests for Alcohol and Drug Influence meeting and Governor Impaired Driving Prevention Advisory Council meeting. **Governor Tucker** reported he attended the Muskogee County Bar Association meeting and OBA Annual Meeting planning meeting. **Governor Weedn** reported the Ottawa County Bar Association passed a resolution supporting Chuck Chestnut for 2018 OBA president-elect. He said the board's Audit Committee will meet soon.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Lane Neal reported YLD nominating petitions were finalized, and candidate bios will be published in the upcoming bar journal. He said they have the most people running in a long time. Promotion efforts and reaching out to Leadership Academy classes were both effective. He chaired the July YLD board meeting and attended the ABA YLD Council Meeting, ABA YLD Assembly and ABA House of Delegates.

BOARD LIAISON REPORTS

President-Elect Hays said the Strategic Planning Dues Subcommittee is recommending senior members pay a reduced fee for dues but didn't agree on an amount. She said the Financial Planning Subcommittee looked at the need for a dues increase. They report an increase will be needed by 2022 and decided action was not needed at this time. The *Oklahoma Bar Journal* Subcommittee reviewed the need to continue printing and mailing the bar journal court issues. The subcommittee recommends discontinuing printing court issues as of Dec. 31, 2017, but continuing to publish the issues as they look now and distributing them electronically, which is a current option. The savings could be as much as $165,000. The theme issues would continue to be mailed.

President-Elect Hays reported the full Strategic Planning Committee met and discussed senior status. The committee is recommending the creation of a new member classification called Retired Member for members over 70 years of age who are no longer practicing. They would not pay dues or vote. Receiving the bar journal and other member services would be available at the OBA's cost. This would be a resolution considered by the House of Delegates and if passed, will be considered by the Supreme Court. A provision would be included to come out of retired status. Discussion followed. The committee supported the recommendation of the OBJ Subcommittee. President Thomas reported a formal recommendation regarding the bar journal will come to the board at its September Board of Governors meeting. Action will affect the proposed OBA 2018 budget. Board members were urged to share this information with members.

Governor Fields reported the Member Services Committee heard a presentation on a trust accounting software, and the committee will submit a proposal to the board. Governor Gotwals reported the Standards for Defense of Capital Punishment Cases Task Force, chaired by Oklahoma City attorney Mack Martin, has held several meetings. They have produced a set of standards for defense counsel of capital cases. Once a workable document is finalized, it will be sent as a proposal to the Rules Committee.

Executive Director Williams said the report will be on the board's agenda next month before submitting it to the House of Delegates. President Thomas said she has a copy of the task force report and will share with board members if they would like to review the information in advance. She also offered board members copies of the Oklahoma Child Death Review Board annual report. Governor Will reported the Law-Related Education Committee assisted the Law Day Committee with preparing materials and resources for teachers to support the Law Day Contest theme of Separation of Powers: Framework for Freedom.

Executive Director Williams reported the Bench and Bar Committee is finalizing its VPO video. Governor Hutter reported the Diversity Committee is working on the Oct. 19 diversity banquet at which Bob Campbell will be honored. They voted on award recipients and are working on its Boot Camp event. Governor Hicks reported the Access to Justice Committee has held two meetings. At one meeting Management Assistance Program Director Calloway summarized issues of limited scope representation. The committee also decided to request funding this year to assist in the official public announcement of the Free Legal Answers program. Governor Gotwals said the Professionalism Committee submitted a nominee for the OBA Neil Bogan Professionalism Award and is still working on its December symposium. The committee has discussed creating a new Bogan-type award for a lawyer in practice less than 10 years.

REPORT OF THE GENERAL COUNSEL

Executive Director Williams explained General Counsel Hendryx was needed in the office on an urgent matter and was not able to attend the board meeting. He reported one of her support staff members is transferring to the MCLE Department. A written report of Professional Responsibility Commission actions and OBA disciplinary matters for July was submitted to the board for its review.

PRESENTATION

Attorney General Mike Hunter introduced his wife, Cheryl, who is a lawyer, and noted they both went to law school with Executive Director Williams. Attorney General Hunter described his philosophy in operating the Office of the Attorney General and praised the quality of lawyers who work in his office. He shared with the board his commitment to deal with the overprescribing of opioids in Oklahoma. He sees the need to hold drug manufacturers accountable and has asked Michael Burrage, former federal judge and OBA past president, to be lead counsel in litigation of criminal cases. Mr. Burrage has a niece who died from an opioid overdose. Attorney General Hunter said there is much criticism of the Legislature, and he sees a need for more lawyers to run for legislative positions.

