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THE OKLAHOMA BAR
Journal
Volume 91 — No. 3 — March 2020

Constitutional Law

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THE CRIME, THE TRIAL, THE RESPONSE

OBA Remembers the Oklahoma City Bombing

PROGRAM PLANNERS:

Stephen Beam,
Melissa DeLacerda

MODERATOR:

Bob Burke,
Attorney, Author and Historian

Topics and Speakers include:

- The Crime: Jon Hersley and Larry Tongate, Retired FBI
- The Evidence: Bob Burke, Attorney, Author, Historian
- The Trial Proceedings: Brian Hermanson, District Attorney, District #8, Kay & Noble Counties, Defense attorney for Terry Nichols.
- The Trial Reflections: The Honorable Steven W. Taylor, Oklahoma Supreme Court Justice (Ret.) Presided over the Nichols' trial.
- A Unique Moment in History: Charlie Hanger, Sheriff, Noble County, Made historic traffic stop and arrest of Timothy McVeigh.
- The Response: A panel discussion featuring:
  Moderators: Bob Burke and Justice Steven W. Taylor
  Panel: Frank Keating, former Governor of the State of Oklahoma
  David Page, survivor, Special Projects Editor, Journal Record
  M. Courtney Briggs, Derrick and Briggs, Oklahoma City
  Chief Gary Marrs, former Oklahoma City Fire Chief and incident commander
- The Memorial: Kari Watkins, Executive Director, Oklahoma City National Memorial & Museum

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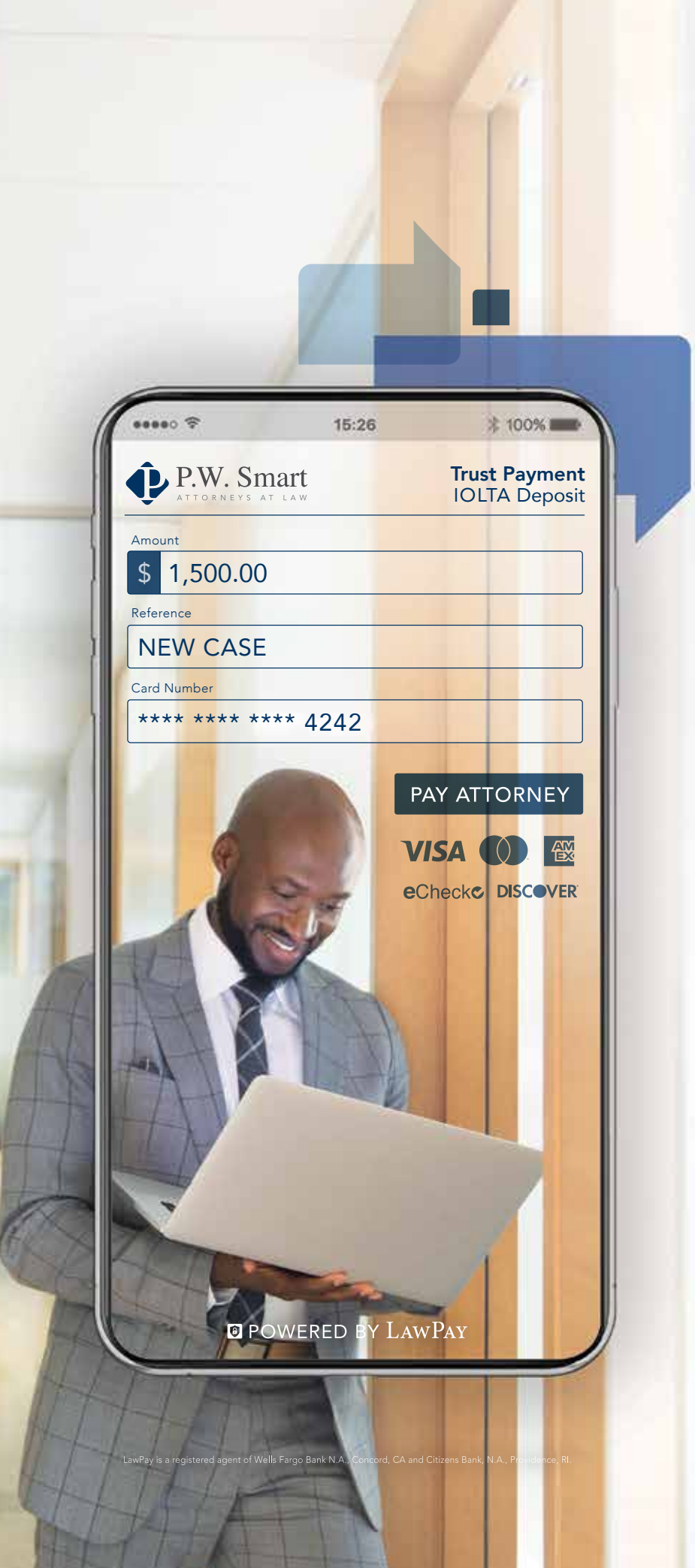

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THE OKLAHOMA BAR Journal

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Disaster Response and Remembering the Oklahoma City Bombing

By Susan B. Shields

NEXT MONTH MARKS THE 25TH ANNIVERSARY of the Alfred P. Murrah Federal Building bombing. Like most people living in Oklahoma on April 19, 1995, I remember exactly where I was when the bomb went off. I was in the tunnel underneath Robinson Avenue walking back to my office from a probate hearing at Oklahoma County District Court. Our offices were in the Bank of Oklahoma Plaza just two blocks south of the Murrah building.

The blast broke most of the floor-to-ceiling windows on the north side of the 15th and 16th floors of our offices, and light fixtures and ceiling tiles came down. Other lawyers in my office were having a meeting in the large 16th floor conference room and took cover from the breaking glass under the table. Very fortunately, no one at our law firm was injured. However, our building was cordoned off inside the perimeter of the crime scene, and it was several days before I could retrieve my car from the parking garage and personal items from my office.

President Shields practices in Oklahoma City.
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405-552-2311

Over the next weeks and months after the broken windows were repaired and we were able to go back to work, our windows looked out to the north over the federal courthouse to the rescue workers and law enforcement at the site of the bombing as they searched for survivors. If I had not had a hearing that morning, I could easily have been driving by the federal building on my way to work around the time the bomb went off. I think many of us remember where we were that morning, but I don't often talk about my personal experience because it pales in comparison to the tragedy of the 168 people who were killed and the more than 680 people who were injured, whose loss is unfathomable.

A well-known Fred Rogers' quote about seeking comfort during disaster encourages people to "look for the helpers." When disaster struck on April 19, 1995, the OBA's Disaster Response and Relief Committee, almost entirely through word of mouth, assembled more than 200 volunteer lawyers in the basement of the bar center less than a week after the bombing to sign up to assist victims and their families. According to OBA records, 143 lawyers were assigned 153 cases, and attorneys donated more than 3,000 hours

(continued on page 59)

MARCH WELLNESS TIP

Hold the coffee and drink more water. Coffee is fuel for many lawyers who work long hours, but studies have shown that drinking water may be even better at improving energy levels and mental performance, among other health benefits. While everyone has different needs, something easy to remember is to try to drink eight glasses of water a day. If that is too much, at least serve yourself a glass of water for every coffee you drink.

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Blocked in the Digital Age

Constitutional Dimensions of Elected Officials Blocking Critics on Social Media

By John G. Browning

ONE MAY NOT THINK THAT OPPOSITES ON THE POLITICAL SPECTRUM like President Donald Trump and Democratic Congresswoman Alexandria Ocasio-Cortez have something in common, but they do – both have been sued for blocking critics on Twitter. In fact, in today's digital age, elected officials at all levels – local, state and national – have come under fire for blocking or censoring critics on social media platforms like Twitter and Facebook. In cases all around the country, courts are tackling the question of how sites run by a governmental entity or public official for public business qualify as "limited public forums" protected by the First Amendment, as well as how under certain circumstances, even a personal site like @realDonaldTrump can function as a limited public forum. To date, three federal circuit courts have examined these issues, along with federal district courts in states like Texas, New York, Virginia, Colorado, Wisconsin, Kentucky, Maryland, Maine, Missouri and Vermont.

Before discussing specific cases, let's examine how such controversies usually arise. In an environment in which over 82% of adult Americans have at least one social networking profile, Twitter processes roughly 6,000 tweets every second and 16 minutes out of every hour spent online is spent just on Facebook, the importance of social media in daily life cannot be underestimated. These platforms go beyond just the latest memes and cat videos. According to a Pew Internet Research study, 71% of Twitter users get their news there, while 67% of Facebook users rely on the platform for news.[1] Because of this, it's easy to understand why government leaders value having a social media presence (according to Twitter's 2018 "Twiplomacy" study, 187 governments and heads of state maintain an official presence on the platform). Yet, while public officials may recognize social media's significance as a broadcasting tool and a means for engaging with constituents, they don't always react well to critical commenters, sometimes resorting to blocking these users or deleting their comments.

When a Twitter user is blocked by an account, that user cannot see the page they are blocked from; instead, they see a "blocked" message. This can be circumvented by logging out and viewing the page as an unregistered user, but whether logged-in or logged-out, the user cannot interact with the blocked account. Similarly, when a Facebook page administrator blocks an individual, that person cannot comment on the page, and any comments to other users' posts on the page will not be visible to anyone but the blocked individual. This Facebook block can be circumvented by creating a "page" and then accessing the blocking account as this new page's administrator.

Naturally, those prevented from participating in what many elected officials regard as digital town halls have considered such blocking as a form of censorship and a violation of their First Amendment right to express themselves in a public forum. Blocking by politicians goes beyond party lines and ideologies. Democratic Congresswoman Alexandria Ocasio-Cortez recently settled two lawsuits brought by two politicians

she blocked on Twitter – New York congressional candidate Joseph Saladino and former New York State Assemblyman Dov Hikind.[2] President Donald Trump, meanwhile, has faced a number of lawsuits over blocking users as a form of viewpoint discrimination, one of which reached the 2nd Circuit earlier this year.

With elected officials like Rep. Ocasio-Cortez and President Trump, however, the boundaries between personal Twitter account and official government site become blurred, with both using their personal accounts to tweet official government business. In 2017, then-White House Press Secretary Sean Spicer even proclaimed that President Trump's tweets, regardless of whether they originated from the @POTUS account or @realDonaldTrump, were official statements of the president. That position was contradicted by the Department of Justice in an August 2018 appeal brief to the 2nd Circuit, arguing that the president's personal Twitter account was not a limited public forum, and thus, he was free to block critics.

