ALSO INSIDE: Legislative News • OBA Day at the Capitol

THE OKLAHOMA BAR Journal

Volume 89 — No. 5 — February 2018

TRANSACTIONAL LAW

A DIFFERENT APPROACH. BIG CASES, WITHOUT BIG EGOS

ACCIDENTS
- Trucking
- Aviation
- Heavy Equipment & Machinery
- Rollover
- Gross Negligence

CLASS ACTIONS
- Oil & Gas Royalty
- Wage & Hour
- Consumer Protection
- Environmental
- Whistleblower

SERIOUS HARM
- Birth Injuries
- Brain & Spinal Cord Injuries
- Amputations & Burns
- Wrongful Death
- Negligent Care & Abuse

PRODUCT LIABILITY
- Roundup® – Non-Hodgkin Lymphoma
- Talcum Powder – Ovarian Cancer
- Power Tool Injuries
- Vehicle Defects
- Consumer Product Defects

PHARMACEUTICAL & MEDICAL DEVICE
- Hip Implant Failures & Revision Surgeries
- Taxotere® – Permanent Alopecia
- Abilify® – Compulsive Gambling
- Hernia Mesh Defects
- Opioid – Addiction Epidemic

INSURANCE COVERAGE & BAD FAITH
- Automobile Policy Disputes
- Storm Damage Claims
- Life Insurance Disputes
- Fire Damage Claims
- Health Insurance Fraud

FULMER SILL

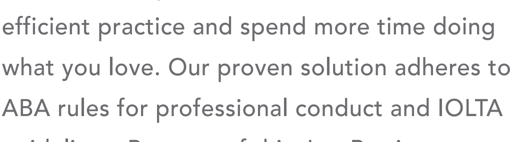
1101 N. Broadway Avenue, Suite 102 · Oklahoma City, OK 73103 · **405.510.0077** · **www.fulmersill.com**

Success is making it to the game on time...and getting paid while you're there.

PAYMENT RECEIVED
Client: Joe Smith
Amount: $1,152.00

PAY

Have the best of both worlds



LawPay was developed to simplify the way attorneys get paid, allowing you to run a more efficient practice and spend more time doing what you love. Our proven solution adheres to ABA rules for professional conduct and IOLTA guidelines. Because of this, LawPay is recommended by 47 of the 50 state bars and trusted by more than 45,000 lawyers.

lawpay.com/oba | 866-275-2206

The experts in legal payments

LawPay is a registered ISO of Merrick Bank, South Jordan, UT

...you can easily meet your MCLE requirements whenever and wherever it is convenient as long **as you have a computer, phone, iPad, Android and more.**

CURRENT ON-DEMAND CATEGORIES

Agriculture Law
Appellate Practice
Arbitration/Mediation
Auto Accidents
Banking Law
Bankruptcy Law
Business & Corporate Law
Constitutional Law
Criminal Law
Disability Law
DUI Law
Elder Law
Electronic Discovery
Energy & Natural Resources
Environmental & Energy Law
Estate Planning
Ethics
Family Law
General Education
General Practice
Health Law
Immigration Law
Indian Law
Insurance Law
Juvenile Law
Labor & Employment Law
Law Office Management and Law Practice Management & Technology
LGBT
Litigation and Civil Litigation
Mental Health
Military/Veterans
Oil and Gas
Personal Injury Law
Real Property
Recent Developments
Social Security / Medicaid
Solo and Small Firm
Tax Law
Trust & Probate Law
Work/Life Balance
Workers' Compensation
Other

Please remember the MCLE rules require no more than 6 of the 12 CLE credits per year can be earned by participating in online, on-demand seminars. You may earn unlimited hours for live programs, webcast encores, and live audio-seminars.

To register go to: www.okbar.org/members/CLE/OnDemand

February 2018 • Vol. 89 • No. 5

THEME: **TRANSACTIONAL LAW**

Editor: Melissa DeLacerda

FEATURES

6 | The Duty to Speak in Contract Formation
By Alvin C. Harrell

14 | Citizenship and Jurisdiction of Federally Chartered Companies
By Miles Pringle

18 | Changes to the Oklahoma General Corporation Act
By Nicole Cawood-Anderson and Chantelle Hickman-Ladd

24 | Protesting Federal Procurement Actions
By Eric Underwood

28 | Dispute Resolution Clauses in Private Construction Contracts
By Theresa Noble Hill

32 | Joint Account Basics
By Miles Pringle

DEPARTMENTS

4 | From the President
36 | From the Executive Director
38 | Law Practice Tips
42 | Ethics & Professional Responsibility
44 | Board of Governors Actions
48 | Oklahoma Bar Foundation News
52 | Young Lawyers Division
54 | For Your Information
56 | Bench and Bar Briefs
57 | In Memoriam
58 | Editorial Calendar
59 | What's Online
64 | The Back Page

PLUS

34 | Legislative News and OBA Day at the Capitol
By Angela Ailles Bahm

PAGE 34 – Day at the Capitol

PAGE 36 – Lawyer Assistance

From The President

What Will Your 2018 Heart Phrase Be?

The month of February brings to mind images of cold weather, Valentine's Day and Sweetheart conversation hearts – those chalky candy hearts only sold during February for Valentine's Day. Created by the NECCO candy company more than 150 years ago, each conversation heart is imprinted with a message such as "Be Mine" and "Kiss Me." The candy company tries to keep current with the times by adding new phrases each year such as "LOL," "Text Me" and "Tweet Me."

What message could be stamped on an OBA Sweetheart conversation heart? Some messages, such as "Your Word is Your Bond," "Justice" and "Integrity" are relevant to our profession in both the past and present. My vision for 2018 OBA conversation hearts could include messages of "Technology," "Aging of Our Profession" and "Competency."

Your Oklahoma Bar Association, like the NECCO candy company, is working to offer members the education needed to stay current in these rapidly changing times.

In his book, *Tomorrow's Lawyers*, Richard Susskind said, "The legal market is in an unprecedented state of flux. Over the next 20 years, the way in which lawyers work will change radically. Entirely new ways of delivering legal services will emerge, new providers will enter the market, and the workings of our courts will be transformed."

Kimberly Hays

President Hays practices in Tulsa.
kimberlyhayslaw@aol.com
918-592-2800

One driving force to these changes is the constantly evolving world of technology. Our Oklahoma Supreme Court has acknowledged this new reality with modifications to the Oklahoma Rules of Professional Conduct (ORPC). Rule 1.1 (Competence) requires that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

Comment [6] to Rule 1.1 explains that "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject, *including the benefits and risks associated with relevant technology*." [emphasis added]

OBA EDUCATION RESOURCES

As lawyers we are required to educate ourselves about the technologies available to our practice of law. You will find OBA CLE seminars covering these relevant topics throughout the year. Mark your calendars to attend the 2018 Solo & Small Firm Conference at the River Spirit Casino Resort in Tulsa June 21-23. This program always offers practical education to assist lawyers in the always-changing practice of law.

The changes to our profession are racing toward us. I encourage you to educate yourself on the opportunities and challenges faced by the practice of law. So this year, be like the NECCO candy company and update your practice with a new "message," preferably one delivered by a form of emerging technology.

THE OKLAHOMA BAR Journal

Volume 89 — No. 5 — February 2018

THE OKLAHOMA BAR JOURNAL is a publication of the Oklahoma Bar Association. All rights reserved. Copyright© 2018 Oklahoma Bar Association. Statements or opinions expressed herein are those of the authors and do not necessarily reflect those of the Oklahoma Bar Association, its officers, Board of Governors, Board of Editors or staff. Although advertising copy is reviewed, no endorsement of any product or service offered by any advertisement is intended or implied by publication. Advertisers are solely responsible for the content of their ads, and the OBA reserves the right to edit or reject any advertising copy for any reason.

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

BAR CENTER STAFF

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

Les Arnold, Gary Berger, Debbie Brink, Melody Claridge, Cheryl Corey, Nickie Day, Ben Douglas, Dieadra Florence, Johnny Marie Floyd, Matt Gayle, Suzi Hendrix, Darla Jackson, Debra Jenkins, Rhonda Langley, Jamie Lane, Durrel Lattimore, Renee Montgomery, Whitney Mosby, Lacey Plaudis, Tracy Sanders, Mackenzie Scheer, Mark Schneidewent, Laura Stone, Margaret Travis, Krystal Willis, Laura Willis, Jennifer Wynne & Roberta Yarbrough

Oklahoma Bar Association 405-416-7000
Toll Free 800-522-8065
FAX 405-416-7001
Continuing Legal Education 405-416-7029
Ethics Counsel 405-416-7055
General Counsel 405-416-7007
Lawyers Helping Lawyers 800-364-7886
Mgmt. Assistance Program 405-416-7008
Mandatory CLE 405-416-7009
Board of Bar Examiners 405-416-7075
Oklahoma Bar Foundation 405-416-7070

www.okbar.org

JOURNAL STAFF

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

CAROL A. MANNING, Editor
carolm@okbar.org

MACKENZIE SCHEER
Advertising Manager
advertising@okbar.org

LACEY PLAUDIS
Communications Specialist
laceyp@okbar.org

LAURA STONE
Communications Specialist
lauras@okbar.org

BOARD OF EDITORS

MELISSA DELACERDA
Stillwater, Chair

LUKE ADAMS, Clinton

AARON BUNDY, Tulsa

PATRICIA A. FLANAGAN
Yukon

AMANDA GRANT, Spiro

C. SCOTT JONES,
Oklahoma City

ERIN MEANS, Moore

SHANNON L. PRESCOTT Okmulgee

LESLIE TAYLOR, Ada

OFFICERS & BOARD OF GOVERNORS

KIMBERLY HAYS, President, Tulsa; RICHARD STEVENS, Vice President, Norman; CHARLES W. CHESNUT, President-Elect, Miami; LINDA S. THOMAS, Immediate Past President, Bartlesville; MATTHEW C. BEESE, Muskogee; JOHN W. COYLE III, Oklahoma City; MARK E. FIELDS, McAlester; KALEB K. HENNIGH, Enid; BRIAN T. HERMANSON, Ponca City; JAMES R. HICKS, Tulsa; ALISSA HUTTER, Norman; JAMES L. KEE, Duncan; BRIAN K. MORTON, Oklahoma City; JIMMY D. OLIVER, Stillwater; BRYON J. WILL, Yukon; D. KENYON WILLIAMS JR., Tulsa; NATHAN D. RICHTER, Mustang, Chairperson, OBA Young Lawyers Division

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

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.

The Duty to Speak in Contract Formation

By Alvin C. Harrell

In *Key Finance, Inc. v. DJ Koon*,[1] the Oklahoma Court of Civil Appeals reversed and remanded the trial court's order granting the motion of Key Finance (Key) for a directed verdict and to compel arbitration on the claims of DJ Koon (Koon) arising from the sale and financing of a vehicle.[2] The case raises some fundamental issues relating to the execution and enforcement of contracts, quite aside from the more specialized issue of arbitration.[3]

Koon purchased a vehicle from Key and executed a purchase agreement, motor vehicle retail installment sales contract (RISC) (including a promise to pay the purchase price for the vehicle in installments, with interest and a security agreement) and arbitration agreement. The arbitration agreement reads in relevant part as follows:

> ARBITRATION AGREEMENT […] This Arbitration Agreement significantly affects your rights in any dispute with us. Please read this Arbitration Agreement carefully before you sign it.[4]

Koon defaulted on his obligation to pay under the RISC, and Key repossessed and sold the vehicle pursuant to the security agreement and UCC Article 9, then filed suit to collect the deficiency (the balance owed after sale of the repossessed vehicle and application of the sale proceeds to the debt). Koon answered and counterclaimed, alleging violations of the UCC, the Oklahoma Consumer Protection Act, the federal Odometer Act and the Oklahoma Vehicle License and Registration Act, and sought to certify a class action.[5] When Key moved to compel arbitration, Koon objected, arguing that the arbitration agreement was unenforceable due to lack of assent, fraud, waiver and unconscionability, on grounds that the agent representing Key in the transaction (the agent) falsely described the consequences of the arbitration agreement to Koon.[6] Koon argued that the agent stated at the time of execution of the contract that the arbitration agreement required Koon to pay his own attorney fee in the event of litigation, without going on to explain more fully the effects of the arbitration agreement.[7]

The trial court granted Key's motion and issued an order compelling arbitration. Koon filed a motion to reconsider, and the trial court held an evidentiary hearing on the issue of whether Key's agent conveyed a false impression to Koon with respect to the arbitration agreement. At the hearing Koon testified that the agent never mentioned that it was an arbitration agreement or explained that it limited his rights in court, instead merely stating that it made Koon liable for his own attorney fee if there was legal action. The trial court then held that Key did not convey a false impression and granted Key's motion for a directed verdict, compelling arbitration.[8]

I. THE FOCUS ON CONTRACT LAW ISSUES

Both the trial and appellate courts appropriately focused on basic contract law issues. As noted above, the court of appeals opinion discusses the FAA[9] and its impact on state

law, recognizing that courts cannot impose requirements on arbitration contracts different from those for other contracts.[10] This principle is well established, and the court's discussion of this issue need not be repeated here, except to note again that it means cases on the enforcement of arbitration agreements are necessarily focused on general contract law issues rather than arbitration per se, and thus may have important implications for other types of contracts.[11] That is the case in *Key Finance*, and this article likewise focuses on the contract law issues rather than arbitration as such.

II. THE COURT OF APPEALS ANALYSIS

The appeal in *Key Finance* was essentially limited to the issue of whether the trial court erred in finding there was no fraud in the inducement of Koon to sign the arbitration agreement.[12] As noted, the court of appeals emphasized that, under the FAA and United States Supreme Court precedent, arbitration agreements can be invalidated only on the basis of "generally applicable contract defenses, such as fraud, duress, or unconscionability."[13] Moreover, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[14]

Thus, the basic issue is a matter of contract law, and contract law recognizes fraud in the inducement as a defense that may impair the assent necessary to form a contract.[15]

In *Key Finance* the court of appeals noted the elements of actionable fraud, described as requiring:

> (1) a material misrepresentation; (2) known to be false at the time made; (3) made with specific intent that a party would rely on it; and (4) reliance and resulting damage.[16]

This requires "the intentional misrepresentation or concealment of a material fact which substantially affects another person."[17] However, "[c]onstructive fraud is a breach of either a legal or equitable duty that does not necessarily involve any moral guilt, intent to deceive, or actual dishonesty of purpose."[18] This includes the breach of a duty which provides an advantage to a person regardless of his or her intent, by misleading another.[19] "Where a party has a duty to speak, but remains silent, there may be constructive fraud."[20] A determination of this depends on the facts and circumstances of each case; however, if the circumstances create a duty to speak and the person remains silent, "to his benefit and to the detriment of the other party, the failure to speak constitutes fraud."[21]

In *Key Finance*, the court of appeals concluded that:

> Koon asserted [that] Key's agent affirmatively represented the following about the document he was signing: 1) if they had to sue, Koon would be responsible for their attorney's fee and all costs of their attorney; 2) that "if I took legal action against them and lost, I'd have to pay their attorneys['] fees;" 3) after Koon hesitated in signing the document, Key's agent told him he had to sign the document if he wanted to buy the car; and 4) that Key's agent never told him that the Arbitration Agreement meant he was giving up his rights to court.[22]

Viewing as true all of the evidence favorable to Koon, and disregarding all of the evidence favorable to Key, for purposes of considering Key's motion for a directed verdict, the court of appeals concluded that Koon presented evidence to indicate that Key "owed him a duty of full disclosure because [Key's] agent chose to speak regarding the Arbitration Agreement."[23] The trial court's grant of Key's motion for a directed verdict was reversed, and the case was remanded for further proceedings.

III. AUTHOR'S ANALYSIS OF *KEY FINANCE*

The court of appeals provided some additional discussion that further highlights the issues in *Key Finance*, noting that silence alone is not equivalent to a misrepresentation, absent a duty to speak.[24] But the court then held that the duty to speak was applicable in this case, without further discussion of wrongful intent or the nature of the underlying relationship, apparently because Key made a true statement that failed to convey the "whole truth."[25] This can be read to impose a duty to speak the "whole truth," as a basis for the defense of constructive fraud, whenever there is a "partial disclosure" in an arms-length relation. To say the least, this would break new ground in Oklahoma law and the law of contracts. The court of appeals stated that Key's partial disclosure created a false impression of the purpose and content of the arbitration agreement, in circumstances where Key's agent had a "duty to speak," even without any knowledge or wrongful intent on the part of Key. This imputed to Key a "duty to speak" the "whole truth" about the applicable law in an arms-length contract negotiation, as the basis for a claim of constructive fraud. Thus, the court's opinion can be read to indicate that, in ordinary contract negotiations, the parties have a duty to "say nothing or to tell the whole truth."[26] In *Key Finance*, this applied even though there was no evidence that Koon was illiterate, or was prevented from reading the documents[27] or that Key's statements were untrue.[28] The court's opinion can be read to say that disclosing some facts while omitting others is per se constructive fraud, even in an arms-length relation and absent any wrongful intent or "peculiar circumstances."[29]

It should be noted that, while the court of appeals seemed eager to weigh in on these substantive law issues,[30] the decision remains essentially a procedural one, relating to the burden of proof necessary to sustain a motion for a directed verdict.[31] Still, the case was remanded for "further proceedings consistent with the [court of appeals'] opinion,"[32] an opinion that includes strong substantive language in support of a finding of constructive fraud on these facts (as to the arbitration agreement, not the underlying RISC). This represents a striking

reversal of the trial court's order, considering that the trial court had already conducted a hearing on the question of fraud in the inducement and issued an order based on findings of fact seemingly contrary to the court of appeals' subsequent conclusion.[33] Thus, it is not difficult to suppose that the *Key Finance* opinion could be read to mean that a duty to speak the "whole truth" arises as the basis for constructive fraud in every contract negotiation, a view that would significantly rewrite the law of contracts.

It also can be noted that, despite the court of appeals' focus on the tort concept of fraud, the ultimate issue is whether there was assent to a contract. There is more discussion on the relation between tort and contract law in Sections IV and V but it can be noted here that contract law has long (going back hundreds of years) dealt specifically with these issues.[34] The Oklahoma Supreme Court, consistent with the long-standing majority view,[35] has expressly held that (absent fraud) a person who has the opportunity to read a written contract before signing it is obligated by its terms regardless of actual knowledge or intent.[36] Any other rule would make ordinary commerce impossible. Given that Koon had ample opportunity to read the arbitration agreement, which was conspicuously labeled as such, and that the trial court had already conducted an evidentiary hearing and found no fraud in the inducement,[37] it would seem that the issue of assent was already settled as a factual matter.

The facts of *Key Finance* may bring to mind other issues.[38] The court's opinion may sound similar to an analysis grounded in a mutual mistake of fact or law, or perhaps a unilateral mistake with advantage taken, presenting a somewhat different set of issues from those addressed in *Key Finance*.[39] These theories would not require a separate "duty to speak" based on a special relationship or the other "peculiar circumstances" that are traditionally necessary to a claim of constructive fraud and apparently were missing in *Key Finance*. Of course, the *Key Finance* court was limited to considering the arguments made by Koon. Still, for the various reasons noted here, the results may be problematic, if seen as imposing a tort-based duty on nonlawyers to fully explain the law to the other party in an arms-length contract negotiation. This would create an obviously impossible standard for contracting parties to meet, requiring, i.e., each party to demonstrate that he or she had fully and properly explained the applicable law to an adverse party.[40] Such a standard is unprecedented and would be unwise. As additionally discussed below, it also ignores the policy considerations that led to development of the common law of contracts more than 300 years ago, as a body of law separate from the law of torts; these considerations are equally compelling today and deserve emphasis by the courts in these kinds of cases.

It also can be noted that, despite the court of appeals' focus on the tort concept of fraud, the ultimate issue is whether there was assent to a contract.

IV. TORT VERSUS CONTRACT LAW

The court of appeals analysis in *Key Finance* reveals some inherent tensions between tort and contract law. All of these tensions cannot be described here, but suffice it to note that there are fundamental differences between enforcing private bargains and protecting against torts.[41] Contract law provides time-honored principles designed to preserve consensual bargains and expectations of the parties as expressed in private agreements.[42] A substantial discussion of these contract law issues in a case like *Key Finance* might serve to enhance application of the tort-based concepts inherent in a fraudulent inducement case, including the use of constructive fraud to override contract law expectations with respect to execution and enforcement of the parties' agreement.[43] In contrast, as previously suggested and discussed further below, the *Key Finance* court's broad adoption of a "duty to speak" as the basis for a finding that constructive fraud precluded assent to the arbitration agreement could be viewed as creating a new legal standard that would make it all but impossible to enforce a contract in a consumer transaction.[44]

Thus, it is important to recognize the relation between contract and tort law in this context. Clearly a fraudulent misrepresentation in the formation of a contract can negate the mutual assent necessary for a private bargain.[45] On the other hand, contract law recognizes that there could never be an enforceable contract if one party or the other can rescind the bargain merely by claiming that he or she did not read the written contract or fully understand the deal or the applicable law.[46] Thus, an

unexpressed subjective intent, a unilateral lack of understanding about the facts or contract terms, or a mistake with respect to an opinion of law or a future expectation, without more, generally will not impair the enforcement of a signed written contract.[47] As noted, the Oklahoma Supreme Court has been clear in recognizing the basic principle that the parties to a signed contract are bound by the contract terms, even if they did not read it first, so long as they had an opportunity to do so.[48] This is subject to defenses based on actual fraud (apparently not an issue in *Key Finance*) or constructive fraud (based on a duty to speak created by a special relationship or other "peculiar circumstances"), the law of mistake, etc.

Considering this state of the law, which is likely necessary to the optimal functioning of modern society, there are troubling aspects of the *Key Finance* holding as regards the relation between tort and contract law. As noted, the decision may open the door to rescission and damages claims on a tort-based theory that one party did not fully explain to the other the full range of legal consequences and the legal effect of the contract terms that were being negotiated, seeming to require the provision of legal advice from a nonlawyer on the opposite side of an ordinary arms-length negotiation.[49] Moreover, the *Key Finance* court apparently imposed this duty on the basis of constructive fraud, i.e., without regard to wrongful intent or the other elements of actual fraud.[50] This is not to ignore the procedural aspects of the *Key Finance* decision; clearly the movant's burden is high in a motion for a directed verdict, as indicated by the court of appeals. Even so, the court's conclusion, that an apparently innocent and truthful (if incomplete) comment about the legal effect of an arbitration agreement during arms-length pre-contract negotiations gives rise to a tort-based duty to provide a full explanation of the legal rights of the other party, by a nonlawyer, would create an obviously unrealistic and untenable burden in the formation of ordinary contracts.[51] Is there any person who, seeking to avoid a contractual obligation, could not argue that the other party made an innocent oral comment during the negotiations that failed to fully describe the legal implications of the proposed agreement and therefore committed constructive fraud? Such a standard is inconsistent with the law of contracts as we know it.[52] Arguably this would represent the reabsorption of contract law into the law of torts, reversing what is likely the greatest development in the history of Anglo-American common law.[53]

V. GOOD FAITH AND THE TORTIFICATION OF CONTRACT LAW

Some years ago there was a trend in some states, that temporarily spread to Oklahoma, toward treating a breach of contract as an independent tort for breach of the duty of good faith.[54] These cases were subsequently repudiated.[55] The *Key Finance* holding, that there is an independent tort-based duty in contract negotiations, creating the basis for a claim of constructive fraud for breach of an imputed duty to speak the "whole truth," seems to resurrect aspects of this discredited theory. One hopes that a similar battle will not have to be fought again, to maintain the traditional and important distinctions between the law of torts and contracts, and the limits on fiduciary or special relationships, in the context of contract formation.[56]

VI. SUMMARY AND CONCLUSION

There are at least four reasons why the *Key Finance* analysis may be misleading or questionable, or even (on some issues) entirely wrong.[57] First, the duty to speak as a basis for a claim of constructive fraud should not arise in an arms-length contract negotiation, absent a special relationship or other "peculiar circumstances."[58] Second, the suggestion that an innocent failure to speak the "whole truth" violates this duty imposes an impossible burden on contracting parties.[59] In *Key Finance*, the imputation of a "duty to speak" the "whole truth" in an ordinary contract negotiation, as the basis of an independent tort-based claim of constructive fraud, without evidence of wrongful intent or guilty knowledge, cannot be logically sustained without some other foundation in the relation between the parties. Third, the requirement for a nonlawyer engaged in contract negotiations to disclose the "whole truth" about a complex area of law to an adverse party is not realistic.[60] Again assuming that there is no actual fraud, the cases on allegations of a mistake of law could be instructive on this point.[61] Even if there was a unilateral mistake of law with advantage taken or a mutual mistake (arguments not addressed by the court of appeals in *Key Finance*), a mistake of law may not be actionable under Oklahoma case law.[62] Fourth, the 1980s history noted in Section V (addressing somewhat similar

issues on the basis of good faith) should discourage a judicial effort to create a new all-absorbing tort-based claim (resulting from innocent statements, without actual fraud) to override basic contract law principles. In effect, that has been tried and rejected.[63]

Even conceding the procedural posture of the *Key Finance* holding,[64] a full analysis should recognize that constructive fraud arises only if there is a duty to speak under other law, e.g., due to a special relationship or other "peculiar circumstances," and that ordinary contract negotiations do not constitute "peculiar circumstances." Thus, courts should not impose a duty to speak as indicated in *Key Finance* (a duty to say nothing or tell the "whole truth") unless there is some basis for imposing a special obligation to protect the legal interests of the other person. A fiduciary duty is an obvious example, although other "peculiar circumstances" may give rise to a special or confidential relation. In the absence of such circumstances or actual fraud one does not owe a "duty to speak" the "whole truth" to the entire world, and certainly not to an adverse party in an arms-length contract negotiation.[65] Absent something more, e.g., a special relationship and/or guilty knowledge (as in the context of a unilateral mistake with advantage taken),[66] there should be no liability for a failure to speak the "whole truth" in an arms-length contract negotiation. A recognition of this basic point is the missing piece in the puzzle of *Key Finance*.