PETITION TO CREATE OBA INTERNATIONAL LAW SECTION

Executive Director Williams said OBA member Katherine Trent contacted him about establishing a new International Law Section, and the required number of signatures was obtained on the petition. The board approved the creation of the new section and the proposed International Law Section bylaws.

OKLAHOMA BAR FOUNDATION APPOINTMENTS

The board approved President Thomas' recommendations to reappoint Gary Farabough, Ardmore; Michael Torrone, Big Cabin; Paul Kluver, Clinton; and to appoint Laura Sanders Hill, Tulsa, to the OBF Board of Trustees. Their terms will expire Dec. 31, 2020.

REQUEST TO PAY CONFERENCE REGISTRATION AND TRAVEL EXPENSES

The board approved registration and travel expenses for one OBA employee and one attorney from the Access to Justice Committee to attend the ABA Unbundling Conference in Denver in October. Executive Director Williams said the travel is inexpensive, and the employee attending would be Practice Management Advisor Darla Jackson.

EXECUTIVE SESSION

The board voted to go into executive session to discuss the executive director's evaluation, met in executive session and voted to come out of session.

RESOLUTION OF APPRECIATION

President Thomas thanked the Washington County Bar Association for its support and hospitality to the Board of Governors during its visit to Bartlesville for the August meeting.

NEXT MEETING

The Board of Governors met Sept. 15 at the Oklahoma Bar Center. A summary of those actions will be published after the minutes are approved. The next board meeting will be at 10 a.m. Friday, Oct. 27, via conference call.

OBF Grantees Will Impact More Than 60,000 Oklahomans in 2018

By Candice Jones

The Oklahoma Bar Foundation's newly named grantees are projected to help over 60,000 Oklahomans gain access to legal services and legal education in 2018. All of the organizations will use the funding they receive to further the OBF's mission to ensure justice is possible for all Oklahomans.

Owasso High School volunteers staff Youth Court, a program of Youth Services of Tulsa.

In order to receive funding, each of the nonprofits submitted an application detailing how their program aids Oklahomans in need, and particularly highlighted their program's impact – how many individuals they will serve this year and their projected needs for 2018. Agency staff across the state emphasized to the OBF the increasing number of people they believe will need aid with legal services in the upcoming year. During in-person interviews with the OBF Grants & Awards Committee, they noted that funds such as those provided by the OBF are critical to meet the growing needs they see daily in their program activities.

A teen court hearing takes place in Comanche County.

The OBF Board of Trustees approved funding recommendations from the OBF Grants & Awards Committee at the September board meeting, naming the following nonprofit organizations as 2018 IOLTA grantees:

Grantee	Program	Area of Service	Lives Impacted	Funding Amount
Center for Children & Families	Divorce Visitation Arbitration	Cleveland & Oklahoma counties	900	$18,000
Community Crisis Center	Court Advocate	Ottawa, Craig & Delaware counties	266	$5,000
Domestic Violence Intervention Services	Court Advocacy and Legal Services	Tulsa & Creek counties	3,313	$20,000
Family & Children's Services	Family Court	Tulsa County	9,600	$7,000
Foundation for Oklahoma City	Law & Public Safety Academy	Northeast Oklahoma City	50	$18,000

Legal Aid Services of Oklahoma Public Schools	Civil Legal Services	Statewide	21,719	$85,000
Marie Detty Youth & Family Services	Domestic Violence Court Advocate	Comanche, Cotton & Caddo counties	775	$15,000
Mock Trial	High School Mock Trial	Statewide	720	$50,000
Oklahoma City University School of Law	American Indian Wills Clinic	Statewide	150	$30,000
Oklahoma County Juvenile Bureau	Literacy Initiative	Oklahoma County	160	$7,000
Oklahoma Guardian Ad Litem Institute	Guardian Ad Litem Services	Statewide	260	$18,067
Oklahoma Lawyers for Children	Legal Services for Abused & Neglected Children	Oklahoma County	3,000	$54,000
Teen Court	Delinquency Prevention for First Offenders	Comanche County	800	$49,567
The Care Center	ROAR Education Program	Oklahoma County	15,000	$5,000
The Spero Project	The Common - Legal Services for Refugees	Oklahoma City Metro	300	$15,000
Tulsa Lawyers for Children	Legal Services for Abused & Neglected Children	Tulsa County	400	$40,000
University of Tulsa Law School	Immigrant Rights Project	Statewide	34	$8,866
William W. Barnes CAC	Recognizing, Reporting & Responding to Child Abuse	Rogers, Mayes & Craig counties	900	$4,000
YMCA of Great Oklahoma City	Oklahoma Youth in Government	Statewide	600	$5,500
Youth Services of Tulsa Inc.	Youth Court	Tulsa & Ottawa counties	550	$10,000
YWCA Tulsa	Immigration Legal Services	Tulsa Metropolitan Area	600	$15,000