To date, however, the decisions that have come down have been overwhelmingly in favor of applying the First Amendment to the digital fora of Twitter and Facebook in the same way it applies to town halls and open school board meetings. Moreover, this constitutional protection will also apply to personal sites belonging to elected officials when they are administered to perform public duties and are inextricably linked to the defendant's public office.

The 4th Circuit was the first federal appellate court to articulate this in its January 2019 decision in *Davison v. Randall*.[3] Phyllis Randall, chair of the Loudoun County (Virginia) Board of Supervisors, maintained a Facebook page to keep in touch with her constituents, writing in one post "I really want to hear from ANY Loudoun citizen on ANY issue, argument, criticism, complaint, or just your thoughts." Loudoun resident Brian Davison took her up on this offer, posting a comment on her page alleging corruption by Loudoun County's School Board. Randall reacted by deleting the entire post (including Davison's comment) and blocking him (though she later unblocked him). Davison sued, alleging that his right of free speech had been violated. U.S. District Judge James Cacheris agreed, noting that because Randall had blocked Davison over being offended by his criticism of her colleagues, she had "engaged in viewpoint discrimination," a "cardinal sin under the First Amendment."

In response to Randall's argument that Davison was free to disseminate his criticism elsewhere, the court noted the U.S. Supreme Court's recent decision in *Packingham v. North Carolina* and its recognition that social media may be "the most important" modern forum "for the exchange of views." Judge Cacheris wrote that "the Court cannot treat a First Amendment violation in this vital, developing forum differently than it would elsewhere simply because technology has made it easier to find alternative channels through which to disseminate one's message." While Randall had set up the page as a personal one, the court observed, she was listed on it as a "government official," routinely used the page for official proclamations, made posts "on behalf of the Loudoun County Board of Supervisors" and regularly engaged with constituents in the comments section.

The 4th Circuit affirmed Judge Cacheris' ruling, holding that while the Facebook page may have been a personal one, its "interactive component" gave it all the "hallmarks" of a public forum, including the stated purpose of the page as "public discourse."[4] In addition, the 4th Circuit held that because Randall sought to "suppress" Davison's opinion about corruption on the school board, her decision to ban him "constitutes black letter viewpoint discrimination."[5] The concern with such blocking was all the more problematic, the court said, because speech like Davison's "occupies the core of the protection afforded by the First Amendment."[6]

In July 2019, the 2nd Circuit echoed its 4th Circuit counterparts, albeit in a somewhat more high profile matter – that of seven individual Twitter users (represented by the Knight First Amendment Institute at Columbia University) who sued President Trump (along with other White House officials) after being blocked from his Twitter account after expressing views the president disliked.[7] The court affirmed the lower court ruling of U.S. District Judge Naomi Buchwald that President Trump had engaged in unconstitutional viewpoint discrimination by blocking such critics. Observing that "once the president has chosen a platform and opened up its interactive space to millions of users and participants, he may not selectively exclude those whose views he disagrees with." The court held that the First Amendment does not permit a public official who utilizes a social media account "for all manner of official purposes" to exclude persons from an otherwise open online dialogue "because they expressed views with which the official disagrees."[8] The court rejected the argument that the act of blocking users was merely private conduct, noting that the public presentation of the @realDonaldTrump Twitter account and the webpage associated with it "bear all the trappings

To date, however, the decisions that have come down have been overwhelmingly in favor of applying the First Amendment to the digital fora of Twitter and Facebook in the same way it applies to town halls and open school board meetings.

of an official, state-run account" and that the government itself conceded that, since President Trump's inauguration, the account had been used "as a channel for communicating and interacting with the public about his administration."[9]

The 2nd Circuit was, however, careful to state that its ruling did not consider or decide whether elected officials may constitutionally exclude persons from a wholly private social media account or whether private social media companies like Twitter and Facebook are bound by the First Amendment when policing their platforms. As far as the blocking of critics by President Trump, the court was decisive in its constitutional analysis. Observing the irony of having to confront this issue "at a time in the history of this nation when the conduct of our government and its officials is subject to wide-open, robust debate," the court ended its opinion with a sobering reminder that "if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less."[10]

While the 10th Circuit has yet to weigh in on the issue of elected officials blocking critics or deleting their comments, the neighboring 5th Circuit has. In its April 2019 decision in *Robinson v. Hunt County*, the 5th Circuit addressed whether a county sheriff in Texas had violated the free speech rights of an individual by deleting her comments and banning her from his office's public Facebook page.[11]

In January 2017, Hunt County Sheriff Randy Meeks' Facebook account included a post noting that, following a killing of a north Texas police officer, the sheriff's office had received a number of "anti-police calls" and several posts on its Facebook page from "people trying to degrade or insult police officers," prompting Meeks to remind visitors that "comments that are considered inappropriate will be removed and the user banned." Deanna Robinson posted a response saying that "insulting police officers is not illegal, and in fact has been rule (sic) time and time again, by multiple U.S. courts as protected First Amendment speech." Following her comment, it and other posts were removed and Robinson herself was banned.

Although the district court sided with the sheriff reasoning that removal of the comments could comply with Facebook's own policies, the 5th Circuit disagreed, ruling that deleting Robinson's comment and banning her from the Facebook page constituted viewpoint discrimination. Reinstating her constitutional claims and remanding her case to the trial court for reconsideration of Robinson's request for injunctive relief, the court held that "Official censorship based on a state actor's subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination."[12]

Another Texas case may someday add to this growing body of constitutional law. Texas House Speaker Dennis Bonnen is currently embroiled in a similar federal lawsuit brought by pro-Second Amendment activists. Lone Star Gun Rights Co-Founder Justin Delosh, Senior Editor Derek Wills and one other plaintiff claim that Bonnen blocked them from his Facebook page after they expressed disagreement over a gun bill in the 2017 legislative session. The bill in question concerned "constitutional carry," and would have allowed Texans to carry a firearm without a license. Bonnen, who opposed the bill, blocked the Lone Star Gun Rights members and posted about how "fringe gun activists" were harassing him and making death threats.[13]

The plaintiffs maintain that because they were blocked by the speaker, they could not respond to Bonnen's criticisms or refute his allegations of death threats. While they allege the blocking violates their First Amendment rights, Bonnen argues that free speech is not implicated because the Facebook page in question is Bonnen's personal campaign page rather than one maintained in his official government capacity. As we have seen in other cases, much will depend on how intertwined such a page is with Speaker Bonnen's official role.

While there is currently no Oklahoma federal case authority or 10th Circuit decision to guide us on how Oklahoma courts might treat the issue of elected officials blocking critics on social media or deleting their posts, Oklahoma has had an Open Records Act since 1959. While the original statute consisted of a single paragraph, it was amended and expanded considerably after two 1984 Oklahoma Supreme Court decisions.[14] This act, which does not classify computer software as a "record," does not address social media posts. While a 2002 Oklahoma Attorney General Opinion states that neither the Open Meeting Act nor the First Amendment "provides an opportunity for citizens to express their views on issues being considered by a public body," nevertheless "a public body may voluntarily choose to allow for such comments."[15] Given how courts across the country have held that public officials may not engage in viewpoint discrimination on government-created and maintained social media platforms, it seems likely that Oklahoma courts would similarly prohibit officials from blocking or banning their critics on social media.

As elected officials from the local school board to the Oval Office have recognized the power and reach of social media, the urge to block or silence their critics engaging with them or their platforms has followed. However, as court after court has acknowledged, such digital spaces need not be echo chambers where officials are insulated from criticism or accountability. As the U.S. Supreme Court noted in 2017's *Packingham v. North Carolina*, not only does the First Amendment apply to "commonplace social networking sites like Facebook, LinkedIn, and Twitter," but "to foreclose access to social media ... is to prevent the user from engaging in the legitimate exercise of First Amendment rights."[16]

ABOUT THE AUTHOR

John G. Browning is a partner in the Plano, Texas, office of Spencer Fane LLP, where he handles a wide variety of civil litigation and appeals in state and federal courts. The author of several books and numerous articles on social media and the law, he serves as an adjunct professor at SMU Dedman School of Law and is the chair of the State Bar of Texas' Computer & Technology Section.

ENDNOTES

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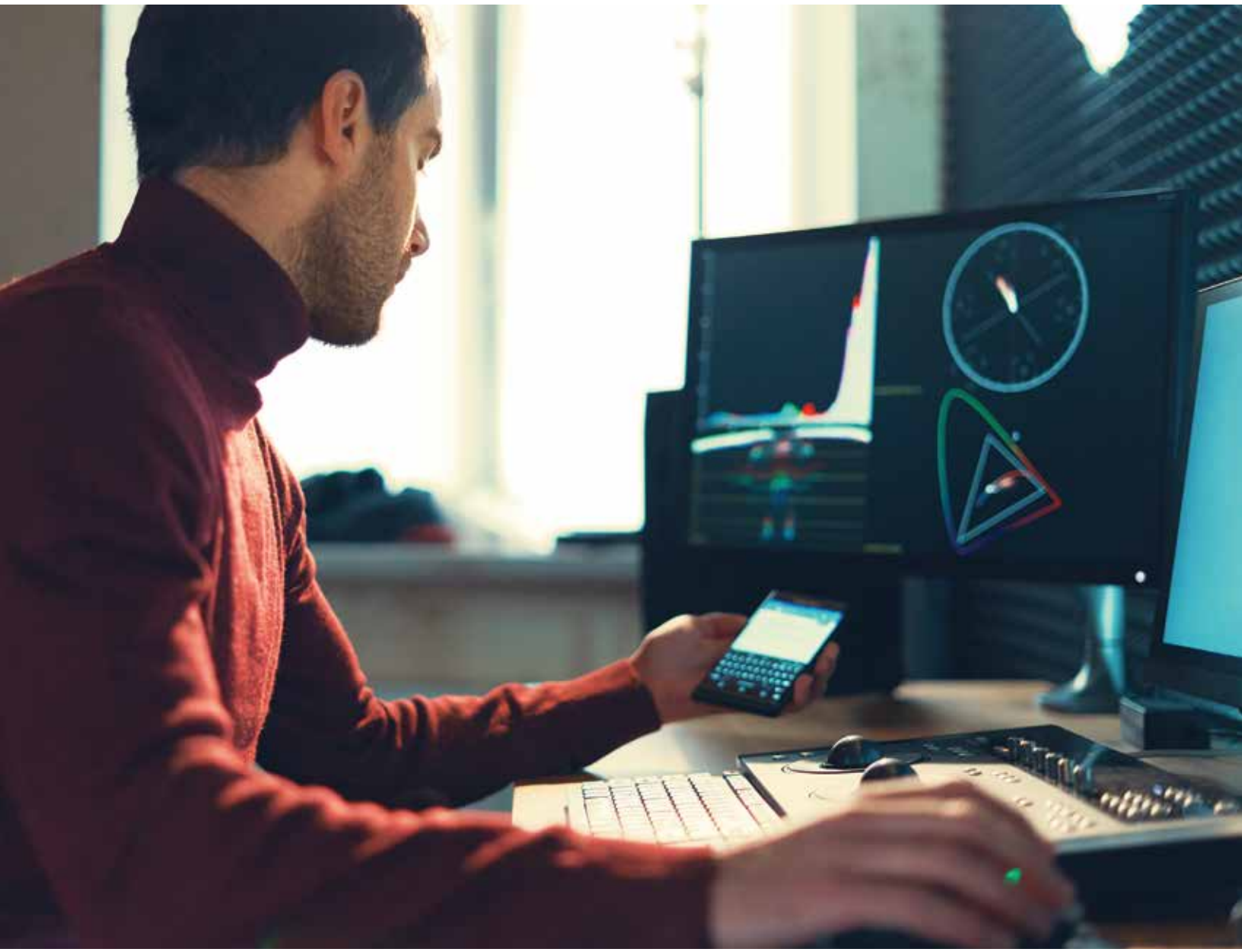
Smoke and Mirrors: Constitutional Ideals When Fact and Fiction Can't Be Separated