ABOUT THE AUTHOR

Alvin C. Harrell is a professor emeritus at the OCU School of Law and president of Home Savings and Loan Association of Oklahoma City. He is co-author of a dozen books, including *The Law of Modern Payment Systems and Notes*. He was editor of the *Consumer Finance Law Quarterly Report*, 1988-2017 and chaired the ABA UCC Committee task forces on State Certificate of Title Laws and Oil and Gas Finance.

ENDNOTES

1. 2016 OK CIV APP 27, 371 P.3d 1133 (Oct. 6, 2015), 57 *Okla. Bar J*. 980 (May 14, 2016), *cert. denied* (April 4, 2016) [hereinafter *Key Finance*].

2. *Id.* The order of the trial court also rejected Koon's effort to certify a class action. *Id.*

3. *Key Finance* arose in the aftermath of the enforcement by Key of a security interest in Koon's vehicle under Uniform Commercial Code (UCC) Article 9, and specifically involved the effort of Key to invoke an arbitration clause in response to Koon's counterclaim in the resulting collection suit for the deficiency. Nonetheless, the issues in the case do not relate specifically to the UCC or to arbitration, but rather to contract law generally. Pursuant to the Federal Arbitration Act (FAA), 9 U.S.C.A. §2 (2000), and as expressly recognized in *Key Finance*, 371 P.3d at 1137, 87 *Okla. Bar J.* at 981 – 82, the United States Supreme Court has consistently recognized that arbitration contracts can only be invalidated on the basis of "generally applicable contract defenses," *i.e.*, they must be treated "on an equal footing with other contracts." *Key Finance,* 371 P.3d at 1137, 87 *Okla. Bar J.* at 981, quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), as quoted in *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Thus, the issues in *Key Finance* relate broadly to all contracts, not just security agreements or contracts to arbitrate. *See also AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011) (reversing lower court decisions holding an arbitration clause unconscionable); *Quilloin v. Tenet Healthsystem Philadelphia, Inc.*, 673 F.3d 221 (3rd Cir. 2012) (similar analysis).

4. *Key Finance*, 371 P.3d at 1135, 87 *Okla. Bar J.* at 980.

5. *Id.*

6. *Id.* Koon also noted that the RISC included a box indicating that, if checked, the RISC would be subject to a separate arbitration agreement, and that the box was not checked. *Id.* However, the arbitration agreement was a separate contract, not dependent in any way on a reference in the RISC. *See infra* note 15. While Key might prefer that the box had been checked, it does not appear that this was, or should have been, a material issue in the case.

7. *Key Finance*, 371 P.3d at 1138, 87 *Okla. Bar J.* at 982.

8. *Key Finance*, 371 P.3d at 1136, 87 *Okla. Bar J.* at 981.

9. 9 U.S.C.A. §§1 *et seq. See supra* note 3.

10. *See supra* note 3.

11. *Id.* Thus, there may be reason for concern that a hostility to arbitration could color these decisions, with unintended adverse implications for contracts generally.

12. *Key Finance*, 371 P.3d at 1137, 87 *Okla. Bar J.* at 980 - 81. The doctrine of fraudulent inducement, as stated by Professor Corbin, is as follows: "If one party to a bilateral contract is induced to make it by fraudulent representations of the other party, he has the power of avoidance and also the power to ratify." *Arthur Linton Corbin, Corbin On Contracts* §146 at 214 (1952). Discussions of fraud commonly focus on actual fraud, as contrasted to the constructive fraud apparently at issue in *Key Finance*. Constructive fraud can have the same effect as actual fraud; however, as noted in this article, constructive fraud arises only in the context of a special relationship or other "peculiar circumstances." *See infra* this text and notes 18 – 21, and *infra* Sections III – V

13. *Key Finance*, 371 P.3d at 1137, 87 *Okla. Bar J.* at 980 - 81 (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), as quoted in *Rent-A-Center, W, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)). *See also* the FAA, 9 U.S.C.A. §2, quoted in *Key Finance,* 371 P.3d at 1137, 87 *Okla. Bar J.* at 981 – 82; and *see* other sources cited *supra* at note 3.

14. *Key Finance*, 371 P.3d at 1137, 87 *Okla. Bar J.* at 982, ¶10 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983), as quoted in *Continental Cas. Co. v. Am. Nat'l Ins. Co.*, 417 F.3d 727, 730 – 31 (7th Cir. 2005)).

15. *See e.g.*, Corbin, *supra* note 12. In *Key Finance* the court of appeals noted that, pursuant to the FAA, 9 U.S.C.A. §2, and as further explained in *Rent-A-Center*, 561 U.S. 63, challenges to the contract as a whole are not sufficient to bar enforcement of an arbitration agreement. Rather, the question is whether the arbitration agreement is enforceable; *i.e.*, because the "arbitration provision is severable from the remainder of the contract," it is separately enforceable. *Key Finance*, 371 P.3d at 1137, 87 *Okla. Bar J.* at 982, quoting *Buckeye v. Cardegna*, 546 U.S. 440, 444 (2006). *See also Quilloin*, 673 F.3d 221 (*supra* note 3). On this issue, the analysis is similar to that for forum selection clauses. *See e.g.*, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Rucker v. Oasis Legal Finance, LLC*, 632 F.3d 1231 (11th Cir. 2011).

Of course, a claim of fraud or misrepresentation also may form the basis a separate cause of action under tort law, but this may require a higher level of proof as compared to a contract law defense. *See e.g.*, *Restatement Second of Contracts* Ch. 7 Introductory Note (1979).

16. *Key Finance*, 371 P.3d at 1137, 87 *Okla. Bar J.* at 982, ¶10 (citing *Bowman v. Presley*, 2009 OK 48, ¶13, 212 P.3d 1210, 1218).

17. *Key Finance*, 371 P.3d at 1138, 87 *Okla. Bar J.* at 982, ¶13 (quoting *Faulkenberry v. Kansas City Southern Railway Co.*, 1979 OK 142, ¶4, 602 P.2d 203, 206). Note that this describes actual fraud. While the court's opinion is not entirely clear on this point, there does not appear to be evidence of actual fraud in *Key Finance*, and in any event this would involve issues of fact seemingly settled by the trial court's previous holding on the issue. *See Key Finance*, 371 P.3d at 1136, 87 *Okla. Bar J.* at 981, ¶¶5 and 6; and *infra* note 33. Instead, in *Key Finance* the court of appeals seems to have focused on imposing a duty to speak as the basis for constructive fraud (*i.e.*, an innocent failure to tell the whole truth). *See infra* this text and notes 18 – 21, and *infra* Sections III – V

18. *Key Finance*, 371 P.3d at 1138, 87 *Okla. Bar J.* at 982, at ¶13.

19. *Id.* (citing *Patel v. OMH Med. Ctr., Inc.*, 1999 OK 33, ¶34, 987 P.2d 1185, 1199). As noted, this appears to be the primary allegation considered by the court of appeals in *Key Finance*. *See supra* note 17.

20. *Key Finance*, 371 P.3d at 1138, 87 *Okla. Bar J.* at 982, ¶13 (citing *Evers v. FSF Overlake Assocs.*, 2003 OK 53, ¶16 n. 3, 77 P.3d 581, 587, n. 3). Similar yet different issues may arise when there is a claim of unilateral mistake with advantage taken, *e.g.*, where one party has reason to be aware of the other party's mistake of fact, and seeks to take advantage of it rather than speaking up to indicate the mistake. *See e.g.*, Corbin, *supra* note 12, at §608; *infra* notes 39 and 51. There does not appear to be any allegation of this in *Key Finance*.

21. *Key Finance*, 371 P.3d at 1138, 87 *Okla. Bar J.* at 982, ¶14 (citations omitted). *See also supra* this text at notes 18 – 20. A crucial question, of course, is whether the circumstances create a duty to speak. This is a limitation on the use of constructive fraud which (given the court of appeals'

emphasis on this doctrine in *Key Finance*) perhaps should have received more attention in the court's opinion. The court's language on constructive fraud (citing various cases) is similar to (but does not cite) the statutory language at Okla. Stat. tit. 15 §59 (defining constructive fraud). This definition is predicated on the requirement that the duty to speak applies only "[i]n any breach of duty," indicating that the elements of constructive fraud (*e.g.*, gaining an advantage by innocently misleading another) arise only in the context of a duty that is being breached. This predicate is essential; without it, section 59 (and the doctrine of constructive fraud) could make every person liable for fraud on the basis of innocent statements that provide some advantage to the detriment of another party. This would mean that every person owes an affirmative duty to every other person in the world, at all times, to say nothing or tell the "whole truth," obviously an untenable standard. Thus, section 59 limits constructive fraud to cases where there is a breach of some other duty, *i.e.*, allowing the use of constructive fraud as a means to evidence the breach of that other duty.

Oklahoma case law explicitly recognizes this point, requiring the breach of a separate legal or equitable duty as a prerequisite to the allegation of constructive fraud. *See e.g.*, *Roberts v. Wells Fargo AG Credit Corp.,* 990 F.2d 1169 (10th Cir. 1993); *Silver v. Slusher*, 770 P.2d 878 (Okla. 1988), *cert. denied*, 493 U.S. 817, 110 S.Ct. 70; *Faulkenberry v. Kansas City Southern Ry. Co.,* 602 P.2d. 203 (1979) (requiring an "underlying right" to be correctly informed); *Barry v. Orahood*, 132 P.2d 645 (Okla. 1942) (requiring "peculiar circumstances"); *Morris v. McLendon,* 27 P.2d. 811 (Okla. 1933) (same). *See also N.C. Corff Partnership, Ltd. v. OXY USA, Inc.,* 929 P.2d 288 (Okla. Ct. App. 1996) (constructive fraud requires actual knowledge by the person accused); *Roberts Ranch Co. v. Exxon Corp.,* 43 F.Supp.2d 1252 (W.D. Okla. 1997) (same).

In *Key Finance* the court of appeals initially seemed to recognize this, by limiting constructive fraud to cases where there is "a duty to speak" because there is "any breach of a duty[,]" *e.g.*, cases where there is "a breach of either a legal or equitable duty…" *Key Finance*, 371 P.3d at 1137 – 38, 87 *Okla. Bar J.* at 982, ¶13. The court went on to hold that a duty to speak "may arise from a partial disclosure," apparently without more, thereby suggesting that every person who speaks has a broad "duty to say nothing or to tell the whole truth," as a predicate for constructive fraud. *Id.* at ¶14. This was subsequently qualified by a recognition that, "[i]n determining whether there is a duty to speak, consideration must be given to the situation of the parties and matters with which they are dealing." *Key Finance*, *id.*, quoting *Silk v. Phillips Pet. Co.,* 760 P.2d 174, 179 (which also notes the requirement for "peculiar circumstances" in order to trigger a duty to speak). After this brief reference, the requirement for breach of an established duty is seemingly dropped from the court of appeals' analysis. The *Key Finance* opinion omits any further reference to or consideration of the "situation of the parties" (who apparently were in an ordinary, arms-length contract negotiation, not involving a special relation) or any "peculiar circumstances" that might give rise to a duty to speak as a predicate for constructive fraud. Instead, the court's opinion skips directly to the conclusion that Koon had presented evidence indicating that Key had such a duty. Since no such evidence is mentioned in the court's opinion, and indeed the predicate issue (*e.g.*, a requirement for a special relation or other "peculiar circumstances") is not even discussed except as provided in the quotes from the *Silk* case noted above (which merely note the requirement as a matter of general law), it appears there is a significant gap in the court's analysis and holding as regards constructive fraud.

22. *Key Finance*, 371 P.3d at 1138, 87 *Okla. Bar J.* at 982, ¶15. Note again the significant omission in this statement of any reference to a special relationship or the "peculiar circumstances" previously required by Oklahoma courts in order to trigger an obligation to say more. *See supra* note 21. If the language quoted in the text is the full extent of the evidence considered by the court, it does not appear to be sufficient to support the court's decision. *See* discussion below.

23. *Key Finance*, 371 P.3d at 1138, 87 *Okla. Bar J.* at 983, ¶16. *But see supra* notes 20 – 22, and further discussion below. As indicated above at notes 21 and 22, this appears to understate the requirements for constructive fraud, by indicating that any statement, even between parties in an ordinary arms-length (and inherently adversarial) contract negotiation process, creates a fiduciary-like duty to say nothing or tell the "whole truth." Despite the quoted language in the text, there is no evidence cited by the court of appeals that was presented by Koon to indicate circumstances that would create a "duty of full disclosure" as the basis for a claim of constructive fraud in this case. *See also infra* Sections III - V Contrast the requirements for a claim of actual fraud, as noted *supra* this text at notes 16 and 17 (including a requirement for an intentional misrepresentation but not a special relationship).

24. *Key Finance*, 371 P.3d at 1138, 87 *Okla. Bar J.* at 983, ¶16. Note again that silence can constitute actual fraud (*e.g.*, where there is intentional and fraudulent concealment), but this requires the elements noted in the text above at notes 16 and 17. For an example, *see infra* note 26. These elements are not apparent in the facts described by the court of appeals in *Key Finance*. *See supra* this text at notes 21 and 22, and *infra* this text and notes 26 – 29.

25. *Key Finance*, 371 P.3d at 1138, 87 *Okla. Bar J.* at 983, ¶16.

26. *Id.* (quoting *Deardorf v. Rosenbusch*, 1949 OK 117, ¶8, 206 P.2d 996, 998). As noted, the *Key Finance* court indicates this as a basis for constructive fraud, even in the absence of guilty knowledge or wrongful intent, *e.g.*, in the case of an innocent misrepresentation. *See e.g., Key Finance*, 371 P.3d at 1138, 87 *Okla. Bar J.* at 982; *supra* this text and notes 18 – 23. However, it should be noted that *Deardorf*, relied on in the *Key Finance* opinion, does not go this far and is distinguisheable from *Key Finance* in several significant ways: 1) *Deardorf* was a case of actual fraud (which does not require the predicate of a special relationship or other "peculiar circumstances"); 2) although not discussed in *Deardorf* (as unnecessary, because there was actual fraud), *Deardorf* may well have involved a special relationship, which was clearly missing in *Key Finance*; 3) *Deardorf* involved an apparent misrepresentation of a known fact, as opposed to the mistake of law in *Key Finance*; and 4) *Deardorf* affirmed the trial court's finding of fact, whereas *Key Finance* reversed it (*see infra* note 33).

27. *See supra* note 26. Failure to read the terms of a written contract before signing it is not a defense. *See e.g., Exchange Int'l Leasing Corp. v. Consolidated Business Forms Co.,* 462 F.Supp. 626 (W.D. Pa. 1978); and sources cited *infra* at notes 35 and 36. Also note that the arbitration agreement in *Key Finance* included the bold face disclosure excerpted *supra* this text at note 4.

28. Again, *compare* the elements of fraud and fraudulent representation, indicated *supra* at note 12 and in this text *supra* at notes 16 and 17.

29. There are two apparent problems with this conclusion: One is the court's suggestion that a duty to speak arises in every contract negotiation, without more; the other is the indication that even an innocent failure to speak the "whole truth" will breach this duty. Again, *cf. supra* this text and notes 12 and 18 – 26. There is something incongruous about imposing a legal duty to explain things that the person does not know, absent a separate duty to do so. Of course, if there is a special relation between the parties, as in a fiduciary or attorney-client relation, there may be a duty to research, resolve or disclose unknown matters. But to impose a duty to fully explain things that one does not know, in an arms-length contract negotiation (and absent any "peculiar circumstances"), would be something quite extraordinary.

30. *See supra* this text Section II and notes 21 – 26.

31. *Key Finance*, 371 P.3d at 1138, 87 *Okla. Bar J.* at 982 – 83, ¶16. And, for the parties, it ultimately meant that the merits of the underlying dispute were left to be determined in a court of law rather than arbitration.

32. *Key Finance*, 371 P.3d at 1138 – 39, 87 *Okla. Bar J.* at 983, ¶17.

33. *Key Finance*, 371 P.3d at 1136, 87 *Okla. Bar J.* at 981, ¶¶5 and 6. Note that "[a]ctual fraud is always a question of fact." Okla. Stat. tit. 15 §60.

34. *See e.g.*, Corbin, *supra* note 12.

35. *See e.g, Fountain v. Oasis Legal Finance, LLC,* 86 F. Supp. 3d 1037 (D. Minn. 2015) (rejecting the argument that an adhesion contract was unenforceable, the court noting there was no allegation that the plaintiff was unable to read and reject the terms and seek an alternative transaction elsewhere); *supra* note 27; Corbin, *supra* note 12, §607.

36. *See e.g., Walker v. Builddirect.com Technologies, Inc.,* 2015 OK 30, 2015 WL 2074964 (S.Ct. May 5, 2015), at ¶13 (citing *One Beacon Inc. v. Crowley Marine Serv.*, 648 F.3d 258 (5th Cir. 2011)). *See generally* Alvin C. Harrell, "Electronic Commerce and Incorporation by Reference in Contract Law", 86 *Okla. Bar J.* 2351 (2015) (discussing the *Walker* case).

37. *See supra* note 33.

38. For example, while not bearing directly on the issue of fraud or mistake, and subject to many exceptions and qualifications, the parol evidence rule was intended to prevent the impeachment of written contracts by oral testimony that may be self-serving and unreliable. *See e.g.*, John Edward Murray, Jr., Murray on Contracts §§83 – 87 (5th Ed. 2011). Nonetheless, the parol evidence rule is a matter of contract law and does not bar the use of such evidence as it bears on tort law issues, or equity doctrines such as the law of mistake. "The parol evidence rule does not preclude the use of prior or contemporaneous agreements or negotiations to establish that a party was mistaken. *See* §214." Restatement Second of Contracts §153, cmt. a. *See also infra* note 39.

39. An alternative to the constructive fraud analysis in a case like *Key Finance* might be the doctrine of unilateral mistake with advantage taken, which recognizes silence as a predicate factor without any need for a special relationship between the parties. *See supra* note 20 (noting the doctrine of unilateral mistake with advantage taken). *See also* the doctrine of mutual mistake. *See e.g.*, Corbin, *supra* note 12, §§608 – 616. As to a mistake of law, *see id.* §§616 – 620. The Restatement Second of Contracts treats a mistake of law the same as a mistake of fact (*see* § 151, cmt. b), but historically the Restatement of the Law of Restitution differs (*see e.g.*, Corbin, *supra* note 12, at §616, noting also that many cases recognize a distinction between mistakes of law and fact). Corbin notes that the effect of the Restatement Second of Contracts on this issue is muted somewhat by the continuing and long-standing recognition by many courts of a distinction between mistakes of law and mistakes of

fact, and a common unwillingness to allow rescission based on a mistake of law (at least without a special relationship or superior knowledge). Oklahoma case law fits this pattern. *See e.g., Nesbitt v. Home Federal Sav. and Loan Ass'n.*, 440 P.2d 738 (Okla. 1968); *Equity Life Ass'n of Oklahoma City v. Willis*, 108 P.2d 110 (Okla. 1940); *White v. Harrigan*, 186 P. 224 (Okla. 1919) (all rejecting rescission on the basis of a mistake of law). *See also infra* Section IV. The reasons for the distinction seems obvious; as Corbin states: "Even the wisest jurist may be mistaken in this manner [as regards a rule of law]." Corbin, *supra* note 12, §616. Nonetheless, Corbin advocates doing away with the distinction between mistakes of law and fact, as essentially advocated in the Restatement Second of Contracts. In any event, however, the Restatement Second of Contracts view is predicated on the notion that a mistake of law should be subject to the same requirements as a mistake of fact. *See*: *id.* §151, cmt. b; Corbin, *supra* note 12, §616. That is, *i.e.*, a mistake of law (or fact) is a basis for rescission only if there is an objective fact as to which the person is mistaken; matters relating to an opinion or prediction, for example, do not qualify, whether relating to a fact or the law. *See e.g.*, Restatement Second of Contracts §151. Given the inherent uncertainty as to many legal issues (as to which even scholars may disagree), many mistakes of law (including perhaps that in *Key Finance*) could fail this test. There is also the even more basic question as to whether a nonlawyer should be held liable for failing to provide legal advice in the context of an arms-length contract negotiation. Perhaps these sorts of problems influenced a decision not to pursue these theories in *Key Finance. See also infra* note 65.

40. *See supra* note 39. Note again the court's apparent recognition that the agent's statements to Koon were true. *See also supra* this text and notes 26 - 29.

41. *See e.g.*, Murray, *supra* note 38, §125.

42. *See e.g.*, *supra* notes 27 and 35 – 36, and *supra* this text Section III, noting the basic principle that one is bound by a contract one signs so long as there was an opportunity to read it first. This is obviously essential to party autonomy as the basis for economic transactions.

43. The argument that Koon did not understand the full implications of the arbitration agreement does not undermine the statement in the text; if it were required that every contracting party fully understand the legal implications of the agreement, there could be no contracts.

44. *Id.*

45. Again, *see supra* notes 12 and 16 – 17 and accompanying text. *See also* Okla. Stat. tit. 15 §§53 and 58 – 59.

46. *See e.g.*, Corbin, *supra* note 12, §607 (noting, of course, an exception where the signing party "is induced by the artifice or misrepresentation of the other party."). *See also supra* notes 27 and 35 – 36.

47. *See e.g.*, Corbin, *supra* note 12, §597. Though a unilateral mistake of fact with advantage taken is actionable by reformation or rescission. *Id.* §608. *See generally supra* note 39.

48. *See e.g., supra* note 42 – 43.

49. Based on traditional legal analyses, this would be an error. *See e.g., supra* note 29. It can be noted here that there is no duty of good faith in the negotiation and formation of a contract, in contrast to its performance and enforcement. *See e.g.*, UCC §1-304 ("Every contract or duty within [the UCC] imposes an obligation of good faith in its performance and enforcement."). Moreover, in the context of *Key Finance* there was apparently nothing in the nature of a fiduciary or special duty on the part of either party, to protect the other party or to explain his or her legal rights.

50. *See supra* note 49.

51. *Id.* And one that arguably violates the FAA in this context, since the result was to impose requirements on an arbitration agreement more onerous than those previously applied to other contracts. *See id.*, and *supra* note 3.

52. Again, perhaps violating the FAA in this context. *See supra* notes 3 and 51. It is one thing to say, as Corbin does, that a contract can be rescinded if one party is induced to enter it by the fraudulent representations of another. This is accepted law. *See supra* note 12. It is something else to say that it is fraud for a nonlawyer, without wrongful intent, to incompletely describe a complex series of legal issues, on which even lawyers may differ. *See e.g.*, Corbin, *supra* ¶note 12, at §616. Traditionally, the salient distinction in the law has depended on whether the mistaken party was entitled to rely on the representation by the other party. As noted by Corbin, relief is appropriate if the mistake was "caused by a fraudulent misrepresentation of the law by the other [apparently not the case in *Key Finance*], or by his innocent misrepresentation if the relations of the parties are such as to make it reasonable for the one to rely upon the representations of the other." *Id.* at §618. *See also supra* note 39. Thus, an essential question in a case like *Key Finance* is whether the parties to an arms-length contract negotiation have a special relationship or otherwise are justified in relying on an adverse party (who is a nonlawyer) for legal advice. In the absence of any fiduciary-like relationship or other duty of trust (or good faith), this seems doubtful. *See e.g., supra* notes 21, 39 and 49, and *infra* notes 53-55. Note also, again, the contract disclosure excerpted *supra* this text at note 4.