The Jenks High School team won the Oklahoma 2017 Mock Trial Championship and advanced to nationals.

ABOUT THE AUTHOR

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

Election Underway for New Leadership

By Lane Neal

From left YLD board members Brittany Byers, Melanie Christians and Brandi Nowakowski help welcome new lawyers at the reception following the Sept. 26 swearing-in ceremony at OCU in Oklahoma City.

Just when I am beginning to get a handle on 2017, it is already time to look to 2018 and the election of new leadership for the YLD. By now, all young lawyers (practicing 10 years or less) should have received a ballot via email to vote for the open seats in their district as well as at-large positions. Immediate YLD Past Chair Bryon Will and the rest of the election committee have done an excellent job organizing this year's YLD elections. The division also has a strong slate of candidates for each open position that ensures the future will continue to be bright for the YLD.

Voting for the YLD Board of Directors will end on Wednesday, Oct. 25, at 5 p.m. I encourage all young lawyers to look into the candidates and cast your vote. Information on all the candidates was published in the Sept. 9 OBJ and is online at www.okbar.org/members/YLD/YLDelections. If you did not receive a ballot via email, please contact OBA IT Director Robbin Watson at robbinw@okbar.org for assistance.

OBA ANNUAL MEETING

Election results will be announced at the YLD November meeting, which will be held in conjunction with the OBA Annual Meeting on Thursday, Nov. 2, at 4 p.m. at the Hyatt Regency in Tulsa. The meeting location will be in the YLD Hospitality Suite, Suite 315. The meeting is open to all young lawyers and will be a great time to network with YLD Board of Directors members.

On that note, I hope you have decided to attend the Annual Meeting in Tulsa. If not, there is still time to register. The Annual Meeting provides several opportunities for young lawyers to network and learn alongside lawyers from across the state. It seems like more and more young lawyers are spending their days chained to their desks on the phone or on their computers. I encourage you to "cut the cord" for a day or two to spend some in-person time getting to know some of the great lawyers we have here in Oklahoma.

To learn more, go to the Annual Meeting website at www.amokbar.org. Discounted rates for registration and CLE are available for new lawyers sworn in during 2017. I hope to see you there!

ALL YLD MEMBERS INVITED

OBA YLD
Board of Directors Meeting

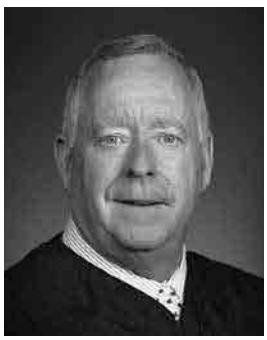
Thursday, Nov. 2
4 p.m.

Hyatt Regency Hotel
Suite 315

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.

Supreme Court Justice Joseph Watt to Retire



Justice Joseph Watt

Oklahoma Supreme Court Justice Joseph Watt will retire effective Dec. 31. Justice Watt serves the 9th Judicial District.

Justice Watt began his judicial service in 1985 when he was appointed special district judge for Jackson County. He was elected associate district judge in 1986.

In 1991, then-Gov. David Walters named Mr. Watt as his general counsel. He was appointed by Gov. Walters to the Oklahoma Supreme Court on May 17, 1992, and is in his 26th year of service. He served two terms as chief justice, from 2003 to 2007.

"Having spent almost half of my entire life serving in the judicial branch of government, the past 25 ½ years on the Supreme Court have been the most rewarding of my entire life," Justice Watt said. "As the new year dawns, I look forward to beginning the next chapter in my life spending more quality time with my grandchildren, traveling with my wife, Cathy, and taking active retired status beginning Jan. 1, 2018."