By Mbilike M. Mwafulirwa



IMAGINE YOURSELF – an upstanding and accomplished attorney or judge – surfing the internet in your down time. While doing so, you come across a video clip of a familiar person spewing deplorable things about your peers and admitting to serious crimes. To your horror, the person in the video looks exactly like you, they sound just like you and that person acts like you. The only thing you're certain of is it's not you and you do not have an identical twin – but for all you know, everyone you know believes it's you in the video clip. What then for you?

Welcome to the age of the deepfake. Like fake news, a deepfake is a more devilish and recent derivative of the technological advances of our time. Simply put, deepfakes are highly sophisticated, malicious and convincing fake audio and video that make any person appear to say or do something they did not.[1] When done right, the most sophisticated deepfakes can be nearly impossible to detect.[2] That should concern us all. Our legal system relies heavily on audiovisual evidence. Courts, for example, routinely resolve summary judgments based on video or audio evidence. Juries, courts recognize, find it difficult to overcome what they see or hear.[3] Thus, the key question becomes: What do we do when our legal system can no longer trust what we see or hear?

That important concern reverberates into the constitutional realm. To begin, an adverse judgment based on false evidence raises serious due process concerns. Likewise, the First Amendment comes into play in multiple ways. First, there are U.S. Supreme Court cases on content restrictions to deal with when any governmental solution for deepfakes is under consideration. Second, drawing a line between protected fake speech – for example parodies and satire – as opposed to deepfakes, requires careful analysis. Third, that analysis inevitably brings into sharp focus First Amendment and due process rights to petition for redress in the courts for malicious falsehoods. Finally, because deepfakes also affect national security and democratic processes, a word or two on the constitutional considerations on those subjects is warranted.

THE PROBLEM DEFINED – DEEPFAKES

Superimposing images and video and altering speech is not new in America. Traditionally, satire, parody and caricature edit, insert or superimpose deliberate exaggerations into real situations for humorous or critical effect.[4] Intellectual property law has, likewise, long recognized that to foster innovation, a fair degree of borrowing, improving and superimposing is inevitable.[5] In recent times, Hollywood has used superimposing technology in movies and television shows for entertainment. The classic movie *Forrest Gump*, for example, superimposed Tom Hanks' character in several important historical events,[6] and in this age of social media, most of us are familiar with Photoshop, a software that allows users to alter pictures artificially to improve them.[7]

Deepfakes are different. Deepfakes are highly believable fake video and audio created using advanced software for malicious ends.[8] The first traces of deepfakes superimposed celebrities' faces on pornographic actors.[9] Soon though, deepfakes charted into new terrain: a deepfake video of President Obama making a public service announcement about civility in public discourse. Then, a fake video of Mark Zuckerberg confessing that Facebook is misusing user data also surfaced.[10]

Worryingly, both the President Obama and Mark Zuckerberg videos were (to the naked eye) undetectable. As noted, when done right, sophisticated deepfakes are nearly impossible to detect even for the most adept among us. To compound matters, even with the aid of advanced forensic technology, detecting well-done deepfakes is a highly challenging endeavor.[11,12] What's more, unlike the human-generated spliced videos or edited pictures, films or audio of old, artificial intelligence largely generates deepfakes.[13] That helps explain the generally high-quality end product.

These days, celebrities and politicians are no longer the only targets of deepfakes. Private figures and businesses are now in the deepfake mix. Consider first the plight of private individuals. In June 2017, an app called DeepNude made headlines because its deepfake technology can turn any photo of a woman into a real-looking nude picture.[14] In fact, DeepNude's process is streamlined – just upload a photograph of any woman and the app's software does the rest.[15]

Experts have also recognized the acute risks that deepfakes pose for private businesses. Consider, for example, the night before a company undergoes its initial public offering (IPO). An IPO is the process by which a private company becomes publicly traded and, for many companies, is the Holy Grail. If a disturbing deepfake were to surface, for example, suggesting that a company or its leadership had engaged in serious criminal activity, it could seriously disrupt that process.[16]

Deepfakes also affect some of Americans' most fundamental "constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives."[17] In these politically divisive times, the potential for deepfake recordings to cause pandemonium is exceedingly high. As experts have recognized, for example, a highly offensive deepfake released when emotions and frustrations are at tipping point could cause certain groups to lose their cool.[18] Likewise, a deepfake of similar nature, released on the eve of a major election, depending on what was shared, could affect the outcome.[19]

The internet and social media have given deepfakes added bite. As the U.S. Supreme Court has recognized, most First Amendment activity these days takes place on the "vast democratic forums of the internet."[20] For that reason, within an instant, anyone can engage the world with any message. That is because "[s]ocial media offers 'relatively unlimited,' low-cost capacity for communication of all kinds."[21] Studies have also shown that when people correspond online (particularly on social media platforms), they are more likely to lie.[22] The impersonal nature of social media and the relative ease by which users can mask their identities empower people to say or do things online they would not do in real life.[23] This propensity to promote false online speech and personas only adds to the likely continued proliferation of deepfakes.

AUDIOVISUAL EVIDENCE AND THE ENIGMA OF DEEPFAKES FOR COURTS

In American courts, video and audio evidence has high currency. There is nothing more damning or clarifying than a video or audio clip that clears up what

happened.[24] The U.S. Supreme Court, for one, has shown itself receptive to that kind of evidence. In *Scott v. Harris*, for example, the court had to resolve a use of force civil case with resort to video evidence.[25] What makes *Scott v. Harris* remarkable is not so much its result; in Fourth Amendment cases, courts usually grant qualified immunity to police officers (and dismiss cases) unless they violated clearly established law.[26] Statistically, that has proven a high bar for plaintiffs to overcome.[27]

What stood out about *Scott v. Harris*, however, was the Supreme Court's near unquestioned embrace of video evidence. In resolving the summary judgment questions before it, the court "was happy to allow the video tape speak for itself."[28] The court adopted a new summary judgment rule when there was audiovisual evidence. When "opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version..."[29] Lower courts have extended *Scott* to other objective evidence like audio recordings and pictures.[30] Thus, audiovisual evidence has become dispositive in civil cases.[31]

Audiovisual evidence has also had a profound effect in criminal cases. From their own experiences, courts recognize that juries too are particularly susceptible to what they see and hear. When juries hear or see something from an audiovisual medium, it is hard to get them to see what else might be there.[32]

Therein lies the rub about deepfakes. Besides being highly sophisticated and convincing, when they're done right, as noted, deepfakes can be nearly impossible to detect.[33] That's been the concern of the federal law enforcement and national security agencies. As shown, courts have readily embraced audiovisual evidence.[34] As deepfakes are becoming even more sophisticated, the detection problems will likely become acute. So, if the very best players in internet, social media and law enforcement have not found a readily discernable way to detect deepfakes, how can courts do any better? That should concern us all.

THE CONSTITUTIONAL DIMENSIONS OF DEEPFAKES

Deepfakes affect both private and public interests. Thus, any searching comprehensive constitutional analysis must consider how deepfakes affect both. We turn to that analysis.

How Deepfakes Affect Private Interest

Because of First Amendment speech rights, "it is a prized American privilege to speak one's mind."[35] The freedom to speak our minds, the U.S. Supreme Court has noted, "is essential to the common quest for truth and the vitality of society as a whole."[36] Audiovisual data and software are forms of speech.[37] Recall, at their core, deepfakes are simply false data. The First Amendment does not generally protect defamation.[38] When false speech harms another, the law affords a remedy. In Oklahoma, a "man's good name and reputation is his most valuable personal and property right and one that no man may wrongfully injure or destroy without being held accountable..."[39] Below, we consider the most common remedies Oklahoma law provides a person who suffers a reputational harm.

Begin with defamation. The law of defamation protects reputations. That body of law provides a remedy when one person publishes falsehoods about another, without justification.[40] When the plaintiff is a public figure, the U.S. Supreme Court has added a judicial gloss; the person must show that the falsehood was made deliberately or with reckless disregard about its falsity.[41]

Consider next the Oklahoma false light tort. Although false light and defamation overlap in some respects, the two are also different. In false light claims, "actual truth of the statements is not necessarily an issue, [but] a false impression relayed to the public is."[42] Liability rests on publication of major misrepresentations of "character, history, activities or belief" that could be seriously offensive to a reasonable person.[43] Additionally, a plaintiff must show that the publication was made with knowledge of or reckless disregard of its falsity (the actual malice standard).[44] That standard – the Oklahoma Supreme Court has stated – "is a formidable one."[45]

Those who abuse others online fare no better. As the U.S. Supreme Court has made clear, "personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."[46] Understood in that sense, those who intentionally inflict emotional distress on others could also ordinarily be held liable.[47] But the U.S. Supreme Court's decision in *Snyder v. Phelps* may have cabined that rule: the court held that tort liability for intentional infliction of emotional distress is inappropriate when the offensive speech is about "a matter of public concern *at a public place*."[48] That matters because the Supreme Court's decision in *Packingham v. North Carolina* appears to have recognized that Facebook (and the internet generally) is a public place for exchange of speech.[49] If the target of the abuse is a public figure, the court has imposed First Amendment constraints.[50] To recover, a public figure plaintiff has to show 1) falsity in the communication; and 2) that falsehood was published with knowledge

that it was false or with reckless disregard of its truthfulness.[51]

Deepfakes rest on their weakest constitutional footing when they cause freestanding proprietary harms. Outside reputational and emotional harms, the U.S. Supreme Court has refused to apply the *New York Times v. Sullivan*, actual malice standards when a public figure plaintiff claims injury to property interests, as opposed to "feelings or reputation."[52] The court reiterated that important dichotomy when it denied relief to Rev. Jerry Falwell for injuries to his feelings and emotions.[53] In *Zacchini v. Scripps-Howard Broad. Co.*, the court permitted a plaintiff to recover for invasion of privacy for the misappropriation of a creative stunt methodology.[54] Thus, if a deepfake engaged in a *Zacchini*-like tort – that is, it targets an injured party's commercial interests – liability would be proper.