53. *See e.g.*, Alvin C. Harrell, "The Importance of Contract Law: A Historical Perspective", 41 *Okla. City Univ. L. Rev.* 1 (2016).

54. *See e.g.*, Peter G. Pierce III and Alvin C. Harrell, *Financiers as Fiduciaries: An Examination of Recent Trends in Lender Liability*, 42 *Okla. L. Rev.* 79 (1989) (discussing, *e.g.*: *Rodgers v. Tecumseh Bank*, 756 P.2d 1223 (Okla. 1988) (there is no tort action based on an implied duty of good faith); and *Commercial Cotton Co. v. United California Bank*, 163 Cal. App.3d 511, 209 Ca. Rptr. 551 (1985) (imposing a "quasi-fiduciary" duty on the bank-customer relation)). Subsequent cases have universally rejected the *Commercial Cotton* view. *Id.* In addition, the official comments to the UCC were revised to make this clear. *See* UCC §1-304 cmt. 1 (current official text) ("[the definition of good faith] does not support an independent cause of action for failure to perform or enforce in good faith."). It should also be noted that even cases like *Commercial Cotton* did not seek to extend the duty of good faith beyond performance and enforcement issues, *e.g.*, to contract negotiations and formation. *See also supra* note 49.

55. *See supra* note 54. *See also* Frederick. H. Miller and Alvin C. Harrell, *The Law of Modern Payment Systems* ¶¶9.3[1] and [2], 9.5 and 9.8[3] (2d. ed. 2017) (noting numerous cases rejecting the argument that there are special or fiduciary duties in an ordinary debtor-creditor relation).

56. Of course, if the court concluded that Key or its agent assumed a fiduciary-like duty based on a special relationship with Koon or other "peculiar circumstances," this could trigger a duty to speak as the basis for constructive fraud, but there is no mention in *Key Finance* of any such relation or circumstances. *See also supra* notes 26 – 29 and *infra* note 58. If the courts are going to impose fiduciary-like obligations in ordinary contract negotiations, some additional explanation and stated parameters are sorely needed.

57. This refers to the court's substantive law analysis. On the procedural posture, relating to the burden of proof necessary to sustain a directed verdict, the court was correct. *See supra* this text at note 31.

58. *Compare* the court's conclusion at ¶16: "Koon has presented evidence that Key's agent owed him a duty of full disclosure because the agent chose to speak … Key's agent's partial disclosure or representation to Koon conveyed a false impression … As a result, a duty to speak arose, 'the speaker being under a duty to say nothing or to tell the whole truth.'" *Key Finance*, 371 P.3d at 1138, 87 *Okla. Bar J.* at 983 (quoting *Deardorf*, 206 P.2d at 998, ¶8) (suggesting that a duty to speak "the whole truth" arises in every contract negotiation). It can be noted again that there is no indication that other evidence was presented to suggest any special relationship or "peculiar" circumstances that would create a duty to speak, and that *Deardorf* does not support this conclusion. *See supra* note 26.

59. *See supra* note 29. *See also supra* note 58. One cannot help recalling the Hollywood movie *Liar, Liar* (starring Jim Carey), to illustrate this point. Along the same lines, *see* Elizabeth Bernstein, Life and Arts, "*Bonds: On Relationships, A Guide to Little White Lies*," *Wall Str. J.*, June 6, 2017, at A11 ("I bet you've lied recently.").

60. *Id. See also supra* notes 39 and 52.

61. *See e.g., supra* note 39.

62. *See supra* notes 39 and 52, and *infra* note 66.

63. *See supra* Section IV. It is unfortunate the Oklahoma Supreme Court passed up the opportunity to further clarify this point. *See supra* note 1.

64. *See supra* this text at notes 23 and 31.

65. *See supra* notes 57 and 58. Note again that a duty of good faith (a lower standard) does arise, once the contract is formed, but not during the negotiations for contract formation. *See supra* notes 49 and 54. Again, it also can be noted that *Deardorf*, relied on by the court of appeals for the quoted language, was a very different type of case from *Key Finance*. *See supra* note 26. In *Deardorf*, the Supreme Court was merely reaffirming the trial court's finding of fact that there was actual fraud, on ample evidence of that fact. This is very different from imposing a tort-based finding of constructive fraud, on the theory that innocent statements created a duty to speak "the whole truth" in an arms-length contract negotiation.

66. As noted previously, one may speculate as to whether *Key Finance* should have been framed as a case of mistake rather than constructive fraud, and why this theory was not pursued. *See e.g., supra* notes 39, 47 and 52. However, this would require a mutual mistake or a unilateral mistake on the part of Koon and either a conscious advantage taken by Key or an unconscionable result. *See* Restatement Second of Contracts §153. In *Key Finance*, there is no indication in the court's opinion that Key's agent knew the law well enough to realize that Koon was acting under a mistake of law. Even if a mistake of law is actionable (which may not be the case in Oklahoma – *see supra* note 39), this doubt as to the agent's knowledge of the law might negate the argument that there was a mutual mistake or conscious advantage taken by Key. As to unconscionability, the United States Supreme Court has made clear that arbitration agreements are not unconscionable *per se*. *See* sources cited *supra* at note 3. So, the doctrine of unilateral mistake apparently did not hold much promise on the facts of *Key Finance*.

Citizenship and Jurisdiction of Federally Chartered Companies

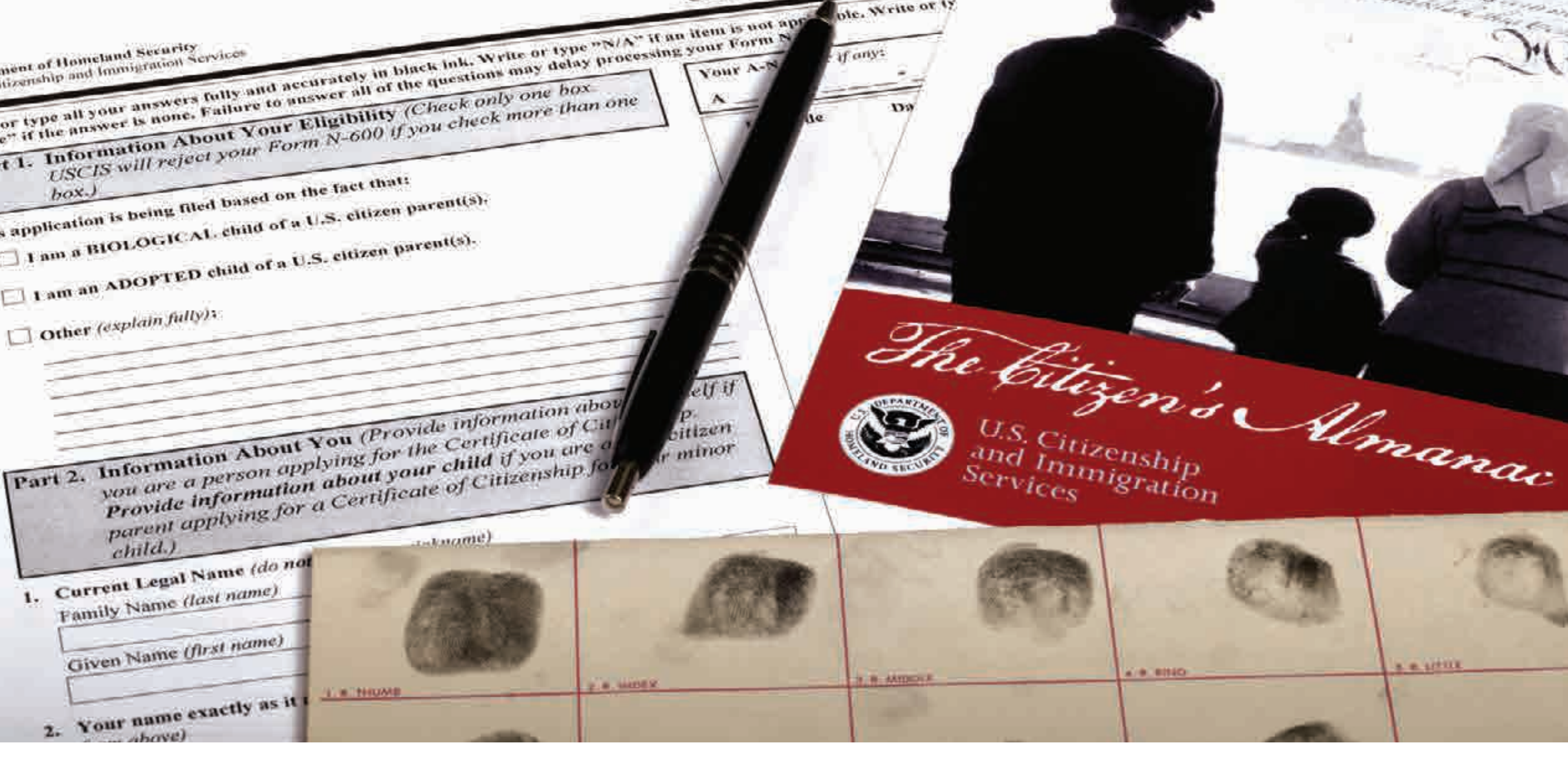
By Miles Pringle

A federal court's jurisdiction is typically based on either federal question jurisdiction or diversity of citizenship; however, regarding federally chartered companies, federal jurisdiction is more nuanced than one might imagine.

While most companies in the United States are chartered by state governments, many are chartered by the federal government, such as certain banks, credit unions and railroad companies. Examples include private companies (*e.g.* Bank of America NA), companies wholly owned by the U.S. government that act in a regulatory capacity (*e.g.* Federal Deposit Insurance Corporation), and nonprofit corporations (*e.g.* Boy Scouts of America, Girl Scouts of America, American National Red Cross). The first company chartered by the U.S. government was the First Bank of the United States, during President George Washington's administration (at the urging of Alexander Hamilton). In fact, it was litigation over jurisdiction and constitutionality of the Second Bank of the United States in *McCulloch v. Maryland*, in which the Supreme Court first adopted an expansive interpretation of the Necessary and Proper Clause.[1]

As background, most federally chartered companies are set up as corporations. Limited liability companies (LLC) did not become widely accepted in the United States until the latter half of the 20th century. Oklahoma did not pass its Limited Liability Act until 1992.[2] Even though companies may be chartered by the federal government, their actions are usually governed by state law. For example, in *First National Bank v. Kentucky* (1870), the Supreme Court explained that national banks "are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law."[3] Thus, most law suits involving federally chartered companies are based on state law, not a federal question.

Even though claims made by and against federal companies are typically governed by state law, historically federal district courts still had jurisdiction over most actions involving federal companies. At first, jurisdiction was based on a company's charter, which was promulgated by the federal government. The Supreme Court reasoned that the act of incorporation itself gave federal courts jurisdiction over suits by and against federal corporations.[4] After 1875, when Congress extended general jurisdiction to issues involving a federal question, the courts determined that federal corporations were entitled to removal from state courts on the basis that such suits involving federal corporations inherently involved a federal question.[5] In 1948, Congress reversed course when it passed 28 U.S.C. §1349, which provides that district courts shall not have jurisdiction based upon the ground that a corporation was incorporated by or under an act of Congress ("unless the United States is the owner of more than one-half of its capital stock"). Thus, a federal question must be included in the allegations of the pleadings to evoke federal question jurisdiction (*e.g.* alleging a violation of the Equal Credit



Opportunity Act).

Regarding diversity jurisdiction, originally any corporation – state or federal – had difficulty establishing diversity of citizenship due to the court's early interpretation of a corporation's citizenship. Noting that a corporation is a "mere legal entity," the court decreed that a corporation's citizenship was the state of each of its shareholders.[6] In 1958, to address the growing national make up of corporate shareholders, Congress passed 28 U.S.C. §1332(c)(1), providing that a corporation is a citizen of the state in which it has been incorporated.[7] It should be noted that Congress has not stepped in to address the citizenship of limited liability companies;[8] therefore, an LLC is a citizen of each of its members' states for diversity purposes.

While Section 1332 made it easier for state chartered corporations to obtain diversity jurisdiction, it was not applied to federally chartered corporations.[9] Additionally, in 1916 the Supreme Court ruled that federal corporations are "not a citizen of any state" (concluding that a federal corporation's "activities and operations are not to be confined to a single state, but to be carried on, as in fact they are, in different states").[10] With the narrowing of federal question jurisdiction, and the inability to establish diversity, removing an action to federal court for federal companies was often difficult.

While Congress has never sought a general solution to these issues, there are a myriad of carveouts for specific federal companies. For example, 12 U.S.C. §1717 provides that Fannie Mae is deemed to be a citizen of the District of Columbia corporation. Regarding national banking organizations, 28 U.S.C §1348 provides that for diversity purposes national banks are "deemed citizens of the states in which they are respectively located." Federal savings associations have a similar provision, 12 U.S.C. §1464(x), as well.

There remain several forms of federally chartered organizations that do not have their own carveouts, which courts handle in different ways. Federally chartered credit unions, for example, are "usually not considered citizens of any particular state for diversity purposes. However, courts have found that when a credit union maintains 'localized operations,' it can be treated as a citizen of the state in which it operates."[11] This principle is generally known as the "localization doctrine." One court adopting this rationale acknowledged the principle was a "judicially-created exception;" however, it is one that has "won general acceptance in various federal courts."[12]

Just because a carveout does apply to an entity, does not mean that all citizenship issues are resolved. For instance, the appropriate citizenship of national banks came before the Supreme Court in 2006 based on the interpretation of the term "located."[13] The 4th Circuit had ruled that Wachovia Bank NA's citizenship was "every state in which it has established a branch." The Supreme Court disagreed, stating, "Congress,

we are satisfied, created no such anomaly." The court further opined a national bank's citizenship for diversity purposes is the state designated in its articles of association as its main office. Some have sought even further clarification on this issue (i.e. can a national bank be a citizen of both its main office and its principle place of business),[14] but the circuit courts appear to be in conformity that a national bank's main office is its only place of citizenship.[15]

Federal jurisdiction is not the only issue for federally chartered companies. We must also consider when a state court may exercise jurisdiction over a federal company. While not addressing this issue directly, in 2011 the Supreme Court provided a thorough description of a state court's authority to adjudicate matters in *Goodyear Dunlop Tires Operations, S.A. v. Brown*.[16] The court explained that because a state court's assertion of jurisdiction exposes defendants to the state's coercive power, it is subject to review for compatibility with the 14th Amendment's Due Process Clause. Under the Due Process Clause, a state may exercise either general (or all-purpose) jurisdiction, or specific jurisdiction.

"For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home."[17] For companies, this is usually the state in which the company is organized; however, it may also be the state in which the company's principle place of business is located (which is not always the same as its organizing state). Thus, if a federally chartered company identifies a main office, it is likely subject to the general jurisdiction of that state. Additionally, the state in which a federally chartered company's principal place of business is located is also likely to have general jurisdiction over the company.

Specific jurisdiction, on the other hand, is limited to matters stemming from or connected with the state itself. That is, a state may exercise jurisdiction over nonresident defendants when they cause harm *inside* the state, so long as the assertion of jurisdiction complies with "traditional notions of fair play and substantial justice."[18] There are two types of specific jurisdiction: 1) when the defendant's "continuous and systematic" and gave rise to the episode-in-suit; and 2) when single or occasional acts in a state may be sufficient to render the defendant answerable with respect to those acts, but not to other matters unrelated to the forum connections. Many states, including Oklahoma,[19] have enacted long-arm statutes granting their courts' jurisdiction "on any basis consistent with the Constitution of this state and the Constitution of the United States."

Under the Due Process Clause, a state may exercise either general (or all-purpose) jurisdiction, or specific jurisdiction.

In sum, a federal court may exercise jurisdiction over a federally chartered company when a federal question exists, or when diversity is met. In order to establish diversity, one may need to look to the statute creating the chartering authority, or rely on a judicially created exception. Regarding a state court's jurisdiction, it must comply with the Due Process Clause and the applicable long-arm statute.

ABOUT THE AUTHOR

Miles Pringle is partner with Pringle & Pringle PC, where he represents clients in a variety of business matters, including financial institutions. He is a native Oklahoman, licensed to practice law in Missouri, Oklahoma and Texas. Mr. Pringle currently serves as chairperson for the OBA's Financial Institution and Commercial Law Section.

ENDNOTES

1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400 (1819).
2. (18 O.S. (1992) §2000).
3. 76 U.S. (9 Wall.) 353, 362 (1870); *see also* Lund, Paul E., "*Federally Chartered Corporations and Federal Jurisdiction*", 36 Fla. St. U.L. Rev. 317, n. 51.
4. *See e.g. Osborn v. President, Dirs. & Co. of Bank*, 22 U.S. (9 Wheat.) 738, 816 (1824); *see also* 36 *Fla. St. U.L. Rev.* 330.
5. *Pac. R. Removal Cases*, 115 U.S. 1, 3, 5 S. Ct. 1113, 1113 (1885); *see also* 36 *Fla. St. U.L. Rev* at 332; *Rockey v. Harrison*, No. 1:14-cv-00147, 2014 U.S. Dist. LEXIS 118304, at *2 n.1 (N.D. Ohio Aug. 19, 2014).
6. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809); *see also* 36 *Fla. St. U.L. Rev* at 327.
7. 36 *Fla. St. U.L. Rev* at 329.
8. *Guzman v. Smithfield Foods, Inc.*, No. CIV-17-697-D, 2017 U.S. Dist. LEXIS 148232, at *2 (W.D. Okla. Sept. 13, 2017); *citing Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990).
9. *See Wachovia Bank, Nat'l Ass'n v. Schmidt*, 546 U.S. 303, 306, 126 S. Ct. 941, 945 (2006).
10. *Bankers Tr. Co. v. Tex. & P. R. Co.*, 241 U.S. 295, 309, 36 S. Ct. 569, 572-73 (1916).
11. *Mungo v. Minn. Life Ins. Co.*, No. 0:11-464-JFA, 2011 U.S. Dist. LEXIS 67654, at *9 (D.S.C. June 22, 2011).
12. *Arlington Cmty. Fed. Credit Union v. Berkley Reg'l Ins. Co.*, 57 F. Supp. 3d 589, 593 (E.D. Va. 2014).
13. *See* End Note ix, *supra.*
14. *See e.g.* NOTE: DETERMINING DIVERSITY JURISDICTION OF NATIONAL BANKS AFTER WACHOVIA BANK V. SCHMIDT, 81 *Fordham L. Rev.* 1447.
15. *OneWest Bank, N.A. v. Melina*, 827 F.3d 214, 219 (2nd Cir. 2016) ("We agree with our sister circuits that a national bank is a citizen only of the state listed in its articles of association as its main office.").
16. 564 U.S. 915, 131 S. Ct. 2846 (2011).
17. *Id.* 564 U.S.at 924, 131 S. Ct. at 2853-54.
18. *Id.* 564 U.S. at 919, 131 S. Ct. at 2850-51.
19. (12 O.S. §2004(F)).

All "In-Person Programs" will be held at the Oklahoma Bar Center unless otherwise noted.

**** Denotes simultaneous webcast available***

FEBRUARY 2018

2-3	**Legal Technology/Law Practice Management Institute,** *21C Museum Hotel, OKC*
6	**Trust Accounting Essentials**
14	**Tax Cuts and Jobs Act of 2017 with Donna Jackson: Part 1** *Live Webcast Only*
28	**Tax Cuts and Jobs Act of 2017 with Donna Jackson: Part 2** *Live Webcast Only*

MARCH 2018

7	**IRS Updates with Anita Douglas** *Live Webcast Only*
9*	**Interrupt Your Unconscious Biases and Make Better Decisions** *Morning Program*
9*	**Colors** *Afternoon Program*
14	**Transitions Expertise Matters with Suzanne Wheeler** *Live Webcast Only*
21	**Energy Reboot for Productivity and Billable Hours** *Live Webcast Only*
28	**Drafting Joint Venture Documents** *Live Webcast Only*

APRIL 2018

4	**Eliminate He Said She Said** *Live Webcast Only*
11	**HEALTH LAW: The Opioid Epidemic w/Mary H. Richard** *Live Webcast Only*
17	**Trust Accounting Essentials**
27*	**A Guide to 42 USC Principles**

MAY 2018

4*	**Herbert M. Graves Basic Bankruptcy Seminar**
9	**HEALTH LAW: Surrogate Births & Fertility Issues in Okla. w/Stacy M. Brklacich** *Live Webcast Only*

JUNE 2018

19	**Trust Accounting Essentials**
21-23	**2018 Solo and Small Firm Conference,** *River Spirit Casino Resort, Tulsa*

All programs listed are subject to change without notice.

Changes to the Oklahoma General Corporation Act

By Nicole Cawood-Anderson and Chantelle Hickman-Ladd

The 2017 Oklahoma legislative term wielded many changes to Title 18 of the Oklahoma Statutes on corporate regulation. These additions and redactions to the Oklahoma General Corporation Act passed with overwhelming support.[1] Adjustments were made to the interpretation and enforcement of corporate instruments, indemnification in lawsuits, issuance of stock, ratification of defective corporate acts, determination of record stockholders, mergers, consolidations, dissolutions and appraisal rights.

This article is designed to outline and briefly summarize the significant amendments and new statutes signed into law by the governor on May 17, 2017, and took effect on Nov. 1, 2017.

FORMATION

The first amendment to the Corporation Act provides leeway for incorporators who are acting on behalf of others. Section 1012 added a provision that allows "any person for whom or on whose behalf [an] incorporator was acting ... as employee or agent [to] take any action that such incorporator would have been authorized to take."[2] However, any instrument signed by the actor, or record of a meeting the actor participated in, must state that the incorporator is unavailable and why; that the incorporator was acting as an employee or agent for, or on behalf, of the actor; and the actor's "signature on such instrument or participation in such meeting is otherwise authorized and not wrongful."[3]

Shareholders have also been given more leeway in examining corporate documents. Section 1014.1, now titled Interpretation and Enforcement of Corporate Instruments and Provisions of this Title, permits a shareholder, member or director to inquire into

the validity of any instrument, document, agreement relating to the selling of stock or leasing or exchanging property or assets.[4] Documents involving the "restrictions on the transfer, registration of transfer or ownership of securities under Section 1055;" "any proxy under Section 1057 or 1060; any voting trust under Section 1063; any agreement, certificate of merger or consolidation, or certificate of ownership and merger governed by Sections 1081 through 1087, or Section 1090.2;" and certificates of conversion under Section 1090.4 or 1090.[5] may also be reviewed.5 If after reviewing such documents a cause of action has been deemed necessary, a suit may be brought in the district court unless exclusive jurisdiction is specified elsewhere.[6] Beyond this, the Oklahoma Legislature created a new law, Section 1014.2, allowing the certificate of incorporation or bylaws of a corporation to contain a provision stating that all internal corporate claims must be brought in an Oklahoma court.[7] However, this section prohibits a corporation from making regulations against a suit being brought in an Oklahoman court.[8]

REGISTERED OFFICE AND REGISTERED AGENT

The amendments to Section 1022 seem to clarify and fill in gaps of the unrevised statute. Section 1022(B)(2) provides that a foreign corporation must maintain the secretary of state as its registered agent, but may list an additional registered agent, aside from itself, that process can be served on.[9] Furthermore, Section 1022 now contains a provision requiring all corporations to provide its registered agent with general contact information for an "employee or designated agent ... who is ... authorized to receive communications from the registered agent."[10] More interestingly, the registered agent is allowed to resign, pursuant to Section 1026, if the corporation "fails to provide the registered agent with a current communications contact."[11]

DIRECTORS AND OFFICERS

Under Section 1031, an officer or director may receive an advancement of expenses from a corporation, including attorney's fees, to defend a criminal, civil or administrative or investigative action prior to a final disposition.[12] The director or officer is also protected from the corporation taking steps to prevent them from receiving indemnification or advance funds by precluding the corporation from "eliminate[ing] or impair[ing] … the certificate of incorporation or the bylaw[s] after the occurrence of an act or omission."[13] However, the certificate of incorporation or bylaws may permit the elimination or impairment of indemnification or the advancement of funds so long as "the provision in effect at the time of [the] act or omission" explicitly authorizes it.[14]

STOCKS AND DIVIDENDS

Capital stock could already be exchanged for consideration, excluding services. Section 1033 now provides the Board of Directors with the discretion to create a formula that will establish the amount of consideration needed for that exchange.[15] Furthermore, the certificates of stock may now be signed by any two authorized officers, instead of specific board members as previously required under Section 1039.[16]

STOCK TRANSFERS

One of the more interesting changes to the General Corporations Act is the addition of Sections 1055.1 and 1055.2, which give corporations a way to remedy defective corporate acts. A defective corporate act is defined as "an overissue, an election or appointment of directors that is void or voidable, or any act or transaction purportedly taken by or on behalf of the corporation that is, … [or] would have been,

within the power of a corporation under subchapter II of Title 18 of the Oklahoma Statutes, but is void or voidable due to a failure of authorization."[17]

Section 1055.1 governs the ratification of defective corporate acts and stocks.[18] To ratify a defective corporate act, the Board of Directors is required to, among other things, adopt a resolution stating: "the [specific] defective corporate act … to be ratified, the date of [the] defective corporate act …, if such defective corporate act ... involved the issuance of shares of putative stock …, the nature of the failure of authorization …, and that the board of directors approves the ratification of the defective corporate act."[19] For the ratification of an election of the initial Board of Directors, the resolution must state "the name of the person[(s)] who [were] … the initial board of directors of the corporation, the earlier of the date on which such persons first took such action or were purported to have been elected as the initial board of directors, and that the ratification of the election of such person[(s)] as the initial board of directors is approved."[20] Unless otherwise determined under Section 1055.2, "each defective corporate act ratified in accordance with this section shall no longer be deemed void or voidable as a result of the failure of authorization."[21] Critically, the ratification will retroactively take effect to the time of the defective corporate act.[22]

Section 1055.2 governs proceedings regarding the validity of defective corporate acts and stock.[23] This section allows for anyone claiming to be "substantially and adversely affected by a ratification" to apply to the district court who may, among other things: "determine the validity and effectiveness of any defective corporate act ratified pursuant to Section [1055.1] ...; determine the validity and effectiveness of the ratification of any defective corporate act pursuant to Section [1055.1] ...; and modify or waive any of the procedures set forth in Section [1055.1]."[24] The district court may also look to factors, such as what harm may be caused by ratifying or validating the defective act or by not ratifying or validating the corporate act, whether the defective act was treated as valid or "[a]ny other factors or considerations the court deems just and equitable."[25]

The Legislature amended Section 1081 to include a new form of merger to be effectuated without a shareholder vote.