Justice Watt earned a bachelor's degree in history/government from Texas Tech University and a J.D. from the University of Texas Law School. In 1973, he moved to Altus where he worked in private law practice and served as Altus city prosecutor until 1985.

Dana Kuehn Named to Court of Criminal Appeals

Judge Dana Kuehn

Gov. Mary Fallin announced the appointment of Judge Dana Kuehn to the Court of Criminal Appeals. Judge Kuehn, of Tulsa, succeeds Judge Clancy Smith.

Judge Kuehn, a former prosecutor, has served as a Tulsa County associate district judge since 2006 where she presides over civil litigation. Before moving to handle civil cases in 2009, she presided over criminal felony cases, including two death-penalty cases. She has 17 years of trial experience in the criminal and civil divisions in the Tulsa County District Court.

Judge Kuehn previously served seven years as a Tulsa County assistant district attorney. Prior to that, she worked two years as an associate in a Tulsa private law firm.

"A career path is the evolution of different experiences," Judge Kuehn said. "My path includes experiences as a student of the law, a practitioner of the law as a prosecutor and an associate lawyer, a teacher of the law as an adjunct professor, and an upholder of the law as a trial judge. My experiences have prepared me to serve the state of Oklahoma as an appellate judge. I am honored and humbled that the governor has selected me for this important and solemn assignment."

Judge Kuehn earned a bachelor's degree in political sciences from OSU and a J.D. from the TU College of Law.

Former Justice Daniel Boudreau Receives First Peter Bradford Award

Former Justice Daniel Boudreau received the first Peter Bradford Award for Distinguished Achievement in Alternative Dispute Resolution from the OBA Alternative Dispute Resolution Section Thursday, Oct. 5.

The award is named in honor of Peter B. Bradford, a formidable and respected trial lawyer who skillfully pioneered alternative dispute resolution in the latter half of his career. It will be presented annually to a member of the OBA practicing in the field of alternative dispute resolution who achieves the standards set by Mr. Bradford and will be displayed in Room 131 of the Oklahoma Bar Center.

Former Justice Daniel Boudreau receives the first Peter B. Bradford Award from OBA Alternative Dispute Resolution Section Chair Larry Lipe.

Former Justice Boudreau retired from the Oklahoma judiciary in 2004 after serving 25 years as a trial and appellate judge. At the time of his retirement, Justice Boudreau was a justice on the Oklahoma Supreme Court while also serving on the Appellate Division of the Oklahoma Court of the Judiciary.

"Daniel Boudreau has combined his 25 years of experience as both a trial and appellate judge with the ability to be an impartial mediator and a fair and incisive arbitrator in a multitude of matters," said Larry Lipe, OBA Alternative Dispute Resolution Section chair. "He exhibits the ability to listen, understand and communicate effectively with attorneys as well as parties in mediation settings where he challenges the parties to focus the dispute on the key issues."

Prior to his appointment to the Supreme Court, Justice Boudreau served eight years as an Oklahoma Court of Civil Appeals judge and 11 years as a general jurisdiction trial judge. In 1999, he began teaching at the TU College of Law and also began a private practice in mediation, arbitration and private judging.

OBA Member Resignations

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

Catheryn Sophia Koss
OBA No. 20750
1400 Commons Drive
Sacramento, CA 95825

John H. Weigel
OBA No. 18616
957 NASA Parkway #113
Houston, TX 77058

Karen J. Powell
OBA No. 13933
3360 Allspice Run
Norman, OK 73026-4540

Connect With the OBA Through Social Media

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

Important Upcoming Dates

Don't forget the Oklahoma Bar Center will be open for a CLE, but the offices will be closed Friday, Nov. 10, in observance of Veterans Day. The bar center will also be closed Thursday and Friday, Nov. 24-25, for Thanksgiving. Remember to register and join us for the OBA Annual Meeting to be held in Tulsa Nov. 1-3.

Kudos

Malinda S. Matlock of the Oklahoma City-based law firm Pierce Couch Hendrickson Baysinger & Green, was elected to the Board of Directors of the USLAW Network Inc. at the annual member meeting held in Carlsbad, California, Sept. 7-9. Prior to being elected to the board, Ms. Matlock served as chair of USLAW's Professional Liabi-lity Practice Group.

Ron D. Burton was elected chair of the Rotary Foundation of Rotary International for the 2018 to 2019 rotary year. He served as president of Rotary International from 2013 to 2014.