Deepfakes and the Public Interest: Governing Constitutional Considerations

The criminal law is a tool for vindicating the public interest.[55] In fact, "[o]ur entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed..."[56] That realization requires an analysis of deepfakes and prosecutions.

Justice Thurgood Marshall long ago observed, "It is the State that tries a man, and it is the state that must ensure that the trial is fair."[57] Beginning with *Brady v. Maryland*,[58] the U.S. Supreme Court requires prosecutors to disclose to a defendant evidence favorable to him when that evidence materially bears on guilt or innocence.[59] That is because the prosecutor's job, according to the U.S. Supreme Court, is to ensure that justice is done.[60] Against that background, the court has held that a prosecutor's use of evidence she knows is false violates the Due Process Clause.[61] In fact, that is also true if a prosecutor fails to correct testimony that she knows is false.[62]

Deepfakes will likely bring into sharp focus a prosecutor's knowledge of falsity. If, as noted, the prosecutor knows that material audiovisual evidence is false, then her use of it to secure a conviction violates the due process. Straightforward. But, as noted, when well done, the best deepfakes can be *nearly* impossible to detect for even the most adept professionals. So, under those circumstances, could there still be a due process violation? To begin, *nearly impossible does not mean impossible*. As a result, if a prosecutor is in a position where she should have known of the deepfake but did not guard against its use, then just as the Supreme Court treats other forms of false evidence in a similar posture, there should be a violation;[63] but if the prosecutor did not know, and even after exercise of diligence could not have known of the falsehood, some courts have refused to find a constitutional violation.[64] Nothing in principle prevents a court from subjecting deepfakes to this established analytical framework.

Criminalizing Deepfakes

Although the Supreme Court has held that false speech generally has no First Amendment protection, in *United States v. Alvarez*, the court cabined that rule.[65] In *Alvarez*, a fractured court held that a statute that criminalized speech only because it was false (without proof of attendant or likely harm to any person) was unconstitutional.[66] The court held that the Stolen Valor Act – the statute at issue – was a content restriction on speech, which are presumptively "invalid."[67]

Alvarez's rationale applies to deepfakes and social media postings. If someone generates false audiovisual speech online – for example, falsely claiming to have achieved certain feats of excellence or nobility – *Alvarez* would likely constrain the hard hand of the criminal law.[68]

The U.S. Supreme Court in *Beauharnais v. Illinois* and *Chaplinsky v. New Hampshire* has, however, upheld criminal laws that punish false and offensive words directed at a person or group that would tend to cause a breach of the peace or public disorders.[69] The court has extended the *New York Times v. Sullivan* actual malice requirement to criminal libel statutes protecting public figures.[70] If such narrowly tailored laws are still on the books, the criminal law could perhaps deal with deepfakes.

Experts have also recognized the potential for deepfakes to claim falsely or depict a public catastrophe or terrorist attack or the like – *i.e.*, the equivalent of falsely shouting fire in a crowded theatre and causing public panic.[71]

But, as noted, when well done, the best deepfakes can be nearly impossible to detect for even the most adept professionals.

As Justice Holmes wrote for the Supreme Court 100 years ago, "[t]he most stringent protection of *free speech would not protect a man in falsely shouting fire* in a *theatre* and causing a panic."[72] Justice Breyer's controlling concurring opinion in *Alvarez v. United States* (which Justice Kagan joined),[73] echoed Justice Holmes' position. He alluded to existing federal statutes and regulations that punish false statements about terrorist attacks, catastrophes or crimes.[74] Based on those rationales, some federal courts have, for example, upheld convictions under the federal Anti-Hoax Statute[75] based on Justice Holmes' false-fire-shouting rationale.[76] Under these circumstances, if a deepfake were to make false statements about terrorist attacks or public catastrophes causing significant public harm, criminal anti-hoax laws would likely apply.

CONCLUSION

Deepfakes are new phenomena that challenge settled expectations on what is real and what is not. Before, with the benefit of a trained eye or ear, it was easier to determine what was real and what was not. Not anymore. Even though the deepfake problem is new, as shown, the old tools that have traditionally dealt with false unprotected speech can provide redress. Until the deepfake technology identification dilemma is resolved, it will remain both a forensic and legal quandary. Experience teaches that people, no less the law, can't solve problems they can't define.

ABOUT THE AUTHOR

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The Role of State Constitutions in the Protection of Individual Rights

By Justice Clint Bolick and Judge Gerald A. Williams

A NATURAL TENSION EXISTS between our representative form of government and the need to constrain government power to protect individual rights. A written constitution can provide the best fortification against a government straying beyond its proper boundaries. Justice William O. Douglas stated, "The Constitution is not neutral. It was designed to take the government off the backs of people."[1] However, if our federal Constitution is interpreted in a way that inappropriately expands the role and scope of government power, then state constitutional provisions have the potential to fill the gap and ensure the rights of citizens "will not erode even when federal constitutional rights do."[2]

Perhaps ironically, one of the earliest proponents of the importance of state constitutional law was a U.S. Supreme Court justice. Justice William Brennan believed that state courts interpreting their own counterparts to the federal Bill of Rights guaranteed citizens of their states additional protections.[3] Another advantage is that, as times change, state constitutions are significantly easier to amend.

In addition to states using their own constitutions to define separate sets of constitutional rights, state courts can also interpret language in their own constitutions that is identical to our federal Constitution differently, as long as their interpretation provides more individual freedom than federal courts have allowed.[4] It is a one-way ratchet that should be very appealing to those advocating on behalf of individual rights.

This article will highlight some of the parallels and differences between Oklahoma's and Arizona's state constitutions in terms of an individual's right to bear arms, searches and seizures, tort claims for excessive force by law enforcement and freedom of speech. Arizona and Oklahoma were two of the last states to enter the union (48 and 47) and have comparatively recent state constitutions.

At the time it was written, Oklahoma's Constitution was the longest state constitution.[5] It is an extremely inclusive document.[6] For example, included are a constitutional right to hunt and fish[7] as well as specific standards for kerosene oil.[8] Oklahoma's Constitution existed and was considered when Arizona's Constitution was being written.[9] Some of the influence is quite apparent.

STATE VERSIONS OF THE SECOND AMENDMENT

Ariz. Const. Art. 2, §26

"The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men."[10]

Okla. Const. Art. 2, §26

"The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons."

It was not that long ago that there was a debate as to whether the Second Amendment, with its reference to a well-regulated militia, was really a reference to a collective right, meaning that people had a right to own a firearm only if they were in an organization similar to the National Guard. In 2008, the U.S. Supreme Court decision in *Dist. of Columbia v. Heller*, resolved that issue.[11] However, based on the language in their state constitutions, appellate courts in Arizona and in Oklahoma had already resolved the issue of an individual vs. collective right and instead were determining whether and when that individual right could be limited.

In 1999, the Supreme Court of Oklahoma examined a state statute that prohibited certain categories of individuals from obtaining a concealed handgun license, one of which was being arrested for a felony. In that case, the applicant, who had been arrested for a felony, was denied a handgun license even though he had been subsequently acquitted. The Oklahoma Supreme Court held that while there was no right to carry loaded weapons at all times in all circumstances, this statute, as applied to the applicant in this case, was unconstitutional because

Although Arizona's free speech provision is, by comparison, a model of brevity, both state constitutional protections are significantly broader than the familiar "Congress shall make no law" language in the First Amendment.

there was no rational basis for the restriction.[12] The majority noted "there exists no nexus or connection between appellant's arrest for arson conspiracy and any firearm."

That same year, an Arizona appellate court considered a similar issue but reached a different result. In that case, the defendant was charged with violating a Tucson ordinance that prohibited the possession of firearms in city parks. The trial judge granted the defendant's motion to dismiss, but the state appealed. In that case, the Arizona Court of Appeals acknowledged his individual right to bear arms, but held the ordinance constitutional because an individual's right to possess firearms for self-defense must be balanced against the government's duty to adopt reasonable regulations for the safety of its citizens.[13] "Moreover, his assertion that the city's action strips him of his ability to defend himself is severely undercut by the fact that he can readily avoid the burden … by simply walking around the park with his firearm, instead of through it."[14]

OKLAHOMA AND ARIZONA'S VERSION OF THE FOURTH AMENDMENT

While Oklahoma's Constitution follows the language of the Fourth Amendment,[15] Arizona's Constitution codifies an actual right to privacy by stating, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."[16] Arizona courts have applied this provision to protect against warrantless searches of homes, and a recent court of appeals decision has extended it to internet subscriptions. Relying on this language, an opinion from the Arizona Supreme Court provides an example of how a suspect can have enumerated rights under a state constitution that are arguably absent from the federal Constitution.

In *State v. Bolt*, after making several small marijuana purchases from a woman, agents arranged to meet her supplier, who was her brother.[17] During a transaction, the brother inadvertently named his supplier. The wholesale supplier was then placed under surveillance.

The brother was arrested and immediately began cooperating with the police. As agents were drafting an affidavit to seek a telephonic search warrant, they were notified by the agents watching suspect's house that a pickup truck had left. The case agent ordered that the truck be stopped and that the house be secured until a warrant could be obtained. After they had a warrant, both house and vehicle were searched. Large quantities of marijuana were found in both, and the suspect was convicted by a jury of felony possession and distribution of marijuana. The Arizona Court of Appeals affirmed the conviction.[18] The Arizona Supreme Court reversed.[19]

The Arizona Supreme Court held that securing the residence until a warrant could be obtained was the same as a seizure and it was therefore unconstitutional under Arizona's state constitutional right to privacy provision.[20] The majority opinion noted that no exigent circumstances were present because the individuals remaining in the house did not know that they were under police surveillance. As such, they would not be destroying evidence. The majority opinion explained the state constitutional right to privacy:

> Our constitutional provisions were intended to give our citizens a sense of security in their homes and personal possessions. It is impossible to reconcile that sense of security with the idea that the police may enter without warrant, inspect the premises, and hold everyone that they find until such time as they determine whether a warrant can be issued and brought to the home.[21]

In *Bolt*, the Arizona Supreme Court reversed a conviction that may have been upheld if only the U.S. Constitution had been applied to the facts of the case. While Oklahoma's Constitution follows the text of the Fourth Amendment, the Oklahoma courts have construed that identical language more broadly.