MEETINGS, ELECTIONS, VOTING AND NOTICE

Another interesting addition is the amendment to Section 1058. Section 1058(A) now provides the record date for shareholders entitled to notice and the record date for shareholders entitled to vote at a meeting may be different days.[26] However, the Board of Directors must specify that the record dates will be different, or it will be presumed to be the same date.[27] The stock ledger of a corporation must still be updated prior to each and every meeting of the shareholders, however, when the record date establishing those entitled to vote and receive notice is less than 10 days before the scheduled shareholder meeting, the established ledger is deemed to reflect those eligible to vote.[28] Furthermore, if an adjournment is requested at a meeting, the record date from the original meeting will be presumed to be the same for the reconvening of the adjourned meeting, unless the Board of Directors establish a new record date.[29] If a new record date has been established that sets out the shareholders who are entitled to notice and to vote in the reconvened adjournment meeting, the Board of Directors must give notice of such a meeting in accordance with §1058(A).[30]

The Legislature also relaxed written consent requirements for corporations that have "a class of voting stock listed or traded on a national securities exchange or registered under 12(g) of the Securities Exchange Act of 1934 …, and [one thousand] or more shareholders of record."[31] Section 1073(B), requiring actions by the shareholders approved by written consent to be approved by holders of all outstanding stock entitled to vote was removed, leaving Section 1073(A) to govern consent of shareholders in lieu of a meeting.[32] Furthermore, Section 1073(D) now permits "any person executing a consent" to authorize that his consent "will be effective at a future time" or after some triggering event.[33] The future time will then serve as the time of signature for the purpose of this statute.[34] However, with all extensions comes some regulation. This future time or triggering event can be no later than 60 days after the future consent is instructed or made.[35] Critically, the future consent may be revoked "prior to it [ever] becoming effective."[36]

Section 1065.1 regulates proxy solicitation material and reimbursements for the use of any proxy materials prior to a meeting.[37] The bylaws of a corporation may now require proxy materials used to elect Board of Directors to include, not

only the individual(s) selected by the current Board of Directors, but also "one or more individuals nominated by a shareholder."[38] Consequently, the corporation may include provisions requiring the nominating shareholder to list the number and type of shares belonging to him, provide information regarding the shareholder and his nominees, require that a "nominating shareholder undertake to indemnify the corporation … [for] any loss arising as a result of any false or misleading information … submitted by the nominating shareholder" and more.[39] A reimbursement for any expenses incurred in soliciting a proxy may be given to a shareholder, if provided for in the bylaws.[40] However, limitations may be placed on the requesting shareholder's ability to collect a reimbursement such as, basing the reimbursement amount off the number of persons nominated, the number of votes cast for a nominee or "whether [the] shareholder previously sought reimbursement for similar expenses."[41] However, the bylaws cannot "apply to elections for which any record date precedes its adoption."[42]

If an elected Board of Directors has committed a felony in connection with the director(s) duties to a corporation or breached his duty of loyalty to any corporation, a corporation or a shareholder "derivatively in the right of the corporation," may bring a subsequent action to the district court to remove said director(s).[43] The district court may remove the director(s) if it determines "that the [director(s)] did not act in good faith in performing the acts resulting in the prior conviction or judgment and judicial removal is necessary to avoid irreparable harm to the corporation."[44]

AMENDMENT OF CERTIFICATE OF INCORPORATION; CHANGES IN CAPITAL AND CAPITAL STOCK

Section 1077 permits a corporation to amend its certificate of incorporation after receiving capital stock or after a nonstock corporation receives members.[45] A corporation may now delete the named incorporator(s), the initial Board of Directors and the original subscribers of shares.[46] It may also delete any amendments that "effect a change, exchange, reclassification, subdivision, combination or cancellation of stock," if such an amendment has already become effective.[47] "[U]nless otherwise expressly required by the certificate of incorporation," a meeting or vote of the shareholders is not required to effectuate any of these changes, or a change to the corporate name.[48] For all other amendments to the certificate of incorporation, notice in accordance with Section 1067 must be provided prior to the annual meeting or a special meeting being called, "unless such notice constitutes a notice of Internet availability of proxy materials under the rules promulgated under the Securities Exchange Act of 1934."[49]

MERGER OR CONSOLIDATION

The Legislature amended Section 1081 to include a new form of merger to be effectuated without a shareholder vote. To qualify under this new merger provision, a corporation must "consummate[][50] an offer for all of the outstanding stock of [a] constituent corporation," aside from any excluded stock.[51,52] The agreement of merger must expressly "permit[] or require[] such merger to be effected under" Section 1081(H), and the merger must be "effected as soon as practicable following the consummation of the offer."[53] The tender offer may be conditioned on a minimum amount of shares purchased to effectuate a merger, but the consummating corporation must accept enough shares for purchase that, "together with the stock otherwise owned by the consummating corporation or its affiliates and any rollover stock,"[54] would equal a majority vote on the merger.[55] After the consummating corporation gains a majority of the shares, the merger must actually occur.[56] Once the merger has occurred, the consummating corporation must give "the same amount in kind of cash, property, rights or securities" as the original tender for the constituent corporation's shares.[57] It should be noted that if the merger is approved, "[a]ny shareholder entitled to appraisal rights may, ... within the later of the consummation of [the] offer contemplated … and [twenty] days after the date of mailing of [his appraisal rights] notice, demand in writing from the surviving or resulting corporation the appraisal of the holder's shares."[58]

When a parent entity wishes to merge with a subsidiary corporation, the Legislature has provided in Section 1083.1 that, similar to Section 1083, where "at least [90%] of the outstanding shares of each class of the stock of a corporation[(s)]" is owned by an entity,[59] the entity "may either merge the corporation[(s)] into itself and assume all of its or their obligations, or merge itself ... into one of the other corporations" if "one or more of such corporations is a corporation of this state."[60] Under this section, Sections 1088, 1090 and 1127 shall apply to the merger, and Sections 1089 and 1081(E) "shall apply to a merger ... in which the surviving constituent party is a corporation

of this state."[61] "If the surviving constituent party exists under the laws of the District of Columbia or any state or jurisdiction other than this state," Section 1082(D) "shall also apply to a merger under this section."[62]

Once a merger has occurred, pursuant to Section 1091(D)(1), shareholders "who [were] such on the record date for notice" prior to a merger approval meeting shall receive notice of which shares are available for appraisal rights.[63] The notice to said shareholders must "include in the notice a copy of [Section 1091] and, if one of the constituent corporations is a nonstock corporation, a copy of Section 1004.1."[64] Please note that Section 1004.1 is nonexistent under Title 18 of the Oklahoma Statutes, leaving this cross-reference unclear.

If a shareholder decides to bring an appraisal rights suit, the district court may now dismiss the suit if the stock of the constituent corporation is listed on a national securities exchange. However, the suit may not be dismissed if: "(1) the total number of shares entitled to appraisal exceeds [1%] of the outstanding shares of the class or series eligible for appraisal, (2) the value of the consideration provided in the merger or consolidation for such total number of shares exceed [$1 million], or (3) the merger was approved pursuant to Section 1083 or Section 1083.1."[65] Shareholders that have demanded appraisal rights are not "entitled to vote the[ir] stock for any purposes or to receive payment of dividends or other distributions" pursuant to Section 1090(K).[66] However, the Legislature clarified that this section shall not affect the shareholders' rights to withdraw their "demand for appraisal [rights] and to accept the terms offered upon the merger or consolidation within [sixty] days after the effective date of the merger or consolidation" if they did "not commence an appraisal proceeding or joined that proceeding as a named party."[67] If the shareholder is involved in the suit and appraisal rights are granted, the Legislature provided that "unless the court in its discretion determines otherwise for good cause shown, ... interest from the effective date of the merger through the date of payment of the judgment shall be compounded quarterly and shall accrue at [5%] over the Federal Reserve discount rate."[68] Nevertheless, the corporation may avoid interest payments by paying a lump sum to each shareholder entitled to appraisal rights prior to an entry of judgment.[69]

SALES OF ASSETS, DISSOLUTION AND WINDING UP

Section 1099 was amended to include that Sections 1100 through 1100.3 will now also apply to any corporation that has expired by its own limitation.[70] To accomplish this goal, the Legislature also provided that all references to a dissolved corporation or dissolution in Sections 1100 through 1100.3 will include a corporation that has expired by its own limitations and to that expiration.[71]

RENEWAL, REVIVAL, EXTENSION AND RESTORATION OF CERTIFICATE OF INCORPORATION OR CHARTER

Section 1119 is now extended to include the restoration of expired certificates of incorporation.[72] This has left Section 1120 to address only the revival of "any corporation whose certificate of incorporation has become forfeited by law for nonpayment of taxes or whose certificate of incorporation has been revived, but, through failure to comply strictly with the provisions of the Oklahoma General Corporation Act" has brought the validity of the revival into question.[73] However, the Legislature made expressly clear that Section 1120 will not apply to "a corporation whose certificate of incorporation has been revoked or forfeited pursuant to Section 1104."[74]

"A corporation may [now] revoke [a] dissolution ... or restore its certificate of incorporation after it has expired by its own limitations " by having the Board of Directors adopt a resolution to revoke the dissolution or adopt a resolution that restores an expired certificate of incorporation.[75] The Board of Directors must then "submit[] [the resolution] to a vote at a special meeting of the shareholders."[76] Notice of the special meeting to the shareholders is required, and during this meeting the shareholders shall vote whether or not to accept the resolution.[77] A nonstock corporation may also revoke a dissolution or restore a certificate of incorporation by a vote of the eligible members, and by filing a certificate of revocation or of restoration.[78]

Any corporation, with or without stock, that has revoked a dissolution agreement or reinstates a certificate of incorporation, must "file all annual franchise tax reports that the corporation would have had to file if it had not dissolved or expired."[79] The corporation must also "pay all franchise taxes that the corporation would have had to pay if it had not dissolved or expired."[80]

FOREIGN CORPORATIONS

Section 1136 states that when a foreign corporation has agreed, in writing, to be a subject within Oklahoma jurisdiction and does not designate a manner of service,

the corporation will be "deemed to have … appointed … the Secretary of State [of Oklahoma] … [as] its agent for the acceptance of legal process in any ... proceeding against [the corporation]."[81] Under Section 1135, when the secretary of state is served in accordance with Oklahoma Title 12 Section 2004, the corporation must be notified immediately by letter, certified mail or return receipt requested at the appropriate corporate address.[82] It is the plaintiff's duty to deliver duplicates during service, "to notify the Secretary of State that service is being effected pursuant to [Section 1135(D)]," and to pay a fee required by Section 1142(7).[83] The secretary of state can only be required to keep the record of such service for five years.[84]

CONCLUSION

The 2017 legislative session impacted Oklahoma incorporations by making significant changes to the Oklahoma General Corporation Act. The Legislature implemented new laws on forum selection provisions within a corporation's certificate of incorporation and bylaws; the ratification of and proceedings regarding the validity of defective corporate acts and stock; access to proxy solicitation materials and reimbursements; and the merger of parent entities with subsidiary corporation(s). Thirty-three sections of Title 18 were partly or substantially amended. These amendments modified several laws affecting the formation of a corporation; indemnification of directors and officers in lawsuits; the merging, consolidating or dissolving of a corporation; and appraisal rights.

Authors' note: Special thanks to Associate Dean Paula J. Dalley for her guidance and support.

ABOUT THE AUTHORS

Nicole Cawood-Anderson graduated from the University of Central Oklahoma with a Bachelors in Criminal Justice and from Baylor University with a Bachelors in Political Science. She is currently a 2L at the OCU School of Law.

Chantelle Hickman-Ladd graduated from the University of Central Oklahoma with a Bachelors in Business Administration. She is currently a 2L at the OCU School of Law, where she is a member of the *OCU Law Review*.

ENDNOTES

1. "Bus. Entities; authorizing actions to determine validity of certain corp. instruments: RCS # 729." Okla. Legis. S. (May 17, 2017) p. SB769, "Bus. Entities; authorizing actions to determine validity of certain corp. instruments: RCS # 667." Okla. Legis. HR. (April 27, 2017) p. SB769 (bill passed 89 to 1 in the House of Representatives, and 36 to 4 in the Senate).
2. Okla. Stat. Tit. 18, §1012(D) (Supp. 2017).
3. *Id.*
4. Tit. 18, §1014.1(A)(2).
5. Tit. 18, §1014.1(A)(3), (5)-(7).
6. Tit. 18, §1014.1(B) (Supp. 2017).
7. Okla. Stat. Tit. 18, §1014.2 (Supp. 2017).
8. *Id.*
9. Tit. 18, §1022(B)(2).
10. Tit. 18, §1022(D).
11. *Id.*
12. Okla. Stat. Tit. 18, §1031(E) (Supp. 2017).
13. Tit. 18, §1031(F).
14. *Id.*
15. Tit. 18, §1033(A).
16. Tit. 18, §1039.
17. Okla. Stat. Tit. 18, §1055.1(H)(1) (Supp. 2017).
18. Tit. 18, §1055.1(A).
19. Tit. 18, §1055.1(B)(1)(a)-(e).
20. Tit. 18, §1055.1(B)(2)(a)-(c).
21. Tit. 18, §1055.1(F)(1).
22. Okla. Stat. Tit. 18, §1055.1(F)(1) (Supp. 2017).
23. Tit. 18, §1055.2.
24. Tit. 18, §1055.2(A)(1)-(5), (B)(1)-(10).
25. Tit. 18, §1055.2(D)(1)-(5).
26. Tit. 18, §1058(A).
27. Okla. Stat. Tit. 18, §1058(A) (Supp. 2017).
28. Tit. 18, §1064(A).
29. Tit. 18, §1058(A).
30. 18 O.S. 2011 §1067(C).
31. Tit. 18, §1073(B)(1)(a)-(b).
32. *Id.*
33. Okla. Stat. Tit. 18, §1073(D) (Supp. 2017).
34. *Id.*
35. *Id.*
36. *Id.*
37. Tit. 18, §1065.1.
38. Okla. Stat. Tit. 18, §1065(A) (Supp. 2017).
39. Tit. 18, §1065.1(A)(1)-(2), (5).
40. Tit. 18, §1065.1(B).
41. Tit. 18, §1065.1(B)(1)-(2).
42. Tit. 18, §1065.1(C).
43. Okla. Stat. Tit. 18, §1070(C) (Supp. 2017).
44. *Id.*
45. Tit. 18, §1077(A)(1).
46. Tit. 18, §1077(A)(1)(g), (B)(1).
47. *Id.*
48. Okla. Stat. Tit. 18, §1077(B)(1) (Supp. 2017).
49. *Id.*
50. Tit. 18, §1081(H)(6)(b) (defining consummate as "irrevocably accept[ing] for purchase or exchange stock tendered pursuant to an offer").
51. Tit. 18, §1081(H)(6)(d) (defining excluded stock as "(1) stock of … [a] constituent corporation that is owned at the commencement of the offer ... by [the] constituent corporation, the corporation making the offer … any person that owns … all of the outstanding stock of the corporation making [the] offer, or any direct or indirect wholly owned subsidiary of any of the foregoing and (2) rollover stock").
52. Tit. 18, §1081(H)(2)
53. Okla. Stat. Tit. 18, §1081(H)(1) (Supp. 2017).
54. Tit. 18, §1081(H)(6)(g) (defining rollover stock as "any share of stock of such constituent corporation that are the subject of a written agreement requiring such shares to be transferred, contributed or delivered to the consummating corporation or any of its affiliates in exchange for stock or other equity interests in such consummating corporation or an affiliate thereof; provided, however, that such shares of stock shall cease to be rollover stock...if, immediately prior to the time the merger becomes effective …[] such shares have not been transferred, contributed or delivered to the consummating corporation or any of its affiliates").
55. Tit. 18, §1081(H)(2)-(3).
56. Tit. 18, §1081(H)(4).
57. Tit. 18, §1081(H)(5).
58. Okla. Stat. Tit. 18, §1091(D)(2) (Supp. 2017).
59. Tit. 18, §1083.1(E)(2) (defining entity as "a partnership, whether general or limited, and including a limited liability partnership and a limited liability limited partnership, a limited liability company, and any unincorporated nonprofit or for-profit association, trust or enterprise having members or having outstanding shares of stock or other evidence of financial, beneficial or membership interest therein, whether formed by agreement of under statutory authority or otherwise").
60. Tit. 18, §1083.1(A)(1)-(3).
61. Tit. 18, §1083.1(B).
62. Tit. 18, §1083.1(A)(3).
63. Okla. Stat. Tit. 18, §1091(D)(1) (Supp. 2017).
64. *Id.*
65. Tit. 18, §1091(G)(2).
66. Tit. 18, §1091(K)
67. *Id.*
68. Okla. Stat. Tit. 18, §1091(H) (Supp. 2017).
69. *Id.*
70. Tit. 18, §1099.
71. *Id.*
72. Tit. 18, §1119.
73. Okla. Stat. Tit. 18, §1120(B) (Supp. 2017).
74. *Id.*
75. Tit. 18, §1119(A).
76. Tit. 18, §1119(A)(2).
77. Tit. 18, §1119(A)(3)-(4).
78. Okla. Stat. Tit. 18, §1119(F)(1)-(2) (Supp. 2017).
79. Tit. 18, §1119(G).
80. *Id.*
81. Tit. 18, §1136(B).
82. Tit. 18, §1135(D).
83. Okla. Stat. Tit. 18, §1135(D) (Supp. 2017).
84. *Id.*

Protesting Federal Procurement Actions

By Eric Underwood

Your client, a small business owner, pays you a visit immediately after he learns the proposal he submitted for a multiyear, multimillion dollar federal construction project was not selected for contract award.

Visibly downtrodden, your client explains to you that the future of his business was heavily dependent on winning this particular contract. Given these high stakes, and with certainty that his bid was competitive among those submitted, your client, who has never protested a federal procurement action, asks for your advice regarding how to protest and whether he should protest the award. Below is an analytical framework containing the salient information you will need to properly advise your client.

'PROTEST' DEFINED

A "protest" is "a written objection by an interested party" to one of a number of enumerated procurement actions, including the award of a contract.[1] Given that your client has expressed concern over a contract award, his concern is one that may be protested.

STANDING

Only interested parties may file a protest.[2] An interested party is "an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract."[3] Typically, prior to contract award, any prospective bidder qualifies as an interested party.[4] Conversely, after contract award, offerors who actually submitted bids or proposals are interested parties, as only those offerors were eligible for award.[5] Since your client submitted an offer that was eligible for award, he has standing to protest the award.

REASONS TO PROTEST

Offerors protest federal contracting actions for a variety of reasons. As relevant to your client's inquiry, protests often stem from an offeror's belief that the government made a material error during the bidding process.[6] Commonly cited errors include "poorly written or vague contract requirements, failure to follow the process or [evaluation] criteria laid out in the request for proposals, and failure to adequately document government findings."[7] An unsuccessful offeror might also protest if the procuring agency did not debrief the offeror after contract award.[8] This can create the perception that the procuring agency treated the contractor unfairly during the award process and, as a result, often invites offerors to protest simply to gain access to information that would otherwise become known during a debriefing.[9] Importantly, however, the government is only required to provide a debriefing upon an unsuccessful offeror's timely request, so the onus to initiate a debriefing is on the offeror.[10]

With that said, your client should absolutely request a debriefing, and he must do so within three days of being notified of the contract award.[11] During a debriefing, the government must disclose, at a minimum, the following:

1) The government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;
2) The overall evaluated cost or price (including unit prices)

and technical rating of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;

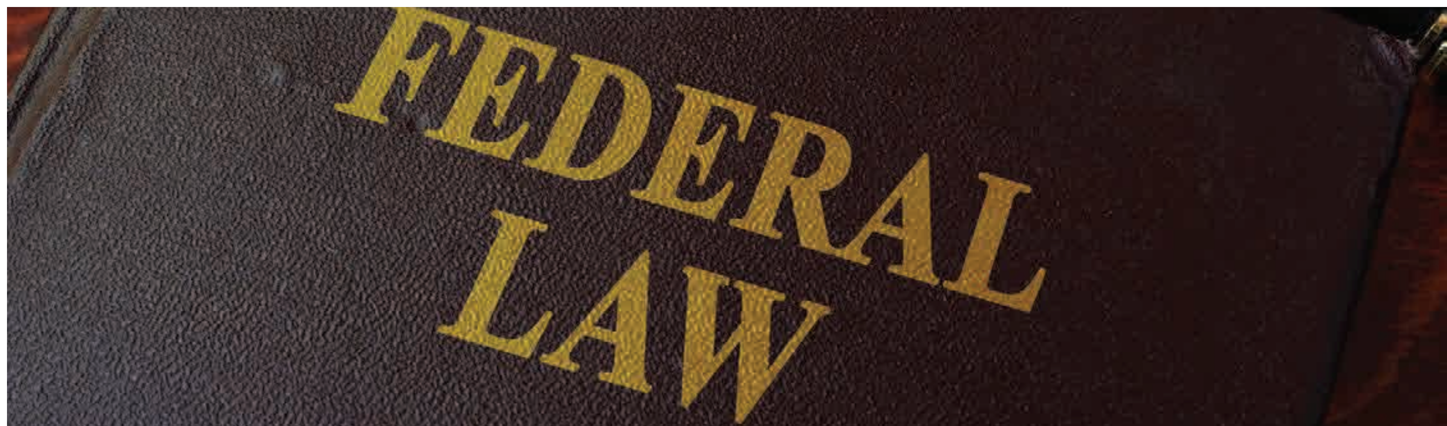
3) The overall ranking of all offerors, when any ranking was developed by the procuring agency during source selection;
4) A summary of the rationale for award;
5) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and
6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.[12]

Sometimes, if a protestor is able to establish a rapport with the individual conducting the debriefing (typically the contracting officer), he may receive through informal questioning additional information beyond the scope of the statutory requirements. In any event, upon completion of the debriefing, your client will have significantly more information at his disposal in determining whether filing a protest is worth the time and expense.