Mike Voorhees was elected as chair of the South Oklahoma City Chamber of Commerce Political Action Committee. Mr. Voorhees has also been appointed to the Riverfront Design Committee. He is a member of the south Oklahoma City law firm Voorhees Voorhees & Byers.

On The Move

Shelly A. Perkins has joined the Oklahoma City-based law firm Resolution Legal Group. Ms. Perkins practices in the areas of general corporate and employment law, nonprofit organizations and estate planning.

Dave Stockwell and **Peggy Stockwell** have opened a new office in Norman. Mr. Stockwell will practice at the new office located at 111 N. Peters, Suite 490, Norman, 73069. His new phone number is 405-217-020. Ms. Stockwell will remain at the original location at 117 E. Main Street, Norman, 73069. Her phone number is still 405-321-9414.

Kevin Freeman joined Electrical Consultants Inc. in their corporate offices in Billings, Montana, as their first in-house counsel. He is responsible for managing all legal work, including insurance and safety areas.

Christina F. Cupp joined the Oklahoma City-based law firm Fellers Snider as an associate. Ms. Cup practices employment, workers' compensation, personal injury, bankruptcy and other civil litigation with the firm.

Keith Tracy announced the formation of Keith Tracy PLLC. He will focus his practice on oil and gas upstream and midstream matters. He can be reached at keith@keithtracy.com and 405-308-7289.

Jacqueline E. Hensley joined the Norman-based firm Floyd Law Firm PC as an associate attorney. Before her promotion to associate, Ms. Hensley gained experience in the area of public finance during her two-year internship with the firm.

Robert Black joined the Oklahoma City-based law firm Miller & Johnson as a trial attorney. Mr. Black is a 1981 graduate of the OCU School of Law.

Carrie Vaughn joined the Oklahoma City office of Spencer Fane LLP as an associate in its environmental and energy practice. Ms. Vaughn focuses her practice on business law, water law, oil and gas law, state and local government law and intellectual property law.

Jack Thorp was appointed by Gov. Mary Fallin as district attorney for District 27. District 27 covers Adair, Cherokee, Sequoyah and Wagoner counties. Mr. Thorp previously served as Tulsa County assistant district attorney.

Henry A. Meyer, Kevin Krahl and **John Krahl** joined the Oklahoma City-based firm Mulinix Goerke & Meyer PLLC. Mr. Meyer is a 1977 graduate of the Georgetown University Law Center. Mr. Kevin Krahl will practice as a trial lawyer and mediator. Mr. John Krahl practices both civil and criminal law.

Gregg J. Lytle joined the Tulsa-based firm McDaniel Acord PLLC. Mr. Lytle will practice in the areas of medical malpractice defense, employment, construction defects and civil litigation.

At The Podium

Esther Roberts represented the Tennessee Bar Association at the Third Annual Animal Law Summit hosted by The Chicago Bar Association in August. Ms. Roberts serves as CEO and founder of Global Intellectual Property Asset Management PLLC of Knoxville, Tennessee.

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 Dec. 16 issue must be received by Nov. 17.

IN MEMORIAM

Robert Allen of Oklahoma City died Aug. 1. He was born Oct. 13, 1928, in Tulsa. **In 1945, he enlisted in the Army and saw active duty in World War II, serving in Yokohama, Japan, from 1947 to 1948.** In 1951, he graduated from OU with a bachelor's degree in political science. Upon graduation from OU, **he was recalled to active duty in Korea for three campaigns. He continued as a member of the Army Reserve through the Vietnam War and retired as a lieutenant colonel in the U.S. Army.** After returning to Oklahoma, he received his LL.B. from the OU College of Law in 1955. He then went into private practice with Abernathy & Abernathy in Shawnee. In 1956, he accepted an appointment as law clerk to U.S. Circuit Court Judge A.P. Murrah. In 1957, he was appointed law clerk for U.S. District Judge Ross Rizley, after which he briefly joined the firm of Kerr, Conn & Davis. He served as deputy insurance commissioner and general counsel for the Oklahoma Insurance Commissioner from 1958 to 1963. He then served as an attorney for Southwestern Bell Telephone Company and as vice president and general counsel for Illinois Bell Telephone Company from 1963 to 1983, when he retired. In 2000, he became assistant general counsel for the Oklahoma Corporation Commission. He resigned from that position in 2003. He served as an adjunct professor at the OU College of Law, OCU School of Law and the OU College of Engineering.