In *Bosh v. Cherokee County Bldg. Authority,* the Oklahoma Supreme Court held the Oklahoma's Constitution provided a private cause of action for excessive force by jailers even if the application of federal law would have resulted in a different conclusion.[22] The court in *Bosh* considered but disregarded federal law and wrote, "Under 42 U.S.C. §1983, *respondeat superior* does not serve as a basis for government liability. … However, Oklahoma is not bound by the constraints of federal law when determining whether the doctrine of *respondeat superior* serves as a basis for municipal liability under a cause of action for excessive force pursuant to the Okla. Const. art 2, §30. … The problems of federalism which preclude the application of *respondeat superior* to §1983 actions are obviously not present when the action is for a violation of a state's constitution."[23]

STATE CONSTITUTIONAL PROVISIONS ON FREEDOM OF SPEECH

Ariz. Const. Art. 2, §6
"Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

Okla. Const. Art. 2, §22
"Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libel, the truth of the matter alleged to be libelous may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous be true, and was written or published with good motives and for justifiable ends, the party shall be acquitted."

Although Arizona's free speech provision is, by comparison, a model of brevity, both state constitutional protections are significantly broader than the familiar "Congress shall make no law" language in the First Amendment. Before an action or restriction can be found unconstitutional under the U.S. Constitution, generally some type of state action is required because the federal Constitution only prohibits governmental infringement of individual rights. The free speech language in the state constitutions has no such requirement.

In *First American Bank & Trust Co. v. Sawyer,*[24] the Oklahoma Court of Appeals examined free speech in the context of a real estate dispute. The customer and his mother owned two houses on the same street in Lexington. The house number for one with the mortgage was 422, but the other, with a house number of 410, was owned free and clear.

The customer defaulted on the 422 house. A vice president at the bank purchased the home at a sheriff's sale. Unfortunately, the documents referenced the 410 house. He then invested $12,000 in repairs and in renovations to the 410 house. Litigation followed and the former bank vice president pled guilty to an unrelated federal criminal charge, but somehow, the customer's mother ended up losing her house.

The mother started peacefully picketing and distributing leaflets on the public sidewalk in front of the bank. She was not accused of trespassing, disturbing the peace or harassment. The bank's only objection was to the content of the flyers. The bank requested and received a restraining order prohibiting her from distributing the flyers.

The Oklahoma Court of Appeals analyzed the case in the context of free speech language in Oklahoma's Constitution. The opinion stated that while an injunction is discretionary, "freedom of speech is a constitutional guarantee."[25] The appellate court noted that the trial court had attempted to draft a narrow injunction that infringed on the mother's rights "as little as possible," but held that it was still an improper content-based prior restraint on speech under the state constitution.[26]

Arizona courts have also broadly interpreted the Arizona Constitution's free speech provision. In one such case, *Korwin v. Cotton,*[27] the City of Phoenix attempted to prevent a firearms training company from advertising their gun safety and marksmanship classes on city busses and bus stops.

The city's restrictions on advertising included a requirement that it is limited to commercial speech.

It objected to the content of the company's advertisement because it contained noncommercial political elements and because it failed to propose a commercial transaction. The Arizona Court of Appeals held that although the city's bus system was not a public forum, its restriction was unconstitutional as it was applied to the company.[28]

SOME FINAL THOUGHTS

Federalism, in the context of the dual sovereignty of state and federal governments, produces a balance of power that enforces freedom. Both the constitutions of Oklahoma and Arizona, in addition to supplementing the rights listed in the U.S. Constitution, provide a list of additional rights that are not documented in our federal Constitution.[29]

Among these are limits on government debt,[30] prohibitions on racial or gender preferences in government operations[31] and specific rights for victims of crime.[32] In addition, Oklahoma's Constitution contains a provision requiring members of the Legislature to disclose if they could personally benefit from a piece of legislation.[33] They are then prevented from voting on it.[34]

Whatever happens or fails to happen in our nation's capital, citizens can seek to limit government overreach and to make meaningful policy changes in state capitals. That is one of the many beauties of our constitutional republic.

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Clint Bolick is a justice on the Arizona Supreme Court. He previously served as vice president for litigation at the Goldwater Institute. He has authored numerous articles and has written 12 books including *Voucher Wars: Waging the Legal Battle Over School Choice* and *Death Grip: Loosening the Law's Stranglehold over Economic Liberty*. He also co-authored *Immigration Wars: Forging an American Solution* with Jeb Bush.

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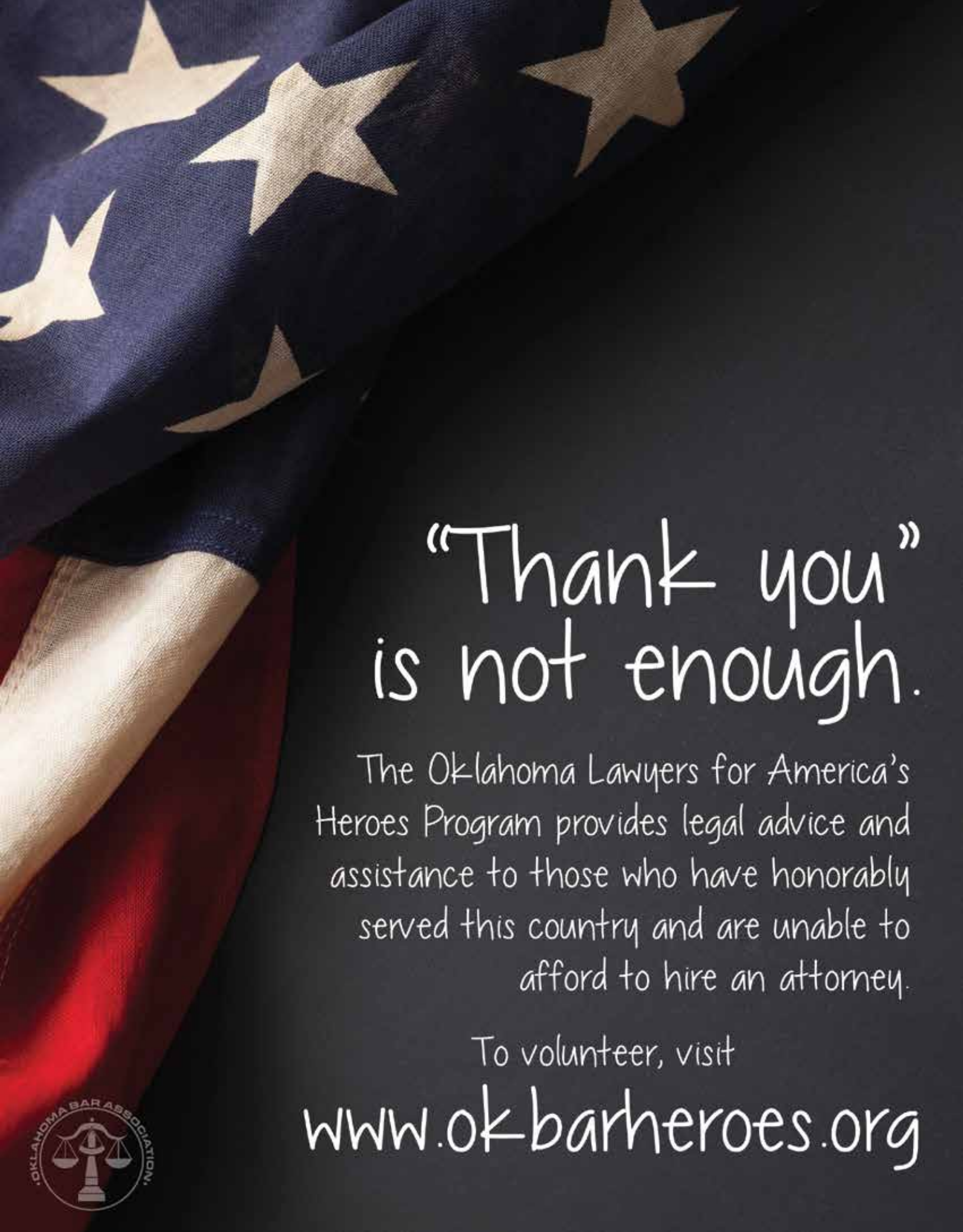
3. William J. Brennan Jr., "State Constitutions and the Protection of Individual Rights," 90 *Harv. L. Rev.* 489 (1977); *See also*, William J. Brennan Jr., "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights," 61 *N.Y.U. L. Rev.* 535 (1986).
4. *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, para. 171-73 (Ariz. 2019)(Bolick, J., concurring). *See generally*, David Schuman, "Using State Constitutions to Find and Enforce Civil Liberties," 15 *Lewis & Clark L. Rev.* 783 (2011).
5. John A. Fairlie, "The Constitution of Oklahoma," 6 *Mich. L. Rev.* 105 (1907).
6. Danny M. Adkison, *Oklahoma Constitution, Oklahoma Historical Society*, (Aug. 12, 2019, 9:22 a.m.), www.okhistory.org/publications/enc/entry.php?entry=OK036. "It will be your own fault if you do not frame the best constitution ever written," William Jennings Bryan admonished the delegates who met in Guthrie in 1906 to draft Oklahoma's Constitution. *Id.*
7. Okla. Const. Art. 2, §36.
8. Okla. Const. Art. 20, §2.
9. John S. Goff, *The Records of the Arizona Constitutional Convention of 1910*, 677.
10. The last clause prohibiting the formation of private armies was an apparent response to employerswho hired "goon squads" to prevent works from organizing for the purpose of collective bargaining. John D. Leshy, The Arizona State Constitution, 102 (2013).
11. 554 U.S. 570, 128 S.Ct. 2783 (2008)(held Second Amendment conferred and individual right to keep and to bear arms). *See also,* Randy E. Barnett, "Forward: Guns, Militias, and Oklahoma City," 62 *Tenn. L. Rev.* 443 (1995)(Introduction to Second Amendment Symposium Issue).
12. *State v. Warren*, 975 P.2d 900 (Okla. 1999).
13. *City of Tucson v. Rineer*, 971 P.2d 207 (Ariz. Ct. App. 1999).
14. *Id.* at 214. One of the most famous gun fights in history was triggered in part by a city ordinance in Arizona that made it unlawful for a person to carry a deadly weapon within the city limits without a permit. Gerald A. Williams, "Justice of the Peace Wells W. Spicer; Wyatt Earp, Doc Holliday, and the Tombstone Judge," *Arizona Attorney*, 12 (Oct. 2012).
15. Okla. Const. Article 2, §30.
16. Ariz. Const. Art. 2, §8.
17. *State v. Bolt*, 689 P.2d 543 (Ariz. Ct. App. 1983).
18. *Id.*
19. *State v. Bolt*, 689 P.2d 519 (Ariz. 1984).
20. *Id.* at 524.
21. *Id.* State constitutions might provide broader protection against the warrantless attachment of GPS devices than does the Fourth Amendment. *State v. Jean*, 407 P.3d 524, 546-47 ¶¶90-97 (Ariz. 2018) (Bolick, J., concurring).
22. 305 P.3d 994 (Okla. 2013). The holding in *Bosh* is limited and does not include the denial of medical care. *Barrios v. Haskell County Public Facilities Authority*, 432 P.3d 233 (Okla. 2018). *See also, Perry v. City of Norman*, 341 P.3d 689 (Okla. 2014)(Arrestee should have sought relief under State Claims Act). *See generally*, Nick Coffey, "Bosh and the Constitutional Cause of Action: The Corridor to Civil Liberties," 68 *Okla. L. Rev.* 621 (2015). A video of the assault in *Bosh* is available. www.newson6.com/story/16320948/booking-video-released-in-lawsuit-against-cherokee-county-jail.
23. *Id.* at 1003–04.
24. 865 P.2d 347 (Okla. Ct. App. 1993).
25. *Id.* at 353.
26. *Id.*
27. 323 P.3d 1200 (Ariz. Ct. App. 2014). *See also*, *Phoenix Newspapers, Inc. v. Otis*, 413 P.3d 692 (Ariz. Ct. App. 2018)(order precluding news agencies from disseminating name of death penalty prosecutor was unconstitutional prior restraint).
28. 323 P.3d at 1210–1211. The Arizona Supreme Court recently held that a city antidiscrimination ordinance, as applied to the owners of a faith-based custom wedding invitation business, unconstitutionally compelled speech. *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019). Although the case was also decided on other grounds, one justice wrote a separate concurring opinion analyzing the facts within the framework of the free speech provision of Arizona's Constitution. *Id*., at 927 (Bolick, J., concurring). *See also*, *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012)(tattoo artists who were denied city permit had constitutional free speech claim).
29. Toni McClory, *Understanding the Arizona Constitution*, 2 (2010).
30. Ariz. Const. Art. 9, §5; Okla. Const. Art. 10, §23.
31. Ariz. Const. Art. 2, §13; Okla. Const. Art. 2, §36A.
32. Ariz. Const. Art. 2, §2.1; Okla. Const. Art. 2, §34.
33. Okla. Const. Art. 5, §24.
34. *Id.*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Where to Draw the Line: Setting Legislative Districts After *Rucho v. Common Cause*