THE MECHANICS OF A PROTEST

The procuring agency, the Government Accountability Office (GAO) and the Court of Federal Claims have concurrent jurisdiction over bid protests. While there are several factors to consider in determining the proper forum to file a protest, suffice it to say that protests to the GAO typically strike the best balance between the protestor's desire for an independent review of the procuring agency's decision with the interest of resolving a protest in an efficient and economical matter.[13] Moreover, GAO decisions are widely published, thus increasing the predictability of protest outcomes.[14] The most significant drawback of protesting to the GAO is that, as a legislative agency, the GAO cannot constitutionally compel executive agencies to implement its recommendations.[15] Nevertheless, procuring agencies usually implement GAO recommendations.[16]

Assuming that filing a protest with the GAO makes the best sense in your client's case, initiating the protest is relatively



simple. To initiate a protest to the GAO, the protestor must submit to the GAO a notice that: 1) identifies the contracting agency and the solicitation or contract number; 2) lists the legal and factual grounds of protest; 3) establishes that the protestor is an interested party; and 4) states the relief requested (*e.g.*, termination or re-competition of a contract).[17] Beyond these requirements, "[n]o formal briefs or other technical forms of pleading or motion are required."[18] Notwithstanding the simplicity of initiating a protest, the required efforts of the protestor become more significant after the procuring agency submits its "agency report" to the GAO, to which the protestor must submit comments within 10 days of receipt of the "agency report."[19] This can involve a significant amount of effort over a short period of time and, if the protestor fails to submit its comments on time, the GAO may dismiss the protest. Moreover, the GAO may conduct a hearing as part of its effort to resolve the protest, which could demand additional effort from you and your client.[20]

This can involve a significant amount of effort over a short period of time and, if the protestor fails to submit its comments on time, the GAO may dismiss the protest. Moreover, the GAO may conduct a hearing as part of its effort to resolve the protest, which could demand additional effort from you and your client.[20]

PROTEST DISPOSITION

The GAO may dismiss, deny or sustain a protest.[21] The GAO ordinarily dismisses protests containing procedural defects such as: 1) failure to address all requirements of 4 C.F.R. §21.1 or 2) untimely filing.[22] Similarly, if the GAO finds that the procuring agency complied with procurement statutes or regulations, it denies the protest.[23] In either case, the procuring agency may proceed with its procurement once the GAO announces its decision.[24] Conversely, if the GAO determines that the procuring agency violated procurement regulations, it sustains the protest and recommends that the agency implement one or more of the following remedies: refrain from exercising options under the contract; terminate the contract; re-compete the contract; issue a new solicitation; award a contract consistent with statute or regulation; or such other recommendation(s) as GAO determines necessary to promote compliance.[25] Additionally, the GAO may recommend that the procuring agency reimburse the protestor for its costs of "(1) [f]iling and pursuing the protest, including attorneys' fees and consultant and expert witness fees; and (2) [b]id and proposal preparation."[26]

WHAT ARE THE CHANCES OF ULTIMATELY GETTING THE CONTRACT?

Now that your client has a better understanding of the protest process, he asks you, "If I protest, what are my chances of ultimately winning the contract?" Unfortunately, your client is in for some bleak news. According to one study, in 2010, out of roughly 1,500 protests filed with the GAO, the GAO sustained merely 45 protests.[27] Of those sustained protests, only eight (.5 percent of protests filed) resulted in a favorable contract award for the protestor.[28] Notably, this study only considered protests that the GAO decided on the merits and did not address protests where the procuring agency voluntarily took corrective action in response to a protest. Accounting for voluntary corrective action, a separate study estimates that a protestor has roughly a 12 percent chance of ultimately winning the contract.[29] Either way, while it might be prudent to analyze the strengths of your client's grounds to protest (*e.g.* by reviewing GAO decisions in similar cases), it is more likely that protesting the contract award will not yield the result your client desires (*i.e.* to win the contract for himself).

THE ULTIMATE DECISION

Your client now realizes that the decision of whether to protest, like many legal issues, ultimately boils down to a business decision only he can make. On one hand, it is possible to obtain some form of relief by filing a protest. Statistically, however, even though a successful protest might give a contractor another bite at the apple, protesting a government contract award does not substantially increase the likelihood that the protestor will ultimately secure the contract. Thus, in most cases, the time and expense of protesting a contract award could be more effectively used locating a similar solicitation on which to bid, seeking legal counsel to carefully scrutinize the

solicitation's evaluation criteria and preparing a proposal that meticulously aligns with those criteria so as to simplify the government's award decision. You therefore conclude the meeting by counseling your client that he has an important decision to make, and that you are prepared to help him navigate the legal intricacies involved in whichever path he chooses.

ABOUT THE AUTHOR

Eric Underwood is an associate attorney with Barrow & Grimm PC, where he primarily practices civil litigation involving complex business disputes. Mr. Underwood received his bachelor's degree from the University of Colorado in 2008 and graduated with highest honors from the TU College of Law in 2017. Prior to attending law school, he spent six years as a contracting officer in the United States Air Force, where he planned, solicited, negotiated, awarded and administered several contracts ranging in scope from base operational requirements to weapon system sustainment.

ENDNOTES

1. FAR 33.101(2016).
2. *Id.*; *see also* U.S. Gov't Accountability Office, Bid Protests at GAO: A Descriptive Guide 6 (9th ed. 2009), available at www.gao.gov/ decisions/bidpro/bid/d09417sp.pdf.
3. FAR 33.101 (2016).
4. Kate M. Manuel & Moshe Schwartz, Congressional Research Service, Pub. No. R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures* 6 (Jan. 19, 2016), available at www.fas.org/sgp/crs/misc/R40228.pdf.
5. *Id.*
6. Moshe Schwartz & Kate M. Manuel, Congressional Research Service, Pub. No. R40227, *GAO Protests: Trends and Analysis* 11 (July 21, 2015), available at www.fas.org/sgp/crs/misc/R40227.pdf.
7. *Id.*
8. *Id.*
9. *Id.*; *see also* FAR 15.505(e), 15.506(d) (2016) (identifying the information an unsuccessful offeror may request upon elimination from the competition).
10. FAR 15.505(a)(1), 15.506(a)(1) (2016). Accordingly, in most cases, if an unsuccessful offeror did not receive a debriefing, it is because he did not request one.
11. *Id.* 15.506(a)(1).
12. *Id.* 15.506(d).
13. Protests to the agency are typically futile, as the agency itself reviews the protestor's concerns. FAR 33.103(d)(4) (2016). Protests to the Court of Federal Claims involve a full-scale judicial review of the agency's decision, thus increasing the complexity and cost of the protest. Fed. Cl. R. App'x C, available at www.uscfc.uscourts.gov/sites/default/files/170801-FINAL-Version-of-Rules.pdf.
14. Schwartz & Manuel, *supra* note 6, at 5.
15. *Ameron, Inc. v. United States Army Corps of Eng'rs*, 809 F.2d 979, 986 (3d Cir. 1986)).
16. Manuel & Schwartz, *supra* note 4, at 16.
17. 4 C.F.R. §21.1(c) (2016).
18. *Id.* §21.1(f).
19. FAR 33.104(a)(3)(iv)) (2016). The agency report includes the contracting officer's statement of facts relevant to the protest, including a best estimate of the contract value, a memorandum of law in response to the protest and all relevant documents in the agency's possession.
20. *d.* 33.104(e).
21. *See id.* 33.104(a)(2) (mentioning that the GAO may deny a protest); *see also id.* 33.104(a)(3)(i)(A) (identifying that the GAO may dismiss a protest); *see also id.* 33.104(h)(8) (outlining a situation in which the GAO might sustain a protest).
22. 4 C.F.R. §§21.1(i), 21.2(b) (2016).
23. Manuel & Schwartz, *supra* note 4, at 15.
24. *Id.*
25. 4 C.F.R. §21.8(a) (2016). The available remedies are: 1) refrain from exercising options under the contract; 2) terminate the contract; 3) re-compete the contract; 4) issue a new solicitation; 5) award a contract consistent with statute or regulation; or such other recommendation(s) as GAO determines necessary to promote compliance.
26. *Id.* §21.8(d).
27. Manuel & Schwartz, *supra* note 6, at 9.
28. *Id.*
29. Thomas Papson et al., *The Odds of Winning a Contract After Protesting are Higher than You Think*, 55 Gov't Contractor no. 16 (2013).

June 21-23, 2018

Mark your calendar!

2018

Solo & Small Firm Conference

River Spirit Casino Resort

Tulsa

Questions about the Conference?

Contact Mark Schniedewent at 405-416-7026 or marks@okbar.org

Want to be an exhibitor/sponsor? Contact Nickie Day at 405-416-7050 or nickied@okbar.org

Dispute Resolution Clauses in Private Construction Contracts

By Theresa Noble Hill

Most contracts involving the construction of a private project include some type of provision addressing dispute resolution.

This article is not intended to be an exhaustive review of Oklahoma law that may be involved in any particular contract or dispute. Instead, this article addresses the Oklahoma law that could render your dispute resolution clause void or unenforceable.

CHOICE OF LAW AND FORUM SELECTION PROVISIONS

Many construction contracts contain provisions addressing the applicable law and venue for resolving disputes. If these provisions do not specify Oklahoma law for an Oklahoma project and/or require dispute resolution proceedings outside Oklahoma, such provisions may run afoul of the express public policy of Oklahoma.

In 2010, the Oklahoma Legislature enacted an act relating to certain construction projects "establishing requirements for certain bid project contracts," "specifying language on certain bid contracts," "establishing requirements for certain privately negotiated contracts," "specifying requirements for certain invited bids" and other provisions.[1] "Bid projects" include "all private construction projects in which a set of plans or specifications or both plans and specifications are issued for bid."[2] "Private negotiated projects" appear to include most other private construction projects.[3] However, any contract relating to a "single-, two-, three-, or four-family dwelling" is exempted from this act.[4]

It is important to carefully review any choice of law and forum selection provisions in a private construction contract to determine whether such provisions comply with this act. The act provides:

The following are against this state's public policy and are void and unenforceable:

1. A provision, covenant, clause or understanding in, collateral to or affecting a construction contract that makes the contract subject to the laws of another state or that requires any litigation, arbitration or other dispute resolution proceeding arising from the contract to be conducted in another state; and
2. A provision, covenant, clause or understanding in, collateral to or affecting a construction contract that disallows or alters the rights of any contractor or subcontractor to receive and enforce any and all rights under this act.[5]

There are no reported decisions interpreting the broad language of "collateral to or affecting a construction contract." As a result, when reviewing private construction projects, the practitioner must carefully consider not only any choice of law and forum selection clauses, but also provisions addressing insurance, subcontracts, consultant agreements and arbitration to ensure compliance with this act.

Outside the construction context,[6] there is no stated public policy in Oklahoma against choice of law provisions applying the law of another state or venue selection clauses requiring proceedings in another forum outside Oklahoma. "Generally, [t]he law of the state chosen by the parties to govern their contractual rights and

duties will be applied."[7] A party seeking to avoid enforcement of a contract will bear the burden of proving that the contract violated the public policy of Oklahoma. However, absent a clear statement of public policy, courts will only void such provisions when free of doubt.[8]

ARBITRATION PROVISIONS

Since 2010, there are no reported cases challenging an arbitration provision that would apply the law of another state to a conflict involving a private construction contract in Oklahoma or require arbitration proceedings outside of Oklahoma. The statutory prohibitions discussed above against certain choice of law and forum selection clauses will equally apply to arbitration provisions.[9] Oklahoma's Uniform Arbitration Act (OUAA)[10] expressly provides an arbitration agreement is subject to the public policy of the state and the laws of the state outside the OUAA.[11] Since 2010, the stated public policy of Oklahoma is that any contractual provisions in a construction contract that make the contract subject to the laws of another state or that require litigation, arbitration or other dispute resolution proceedings to be conducted outside the state are void and unenforceable.[12]

Overview of OUAA

Most practitioners are familiar with arbitration agreements. Oklahoma has a strong public policy in favor of arbitration.[13] Courts generally favor arbitration provisions as an efficient and expedient manner to resolve conflicts.[14] Oklahoma's first Uniform Arbitration Act was effective from Oct. 1, 1978, through Jan. 1, 2006.[15] The current OUAA expands an arbitrator's authority to allow methods of discovery as they deem appropriate including taking depositions regardless of witnesses' availability to attend arbitration hearings, issuing protective order, demanding compliance with the arbitrator's discovery-related orders and compelling nonparty witnesses to testify or produce documents.[16] Essentially, an arbitrator has the same discovery tools that are available in litigation.

Upon application, arbitration awards will be confirmed by a district court by order.[17] Only in limited circumstances, set forth in statute, will a motion to vacate an arbitration award be granted.[18] In reviewing a district court's decision concerning a motion to vacate or modify an arbitration award, Oklahoma appellate courts review the question of law, whether the district court had authority to vacate the arbitration

award, *de novo*.[19] In reviewing an arbitrator's decision, the trial court must give the arbitrator great deference and "cannot review the merits of the award, including any of the factual or legal findings."[20]

In an arbitration arising from a construction contract, an arbitrator's failure to award the prevailing party its attorney fees and expenses, pursuant to the parties' agreement, exceeded his power. The Oklahoma Supreme Court has found that the district court did not err in vacating an arbitrator's award in part and awarding the prevailing party attorney fees and costs.[21]

Potential Pitfalls

When reviewing a construction contract, consider whether multiple parties may be involved if a dispute occurs. A party who contracts with multiple entities on a construction project should ensure that it has consistent arbitration provisions across its separate contracts. For instance, if an owner and general contractor include no arbitration provision in their contract, but the general contractor has arbitration provisions in its contracts with its subcontractors, the subcontractors may compel arbitration if they are brought into litigation between a general contractor and owner. Courts will not easily infer a waiver of a contractual arbitration provision.[22] Accordingly, a general contractor may find itself both in court and separate arbitrations involving the same project.

On the flip side, if separate contracts relating to the construction of a single project all contain arbitration provisions, a party may be joined into an arbitration initiated by other parties pursuant to a separate contract. In *Highland Crossing, L.P. v. Ken Laster Co.*,[23] the owner of the project objected to being joined as an additional party to an arbitration pending between a subcontractor and general contractor. After an arbitration award was made to the subcontractor, the owner moved to vacate the arbitration award. The Oklahoma Court of Civil Appeals denied the owner's motion, finding that all the respective construction contracts revealed all parties' agreement to arbitrate. The owner's contract with the general contractor contained an arbitration provision application to "any claim arising out of or related to the Contract [owner's contract with general contractor]."[24] The *Highland Crossing* court explained, "[i]t is clear that the parties' respective contracts relate to the same construction project, reference the parties' respective related duties and obligations, and were both executed to carry out the mutual intent of completion of the project."[25]

Courts will not easily infer a waiver of a contractual arbitration provision.[22]

The procedures for arbitration should be set forth in the contract. Many construction contracts incorporate the procedures of the American Arbitration Association or other private groups. If an arbitration clause refers to procedures established and maintained by another, be sure those procedures are appropriate and maintained. In *Amundsen v. Wright*,[26] a homeowner and builder agreed that disputes would be submitted to "binding arbitration pursuant to the procedures established and maintained by the Central Oklahoma HomeBuilder's (sic) Association."[27] The problem was that the Central Oklahoma Home Builders Association did not have procedures established for arbitration. The court denied the builder's motion to compel arbitration finding it was impossible to compel arbitration because the procedure chosen by the parties did not exist.[28]

NOTICE PROVISIONS

Many arbitration provisions and dispute resolution provisions in construction contracts contain time limits for giving notice or commencing a claim. Arbitration agreements cannot unreasonably restrict the rights to receive notice of the initiation of an arbitration proceeding.[29] Arbitration provisions or other dispute resolution provisions that purport to limit a party's time to enforce its rights under contract may be subject to challenge pursuant to Oklahoma statute or the Oklahoma Constitution.

Specifically, 15 O.S. §216 addresses such time limitations contained in contracts:

> Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void.

Article 23 Section 9 of the Oklahoma Constitution provides:

> Any provision of any contract or agreement, express or implied, stipulating for notice or demand other than such as may be provided by law, as a condition precedent to establish any claim, demand, or liability, shall be null and void.

Oklahoma courts will carefully review any notice of claims provision. In *M.J. Lee Construction Co. v. Oklahoma Transportation Authority*,[30] the Oklahoma Supreme Court found that a notice of claim provision was not a condition precedent to liability, but could limit items of costs included in a contractor's claim for additional compensation. While this case did not involve a private construction project, it is expected that Oklahoma courts would scrutinize notice provisions in private construction contracts in the same manner.[31]

CONCLUSION

When reviewing dispute resolution provisions in contracts for private construction projects, consider the following checklist:

1) Does the dispute resolution provision provide that the law of another state will apply to a dispute? If yes, consider whether 15 O.S. §§820 and 821 will void this provision.
2) Does the dispute resolution provision require litigation, arbitration or other proceedings outside the state of Oklahoma? If yes, consider whether 15 O.S. §§820 and 821 will void this provision.
3) Are there complementary arbitration provisions in all the related contracts for a certain project?
4) Does the dispute resolution provision provide for an award of attorneys' fees and costs to the prevailing party?
5) Are the procedures for arbitration clearly set forth in the contract?
6) Are there notice requirements for claims? If so, are such provisions consistent with 15 O.S. §216 and Okla. Const., Art. 23, §9.

These are basic considerations for the drafting and review of dispute resolution provisions in a private construction contract. A myriad of other issues can arise when parties find themselves in a dispute, but the enforceability and constitutionality of the dispute resolution provision should not be subject to challenge.

ABOUT THE AUTHOR

Theresa Noble Hill is a partner with Rhodes, Hieronymus, Jones, Tucker & Gable PLLC in Tulsa. Her areas of emphasis include complex civil litigation, construction law and environmental law. She is the author of several publications addressing construction issues in Oklahoma, including authorship of the Oklahoma-specific chapters of *State-by-State Guide to Construction Contracts and Claims* and *Fifty State Construction Lien and Bond Law*.

ENDNOTES

1. Laws 2010, SB 1012, c. 208, §1, emerg. eff. May 5, 2010. This act also addresses payment terms, suspension of work and related terms that are not addressed here.
2. 15 O.S. §820(A)(1).
3. 15 O.S. §820(B).
4. 15 O.S. §821(A).
5. 15 O.S. §821(B).
6. The Fair Pay for Construction Act contains similar provisions relating to certain public construction project, *See* 61 O.S. §§221 *et seq.*
7. *Leritz v. Farmers Insur. Co.*, 2016 OK 79 ¶2, fn. 2, 385 P.3d 991, 992 (citing Restatement (Second) of Conflict of Laws, §187 (1971)); *Fossil Creek Energy Corp. v. Cook's Oilfield Services,* 2010 OK CIV APP 123, ¶11, 242 P.3d 537, 541, fn 5. *See also Telex Corp. v. Hamilton*, 1878 OK 32, ¶¶7-8, 576 P.2d 767, 767 (implying that, even if the contract had not been entered into and performed in Oklahoma, Oklahoma law would have been applied because the contract so provided); and *Victory Energy Operations, L.L.C. v. Rain CII Carbon, L.L.C.*, 2014 OK CIV APP 83, ¶10, 335 P.3d 809, 812.
8. *See In re Kaufman,* 2001 OK 88, ¶18, 37 P.3d 845, 854 ("Our power to void a contract as being in contravention of public policy is delicate and undefined. We exercise it only in cases free from doubt."). *See also* 15 O.S., §211; *Hamilton v. Cash*, 1939 OK 255, 91 P.2d 80, 81.
9. 15 O.S. §§820 and 821.
10. 12 O.S. §§1851 *et seq.*
11. 12 O.S. §1855(A).
12. 15 O.S. §821(B)(1).
13. 12 O.S. §1855(B)(1) and 1857(A).
14. *Willco Enterprises, LLC v. Woodruff*, 2010 OK CIV APP 18, ¶14, 231 P.3d 767; *Long DeGreer*, 1987 OK 104, ¶5, 753 P.2d 1327, 1328; *Voss v. City of Oklahoma City*, 1980 OK 148, ¶8, 618 P.2d 925, 928.
15. 15 O.S. §§801, *et seq.* and repealed by Laws 2005, SB 873, c. 364, eff. Jan. 1, 2006.
16. 12 O.S. §1868. *See also Willco Enterprises, LLC v. Woodruff*, 2010 OK CIV APP 18 at ¶20, 231 P.3d at 774.
17. 12 O.S. §1873.
18. 12 O.S. §1874 provides that:

A. Upon an application and motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

1. The award was procured by corruption, fraud, or other undue means;
2. There was:
   a. evident partiality by an arbitrator appointed as a neutral arbitrator,
   b. corruption by an arbitrator, or
   c. misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
3. An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 6 of this act, so as to prejudice substantially the rights of a party to the arbitration proceeding;
4. An arbitrator exceeded the arbitrator's powers;
5. There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under subsection C of Section 16 of this act not later than the beginning of the arbitration hearing; or
6. The arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 10 of this act so as to prejudice substantially the rights of a party to the arbitration proceeding.

19. *Sooner Builders & Investments, Inc. v. Nolan Hatcher Construction Services, L.L.C.*, 2007 OK 50, ¶8, 164 P.3d 1063.
20. *Fraternal Order of Police, Lodge 142 v. City of Perkins*, 2006 OK CIV APP 122, ¶4, 146 P.3d 829, 830 (internal citation omitted).
21. *Sooner Builders & Investments, Inc. v. Nolan Hatcher Construction Services, L.L.C.*, 2007 OK 50, 164 P.3d 1063.
22. *Willco Enterprises, LLC*, 2010 OK CIV APP 18 at ¶36, fn. 18, 231 P.3d at 778 (reviewing factors to analyze whether waiver has occurred since the new OUAA and review of cases finding waiver and no waiver.)
23. 2010 OK CIV APP 124, 242 P.3d 567.
24. *Highland Crossing,* 2010 OK CIV APP 124 at ¶11, 242 P.3d at 571.
25. *Id.* at ¶12.
26. 2010 OK CIV APP 75, 240 P.3d 16.
27. *Amundsen,* 2010 OK CIV APP 75 at ¶2.
28. *Id.* at ¶¶16–18.
29. 12 O.S. §1855(B)(2).
30. 2005 OK 87, ¶¶27 - 30, 125 P.3d 1205, 1213-1214.
31. *See also McDonald v. Amtel, Inc.,* 1981 OK 78, 633 P.2d 743 (holding that a contract provision providing that no civil or equitable anti-trust action by either party shall be brought unless instituted within two years of the date of the transaction upon which the action is based was found to be void and unenforceable under the Oklahoma Constitution.)

Joint Account Basics

By Miles Pringle

Jointly owned deposit accounts have been an ever-present part of banking since before Oklahoma became a state. You likely have opened a joint account with your parent or spouse, or even recommended that a client use a joint account.

This article is intended to alert readers to some of the issues involved with joint accounts. To begin, in Oklahoma there is a presumption that all joint owners are joint tenants, and any one account holder is presumed to have access to all account funds.[1] Typically, the instrument creating the account, *e.g.* account agreement, is between the bank and account owners and sets out the specific terms of the account.

Account owners should be aware that adding joint owners may subject account funds to garnishment or other collection attempts by the creditors of another joint owner. A joint owner may fight a collection attempt, because Oklahoma courts have ruled that the "creditor cannot reach any farther than the debtor could. The debtor should thus be allowed to prove the extent of his equitable interest in the joint account."[2] However, those fights may be difficult to win because the burden of proof is on the joint account owner fighting the collection attempt. A written agreement is one method of evidencing the interests between the account owners. It is important in these cases to respond and object promptly after receiving notification of any collection attempt.

Family law attorneys are well aware of issues raised by joint accounts. Adding a spouse as a joint owner may put previously separate funds into the marital estate via gift. For example, in *Beale v. Beale*, the husband voluntarily added his "wife's name to certain of his premarital banking and investment accounts, which prior to the marriage had been held in his name only. Husband also opened several new accounts in both names, and purchased a certificate of deposit in both names."[3] In reviewing the case, the Oklahoma Supreme Court noted that "[n]ormally in dealing with marital property the issue of whether the accounts were held in joint tenancy, tenancy in common, or in the name of one spouse is not an issue." The court held that the husband's actions constituted a gift in relation to some, but not all, of the accounts explaining that the "Wife proved Husband placed three of those accounts into joint tenancy with her, thus creating the presumption of a gift. Further, we find Husband failed to rebut the presumption that an interspousal gift occurred by clear and convincing evidence in two out of three of those instances, and the following accounts therefore became joint marital property subject to an equitable division."

Joint accounts are often used in connection with estate planning in Oklahoma, because joint tenancies are presumed to contain the right of survivorship.[4] Thus, when a joint account owner dies, the decedent's interest in the account passes with the decedent, and the remaining joint owners retain their interests in the account. The funds – generally – do not become a part of a decedent's estate, and do not become subject to the laws of wills or intestacy. In reviewing these issues, the Oklahoma Supreme Court has flatly stated "the surviving joint tenant, is the owner of the account."[5] For example, in *Henderson v. Krumsiek* the deceased converted her account into a joint account between herself and her nephew with right of survivorship.[6] Thereafter, the deceased executed a will leaving all her of personal property to her husband, and specifically included the bank account on a list of her personal property. The court held that the nephew was

the proper owner of the account, and affirmed the trial court's ruling stating "that the will did not destroy or suspend the previously contractual obligation created in the joint tenancy."