Joseph Monroe Best of Skiatook died Aug. 25. He was born Oct. 12, 1925. He graduated from Tiawah High School in 1943. **At age 17, he joined the Marines where he proudly served in World War II. During the war, he served in the Pacific Theater where he was involved in the battles of Guam, Iwo Jima and Guadalcanal. He achieved the rank of corporal and was honorably discharged in 1945.** After returning to the U.S., he attended law school and graduated in 1949. He was a member of the Federation of Defense and Corporate Council in 1972 and became president of the council. Honorable contributions can be made to Oklahoma Baptist Children's Home.

Stephen Paul Dixon of Midwest City died Aug. 31. He was born March 2, 1954, in Claremore. After his graduation from McLain High School in 1972, he studied at Northeastern State University before graduating from TU. He received his J.D. from the OU College of Law. He practiced law at the Morris Law Firm in Midwest City for over 35 years. He was a member of the St. Philips Neri Catholic Church where he sang in the choir and was an assistant cantor. He enjoyed music, traveling to New York, photography and reading.

James Wiley George of Oklahoma City died Aug. 28. He was born Oct. 27, 1930, in Okmulgee. He graduated from Peoria High School in Peoria, Illinois, before earn-

ing his bachelor's degree from OU in 1956. He was a member of the Sigma Nu Fraternity. **He served as a corporal in the U.S. Army during the Korean War from 1952 to 1954.** After an honorable discharge, he returned to OU, earning his J.D. in 1957. He began his legal career in private practice. In 1987, he joined Crowe & Dunlevy, serving as of counsel until his retirement in 2010. In 2003, he received the prestigious Eugene Kuntz Award for Outstanding Contribution to Oil and Gas Law and Policy from the OU College of Law. Donations in his honor can be made to the OU College of Law scholarship fund.

Robert Bruce Green of Muskogee died Aug. 22. He was born Jan. 27, 1934, in Sallisaw. Mr. Green received his J.D. from the OU College of Law in 1957. **He was in the Army Reserves for six years including six months of active duty.** In 1961, he was appointed as assistant U.S. attorney in the Eastern District of Oklahoma. He served in that capacity until 1965 when he was appointed as U.S. attorney by President Johnson. He went into private practice in 1969. While in private practice he served on the Oklahoma Judicial Nominating Commission and as president of the Muskogee County Bar Association. In 1990, he went back to work in the U.S. Attorney's Office and served as an assistant until 1998 when he was appointed U.S. attorney by President Clinton. He served on the Attorney General's Committee on Native American Affairs and the Committee on Forfeitures. He retired from the practice of law in 2000. Honorable donations may be made to the Muskogee Presbyterian Church or to the Nature Conservancy District.

Leslie S. Hauger Jr. of Tulsa died Sept. 7. He was born Oct. 10, 1930, in Dallas. **He joined the U.S. Air Force during the Korean War and became a first lieutenant as a navigator/bombardier. He received several citations flying 50 combat missions, including five air medals and a Distinguished Flying Cross.** After serving in the Korean War, he went to work in the insurance business, earning the distinction as a certified property casualty underwriter. He also became licensed as an Oklahoma insurance consultant. After receiving his J.D. from the TU College of Law, he went into private practice. After practicing for 31 years, he was appointed as an U.S. administrative law judge (ALJ). He served in New Orleans for three years, and then became the chief ALJ in McAlester before being assigned to Tulsa. He retired from the Tulsa office in 2000.

Kelly Anthony Hays of Oklahoma City died Sept. 14. He was born March 25, 1951. He graduated from John Marshall High School in 1969. After graduating Phi Beta Kappa from OU in 1972, he studied law at the OU College of Law, graduating in 1977. He served as assistant district attorney in Harper County, and subsequently as a judge in Garfield County from 1981 to 1986. In 1986, he moved to Oklahoma City but maintained a law practice in Stillwater for several years. He became a court-appointed attorney in Oklahoma City in 1990. In 2000, he left the practice of law to open a used book store, 30 Penn Books, which he ran until his death. He enjoyed drawing, singing, writing poetry and playing guitar. Honorable donations can be made to the Justice for Kelly Fund at www.gofundme.com/justice-for-kelly.

David W. Jackson of Broken Arrow died Aug. 20. He was born Nov. 12, 1941. He graduated from Central High School in 1960. After high school, he went on to earn a bachelor's degree in political science. **He then attended Officers' Candidacy School in Colorado which led him to serving in the Vietnam War.** Upon his return, he received a J.D. from the TU College of Law in 1971. He also earned a CPA certification. His career in law included working at the Schuman Law Firm, Facet and the FDIC.