By Miles Pringle

GERRYMANDERING HAS BEEN A HOT TOPIC, and in June 2019 the U.S. Supreme Court issued a much-anticipated ruling in *Rucho v. Common Cause*.[1] The result was a 5-4 decision decreeing that "Partisan gerrymandering claims present political questions beyond the reach of the federal courts."[2] Rucho was part of ongoing challenges in North Carolina and Maryland. For example, in 2017 the Supreme Court issued an opinion finding that North Carolina had used race as a predominate factor in drawing its legislative districts in violation of the Equal Protection Clause.[3] Combining the two cases together in Rucho was particularly interesting because they involved gerrymandering from both Democrats (in Maryland) and Republicans (in North Carolina).

North Carolina legislators were very explicit that their motives in redrawing districts were entirely partisan. For example, North Carolina State Rep. Dave Lewis stated during a hearing, "I propose that we draw the maps to give a partisan advantage to 10 Republicans and three Democrats, because I do not believe it's possible to draw a map with 11 Republicans and two Democrats."[4] This statement proved prophetic as Republicans earned a 10-3 majority of North Carolina's U.S. representatives in 2016 and 2018 despite receiving 53% and 50% of the statewide vote in each of the elections.[5]

Writing for the majority, Chief Justice Roberts stated that Article III of the Constitution limits federal courts to deciding "controversies," which have been taken to mean only questions "historically viewed as capable of resolution through the judicial process."[6] Partisan gerrymandering, Justice Roberts observed, is not new, nor is frustration with it. "The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's districts against their candidates – in particular James Madison, who ultimately prevailed over fellow future President James Monroe."[7]

The court noted that, while Congress does have the right to regulate certain aspects of elections under the Constitution, other matters have been left to the states. Article I, Section 4 (Clause 1) of the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators" (*emphasis added*). History matters according to the court, and the framers "settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress… At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the framers had ever heard of courts doing such a thing."[8]

The *Rucho* court also discussed the difficulty in establishing a standard to apply in partisan gerrymandering cases, which has been a central issue in previous gerrymandering cases. For example, in 1986, a majority of the court agreed that a claim against Indiana Republicans for cracking and packing[9] was justiciable for violation of the Equal Protection Clause; however, "the Court splintered over the proper standard to apply."[10] The difficulty, the *Rucho* court opined, "in settling on a 'clear, manageable and politically neutral' test for fairness is that it is not even clear what fairness looks like in this context[, because] There is a large measure of 'unfairness' in any winner-take-all system."[11] Partisan gerrymandering claims, therefore, "invariably sound in a desire for proportional representation, but the Constitution does not require proportional representation, and federal courts are neither equipped nor authorized to apportion political power as a matter of fairness."[12]

Despite the forgoing, there are at least two scenarios involving congressional districting where federal courts may adjudicate. First, that districts cannot be drawn predominately on the basis of race.[13] Second, is a violation of the one person, one vote rule. This principle arose from a Tennessee case where the districts were based upon a 60-year-old census, resulting in citizens' votes in less populated districts having more "value" than those in more populated districts.[14]

Turning back to *Rucho*, the minority strongly disagreed with the ruling, referring to it as "tragic." Justice Kagan, joined by Justices Ginsburg, Breyer and Sotomayor, condemned partisan gerrymandering as having "debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction."[15] Justice Kagan went on

to state that "The core principle of republican government, this Court has recognized, is that the voters should choose their representatives, not the other way around."[16]

While the court determined that the Constitution does not allow federal courts to address partisan gerrymandering, the court did opine that the states may set such standards.[17] For example: Fla. Const., Art. III, §20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."); Mo. Const., Art. III, §3 ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency."); Iowa Code §42.4(5) (2016) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group."); Del. Code Ann., Tit. xxix, §804 (2017) (providing that in determining district boundaries for the state legislature, no district shall "be created so as to unduly favor any person or political party").

In response to the U.S. Supreme Court's decision, the plaintiffs in *Rucho* brought their claims to the North Carolina state courts. On Sept. 3, 2019, in *Common Cause v. Lewis*,[18] the Superior Court of North Carolina (Wake County) issued a 357-page opinion declaring that the legislative districts drawn by the Legislature were unconstitutional by violating North Carolina's Equal Protection Clause, the Free Elections Clause and the Freedom of Speech and Freedom of Assembly clauses. The basic principle underpinning the opinion can be summarized as "the Court finds that in many election environments, it is the carefully crafted maps, and not the will of the voters, that dictate the election outcomes in a significant number of legislative districts and, ultimately, the majority control of the General Assembly."[19] The *Lewis* court further noted that "the object of all elections is to ascertain, fairly and truthfully the will of the people," and that North Carolina has a compelling interest "in having fair, honest elections."[20]

In most states, the legislature draws the districts. Some states are supplemented in some capacity with advisory commissions (*e.g.*, Iowa and Maine), and in many states the governor may veto the maps (*e.g.*, Alabama, Texas and Kansas). A few states have implemented independent commissions – Arizona, California, Idaho and Washington. In 2015, the constitutionality of Arizona's commission was tested in front of the Supreme Court.[21] The main issue in that case was that the commission had been created by a ballot initiative of the people and not by the state Legislature. The Legislature argued that the formation of the commission violated the Elections Clause. In a 5-4 decision, in which Justice Kennedy joined the majority, the court determined that the commission's creation did not violate the Elections Clause because "the Clause surely was not adopted to diminish a State's authority to determine its own lawmaking processes."[22] Given Justice Kennedy's replacement by Justice Kavanaugh, it is not clear that this opinion would hold if challenged again.

In Oklahoma, the Legislature is granted the authority to draw districts, which the governor may veto. However, if the Legislature fails to do so within 90 days after convening the first regular session following a federal decennial census, then a commission is appointed to accomplish the task. The current form of this back-up commission stems from the aftermath of the 2000 Census, when the Legislature enacted a districting plan for both the Oklahoma House and Senate but failed to enact one for the U.S. House of Representative districts. As a result, a trial occurred in

Oklahoma County in which the governor's plan was enacted. The Oklahoma Supreme Court affirmed the trial court's opinion in *Alexander v. Taylor*.[23]

Again in 2011, in *Wilson v. Fallin*,[24] the Oklahoma Legislature's plan was challenged and reviewed by the Oklahoma Supreme Court. The Oklahoma Supreme Court did look to guidelines set by the U.S. Supreme Court when analyzing the challenge in *Wilson*.[25] The *Wilson* court also referenced previous federal challenges to Oklahoma's districts, but court did not address partisan gerrymandering.[26]

Thus, the current rules of the road for drawing legislative maps are: 1) one person, one vote (*i.e.*, districts should have the same number of people); 2) race cannot be a predominate factor in setting boundaries; and 3) look to state law on the procedure of how districts are drawn. Political gerrymandering has been held to not violate the federal Constitution, but it may violate a state constitution.