Do not rely on the bank to help monitor the proper use of a joint account. In general, there is no duty for financial institutions to monitor accounts between joint account owners. The relationship between a financial institution and its customers is a debtor-creditor one, and not a fiduciary relationship.[7] Additionally, the account agreements usually set out that all joint owners may access all account funds. Thus, without additional facts, the financial institution will not be liable for a joint owner's misappropriation of account funds to another joint owner. If a dispute arises, typically the financial institution will interplead the funds and let the account owners fight it out amongst themselves.

Given the amount of control that joint owners have over account funds, they can be used as a vehicle for financial exploitation, even elder abuse. Under the Protective Services for Vulnerable Adults Act, "exploitation" is defined as the "unjust or improper use of the resources of a vulnerable adult for the profit or advantage, pecuniary or otherwise, of a person other than the vulnerable adult through the use of undue influence, coercion, harassment, duress, deception, false representation or false pretense." Any person, including a financial institution or attorney, that has reasonable cause to believe that a vulnerable adult is suffering from abuse, neglect or exploitation, must report its suspicion to the Department of Human Services, or local law enforcement.

For example, a case in Arizona arose when a caretaker's son tried to have himself named conservator and guardian over his then 91-year-old mother.[8] His mother responded by filing a petition against the son claiming elder abuse. One of the allegations was that funds held in a joint account were misused, and "in a series of transactions, the ever-diminishing money was moved between accounts and/or institutions at least three times." The appellate court upheld a ruling in the mother's favor, and also awarded attorneys' fees to her. It should be noted that a joint tenancy may be rebutted if it is proven that the joint tenancy was created through fraud.[9] In such circumstances, a court may apply a constructive trust to trace funds from the perpetrator of the fraud.

There are other options to a joint account, such as making someone an authorized signor on an account. This avoids the presumption of a joint tenancy while allowing the signor to access account funds. If a dispute arises between the two, the account owner may remove the authorized signor, because the signor has no ownership interest in the account. However if the intent is to avoid probate, this would not accomplish that goal. Thus, a joint account may be beneficial in many circumstances, but owners should beware of potential consequences of holding funds jointly.

ABOUT THE AUTHOR

Miles Pringle is partner with Pringle & Pringle PC, where he represents clients in a variety of business matters, including financial institutions. He is a native Oklahoman, licensed to practice law in Missouri, Oklahoma and Texas. Mr. Pringle currently serves as chairperson for the OBA's Financial Institution and Commercial Law Section.

ENDNOTES

1. *Sears, Roebuck & Co. v. Cosey*, 2002 OK CIV APP 39, ¶11, 44 P.3d 582, 584.
2. *Baker v. Baker*, 1985 OK CIV APP 35, ¶23, 710 P.2d 129, 134.
3. *Beale v. Beale*, 2003 OK CIV APP 90, 78 P.3d 973.
4. *Romine v. Pense (In re Estate of Metz)*, 2011 OK 26, ¶6, 256 P.3d 45, 48-49 ("While the statute does not expressly employ the term 'survivorship,' this court has historically held that the legislature intended this well-defined common law term as a characteristic of joint tenancies, because the common law may not be abrogated by implication").
5. *Id.* 2011 OK at ¶15.
6. 1969 OK CIV APP 13, ¶7, 463 P.2d 337, 338.
7. *First Nat'l Bank & Tr. Co. v. Kissee*, 1993 OK 96, ¶32, 859 P.2d 502, 510 ("Oklahoma recognizes the common law rule that the relationship between a bank and its customer is not fiduciary in nature, but is that of creditor-debtor.").
8. *Yamamoto v. Kercsmar & Feltus, PLLC*, No. 1 CA-CV 14-0580, 2016 Ariz. App. Unpub. LEXIS 473 (Ct. App. April 19, 2016).
9. *Alexander v. Alexander*, 1975 OK 101, ¶12, 538 P.2d 200, 203.

Committee Begins Its Work Monitoring Legislation

Bar Members Urged to Attend Day at the Capitol on March 6

By Angela Ailles Bahm

The Legislative Monitoring Committee has been, and continues to be, actively engaged for the benefit of the bar association. This is no longer a "one and done" committee. If you have *any* interest in the legislative process, I strongly urge you to consider becoming a member. The committee uses its MyOKBar Communities page to communicate with and keep members informed – and to post lists of bills. We have meetings scheduled for the first Tuesday of every month at the Oklahoma Bar Center in Oklahoma City at noon, for now, at least through May. If you cannot attend personally to enjoy lunch with us, you can attend by phone/videoconference using BlueJeans. You can also keep informed of what the committee is doing and upcoming events at www.okbar.org/members/legislative.

After the last regular session, Sen. Kay Floyd asked us to help with an interim study project. Sen. Floyd was permitted to have a hearing on an interim study that took place in November. The stated purpose of the study was to "examine the monetary and non-monetary ramifications of filing unconstitutional legislation in Oklahoma." She asked the committee for assistance in preparing a summary of cases in which legislation has been determined to be in violation of the state Constitution. Hopefully, the outcome will be educational for the Legislature in understanding the implications of creating unconstitutional law, the drain on already depleted resources and the impact on the state's reputation and the negative effect of that on economic development.

Along those lines, another project the committee has completed was creating a list of constitutional provisions that impact the legislative process. This effort put the constitutional provisions in layperson terms to help our legislators avoid unconstitutional legislation. A special shout out to those who did most of the work: Duchess Bartmess, Robert Clark, Clayton Cotton, Shanda McKenney, David Miley and Miles Pringle. The committee plans to provide that list to legislators along with a notepad that includes an email address to which members of the Legislature can send questions. The questions will be answered by committee members to help provide understanding of the intended and unintended consequences of proposed legislation.

Last year I asked that all chairs of committees and sections be made members of the Legislative Monitoring Committee. I have asked that to take place again this year. I am aware several sections and committees have their own legislative liaisons and/or monitor legislation independently. Why not get the benefit of everyone's efforts? That benefit already became apparent during the annual OBA Legislative Reading Day, Jan. 27. Several section and committee chairs were our presenters of bills in a session called "10 Bills in 10 Minutes." I can't thank them enough and hope they will continue to provide me with bills of interest I can report to you.

Next up, the committee will be hosting the annual **Day at the Capitol, Tuesday, March 6.** Mark your calendar now and RSVP by emailing debbieb@okbar.org! Registration will begin at 9:30 a.m. Attorney General Mike Hunter will start the day off, speaking at about 10 a.m. Afterward, we will have a variety of additional speakers, a legislative panel, lunch and then everyone goes to the

Capitol to meet with legislators. It is always an informative and interesting day – and will be again this year. I hope to see you there!

Committee members, be sure to log into the committee's page within MyOKBar Communities and keep an eye out for the summaries of bills. If you think some proposed legislation needs to be watched by the committee and reported on in future articles, please let me know. If you are not a member of the committee, sign up at www.okbar.org.

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

OBA Day at the Capitol Agenda

Time	Topic/Event	Speaker/Location
9:30 a.m.	Registration	Oklahoma Bar Center, Emerson Hall, 1901 N. Lincoln Blvd.
10:00 a.m.	Introduce and Welcome OBA President, Kimberly Hays	John Morris Williams, OBA Executive Director
10:05 a.m.	This Session from the Perspective of the Attorney General	Mike Hunter, Attorney General
10:30 a.m.	Bills of Interest to the Judiciary	(*to be determined*)
10:50 a.m.	BREAK	
11:00 a.m.	How to Track Bills on the Legislative Website	Angela Ailles Bahm, Legislative Monitoring Committee Chairperson
11:20 a.m.	Bills of Interest Relating to the Practice of Law and Their Status	Clay Taylor, Legislative Liaison
11:30 a.m.	How to Talk to Legislators	Randy Grau, Former Representative District 81
11:50 a.m.	Information and Questions	John Morris Williams
12:00 p.m.	LUNCH	Emerson Hall
1 – 3 p.m.	Visit with Legislators	State Capitol Building

Lawyer Assistance Program Guarantees Confidentiality

By John Morris Williams

I know we advertise it, talk about it, write about and program around it. The professional staff we contract with and the volunteers on our committee are top rate. Even some of my peers at the National Association of Bar Executives have said we have the best lawyers assistance program in the country. It didn't happen by accident. Dedicated volunteers and a committed partnership with our outside counseling service make it work very well.

We have taken additional steps to ensure confidentiality, and the professional staff at OneLife have dedicated themselves to being leaders in counseling services in terms of patient confidentiality. Everyone involved with the Lawyers Helping Lawyers Assistance Program takes their obligation and role seriously and compassionately. Our committee members and bar staff, like our counseling service, operate with confidentiality. Under Rule 8.3(d) of the Oklahoma Rules of Professional Conduct there is a provision for confidentiality of LHL interactions. Rule 8.3 (d) states:

> The provisions of Rule 8.3(a) shall not apply to lawyers who obtain such knowledge or evidence while acting as Ethics Counsel or as a member, investigator, agent, employee, or as a designee of the Oklahoma Bar Association Lawyers Helping Lawyers Committee, Judges Helping Judges, or the Management Assistance Program in the course of assisting another lawyer or judge. Any such knowledge or evidence received by lawyers acting in such capacity shall enjoy the same confidence as information protected by the attorney-client privilege under applicable rule and Rule 1.6.

Note the licensed counselor and committee members have the same duty and privilege of confidentiality under our Rules of Professional Conduct. While HIPAA may come into play for the outside counseling service, everyone is cognizant of high responsivity of confidentiality. Whether you call the Office of the Ethics Counsel, Management Assistance Program staff or an LHL committee member, you are guaranteed confidentiality. If you desire peer assistance, your confidences will be protected.

I understand calling for help is hard. Many prefer to go directly to our outside counseling services, and I encourage that. The hotline staffed 24/7 is 800-364-7886. Some go directly to LHL committee members or OBA staff. Everyone gets treated the same and is provided assistance, services or a referral for services.

ASSISTANCE NEEDED?

If you are in need of assistance from both our professional counseling service and peer assistance from LHL, I encourage you to reach out to both. Sometimes peer assistance to help with practice issues while undergoing treatment can literally be a life saver and often key to retaining licensure and making sure clients are not put in further jeopardy. It is the goal of the LHL program to get members to the right place with the right people. So often you will encounter professional counselors and trained volunteers which ever call you make. It's also okay to call both on your own.

OBA members are provided up to six hours of free counseling, we have an involved and informed LHL committee and the OBA Office of the Ethics Counsel and Management Assistance Program staff are all here to assist.

If you need help accessing LHL committee assistance, either ask our professional counseling service or call the OBA at 405-416-7000. We will be glad to get you to the right peer assistance. LHL committee members likewise are trained and have ready access to our counseling services and

can assist making the contact if a caller desires.

We have a great program. We have talented and dedicated volunteers, staff and professional counselors. Your call for help is confidential. It makes no difference if you call our 800 number, an LHL committee member or OBA staff – all are covered by the privilege contained in the Rules of Professional Conduct. I have seen the compassionate and nonjudgmental work of everyone involved. You should have absolutely no fear in calling.

When you need help our LHL program is here, your information is confidential and your road to a better you, regardless of your issue, is one confidential call away.

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

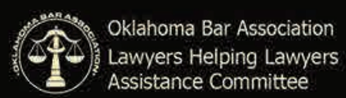
CONQUER YOUR MOUNTAIN

FREE 24-HOUR CONFIDENTIAL ASSISTANCE

Get help addressing stress, depression, anxiety, substance abuse, relationships, burnout, health and other personal issues through counseling, monthly support groups and mentoring or peer support.

800-364-7886

www.okbar.org/LHL



Time-Saving Microsoft Word Customizations and Tools

By Jim Calloway

Often there are easier ways to do our everyday tasks, but we can't use more efficient techniques if we do not know about them.

TRACK CHANGES

One of those efficiencies is using Track Changes in Microsoft Word. When many lawyers make final edits on a document, they print it off and make their edits with a pen. Using Track Changes allows you to see all changes that have been made together with the original text. You then accept or reject each change. This can be tedious with a document with many changes, but the payoff is when you are finished, you have the final version. With the hand-written changes, you have to review the document again once the handwritten notes have been followed. (And, yes, sometimes it is frustrating to click exactly on a period when it the only change.) Do an internet search for "track changes in Word" to see more details from Microsoft.

EMAILING DOCUMENTS

One task we do frequently is proofreading a document and then distributing the document via email. You have just completed proofreading, editing or composing a document in Microsoft Word and now you need to email it to someone.

Many would use these steps:

1) Save the document using File-Save
2) Either minimize Word to find Outlook or open Outlook from the Taskbar
3) Open a blank email
4) Browse to locate the file and attach it to the email
5) Complete the email and send

Here's how you should be doing it:

1) Click the Save Icon in the Quick Access Toolbar
2) Click the Email Icon in the Quick Access Toolbar (which opens a blank email with the file already attached)
3) Complete the email and send

It isn't just that there are three steps instead of five that saves time. Steps 1 and 2 in the second example literally take one second each. How long might it take to browse a folder to select the correct Word file?

QUICK ACCESS TOOLBAR

Not only is the Quick Access Toolbar (QAT) one of the most time-saving tools in Microsoft Word, but it is easy to customize. Let's look at how to do this customization and icons you likely want to add to your QAT.

Where is my QAT? By default, it is at the very top of your screen in Word, right above the Menu Bar (that bar contains the words Menu, Home and Insert) and the Ribbon. It begins with the Save icon that looks like a floppy disk.

CUSTOMIZING YOUR QAT

If you now use the QAT, leave it there but if you haven't used it, I strongly suggest that your very first customization is right-clicking on the QAT and selecting Show Quick Access Toolbar below the Ribbon. We are going to add several items to it and having it right on top of your document below the Ribbon will remind you of all the time-saving tools you have stored there for your convenience.

Save As Icon

So, the Save icon is there by default. Let's add "Save as," the command we use to save the document with a different name.

First you right-click on the QAT and select Customize Quick Access Toolbar. Here you find two columns of commands. The right-hand column is a list of all commands currently on your QAT. The left-hand column defaults to Popular Commands, but the drop-down menu gives you other options like All Commands and Commands Not in Ribbon.

So, scroll down the list to the letter S and select Save As (see

Figure 1). Use the Add button between the two windows to add to the QAT. But we aren't finished yet. The Save icon and the Save As icon look very similar. So putting them next to each other makes perfect sense. Select Save As in the list at the right and then use the arrow keys on the far right to move it up next to the Save icon (see Figure 2).

Email Icon

Just to make certain you have it down, let's repeat this exercise with that most time-saving icon I discussed at the beginning of this article, the email icon. Just follow the same steps.

Speak Icon

Next let's add one of the more esoteric, but useful functions that many readers have never used. For this one, you need to use the drop-down menu to change Popular Commands to All Commands. Now scroll down to the letter S again. (Scrolling down through this much longer list also demonstrates the huge number of operations you can add to your QAT.)

This time select Speak with its cartoon speech bubble icon. Add it to the QAT. If you have been doing these exercises with a blank document, open a document with some text in it (or just type

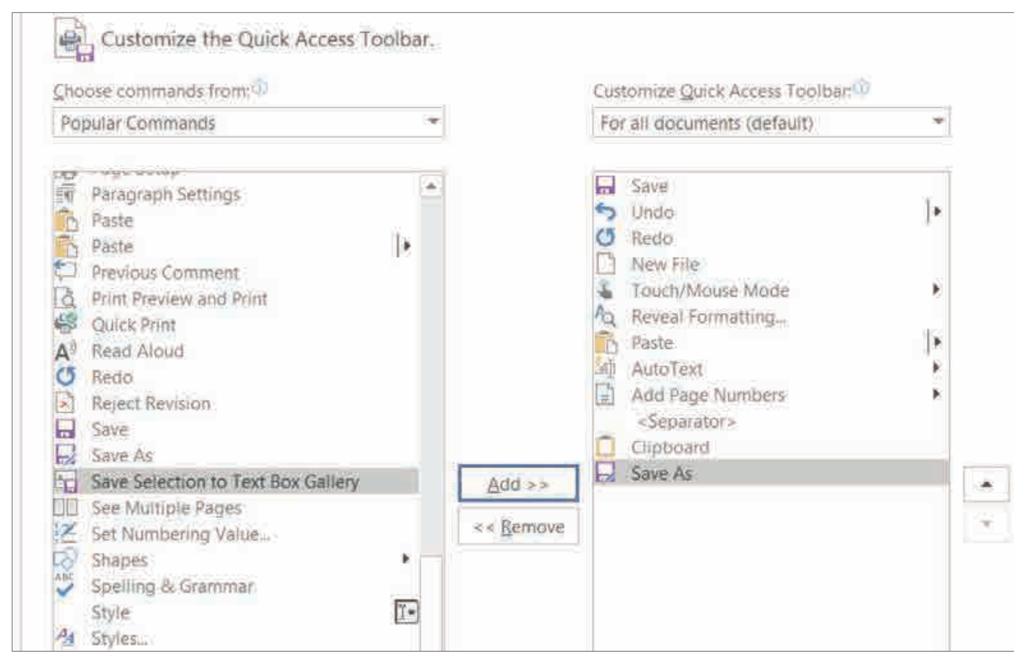


Figure 1

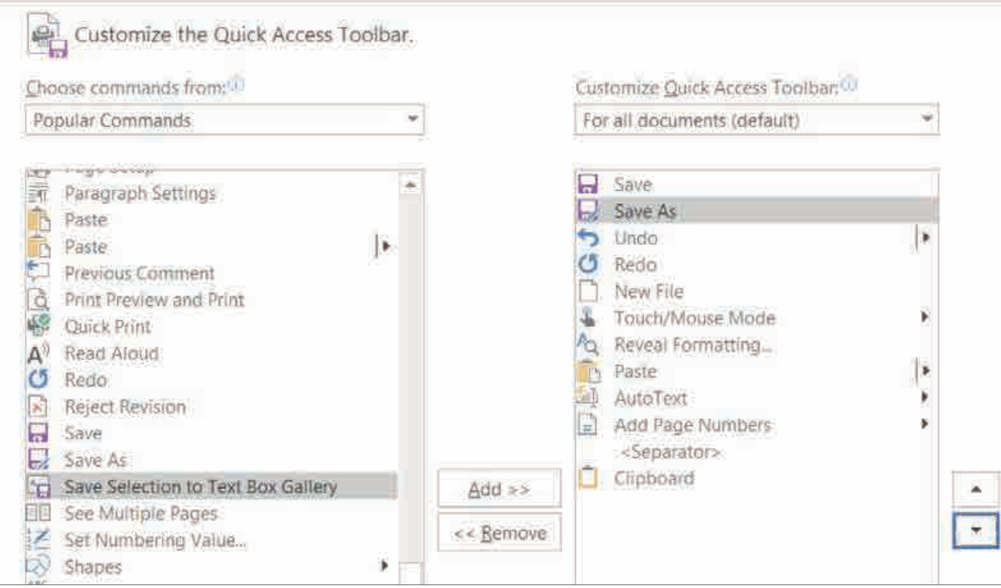


Figure 2

a sentence), highlight a sentence and click the Speak icon. The computer will read the document aloud to you, which may be just the thing for tired eyes at the end of a long day.

Clipboard Icon

Let's try one more command because this one is very powerful. Clipboard is located under All Commands, not Popular Commands. Everybody who uses Word understands copy and paste, but many do not understand that up to 24 items you have copied are still available for pasting into a document. Putting Clipboard on your QAT allows you to easily access all of the 24 saved items and insert them in your document. If you are drafting a contract, for example, and are pasting in the document many of the same terms repeatedly, this function can save you a significant amount of time.

Right-Click or Arrow Expander

Some Microsoft Word power users have probably noted that I have used the right-click on the QAT method when there is another way to do this by clicking on the small downward pointing arrow on the right side of the QAT to access these functions. Using the right click method seemed to be the simplest way to explain things, but you can certainly use that arrow expander for your other customizations.

MORE HELPFUL TIPS

If you routinely use a number of other functions, you should probably add as many functions to the QAT as make sense for you, but don't worry that you won't remember what all of the icons on the QAT mean. You can just hover your cursor over each one to see the name of the command. Or you can just run a function. If you don't like what happened, you can undo the action by clicking the undo button on the QAT. I've been using the keystroke combination CTRL + Z to correct my mistakes for so long I never use the undo button, even though it is on my QAT. Here are some other additions to the QAT that I routinely use.

AutoText

AutoText allows you to insert the text you have saved in various Quick Parts. If you're not using Quick Parts, you're missing another opportunity to save time by inserting large blocks of routine text in a pair of clicks. Learn how to use Quick Parts by watching our video "Fun with Microsoft Quick Parts" in the OBA Management Assistance Program Video Vault at www.okbar.org/members/MAP/videos.

Add Page Numbers

Since I draft a lot of CLE papers that require page numbers, I have this function on my QAT.

Macros

When you were choosing between Popular Commands and All Commands, you may have noticed that macros is another option under the drop-down menu. Any macros you normally use can also be launched from the QAT. If you are not using any Word macros, that is a topic for another day, but you are missing out on using a powerful document assembly tool you already own.

Reveal Formatting

Reveal Formatting allows you to look at the formatting applied to text you select. It also has the option to show all formatting marks within a document. Many power users leave the formatting marks on all the time. WordPerfect users will be quick to note this isn't the same as reveal codes, but it can certainly be helpful when you are confused as to what formatting Microsoft Word is using.

Styles

As we all now understand, while WordPerfect uses hidden codes within the lines of text for formatting, Word uses formatting contained in Styles, which are applied to lines, paragraphs or documents. One key to being a Word power user is using Styles appropriately. For most, it is easier to learn about Styles with a training video for your version of Word so you can type along. Searching will locate lots of free videos, although many of them will also try to sell you a full-blown class on Word.

Status Bar

One more quick customization is adding functions and information displays to your Status Bar. The Status Bar is the gray bar at the bottom of the document. If you haven't customized it, it is mostly all gray. Right click on the status bar and you will see many options for customization. Just check them all. (Yes, check every one.) Don't worry that the Status Bar will be too crowded as most of them will only display in a certain context.

Now your Status Bar displays information about your document that was invisible previously, but the real power behind this change is you can now toggle Track Changes off and on from the Status Bar instead of having to go locate the function under the Review tab in the Menu Bar. For

more information on the Word Status Bar, *Attorney at Work* has a nice video by Deborah Savdra at www.attorneyatwork.com/video-customizing-status-bar-microsoft-office. Ms. Savdra runs the *Legal Office Guru* blog.

FREE TUTORIALS

My parting tip is to remind you that free tutorials to learn how to do these and many more customizations of Microsoft Word are available online. Just type into the search engine of your choice something like "customizing the Quick Access Toolbar in Word 2016" to find assistance for your customizations.

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

The Kansas City Estate Planning Symposium features nationally-recognized speakers at a fraction of the cost of other leading national conferences. You'll advance your career, earn continuing education credits and gain knowledge and relationships that will help you better serve your clients.

Presented in cooperation with the Estate Planning Society of Kansas City and the University of Missouri Kansas City School of Law. To register online or for a complete schedule and information, **visit KCEPS.org or call 816-235-1648**.

$375 with a digital book; $450 with a hardcopy and digital book. One-day pricing is also available.

How Out-of-State Attorneys Can Practice in Oklahoma

By Gina Hendryx

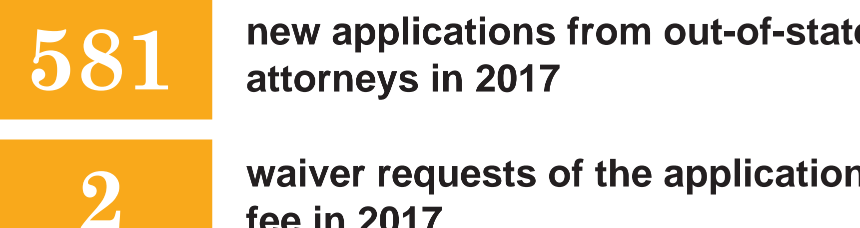
The first of a new year is always a good time to remind Oklahoma licensed attorneys that if they wish to sponsor an out-of-state attorney for purposes of practicing before an Oklahoma state forum, the out-of-state attorney must first register with the Oklahoma Bar Association. The registration rules for attorneys from other jurisdictions can be found in the Rules Creating and Controlling the Oklahoma Bar Association, 5 O.S. Ch. 1, App. 1, Art. II. To appear in an Oklahoma forum, the out-of-state attorney must first:

1) Complete and submit to the OBA a signed application form which can be obtained at www.okbar.org or by calling 405-416-7062.
2) Submit current certificates of good standing from the attorney's licensing jurisdictions. The certificates should be issued within 30 days of submission.
3) Pay the registration fee of $350 per attorney per case made payable to the Oklahoma Bar Association. The fee may be charged to a credit card by contacting Ben Douglas at 405-416-7062.