William E. Maddux of Nowata died Sept. 16. He was born May 4, 1928, in Marche, Arkansas. He graduated from Nowata High School in 1946 while living on his own in a boarding house and working at the local creamery. He earned a bachelor's degree in history from OU and then a J.D. from the OU College of Law in 1951. **After graduation, he served in the U.S. Army as a JAG officer in the 44th Armored Division at Fort Hood, Texas.** After his time in the Army, he spent many years in private practice at Chappell and Maddux. He served as a city attorney and a municipal judge for the city of Nowata.

William Dale Reneau of Oklahoma City died Sept. 18. He was born April 15, 1931, in Hobart. He graduated high school in Sedan in a class of three people. Mr. Reneau received his bachelor's degree from OU. In 1956, he received his J.D. from the OU College of Law. **He served as a captain in the Army JAG Corps.** Mr. Reneau was a senior partner at Fenton, Fenton, Smith, Reneau & Moon PC. He was a member of the Federation of Defense and Corporate Counsel and the American College of Trial Lawyers. He was also a member of St. Luke's United Methodist Church where he led weekly Sunday school classes. He was very active in the Oklahoma Republican Party, Toastmasters and many other civic organizations.

Gerald W. Thomas of Shattuck died Aug. 19. He was born Feb. 20, 1928, in Sharon. Mr. Thomas graduated from Sharon High School in 1946. In 1950, he received his bachelor's degree from OU. In 1953, he received his J.D. from the OU College of Law. After graduation, he moved to Shattuck and served as county prosecutor. He later moved his practice to Mooreland. He was a member of the First United Methodist Church. Honorable donations may be made to the OU Club of Northwest Oklahoma.

Jerry A. Warren of Oklahoma City died Sept. 5. He was born Jan. 9, 1943, in Dewey. He received his bachelor's degree in economics from OU in 1965. In 1968, he received his J.D. from the OU College of Law. After passing the bar he went to work for McAfee & Taft practicing corporate and securities law, retiring as a partner at the firm.

Dale Whitten of Tulsa died Sept. 18. He was born Oct. 15, 1927, in Duncan. He graduated from Central High School in Sioux City, Iowa. As a senior, he won the Iowa State Debate Championship. **After entering the Army, he was sent to Fort Lewis, Washington, and later to Fort Sam Houston where he attended the Army School of X-Ray. He stayed at the school as an instructor until his discharge in 1947.** He then graduated from Coe College in Cedar Rapids, Iowa. In 1952, he graduated from the OU College of Law. After passing the bar, he started work for the Standard Insurance Company in Tulsa. In 1968, he formed a new law firm with Dale McDaniel. He served on the Executive Council of the Tulsa County Bar, several committees including the Grievance Committee, as well as the Tulsa Delegates to the House and Senate. Honorable donations can be made to St. Francis Hospice Services.

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LAW FIRM SEEKING ATTORNEY. 0-3 years' experience. Bilingual is a plus, but not required. Please send resumes to contactams2017@gmail.com.

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.

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OKLAHOMA LAW FIRM IS SEEKING AN ATTORNEY WITH 15 OR MORE YEARS' EXPERIENCE as an oil and gas litigator. The compensation package is commensurate with level of experience and qualifications. Benefits include health, dental, vision, life insurance and profit sharing. Applications will be kept in confidence. Please submit resume and any supporting materials to "Box M," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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RARE OPPORTUNITY! Tulsa AV-rated insurance defense firm seeking a PART-TIME research and writing attorney with five to 10 years of experience. Prefer individual whose training has focused on legal writing. Submit resume and two writing samples to amy.hampton@wilburnmasterson.com.

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BARNUM & CLINTON PLLC is accepting resumes for an experienced licensed associate (3+ years) for our busy workers compensation defense litigation practice located in Norman. Pay commensurate with experience and productivity. Must be proficient with MS Office (Word, Excel) and able to take direction. Transmit resume, writing sample, references and salary history to cbarnum@coxinet.net.