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ENDNOTES

1. 139 S. Ct. 2484 (2019).
2. *Rucho*, 139 S. Ct at 2487.
3. *Cooper v. Harris*, 137 S. Ct. 1455 (2017) ("The Equal Protection Clause of the Fourteenth Amendment prevents a State, in the absence of 'sufficient justification,' from 'separating its citizens into different voting districts on the basis of race.'").
4. *See* Nilsen, Ella and Golshan, Tara, "A North Carolina court just threw out Republicans' gerrymandered state legislature map North Carolina's maps are horribly gerrymandered. This could have big implications for other states, too." *VOX*, Sept. 3, 2019.
5. Allegations of fraud required a special election in North Carolina's 9th Congressional District.
6. *Rucho*, 139 S. Ct. at 2493-94.
7. *Id.* (internal citations omitted).
8. *Id.*, 139 S. Ct. at 2496.
9. A "cracked" district is one in which a party's supporters are divided among multiple districts, so that they fall short of a majority in each; a "packed" district is one in which a party's supporters are highly concentrated, so they win that district by a large margin, "wasting" many votes that would improve their chances in others. *Rucho*, 139 S. Ct. at 2492.
10. *Id.*, 139 S. Ct. at 2497; *discussing Davis v. Bandemer*, 478 U.S. 109, 116-117, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986) (plurality opinion).
11. *Rucho*, 139 S. Ct. at 2500.
12. *Id.*, at 2484.
13. *Id.*, at 2496.
14. *Id.*, at 2496 ("such a claim could be decided under basic equal protection principles"); *discussing Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962).
15. *Rucho*, 139 S. Ct. at 2509.
16. *Id.* (internal quotation marks omitted); citing *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S. Ct. 2652, 192 L. Ed. 2d 704, 736 (2015).
17. *Rucho*, at 2508.
18. 2019 N.C. Super. LEXIS 56.
19. *Id.* at *9.
20. *Id.*; citing *Hill v. Skinner*, 169 N.C. 405, 415, 86 S.E. 351, 356 (1915); also *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 840 (1993).
21. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).
22. *Id.*, at 2677.
23. 2002 OK 59, 51 P.3d 1204.
24. 2011 OK 76, 262 P.3d 741.
25. *Id.*, at ¶¶11-13.
26. *Id.*; citing *Reynolds v. State Election Bd.*, 233 F.Supp. 323 (1964); *Ferrell v. State of Oklahoma*, 339 F.Supp. 73, 76 (1972).

Caution: Approaching the Symbolic Limits of the Establishment Clause

The *Lemon* Test Sours on Symbols

By Micheal Salem

Photo Credit: Renee Green Productions, which has created a documentary titled *Save the Peace Cross* about the Bladensburg WWI Memorial Peace Cross. For more info visit www.SaveThePeaceCross.com.

WHEN THE POWER, PRESTIGE AND FINANCIAL SUPPORT of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.[1]

For over half a century, the rationale of Justice Black's opinion in the New York Regents' Prayer case has stoked controversy with its mandate of strict government neutrality toward religion. *Engel* was, and has remained, very unpopular[2] and led many to conclude Justice Black's opinion was composed out of hostility to religion. The historical record is to the contrary, and the very language quoted above illustrates Black's deep reverence for religious belief. The overwhelming evidence is that Black's view of strict separation of church and state grew out of his Southern Baptist religious beliefs[3] where separation was a longstanding doctrine, and after *Engel* was decided, many religious leaders welcomed and supported Justice Black's strict formulation.[4]

Nowhere has this controversy over religious neutrality been more self-evident than in legal cases involving the use of religious symbols by government or governmental entities. This controversy over symbols raises tough questions for courts keenly aware such cases are unpopular to a vast majority of the population. Some defend the use of holy symbols or references in government ceremony as mere ritual – a form of "ceremonial deism"[5] devoid of religious meaning. However, the term ignores Justice Black's warning

that the use of religious symbols in such a casual manner drains them of the very religious significance which gave them meaning in the first place. With this argument, the sacred becomes profane.

Certainly, some governmental uses of religious identifications are unavoidable and reasonable, such as the names of towns with origin stories of longtime religious meaning or simple appropriation of biblical names for locations.[6]

With a recent case of the U.S. Supreme Court, the controversy of government use of religious symbols continues unabated, and it seems likely that even with seven separate opinions the court has confirmed that the test from *Lemon v. Kurtzman*[7] (*Lemon* test) will no longer apply to Establishment Clause[8] violations alleged when government uses religious symbols. Instead, the court will balance context, history and tradition.[9]

American Legion challenged the "Bladensburg Peace Cross" war memorial, a 32-foot tall "Latin" or "Christian" cross.[10] It was erected as a memorial monument after World War I and eventually acquired and maintained by the local government.

The court's majority opinion, that the cross monument did not violate the Establishment Clause, did not emerge easily, consuming 87 pages of the U.S. reports and seven different opinions by the justices.

FACTS AND PROCEDURAL HISTORY[11]

The American Humanist Association (AHA) and three individuals[12] challenged on Establishment Clause grounds the Bladensburg Peace Cross constructed on public property in the middle of a highway median in Prince George's County, Maryland. It was apparently assumed from the beginning by the proponents that the monument would be built on public property.[13] Planning commenced, and funds were raised by the "Calvary Cross Memorial Committee"[14] beginning in 1918. When funding difficulties arose, the project was taken over and completed by the American Legion which then included its emblem displayed at the center of the cross. The pedestal on which the cross sits has a bronze plaque that lists the names of 49 soldiers from the county killed in the war.[15]

The cross was completed in 1925. The dedication of the cross included an invocation by a Catholic priest and a benediction by a Baptist minister.[16] Over the years the cross hosted numerous events honoring veterans as well as religious services.[17]

Monuments honoring veterans of other military conflicts were added in a park near the cross.[18] As urban growth continued, the location of the cross became a busy intersection and it was acquired by the Maryland-National Capital Park and Planning Commission (commission) in 1961. Public funds were used to maintain the cross after its acquisition by the commission.[19] The American Legion reserved the right to continue use of the site for ceremonies.[20]

The AHA sued in 2014, contending the presence of the cross on public land and its maintenance by the government violated the Establishment Clause. The American Legion intervened to defend the cross and its placement. The district court granted summary judgment to both the commission and the American Legion. The district court applied the *Lemon v. Kurtzman* test[21] and the test of the separate concurring opinion of Justice Breyer in *Van Orden v. Perry*.[22]

The 4th Circuit reversed, holding that AHA had standing and analyzed the cross under *Lemon*, concluding that although there was a secular purpose for displaying the cross, the historical meaning and physical settings overshadowed its secular purpose. The circuit also found that a reasonable observer would conclude that the primary effect of the cross was an endorsement of religion, there was an excessive entanglement of religion and government in that the commission owned and maintained the cross which was displayed on government property and the cross dominated its surroundings.[23]

THE DECISION IN FAVOR OF CONSTITUTIONALITY OF THE BLADENSBURG MONUMENT

The Supreme Court reversed the 4th Circuit, 7-2, finding the cross constitutional. Justice Alito's plurality opinion[24] begins with a discussion of the decisions of the district court and court of appeals and their application of the *Lemon* test. He notes its use has been criticized and that, in some cases, the court had not applied *Lemon* because it presented "daunting problems" and shortcomings in cases such as this one. As a "great array of laws and practices came to the Court, it became more and more apparent that the *Lemon* test could not resolve them."[25] Justice Alito did not apply *Lemon*, even while not expressly repudiating it, but instead appeared to narrow the circumstances in which it would be applied, noting criticism of it and occasions when the Supreme Court did not use it.[26]

First, Justice Alito acknowledged the difficulty in identifying the original purpose of symbols or practices established years ago, and the problem that those purposes multiply, and/or become obscure, or evolve as time goes by.[27] While there was fairly clear evidence in the record of the purpose and choice of the Bladensburg Peace Cross as a war memorial, Justice Alito instead chose to focus on

the facts of *Salazar v. Buono*[28] – the case of a cross constructed in the Mojave Desert more than 70 years earlier by a small group of veterans where the record was sparse as to events and motives.[29]

"Second, as time goes by, the purposes associated with an established monument, symbol, or practice often multiply."[30]

Third, just as purpose can change over time, the message conveyed can also change as these religious expressions become embedded features whose significance becomes independent of their religious origins, such as the names of towns and cities.[31]

Finally, Justice Alito determined that with passage of time, a religious symbol becomes so imbued with familiarity and multiple purposes of historical significance that removing it no longer appears to be a neutral act.[32]

Justice Breyer, joined by Justice Kagan, wrote separately to affirm his prior concurring opinion in *Van Orden v. Perry*,[33] that there is no "single formula" as a rule of decision, and that the review should determine if the symbol or practice meets the objectives of the religion clauses, "assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its 'separate spher[e].'"[34] He concluded there was evidence of a secular motive and no effort to disparage or exclude a religious group and that a lack of public outcry over the years was not due to a "climate of intimidation." The case might be different if evidence showed "the organizers had 'deliberately disrespected' members of minority faiths or if the Cross had been erected only recently, rather than in the aftermath of World War I" in light of "greater religious diversity today" and divisiveness that a contemporary "religious display" might cause.[35]

Justice Kavanaugh separately concurred to point out the court no longer applies *Lemon*, but used a "history and tradition test" in evaluating the constitutionality of the cross.[36] He identifies five "relevant categories of Establishment Clause cases"[37] concluding that *Lemon* does not explain any of them and is no longer "good law."[38]

Although joining the majority decision in part, Justice Kagan did not agree that *Lemon* is no longer valid as she considered a "focus on purposes and effects is crucial in evaluating government action in this sphere ... on a case by case basis."[39]

Justice Thomas questioned the incorporation of the Establishment Clause against the states and that it might be limited "to 'law[s]' enacted by a legislature." However, even if the Establishment Clause went beyond "laws," the cross "does not involve the type of actual legal coercion that was a hallmark of historical establishments of religion."[40]

Justice Gorsuch, joined by Justice Thomas, would deny the AHA standing to sue on an "offended observer" basis.[41]

THOUGHTS ABOUT *AMERICAN LEGION*

Lemon was an aggregation of tests applied in prior cases and offered a useful distillation of the protections of the Establishment Clause with an application based on enforced neutrality. However, prior to incorporation of the Establishment Clause against the states in *Everson v. Board of Ed. of Ewing*[42] government made decisions about religious preferences based upon choices selected by the majority. At the time the Bladensburg Cross was designed and built, the Establishment Clause only bound the federal government and had not yet been applied to the states under *Everson*.

> Certainly, some governmental uses of religious identifications are unavoidable and reasonable, such as the names of towns with origin stories of longtime religious meaning or simple appropriation of biblical names for locations.

So, what is Justice Alito saying when he says *Lemon* does not work in some instances because of "daunting problems?" One factor may be that *Lemon* leads to conclusions that overturn decisions or practices that arose prior to *Everson*, results that some of the justices apparently simply do not agree should change.

Judges or justices may simply accord less concern about the removal of a longstanding religious monument than maintaining neutrality. To the modern Supreme Court, religious minorities must simply "develop a thicker skin" when confronted by government sponsored religious symbols preferred by the majority.[43]

The reality is that *Lemon* is not very different from many other constitutional tests which result in 5-4 decisions. Why does Justice Alito think evaluating a symbolic object many years after its construction involves unique difficulties in discerning its original meaning or purpose?[44] What is the difficulty in finding the original meaning and purpose of a monument constructed long ago for a court composed in part of "originalists" who claim the capability of finding facts of original intent well over 150 years after the creation of a "dead Constitution" and its Civil War amendments?[45] At least four members of the present court identify themselves as "originalist" in part. Yet, even though we have considerable information about the "original intent" of the Constitution, justices also make considered judgments about the original meaning of old statutes with much less "history" than the Bladensburg Cross.