Upon receipt of the application, certificates of good standing and the fee payment, the OBA will review and issue a "Certificate of Compliance." Certificates of Compliance are issued after confirmation of the application information, the applicant's good standing in his/her licensing jurisdiction and payment of applicable fees. All obtained and verified information is submitted to the Oklahoma Court or Tribunal as an exhibit to a "Motion to Admit."

It is then within the presiding judge's discretion whether to permit an attorney to appear in his or her courtroom. If an application is rejected it is usually because the applicant has failed to provide a current certificate of good standing from all licensing jurisdictions. The licensing jurisdiction is (are) the state(s) wherein the attorney has a license to practice. Licensing jurisdiction does not include federal or tribal courts.

All out-of-state attorneys appearing before an Oklahoma tribunal must associate local counsel. Local counsel is defined as an active member of the Oklahoma Bar Association in good standing. Unless the presiding judge or hearing officer determines otherwise, the local counsel must appear at all court hearings and sign all pleadings.



600 average new out-of-state attorneys per year over the last 6 years

An Oklahoma court may temporarily admit an out-of-state attorney on a showing of good cause for noncompliance with the provisions of the rule. However, this temporary admission may be for no longer than 10 days and the attorney must comply with the registration requirements.

In 2017, the Office of the General Counsel processed 581 new applications from out-of-state attorneys requesting to practice before an Oklahoma state tribunal. Likewise, more than 393 attorneys renewed their *pro hac vice* status in 2017.

Out-of-state attorneys appearing pro bono to represent criminal indigent defendants, or on behalf of persons who otherwise would qualify for representation under the guidelines of the Legal Services Corporation due to their incomes, may request a waiver of the application fee from the OBA. In 2016, the Office of the General Counsel processed two waiver requests of the application fee.

Over the past six years, new out-of-state attorney registrations have averaged nearly 600 per year.

Ms. Hendryx is OBA general counsel.

Meeting Summary

The Oklahoma Bar Association Board of Governors met on Friday, Dec. 8, 2017, at the Oklahoma Bar Center in Oklahoma City.

REPORT OF THE PRESIDENT

President Thomas reported she attended the OBA Annual Meeting, Oklahoma Bar Foundation Board of Trustees meeting and OBA House of Delegates as a Washington County delegate. She also addressed the Leadership Academy, chaired the OBA General Assembly and volunteered at the veterans' legal clinic sponsored by Oklahoma Lawyers for America's Heroes and the OBA Military and Veterans Law Section.

REPORT OF THE PRESIDENT-ELECT

President-Elect Hays reported she worked on 2018 budget planning, prepared 2018 committee appointments and participated in planning for both the Annual Meeting and the OBA Family Law Section Annual Meeting. She attended the presentation of the OBA 2018 budget before the Supreme Court, OBA Family Law Section meeting, General Assembly, Delegates Breakfast, Oklahoma Bar Foundation trustee meeting, President's Reception, Jazz Hall of Fame reception, House of Delegates committee meetings and Legislative Monitoring Committee meeting. She also presided over the OBA House of Delegates.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he participated in the state/tribal/federal court working group, monthly staff celebration, Supreme Court hearing on the OBA budget, Access to Justice Commission meeting and Legislative Monitoring Committee meeting. He also prepared and filed the application regarding the change in membership categories, wrote an article promoting limited scope practice, worked on a few matters related to the new website and preparations to prefile the OBA's legislative agenda items.

REPORT OF THE PAST PRESIDENT

Past President Isaacs reported he participated in the state/tribal/federal court working group, presented a *voir dire* demonstration to OU law students and attended both Court of Criminal Appeals Judge Scott Rowland's swearing-in ceremony and induction ceremony of Supreme Court Justice Tom Colbert into the Oklahoma Hall of Fame.

BOARD MEMBER REPORTS

Governor Coyle reported he attended Annual Meeting events including the Lawyers Helping Lawyers breakfast meeting and House of Delegates. **Governor Fields** reported he attended the OBA President's Reception, Show Your Love event at the Jazz Hall of Fame, Delegates Breakfast, General Assembly and Resolutions Committee meeting. **Governor Gotwals** reported he attended the Annual Meeting, gave a presentation on family law mediation at the Family Law Section track CLE, attended the OU College of Law Alumni Luncheon, OBA President's Reception, OBA Family Law Section track, OBA Annual Luncheon, Show Your Love event at the Jazz Hall of Fame, Delegates Breakfast meeting, General Assembly and House of Delegates as one of the Tulsa County delegates. He also attended the inns of court Pupilage Group 5 meeting, Judge Dana Kuehn's swearing-in at the Court of Criminal Appeals, Tulsa Family Courts Quality Assurance Panel meeting, OBA Professionalism Committee meeting (via his legal assistant) and the Avansic E-Discovery and Forensics CLE. **Governor Hennigh** reported he attended the Annual Meeting and Garfield County Bar Association meeting. **Governor Hicks** reported he attended the OBA House of Delegates, Tulsa County Bar Association board meeting and TCBA holiday party. **Governor**

Hutter reported she attended the OBA Annual Meeting, serving as a delegate to the House of Delegates for Cleveland County, Cleveland County Bench and Bar Committee meeting, OBA Diversity Committee meeting, Cleveland County Bar Association executive meeting, Judge Tupper's swearing-in ceremony and luncheon reception, OBA Legislative Monitoring Committee meeting and county bar association meeting that featured Gary Rife as a speaker. **Governor Kee** reported he attended the Military Assistance Committee meeting and Delegates Breakfast. **Governor Oliver** reported he attended the Annual Meeting in Tulsa, Law Schools Committee meeting and pro bono seminar offered by Legal Aid Services of Stillwater. He also presented an OBA award at the OCU School of Law Luncheon, moderated a session of the OBA Leadership Academy and worked with Payne County attorneys to raise funds, shop and deliver coats and toys for 30 Salvation Army Angel Tree children. **Governor Porter** reported she attended OBA Annual Meeting events including the opening ceremonies and House of Delegates, OBA Appellate Section November and December meetings and William J. Holloway Jr. Inn of Court meeting. She also introduced Judge Suzanne Mitchell for an Oklahoma County Bar Association CLE. **Governor Tucker** reported at the Annual Meeting he attended the House of Delegates meeting, Section Leaders Council meeting, Rules and Bylaws Committee meeting, Show Your Love event, Annual Luncheon and TU College of Law Alumni Luncheon. **Governor Will** reported he attended the OBA General Assembly and House of Delegates.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Neal reported he spoke to the OBA Leadership Academy, chaired the November OBA YLD board meeting and worked on transition plans for the OBA YLD Executive Committee.

REPORT OF THE SUPREME COURT LIAISON

Justice Edmondson reported the court approved the creation of the Retired Member classification.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported the OBA remains a defendant in one matter pending in Oklahoma County District Court. Judge Dixon had previously dismissed the matter with prejudice finding that the district court had no subject matter jurisdiction. The plaintiff has filed for reconsideration, and the motion is scheduled to be heard on Jan. 19 before Judge Lisa Davis.

The Professional Responsibility Commission did not meet in November. A PRC report on its actions and OBA disciplinary matters will be submitted to the board next month.

BOARD LIAISON REPORTS

Governor Hutter reported the Legislative Monitoring Committee has set Jan. 27 as Legislative Reading Day and March 6 as OBA Day at the Capitol. Executive Director Williams reviewed the details of the upcoming events. Governor Hutter reported the Diversity Committee is wrapping up its year of activities and starting to plan for next year. The committee will have a new chairperson. Governor Gotwals reported the Professionalism Committee initially planned a full-day symposium for this year, however, plans changed and it is looking at other options. As the Military Assistance Committee liaison, Governor Kee reported 55 Oklahoma counties are covered with volunteer lawyers assisting heroes. He said the committee wants to set up clinics around the state. The opportunity for bar

members to donate to the OBA's heroes program is on the dues statement, and the committee will seek a grant from the OBF. President Thomas attended the Dec. 1 clinic in Tulsa, cosponsored by the heroes program, and she described the activities that took place including people receiving legal assistance.

PROPOSED FINANCIAL INSTITUTIONS AND COMMERCIAL LAW SECTION BYLAWS AMENDMENTS

Section Chairperson Miles Pringle reported the section recently updated its bylaws and approved them at its recent meeting. The board approved the section bylaw amendments.

CLIENTS' SECURITY FUND RECOMMENDATIONS AND FINAL CASE LIST

Chairperson Micheal Salem reported the committee reviewed 33 claims and approved 20 for a total amount of $57,240.62. The unappropriated amount will remain in the reserve fund. The board approved the claims recommended by the Clients' Security Fund Committee and authorized the distribution of a news release approved by the CSF Committee chairperson and OBA president. General Counsel Hendryx and staff member Ben Douglas were thanked for their assistance.

PROPOSED AMENDMENT TO RULES CREATING AND CONTROLLING THE OKLAHOMA BAR ASSOCIATION

The board approved the amendment to Art. VI, Sec. 5 - Report of Executive Director regarding the financial condition of the association. Executive Director Williams explained the amendment gives the OBA more time to get financials prepared and distributed.

PROPOSED AMENDMENTS TO THE GUIDE FOR COMMITTEES AND SECTIONS

Executive Director Williams reported the proposed changes to the basic instructions for committees and sections include the addition of BlueJeans remote meeting conferencing, free and discounted *Oklahoma Bar Journal* advertising policy and changes to section cosponsorship of CLE seminars handled by the OBA CLE Department. The board approved the amendments.

ABA YLD DELEGATE

Governor Neal said the YLD chair traditionally serves as the delegate to the American Bar Association House of Delegates. The 2018 chair, Nathan Richter, meets the rules for YLD membership in Oklahoma but does not meet the definition of a YLD member according to ABA rules. He said the YLD board proposes to designate YLD Chair-Elect Brandi Nowakowski as the YLD delegate for 2018. The board approved the designation of Ms. Nowakowski as the 2018 ABA YLD delegate.

CHILD DEATH REVIEW BOARD

The board approved President-Elect Hays' submission of the names of Robert D. Gifford, Oklahoma City; G. Gail Stricklin, Oklahoma City; and Jennifer Irish, Edmond; to the director of the Commission on Children and Youth as suggestions for the appointment of one to the Child Death Review Board. The term expires 4/30/2020.

OKLAHOMA INDIAN LEGAL SERVICES BOARD OF DIRECTORS

The board approved President-Elect Hays' reappointment of Julie D. Strong, Clinton; Casey R. Ross, Oklahoma City; and Tyson Branyan, Cushing; with terms expiring 12/31/2020 and appointment of Garrett Blake Jackson, Durant, to complete the unexpired term of Diane Hammons with the term expiring 12/31/2019.

PROFESSIONAL RESPONSIBILITY COMMISSION

The board approved President-Elect Hays' reappointment of R. Rick Sitzman, Oklahoma City, with a term expiring 12/31/2020.

MANDATORY CONTINUING LEGAL EDUCATION COMMISSION

The board approved President-Elect Hays' reappointment of Jack L. Brown, Tulsa, as chairperson with a term expiring 12/31/2018, and reappointment as members M. Courtney Briggs, Oklahoma City; Claire C. Bailey, Norman; and Gale G. Allison, Tulsa; with terms expiring 12/31/2020.

BOARD OF EDITORS

The board approved President-Elect Hays' reappointment of Melissa G. DeLacerda, Stillwater, as chairperson with a term expiring 12/31/2018; appointment of Aaron D. Bundy, Tulsa (Dist. 6); and reappointment of Associate Editor Amanda V. Grant, Spiro (Dist. 2). The terms will expire 12/31/2020.

CLIENTS' SECURITY FUND

The board approved President-Elect Hays' reappointment of Micheal Salem, Norman, as chairperson and Dan Sprouse,

Pauls Valley, as vice chairperson, with terms expiring 12/31/2018; reappointment as members Micheal Salem, Norman; Luke Gaither, Henryetta; John Kinslow, Lawton; and James Von Murray, Stillwater; with terms expiring 12/31/2020; and reappointment of lay person Janice Stotts, McLoud, with a term expiring 12/31/2020.

OKLAHOMA BAR JOURNAL CONTRACT

Communications Director Manning reported the format of the 10 bar journal theme issues will change in 2018 to a slightly larger size with glossy paper and color throughout, which will require a change in printers. She said a request for proposal was sent to seven printers, and bids are due today. After reviewing the bids with Executive Director Williams, the contract will be awarded next week.

APPOINTMENTS

President-Elect Hays announced the appointments and reappointments of:

Board of Medicolegal Investigations – Reappoint Glen Huff, Oklahoma City, to a one-year term expiring 12/31/2018.

Investment Committee – Reappoint M. Joe Crosthwait, Midwest City, chairperson; reappoint Kendra Robben, Oklahoma City, vice chairperson; terms expire 12/31/2018; reappoint as members Stephen Beam, Weatherford; Chuck Chesnut, Miami; Chris Meyers, Lawton; Alan Souter, Tulsa; Jerry Tubb Jr., Oklahoma City; Judge Mike DeBerry, Idabel; and Harry Woods, Oklahoma City; terms expire 12/31/2020.

Audit Committee – Appoint Jimmy Oliver, Stillwater, chairperson; term expires 12/31/2018; appoint as members Alissa Hutter, Norman; term expires 12/31/2018; Bryon J. Will, Yukon; and Mark E. Fields, McAlester; terms expire 12/31/2019.

Legal Ethics Advisory Panel – Reappoints Steven Balman, Tulsa; as panel coordinator; term expires 12/31/2018; Oklahoma City panel: reappoints Micheal Salem, Norman; John Hermes, Oklahoma City; and Timila S. Rother, Oklahoma City; terms expire 12/31/2020; Tulsa panel: reappoints Lynnwood Moore, Tulsa; term expires 12/31/2020.

FAREWELL

President Thomas said she has served on the Board of Governors for nine years, and this year was one of the best boards she has served with. She thanked board members for all their work in their communities and is assured the board will be in good hands next year.

NEXT MEETING

The Board of Governors met in January at the Oklahoma Bar Center in Oklahoma City. A summary of those actions will be published after the minutes are approved. The next board meeting will be at 10 a.m. Friday, Feb. 16, at the Oklahoma Bar Center in Oklahoma City.

Scholarship Recipient Highlights

FELLOWS SCHOLARSHIP

Elke C. Meeus

Hometown:	Native of Antwerp, Belgium, but current hometown is Edmond
Law School:	OCU School of Law
Graduation Date:	2019
What field of law are you studying:	I have had criminal law, civil procedure, torts, contracts, property, agency, corporations, legal research and writing. I am currently taking constitutional law, evidence and family law.
Undergraduate:	University of Brussels, 1999
Undergrad Major:	Journalism, print and audiovisual

What made you decide to attend law school?

My professional life began as an investigative journalist and later press officer at the European Parliament. I never considered going to law school until a few years after I moved to Oklahoma, and my husband died tragically in a law enforcement training accident. In my quest to see my husband receive the honors he earned and the benefits he would have wanted for his family, I embarked on a seemingly endless series of legal battles. A truly exceptional lawyer helped me through those legal battles, and to me, he became the epitome of a lawyer: unafraid to take on "unwinnable cases," compassionate to the end and unyieldingly committed to see justice done. He encouraged me, and helped nurture my desire to pursue a legal education. He inspired me to become the kind of attorney that he was to my children and me.

What are your goals?

I want to give back to my community. I aspire to become the kind of attorney who helped in my time of greatest need. Since I started law school, I have already put in over 650 hours of pro bono services and, in the years to come, I fully intend to continue fostering a commitment to pro bono work.

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

It is not so much that I am baffled by the laws or social rules, but I am fascinated by the American legal system in itself, which represents stability, and yet constantly evolves based on case law. This is drastically different from my country of origin, Belgium, which is based on the Civil Code.

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

Integrity, hard work and even harder work open the door to so many opportunities. We cannot always choose what happens in our lives, but we can choose how to respond to events. Law school was my response to the tragic events that happened in my life. Not only have I become fascinated with all things law, but I have had the pleasure of meeting so many extraordinary Oklahoma attorneys who give me full faith in the future of this noble profession.

CHAPMAN-ROGERS SCHOLARSHIP

Taylor Freeman Peshehonoff

Hometown:	Ada
Law School:	OU College of Law
Graduation Year:	2020
What field of law are you studying:	As a 1L, I'm still exploring what my area of interest will be!
Undergraduate:	OU, 2017
Undergrad Major:	Human resources management with a minor in constitutional studies

What made you decide to attend law school?

When I was 13, I was home alone babysitting my younger sisters when a man broke into our house. The process that followed piqued my interest in a legal career. I talked with local attorneys and observed what their day-to-day life looked like. I loved watching the impact that these individuals had on their clients, and I wanted to do the same.

What are your goals?

My short-term goals are to make it through my first year with an academic record that makes me proud and to work toward acquiring an internship for this upcoming summer that will be challenging. Long-term, I hope to finish law school, pass the bar exam and find full-time employment in an area of law that fulfills me. Personally, I hope to continue to build positive connections with others because you oftentimes learn more from those around you than from a book.

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

Something that I've learned during my short exposure to law school is that the law of contracts shields minors while minors are still liable for their intentional torts. I find it interesting that one body of law feels it necessary to allow minors to void contracts into which they've previously entered, but tort law typically holds minors accountable for their intentional acts.

What historical figure inspires you and why?

I really admire Amelia Earhart. Not only did she prove to the world that she can do anything that a man can do, but she also pursued her passion no matter the cost. I look up to Ms. Earhart for her ability to follow her dreams in a situation where those around her told her she was incapable.

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

A phrase that has become my motto over the last few years is to "get comfortable being uncomfortable." Things are never going to happen the way you planned them. Opportunities will arise that make you feel out of your element. Even if those situations are outside of your comfort zone, you never know how that experience will change your perspective or your life.

Your support changes lives!

Fellows Programs

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

Community Fellows – for organizations or businesses
$1,000/year Community Partner
$2,500/year Community Supporter
$5,000/year Community Champion
$7,500/year Community Pillar
$10,000/year Community Cornerstone

Memorials & Tributes

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

Unclaimed Trust Funds

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

Interest on Lawyer Trust Accounts (IOLTA)

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

Cy Pres Awards

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

OKLAHOMA
BAR FOUNDATION
Law. Education. Justice.

Give online at www.okbarfoundation.org/donate

Mail checks to OBF, P.O. Box 53036, Oklahoma City, OK 73152

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

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

connect with us
and stay connected to your profession
follow the oba
/okbarassociation
/okbarassociation
@oklahomabar

MUSCOGEE (CREEK) NATION
DISTRICT COURT
Presents the 16th Annual
INDIAN LAW CONTINUING LEGAL EDUCATION CONFERENCE
APRIL 26-27, 2018
RIVER SPIRIT & MARGARITAVILLE CASINO RESORT, TULSA, OK

CONFERENCE REGISTRATION

TWO-DAY	$150
ONE-DAY	$100
ON-SITE	$200

LODGING
FOR CONFERENCE RATE ($93/NIGHT), CALL 888-748-3731 BY 4/2/18 AND MAKE ROOM RESERVATION AS AN "MCN DISTRICT COURT CLE ATTENDEE"

REGISTER NOW!

VISIT OUR WEBSITE OR CALL FOR MORE INFORMATION:
WWW.MUSCOGEECREEKTRIBALCOURT.ORG (918) 758-1400

THIS COURSE HAS BEEN APPROVED BY THE OKLAHOMA BAR ASSOCIATION MANDATORY CONTINUING LEGAL EDUCATION COMMISSION FOR 12 HOURS OF CLE CREDIT, INCLUDING 1 HOUR OF LEGAL ETHICS CREDIT.

What We Give

By Nathan D. Richter

The YLD is off to a great start in 2018! We held an orientation for newly elected board members followed by our first board meeting of the year in January in Oklahoma City. Following the meetings, we had the "Roast and Toast" of the YLD Immediate Past Chair Lane Neal. The YLD board enjoyed dinner followed by many fun and entertaining stories of our outgoing chair. Lane's leadership was a tremendous asset to the YLD in 2017, and because of his leadership the organization is healthier and well prepared for what the future may hold.

The YLD executive officers also recently returned from the American Bar Association's Young Lawyers Division midyear meeting in Vancouver, Canada. This meeting and those that we will continue to attend throughout the year serve as a valuable opportunity to collaborate with young lawyers from around the country, hear and discuss national trends in the legal profession and make recommendations for policy changes affecting the legal profession. These meetings are our platform to voice concerns over trends that may negatively impact the state of the legal profession in Oklahoma, as well as to praise, and possibly adopt, those that may positively influence our careers. It further provides a venue to share ideas, projects, programs and network with young lawyers from across the nation.

In planning 2018 for the YLD, I am mindful that the YLD was created to be the public service arm of the OBA. I am also mindful of the many different callings of our young lawyers. Many of us are still trying to figure out our practice, and, in addition to all that goes along with practicing law, we are also starting families, engaging in our communities through service on boards, commissions, etc. and otherwise trying to find our way. With life happening all around us, it is easy to lose sight of the life we are all trying to live.

> "We make a living by what we get, but we make a life by what we give."
>
> Winston Churchill

It's upon this backdrop that I stumbled across a quote from the great Winston Churchill: "We make a living by what we get, but we make a life by what we give." It's a profound change of perspective when we begin focusing on what we can do for others, instead of thinking about what they can do for us. Giving to others is our obligation, and yet it is so easy to be a taker instead of a giver. As a young lawyer, I often find myself feeling as though I have nothing to offer. Such a belief is simply a black hole. Young lawyers have plenty to offer, and those who are more seasoned in the profession recognize the talents, perspectives and benefits young lawyers bring to the table. With that, it's time for young lawyers to embrace their future place in this profession, and it all starts with service to others. While every day the practice of law becomes more of a business and less of a profession, we can do our part to preserve the professionalism, comradery and civility while changing the public's perception of lawyers for the better.

CHALLENGE EXTENDED

My challenge for all young lawyers is to implement giving measures in your lifestyle. Create and develop disciplines within your practice that have a direct impact on your community. Whether it be organizing a fun run to raise money for a local charity or volunteering at a local shelter or hosting a canned food drive to help others, any giving will heap blessings upon your life and also go a long way in changing the public's perception of lawyers and the legal profession. We are all here to live life to the fullest,

and with our God-given talents, we should strive to lift others up and make the world a better place, instead of maintaining the status quo.

For the YLD, we too shall serve. The YLD is planning two service projects this year. We will focus on one service project in the spring and one in the fall. These service projects will be in addition to our traditional service to the community through our volunteerism with the Oklahoma City Regional Food Bank and other nonprofit organizations fighting to help others. The service projects will focus on our future – our children. There is no better opportunity to make the world a better place than to help our children learn to mold and shape the world into a better place to live. Keep an eye out for future information relating to the service projects. We hope you can join us.

Nathan Richter practices in Mustang and serves as the YLD chairperson. He may be contacted at nathan@dentonlawfirm.com. Keep up with the YLD at www.facebook.com/obayld.

For Your Information

SAVE THE DATE! OBA DAY AT THE CAPITOL MARCH 6

Oklahoma lawyers, let your voices be heard! OBA will host its annual Day at the Capitol Tuesday, March 6. Registration begins at 9:30 a.m. at the Oklahoma Bar Center, 1901 N. Lincoln Blvd., and the agenda will feature speakers commenting on legislation affecting various practice areas. We will also have remarks from the judiciary and bar leaders, and lunch will be provided before we go to the Capitol for the afternoon. See page 35 for more information.

LHL DISCUSSION GROUP HOSTS MARCH MEETING

"Helping Others Outside the Practice of Law" will be the topic of the March 1 meeting of the Lawyers Helping Lawyers monthly discussion group. Each meeting, always the first Thursday of the month, is facilitated by committee members and a licensed mental health professional. The group meets from 6 to 7:30 p.m. at the office of Tom Cummings, 701 N.W. 13th St., Oklahoma City. There is no cost to attend and snacks will be provided. RSVPs to onelife@plexisgroupe.com are encouraged to ensure there is food for all.

IMPORTANT UPCOMING DATES

Don't forget the Oklahoma Bar Center will be closed Monday, Feb. 19, in observance of Presidents Day. Also, be sure to docket the 2018 Solo & Small Firm Conference in Tulsa June 21-23 and the OBA Annual Meeting also in Tulsa Nov. 7-9.

ASPIRING WRITERS TAKE NOTE

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

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 and @OKBarAssociation on Instagram.