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ENERGY LAW FIRM SEEKS LEGAL ASSISTANT/LEGAL SECRETARY to work in title, transactional and litigation practice. Must be proficient in MS Word and Excel and have the ability to transcribe dictation. Applicants should have at least 2 years' experience as a secretary, administrative assistant or equivalent position. Preference will be given to applicants with 3 or more years of experience in oil and gas, contracts or litigation. Excellent benefits. Salary based upon experience. Please send resume to "Box U," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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TULSA AV RATED LAW FIRM SEEKS ATTORNEY WITH 2-5 YEARS EXPERIENCE who focuses in 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 healthcare related areas. Salary commensurate with experience, compensation includes health insurance and other benefits. Email resume, writing sample, salary requirement and references to rebecca@rodolftodd.com.

THE LAW FIRM OF PIERCE COUCH HENDRICKSON BAYSINGER & GREEN LLP is accepting resumes for an associate position in the Oklahoma City office. Workers' compensation experience is preferred but not required for those with 0-5 years of experience. Send replies to "Box Z," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

STEIDLEY & NEAL, PLLC, is searching for an associate attorney with 1-5 years' experience for its Tulsa office. Competitive salary and other benefits commensurate with level of experience. Looking for a motivated candidate interested in providing assistance to a litigation partner. Applications will be kept in strict confidence. Send resume to Steidley & Neal, located in CityPlex Towers, 53rd Floor, 2448 E. 81st St., Tulsa, OK, 74137, attention Dwain Witt, Legal Administrator.

Federal Law Clerk Vacancy (Full Time Term)
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Western District of Oklahoma

Applications are being accepted for a term law clerk to a U.S. Magistrate Judge Suzanne Mitchell in Oklahoma City. This full time law clerk position is for a one year term with the possibility of extension (not to exceed four years) and is available Feb. 1, 2018.

Applicants must be a law school graduate and possess excellent research, writing, proofreading, and communication skills. In addition to law clerk duties, the term clerk will also undertake responsibility for administrative office support services for the judge and chambers personnel.

Qualified candidates are invited to submit applications by the closing date of October 31, 2017. Go to www.okwd.uscourts.gov to see full notice and application instructions.

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The 'Grandchild Effect'

By Travis Pickens

I call it the "grandchild effect." You hand any new grandchild to a grandparent, and they immediately transform into a smiling, blissed-out, heap of unadulterated happiness. It doesn't matter if the grandparent is a profanity-spewing litigator or a world-weary business executive, the grandchild effect overwhelms the grittiest characters and steeliest miens. The grandparent is instantly reduced into a silly-sounding, high-pitched babbler who can only communicate at a distance of about six inches from the sweet-faced innocent.

The author and his grandson, Everett James.

The rest of the world falls away, and all that matters is nestled in the loving arms of "LuLu" or "Poppy" or whatever name the grandparent has chosen (warning: leaving your grandparent name entirely to chance can be dangerous). Of course, part of the joy is reveling in the fact that your own DNA will bless another generation, but another part is being presented someone who at this tender age triggers nothing but love and acceptance.

Grandchildren affect us in many ways. One is that they remind us of the native good in people. As lawyers we can become cynical know-it-alls. We are adept at instantly sizing up people, usually with some degree of accuracy. We see people lie when it counts. We see contracts broken. But, the totality of a person's soul, character and personality cannot be entirely determined by such flash judgments, and that is no more evident than when the nastiest, most uncompromising person we might encounter is presented with a new descendant. You may never see that giddy, defenseless side of the person, but it is there, as surely as the world spins on its axis.

Another way is that new life, especially new lives intertwined with our own, prompts in us hopeful musings on the larger issues of creation, significance and gratitude that we more often think of in dimmer light, due to the loss of family members, friends or coworkers. We attend more funerals than christenings. A new grandchild instantly erases the doubts we may have had about why we are here or whether it all really matters. The grandchild would not be here without us.

Finally, grandchildren remind us of the other folks to whom we owe another sort of fiduciary duty – our families. Whether that family is one other person, a dog, a spouse and children and grandchildren, or simply the one or two people in this life who qualify as true friends, for most of us our families are the reason we leave the house in the morning. They need us, and we need them. A grandchild literally embodies that ethos, with the added advantage of allowing us to enjoy it all without the day-to-day responsibility.

As I write this, it's Friday afternoon. My own new grandchild, Everett James, is only a few blocks from my downtown office. I am a fiduciary to him, and I am going to leave work and go hold him for a while.

Mr. Pickens practices in Oklahoma City.

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NOVEMBER 9

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3/1 EACH

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