OBA MEMBER RESIGNATIONS

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

Taylor Wyrick Baird
OBA No. 22821
18424 Abierto Drive
Edmond, OK 73012

Kenneth Alan Brokaw
OBA No. 10216
3909 Patty Lane
Bethany, OK 73008

Richard Blanchard
OBA No. 858
6006 E. 115th Street
Tulsa, OK 74137

Dolores Emily Chavez
OBA No. 21134
3612 Hunters Creek Rd.
Edmond, OK 73003

Victoria V. Johnson
OBA No. 20914
2955 Alton Court
Denver, CO 80238

Eric Gederts Melders
OBA No. 10552
10520 N.W. 35th Street
Yukon, OK 73099

Charles Alan Newman
OBA No. 6648
511 Haskell Drive
Akron, OH 44333

Jonathan Eastman Pansius
OBA No. 10109
P.O. Box 471254
Tulsa, OK 74147

Stephen E. Reel
OBA No. 7474
3233 Prairie Rose Rd.
Oklahoma City, OK 73120

Gerald George Zellmer
OBA No. 9994
3 Miller Road
McAlester, OK 74501

A little bit of your time can make a big difference

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

Visit oklahoma.freelegalanswers.org for information or to sign up!

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

Bench and Bar Briefs

ON THE MOVE

George S. Freedman was elected as partner in the Oklahoma City office of Spencer Fane LLP. His practice focuses on employment law, civil rights law and a variety of areas of litigation. **Jacob Reeves** joined the firm's environmental and energy practice groups as of counsel in the Oklahoma City office.

Paul M. Haire joined Nevada-based Advanced Resolution Management as a mediator and arbitrator. His ADR practice emphasizes resolution of tort and commercial litigation cases.

Mitch McCuistian of Edmond was named partner with Evans & Davis. His practice focuses on transaction and estate planning law.

Oklahoma City attorneys **Sasha L. Beling**, **Emily Wilson Bunting**, **Brian A. Burget**, **Terra Lord Parten** and **Christopher M. Scaperlanda** and Tulsa attorney **Jessica John Bowman** were elected as shareholders with McAfee & Taft. Ms. Beling practices patent law. Ms. Bunting practices tax law. Mr. Burget practices aviation law. Ms. Parten is a business transaction lawyer. Ms. Bowman is a patent and trial lawyer. Mr. Scaperlanda is a trial lawyer.

Lloyd Brent Palmer opened a branch office of his Ada law firm, Palmer Law PLC, in Coalgate. The practice focuses on criminal and family law. The firm can be reached at 16963 County Road 3820 Coalgate, 74538 or 405-496-1154.

Conner L. Helms opened Helms Law Firm at 1 NE 2nd St., Suite 202, Oklahoma City, 73104. The firm can be reached at 405-319-0700 or conner@helmslegal.com.

Taylor Henderson of Oklahoma City is now administrative director of the Council on Judicial Complaints. She is a former assistant attorney general in the Oklahoma Attorney General's Office.

John R. Arrowood joined the Oklahoma City-based firm Elias, Books, Brown & Nelson PC as an associate in the firm's litigation practice. Mr. Arrowood's practice focuses on oil and gas, environmental, water, business and administrative law.

Alix L. Samara and **Ashley D. Rahill** have opened Alix Lormand Samara PLLC and Rahill Law Firm PLLC. Ms. Samara practices in the areas of estate planning, probate and corporate matters, and Ms. Rahill's practice is focused on family law. Their office is located at 7100 N. Classen Blvd., Suite 330, Oklahoma City, 73116. They can be reached at 405-286-9619.

Kristen Pence Evans, **Mathew R. Gile**, **Moira C.G. Watson**, **William W. O'Connor** and **Jerrick L. Irby** have been elected shareholders with Hall Estill. **Margo E. Shipley** and **John W. Dowdell** joined the firm as associates. Ms. Evans practices business and commercial litigation, labor and employment and tort defense in the firm's Tulsa office. Mr. Gile practices family law, trust litigation and general civil litigation in the firm's Oklahoma City office. Mr. Watson practices banking and commercial finance law in the firm's Oklahoma City office. Mr. O'Connor, Mr. Irby, Ms. Shipley and Mr. Dowdell focus thier practice in litigation in the firm's Tulsa office.

Laura Corbin of Coleman was appointed as associate district judge for Johnston County. She has practiced law in Tishomingo since 1996.

KUDOS

Holly Hefton of Oklahoma City received the Mona Salyer Lambird Service to Children Award for her volunteer work as a legal advocate with Oklahoma Lawyers for Children. The award is named after Mona Salyer Lambird, who became the first woman president of the Oklahoma Bar Association.

Samuel J. Merchant of Oklahoma City was appointed to serve on the Oklahoma City Board of Adjustment. The appointment was made by Mayor Mick Cornett and confirmed by City Council.

The Oklahoma County Criminal Defense Lawyers Association (OCCDLA) honored three attorneys at the association's annual Christmas party. **Billy Coyle** of Nichols Hills was honored with the OCCDLA Barry Albert Award. **Scott Rowland** of Oklahoma City received the 2017 OCCDLA President's Award. **David Lynn** of Oklahoma City was posthumously awarded with the OCCDLA Manchester Lifetime Achievement Award.

AT THE PODIUM

Robert M. Murphy of Spokane, Washington, addressed the National Association of Unemployment Insurance Appeals Professionals in Seattle at its annual conference. His presentation covered the "History of the Code of Judicial Conduct and Ethics for Judges Using Social Media."

A. L. Haizlip was the keynote speaker at the American Bar Association Forum on Air and Space Law, 2017 Aviation and Space Finance Conference in New York City, in December. Mr. Haizlip is aeronautical central regional counsel for the Federal Aviation Administration.

In Memoriam

Stanley Lloyd Cunningham of Oklahoma City died Nov. 29, 2017. He was born Feb. 7, 1938. He graduated from Tishomingo High School in 1956. After high school, he attended East Central University on a football scholarship. He later transferred to OU and graduated with a Bachelor of Science in geology in 1963. He received his J.D. from the OU College of Law in 1963. After passing the bar, he went to work in the legal department of Phillips Petroleum Co. In 1971, he joined McAfee & Taft law firm. In 2002, he returned to OU and graduated with a Master of Science in geophysics in 2004. He thereafter engaged in the oil business as a geophysicist and lawyer. He also taught petroleum geology at OU as an adjunct professor. **Mr. Cunningham served his country for nine years in the Air Force Reserve and Air National Guard.** Donations in his honor may be made to the OU Foundation, P.O. Box 258856, Oklahoma City, 73125. Please designate the ConocoPhillips School of Geology and Geophysics or the OU College of Law.

Charles Holmes of Denver died Dec. 16, 2016. He was born Dec. 21, 1931, in Wellington, Kansas. He grew up in Wichita, Kansas. **Mr. Holmes served in the Air Force and retired as captain in 1961.** He earned his undergraduate degree from Wichita State University and his J.D. from the OU College of Law. He practiced oil and gas law for over 40 years primarily in Oklahoma, Louisiana and Colorado.

Patton Greene Lochridge of Austin, Texas, died June 1, 2017. He was born Dec. 30, 1949, in the Lower Rio Grande Valley. He graduated from Austin High School in 1968. Mr. Lochridge then attended Princeton University and finished his undergraduate degree at the University of Texas. He received his J.D. from the University of Texas School of Law 1976. After passing the bar, he served as a law clerk to Judge Joseph T. Sneed of the United States Court of Appeals for the 9th Circuit. Mr. Lochridge then joined McGinnis, Lochridge & Kilgore LLP where he practiced law for 38 years, serving as managing partner for many years. He was a Fellow of the American College of Trial Lawyers and the American Board of Trial Advocates. In 2017, he was recognized as a Texas Legal Legend by the Litigation Section of the State Bar of Texas, and as the University of Texas Law School's Outstanding Alumnus for 2016.

Thomas Morgan of Watonga died June 23, 2016. He was born Aug. 14, 1928, in Marlow. In his youth he was a pilot, sailor and motorcyclist. He graduated from the OU College of Law in 1953. **Mr. Morgan served in the U.S. Army from 1953 to 1955.** He then returned to Watonga to practice law for the next 55 years. He was a member of Kiwanis and the First United Methodist Church. He enjoyed traveling and being outdoors with his dogs.

George Lindsay Peters of Shawnee died May 13, 2016. He was born Oct. 12, 1925, in Shawnee. He graduated with a bachelor's degree in business administration from OU in 1950. He received his J.D. from the OU College of Law in 1953. While attending OU he was a member of the *Oklahoma Law Review.* **After passing the bar, Mr. Peters served his country in the U.S. Marine Corp. for seven years, earning the rank of first lieutenant.** Upon his retirement from the Marines, he settled in Shawnee and began practicing law, joining James B. Miller as a partner in the Miller & Peters law firm. He was active in Boy Scouts of America and Rotary Club. He served as Trustee for the W.P. Wood Trust, on the board of the Pottawatomie County Health Department, on the Pottawatomie County Hospice board and as counsel to the Shawnee Urban Renewal Authority.

Donald Winn of Rancho Santa Fe, California, died Oct. 23, 2017. He was born May 31, 1932, in Amarillo, Texas. **Mr. Winn served his country with the Marine Corps, ultimately being stationed at Camp Pendleton.** He received his J.D. from the OU College of Law in 1956. He was an attorney with the U.S. Treasury Department. He also had several successful business ventures including running his own oil and gas company for 35 years. Donations in his honor may be made to the Semper Fi Fund supporting wounded and injured members of our U.S. Armed Forces.

Oklahoma Bar Journal Editorial Calendar

HOW TO PLACE AN ANNOUNCEMENT:

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

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

Articles for the April issue must be received by March 8.

2018 ISSUES

APRIL
Law Day
Editor: Carol Manning

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

2019 ISSUES

JANUARY
Meet your OBA
Editor: Carol Manning

FEBRUARY
Estate Planning
Editor: Amanda Grant
amanda@spiro-law.com
Deadline: Oct. 1, 2018

MARCH
Criminal Law
Editor: Aaron Bundy
aaron@fryelder.com
Deadline: Oct. 1, 2018

APRIL
Law Day
Editor: Carol Manning

MAY
Technology
Editor: C. Scott Jones
sjones@piercecouch.com
Deadline: Jan. 1, 2019

AUGUST
Appellate Law
Editor: Luke Adams
ladams@tisdalohara.com
Deadline: May 1, 2019

SEPTEMBER
Bar Convention
Editor: Carol Manning

OCTOBER
Indian Law
Editor: Leslie Taylor
leslietaylorjd@gmail.com
Deadline: May 1, 2019

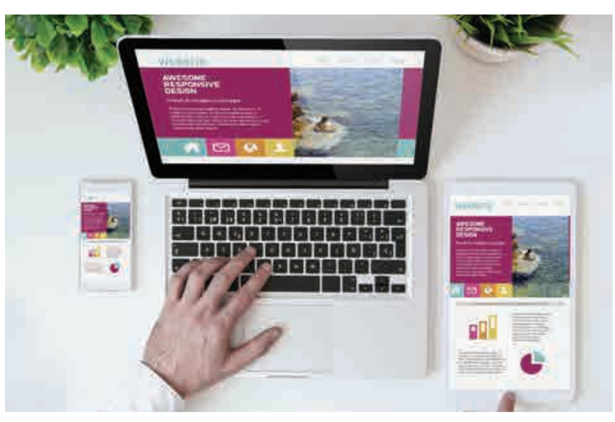
NOVEMBER
Starting a Law Practice
Editor: Patricia Flanagan
Patriciaaflanaganlawoffice@cox.net
Deadline: Aug. 1, 2019

DECEMBER
Ethics & Professional Responsibility
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Aug. 1, 2019

2018 Law Firm Website Trends

If you're looking for ways to improve your law firm's website this year, read what five experts say are going to be the biggest trends and what is worth paying attention to.

Goo.gl/GiFWb7



Beat the Cold and Flu

Cold and flu season is in full swing, and the flu is now widespread across the country. The Centers for Disease Control and Prevention share what's new this flu season, what vaccines are recommended, protective actions and much more.

Goo.gl/bR1qLr

Personal Inventory Day

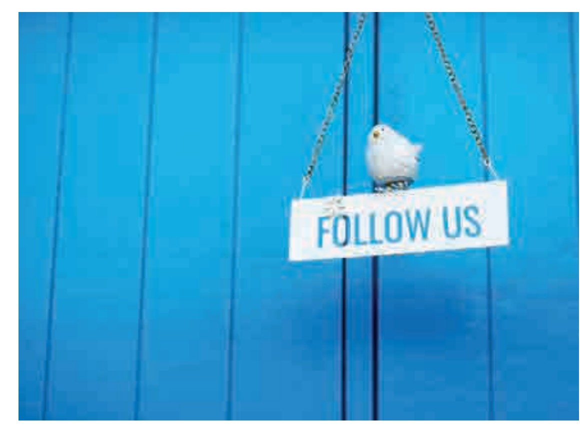
Are you struggling to see the bigger picture or so bogged down in work you are forgetting to take care of yourself? Sabrina Hersi Issa, CEO of Be Bold Media and venture partner at Jump Canon, emphasizes the importance of setting aside time to consider where our time is going and where we want it to go. Here is what she recommends.

Goo.gl/8haCBc

Content Marketing and the 80/20 Rule

Vincent Pareto created the 80/20 rule which holds that approximately 80 percent of the effects come from 20 percent of the causes. In order to build a following on social media, you must learn to adhere to this rule.

Goo.gl/Aktfbu



Classified Ads

SERVICES

OF COUNSEL LEGAL RESOURCES – SINCE 1992 – Exclusive research and writing. Highest quality: trial and appellate, state and federal, admitted and practiced U.S. Supreme Court. Over 25 published opinions with numerous reversals on certiorari. **MaryGaye LeBoeuf 405-728-9925, marygayelaw@cox.net.**

INTERESTED IN PURCHASING PRODUCING AND NONPRODUCING MINERALS; ORRi. Please contact Greg Winneke, CSW Corporation, P.O. Box 23087, Oklahoma City, OK 73123; 210-860-5325; email gregwinne@aol.com.

BRIEF WRITING, APPEALS, RESEARCH AND DISCOVERY SUPPORT. Eighteen years' experience in civil litigation. Backed by established firm. Neil D. Van Dalsem, Taylor, Ryan, Minton, Van Dalsem & Williams PC, 918-749-5566, nvandalsem@trsvlaw.com.

HANDWRITING IDENTIFICATION
POLYGRAPH EXAMINATION

Board Certified	Court Qualified
Diplomate – ABFE	Former OSBI Agent
Life Fellow – ACFEI FBI	National Academy
Arthur D. Linville	405-736-1925

WANT TO PURCHASE MINERALS AND OTHER OIL/GAS INTERESTS. Send details to P.O. Box 13557, Denver, CO 80201.

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

LEGAL RESEARCH, BRIEF WRITING, APPEALS and DEPOSITIONS. Civil cases, large and small, welcome. Over 28 years of experience. Ready to help move your case forward. David Custar, 405-474-6667, custarlaw@gmail.com.

SERVICES

DENTAL EXPERT
WITNESS/CONSULTANT

Since 2005
(405) 823-6434
Jim E. Cox, D.D.S.
Practicing dentistry for **35** years
4400 Brookfield Dr., Norman, OK 73072
JimCoxDental.com
jcoxdds@pldi.net

RETIREMENT ON THE HORIZON?
If you have enjoyed developing estate plans and business transactions in your practice, are considering options for transitioning into retirement, would like to have those clients well-served into the future and have that arrangement be financially beneficial to you, please contact us at attorneyretiring@gmail.com.

OFFICE SPACE

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

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

OFFICE SPACE

OFFICE SPACE IN JENKS. Fully furnished front office available, conference room, reception area, kitchen, free parking, notary services, fax, Wi-Fi and building security. Referrals from experienced attorney. Easy access from Hwy 75 and Creek Turnpike. $600/month. Contact 918-299-4454.

POSITIONS AVAILABLE

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

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.

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

PROGRESSIVE, OUTSIDE-THE-BOX THINKING BOUTIQUE DEFENSE LITIGATION FIRM seeks a nurse/paralegal with experience in medical malpractice and nursing home litigation support. Nursing degree and practical nursing care experience a must. Please send resume and salary requirements to edmison@berryfirm.com.

MID-SIZE TULSA FIRM SEEKS ATTORNEY WITH 3 TO 10 YEARS of civil litigation experience with excellent writing and presentation skills. Duties will include case analysis, drafting pleadings, all phases of discovery, legal research, writing and more. Firm has a diverse civil practice. Compensation DOE with excellent benefits. Applications kept in strict confidence. Submit resume and writing sample to tulsalawfirm@yahoo.com.

POSITIONS AVAILABLE

EXPERIENCED ESTATE PLANNING & BUSINESS TRANSACTION FIRM is hiring an attorney for its Edmond location. The firm is a fast-paced estate planning and business transactional firm with multiple offices across Oklahoma, Texas, Arizona and New Mexico. The firm is seeking only highly qualified candidates with experience in the following: trust administration, probate, general estate planning and corporate transactions. Must be knowledgeable in the areas of law, personable and a self-starter. No existing book of business necessary but welcomed. Salary is commensurate on experience and current client base, if applicable. The firm offers opportunities for advancement, a flexible schedule, a matching 401k plan, 100 percent of premiums for life/vision/dental insurance, and an exceptional work environment. Send your resume and cover letter to "Box EE", Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

FAMILY ATTORNEY NEEDED FOR EXPANDING CASELOAD AT TULSA FIRM. Experience or strong family law interest required. Send reply to "Box F," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

EDMOND FIRM SEEKING OIL AND GAS TITLE ATTORNEY. Prefer 3+ years' experience rendering Oklahoma title opinions. Pay commensurate with experience. Please send resume and example title opinion to edmondattorney@gmail.com.

MID-SIZE TULSA FIRM SEEKS ATTORNEY WITH 3 TO 10 YEARS of civil litigation experience with excellent writing and presentation skills. Duties will include case analysis, drafting pleadings, all phases of discovery, legal research, writing and more. Firm has a diverse civil practice. Compensation DOE with excellent benefits. Applications kept in strict confidence. Submit resume and writing sample to tulsalawfirm@yahoo.com.

TALASAZ & FINKBEINER PLLC SEEKING TITLE ATTORNEY for OKC office. Two to 5 years of experience rendering HBP title opinions preferred. Must have strong writing skills and be detail oriented. Send cover letter and resume to admin@tf-lawfirm.com.

POSITIONS AVAILABLE

The Western District of Oklahoma seeks immediate applicants for the Federal Criminal Trial Panel in Oklahoma City. To be eligible for the Criminal Justice Act Trial Panel you must 1) be a member in good standing of the federal bar in the Western District of Oklahoma; 2) have been admitted to the practice of law not less than 5 years; 3) have trial experience in either federal or state court; and 4) have demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence and the United States Sentencing Guidelines. Application forms can be obtained online at www.okwd.uscourts.gov under the attorney's info tab, then Criminal Justice Act (CJA). The application is a fillable form and can be emailed to Kim Taylor, CJA supervising attorney for the Western District of Oklahoma at Kim_S_Taylor@fd.org or mailed to 215 Dean A McGee Ave., Ste 109, Oklahoma City, OK 73102.

POSITIONS AVAILABLE

ASSISTANT DISTRICT ATTORNEY needed in Pittsburg and Haskell counties. DA Chuck Sullivan seeks VAWA prosecutor to handle domestic violence and sexual assault crimes. Duties include all statutorily defined domestic/sexual assault, and violent crimes with a pre-existing domestic relationship; also will maintain log of cases prosecuted, report statistics and serve as member of Community Coordinated Response Team. Strong courtroom skills, research and writing skills required. Primary office in McAlester — Pittsburg County, but also responsible for same crimes in Haskell County. One-3 years' experience preferred but not required. Salary commensurate with experience. Submit resume, writing sample, references and cover letter to adam.scharn@dac.state.ok.us and amber.suter@dac.state.ok.us.

FOR SALE

FOR SALE: Retiring attorney offers a busy and profitable solo private practice in growing Tulsa metro market community with established 26 year history. Turn-key operation with transferrable client base, marketing plan and all office furniture included. Flexible terms of sale. Contact Perry Newman at 918-272-8860 to discuss offer.

3000 **INSURANCE** GROUP

We proudly serve and support the

Oklahoma Bar Association

Health | Life | Disability | Business Overhead Expense | Home | Auto | Workers' Compensation | Business Owner's Policy

3000 Insurance Group
405.521.1600 | 3000ig.com

HeinOnline lets you view, print or download any article or issue going back to 1930. Access it through MyOKBar.

The Apology

By Retired Judge David Barnett

Many important lessons I have learned in life have been rather expensive, either in terms of money or time expended, or by the suffering of great humiliation. I want to relate a learning experience of the second type.

I grew up in a farming community in southwest Oklahoma in the era following World War II and was very naïve – at least when compared to kids today. However, as a fifth or sixth grader, I was exposed to language not approved by my parents. A valuable lesson taught to me by my dad involved the use of one such opprobrious phrase. I learned if you really want to put someone down, you could call them a "son of a (*expletive deleted*)," which I later learned was an accusation they were the offspring of a female dog.

Soon after adding this phrase to my vocabulary, I became involved in an argument with my older brother, James. In the heat of that discussion, I directed my new words at him, expecting it would really put him down, and I could win the argument. I don't remember if I won the argument, but I do remember later events of that day helped me immeasurably in reforming my vocabulary.

I do not think James snitched on me for my misdeeds, but somehow my dad found out what I had done. As was his custom, he called for me to come into the living room to visit privately with him. I assumed I would confess my wrong to him, receive the expected corporal punishment and then be allowed to go on my way with a warning to "not do that again." Boy, was I ever wrong. I had severely underestimated my dad's wisdom in matters of child discipline.

I will never forget my dad telling me that he understood I had called James a "son of a (*expletive*)" and asking me if I had done so. I confirmed I had done the dirty deed. After musing for only seconds over the proper punishment, my dad said simply, "Okay, go apologize to your mother." Well, I was absolutely dumbfounded and didn't yet understand what this had to do with mother.

He reminded me my phrase suggested she was a female dog, and I must apologize to her since it was her character that had been assaulted. As I left Dad to seek out Mom and apologize, I felt some relief, based on my assumption Dad wouldn't make me apologize without giving Mom some notice. Wrong again.

I remember Mom standing at the stove as I approached and casually said, "Mother, I'm very sorry I called you a (*expletive*)." She could not have been any more shocked if I had doused her with ice cold water. She was absolutely clueless as to the events leading up to my apology, and she demanded a complete explanation. In the course of the conversation, I was able to discern what I had said was actually hurtful to my mom, who was the last person I wished to offend with that phrase.

I suspect you already realize that well-known phrase was deleted from my vocabulary on that day, and I have no use for it, except as it relates to canines. If Dad had taught me a lesson with a leather belt, it could not have had nearly as much positive influence on my life as did the required apology.

Retired Judge Barnett lives in Frederick.

UPCOMING WEBCASTS

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

Wednesday, February 14
Tax Cuts and Jobs Act of 2017
with Donna Jackson: Part 1
Presented by OBACLE

Wednesday, February 14
The Ties That Bind: Avoiding Inappropriate Entanglements in the Practice of Law
Presented by Mesa CLE with Law Humorist Sean Carter

Wednesday, February 21
Attorney, Heal Thyself: The Detection, Treatment and Prevention of Substance Abuse
Presented by Mesa CLE with Law Humorist Sean Carter

Saturday, February 24
The 2018 Ethy Awards
Presented by Mesa CLE with Humorist Sean Carter

Wednesday, February 28
Tax Cuts and Jobs Act of 2017
with Donna Jackson: Part 2
Presented by OBACLE

Wednesday, February 28
Lies, Damn Lies & Legal Marketing: The Ethics of Legal Marketing
Presented by Mesa CLE with Humorist Sean Carter

Wednesday, February 28
Legal Ethics & Substance Abuse Three-Pack
Presented by Mesa CLE with Humorist Sean Carter

Wednesday, February 28
Lawyers Gone Wild: The Ethical Dangers of Compulsive Behavior
Presented by Mesa CLE with Humorist Sean Carter

Wednesday, February 28
Don't Try This At Home: Why You Should Never Emulate TV Lawyers
Presented by Mesa CLE with Humorist Sean Carter

To register go to: www.okbar.org/members/CLE/Webcasts

Coverage includes pro bono legal services with employer's written permission

Exposure to regulatory compliance issues, HIPPA, & other areas makes this well worth the expense.

OKLAHOMA ATTORNEYS
MUTUAL INSURANCE COMPANY

OAMIC.COM | P 405 471 5380 | 800 318 7505