As previously noted, the retreat from *Lemon* may simply be that it presents results with which the justices disagree because they are unpopular. Yet, an unfavorable personal view of a case result is not supposed to be part of judicial decision making as the writings of some justices have emphasized. Both Justice Scalia and Justice Gorsuch have written that a judge will occasionally render a decision that he or she does not like and will personally disagree with the holding.[46]

A different question that arises for originalists is that considering "history and tradition," how does a governmental religious display become "more constitutional" with the passage of time? In reality, isn't this a variation of the "reasonable observer" factor of the "effect" prong of *Lemon*?

This leads to the most perplexing part of the plurality opinion: the Catch 22 holding that over time the religious significance of the cross fades practically into invisibility until its removal is sought, and then, because the cross is a religious symbol, its removal is not a neutral act but instead signifies hostility to religion. Justice Alito sees a violation of the First Amendment for those opposed to removal of the cross, while he detects no violation for those who seek its removal.

Justice Alito acknowledges the cross is a "preeminent Christian symbol,"[47] yet finds that this "preeminent symbol of Christianity" has become secular?[48] Only painters and justices can turn black into white.

While in theory this constitutional principle could be applied to any religious symbol, historically it will most frequently protect Christian symbols since those are part of the dominant religious narrative in the history of this country. Meanwhile, the "history" of public symbols of religions of believers other than Christians will not merit consideration because they have no similar history.

Finally, a Christian cross does not equally honor non-Christian war dead as explained in the AHA BIO Cert., which notes, for example, the "3,500 Jewish soldiers [who] gave their lives for the United States in World War I."[49] The Supreme Court's holding in *American Legion* expects Jewish and other non-Christian war veteran organizations to gather at a Christian cross to honor their dead.

As for Justices Gorsuch and Thomas, would they deny Jewish veterans access to the federal courts if the only standing they possess is an "offensive" encounter with a government religious symbol used to honor Jewish war dead that is incongruent with their religious beliefs? If "offended observer" status is insufficient to enforce the Establishment Clause, what is to prevent government from all manners of violations of adoption of religious practices? Who could stop the Regents' Prayer in *Engel v. Vitale*?

CONCLUSION

In an increasingly pluralistic society, protecting the values of the Establishment Clause can be made more certain by following neutrality, not acquiescence.

By recognizing the difficulty of unpopular decisions, the Supreme Court's struggle to find the appropriate tests for Establishment Clause violations may likely continue to lead its decisions away from the neutrality of Justice Black's *Engel* decision. Government will more readily bend to the popular will of a dominant religious population and, in effect, force dissenting citizens, through the expenditure of tax dollars, to join in a "tithe" for religious symbols, activities or practices with which they disagree.

Thomas Jefferson noted in his autobiography that tax support of the established Anglican Church in Virginia was a "spiritual tyranny" imposed on citizens who were not members.[50] Financial support of the Bladensburg Cross certainly looks like such a "tithe."

In *American Legion*, the Supreme Court encountered a clearly religious monument constructed long before the modern enforcement of civil

rights laws. The determination of the constitutionality of the Bladensburg Cross was an acknowledgment by the court that a cross that time-travels to the present from a much different past will eclipse the rights of minority religious believers.

ABOUT THE AUTHOR

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ENDNOTES

1. *Engel v. Vitale*, 370 U.S. 421, 431-32 (1962) (Op. Justice Black).

2. Corinna Barrett Lain, "God, Civic Virtue, and the American Way: Reconstructing Engel," 67 *Stan. L. Rev.* 479, 481-83 (March 2015).

3. Hugo Black and Elizabeth Black, *Mr. Justice and Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black* 93 (1986) ("Hugo went on to say he was a Baptist; his father was a Baptist; his grandfather was a Baptist; his grandmother was a Baptist."). Black embraced religious traditions from Baptist and Unitarian beliefs. *Id*.

The phrase, "wall of separation between Church and State" came from Jefferson's letter to the Danbury Baptists in 1802. Jefferson was preaching to the choir, essentially telling them what they wanted to hear. www.loc.gov/loc/lcib/9806/danpre.html (last visited 1/10/2020).

Some authors have identified this separation tradition as existing more than 300 years prior to *Engel*. John C. Jeffries Jr. & James E. Ryan, "A Political History of the Establishment Clause," 100 *Mich. L. Rev.* 279, 327 (2001).

Jeffries and Ryan also identify the separation requirement as primarily financial, while more tolerant toward religious exercise in schools. *Id*.

4. "[T]he vast majority of Protestant leaders and organizations announced their support for excluding official prayer and Bible readings from the public schools." Jeffries and Ryan, 100 *Mich. L. Rev.* at 327. Many religious leaders signed statements supporting the decision. *Id*., n. 228. The Southern Baptist Convention issued a statement "thank[ing] the Supreme Court for this decision simply because such a required prayer is using the government to establish religion." *Id*., n. 225. Editorials supporting *Engel* were published in 1962 in both the conservative *Christianity Today* and the liberal religious periodical *The Christian Century*. *Id*., n. 227.

In the early 1980's while working on a church-state case, this author had the opportunity to talk on the telephone with Dr. Herschel Hobbs, pastor of the First Baptist Church in Oklahoma City and president of the Southern Baptist Convention from 1961 to 1963 during the time of the *Engel* decision. He said he heard about *Engel* while returning to Oklahoma on a flight and obtained a copy after his arrival and read it. He commented that Black's opinion read like "regular Baptist doctrine."

5. The first use of the term "ceremonial deism" in a Supreme Court opinion was a dissenting opinion by Justice William Brennan in *Lynch v. Donnelly*, 465 U.S. 668, 716, 104 S. Ct. 1355 (1984). Brennan referenced the term used by Dean Eugene Rostow of the Yale Law School that described certain references such as "God" in the Pledge of Allegiance as expressions that "have lost through rote repetition any significant religious content." *Id*.

6. Examples include St. Paul, Minnesota; Bethlehem, Pennsylvania; St. Charles, Missouri; Corpus Christi, Texas (Body of Christ); San Jose, California (St. Joseph); San Francisco, California (St. Francis); San Juan, Puerto Rico (St. John); Santa Fe, New Mexico (Holy Faith).

A less than exhaustive list of names of towns and places from the Bible is available on Wikipedia: en.wikipedia.org/wiki/List_of_biblical_place_names_in_North_America (last visited 1/10/2020).

There is divided evidence about how Los Angeles (City of Angels) got its name, but while a previous longer name appears disputed, it eventually took a shortened form for which we must give thanks, especially when addressing letters:

> Los Angeles historian Doyce B. Nunis Jr. presented one argument that ... the name of the town was *El Pueblo de la Reyna de los Angeles* meaning "The Town of the Queen of Angels." As evidence, Nunis presented maps dated a few years after the city's founding.
>
> The archivist for the Archdiocese of Los Angeles, Monsignor Francis J. Weber, argued that the name of the city was closer to the name of the river. He claimed that the city was called *El Pueblo de Nuestra Señora de los Angeles de Porciúncula* meaning "The Town of Our Lady of the Angels of Porciúncula."
>
> Regardless of the origin of the city's name, it was eventually shortened to the City of Los Angeles, a title it has retained since its incorporation in 1850.

www.worldatlas.com/articles/wheredidlosangelesgetitsname.html (last visited 1/10/2020).

7. *Lemon v. Kurtzman,* 403 U.S. 602, 612-13, 91 S.Ct. 2105 (1971).

8. The Establishment Clause of the First Amendment provides, "Congress shall make no law respecting an establishment of religion ..."

9. *American Legion v. American Humanist Ass'n*, 588 U.S. ___, 139 S. Ct. 2067 (2019) (American Legion).

10. A "Latin" cross is "a cross whose base stem is longer than the other three arms." *Harris v. City of Zion*, 927 F.2d 1401, 1403 (7th Cir. 1991), *reh. den*. 934 F.2d 141 (7th Cir. 1991), *cert. den*. 505 U.S. 1229, 112 S.Ct. 3054 (1992).

See American Humanist Ass'n v. Md.National Capital Park & Planning Comm'n, 874 F.3d 195, 20607 (4th Cir. 2017):

> The Latin cross is the "preeminent symbol of Christianity." *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004) (internal quotation marks omitted); *see Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995); *Gonzales v. N. Twp. of Lake Cty*., 4 F.3d 1412, 1418 (7th Cir. 1993); *Murray v. City of Austin*, 947 F.2d 147, 149 (5th Cir. 1991); *ACLU v. Rabun Cty. Chamber of Commerce, Inc*., 698 F.2d 1098, 1110 (11th Cir. 1983).

Its sectarian significance is obvious as the justices have acknowledged. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 776 (1995) (O'Connor, J., concurring) ("the cross is an especially potent sectarian symbol"); Justice Souter did the same. 515 U.S. 792. (Souter, J., concurring) (the cross is "the principal symbol of Christianity").

The Latin cross is also a proselytizing symbol. *See County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring and dissenting) (the Latin cross is a "proselytiz[ing]" Christian symbol). Its selection as a government choice is a specific expansion of sectarian preference.

See, *American Legion* (Ginsburg dissenting), 139 S. Ct. at 2108, n. 10. citing *Gonzales*, 4 F.3d at 1418 ("[W]e are masters of the obvious, and we know that ... the Latin cross ... is '[the] unmistakable symbol of Christianity as practiced in this country today.'" (quoting *Harris v. Zion*, 927 F. 2d 1401, 1403 (7th Cir. 1991)).

11. Court filings and briefs in the Supreme Court referenced in this article as well as other resources can be located on *SCOTUSblog*: www.scotusblog.com/casefiles/cases/theamericanlegionvamericanhumanistassociation/ (last visited 1/10/2020).

The Supreme Court Docket for No. 17-1717 is at: www.supremecourt.gov/docket/docketfiles/html/public/171717.html (last visited 1/10/2020).

A companion appeal from the Maryland-National Capital Park Commission was consolidated with *American Legion* for briefing and oral argument. *MarylandNational Capital Park and Planning Commission v. American Humanist Association*, No. 18-18. The SCOTUSBlog case page is here:www.scotusblog.com/casefiles/cases/marylandnationalcapitalparkandplanningcommissionvamericanhumanistassociation/ (last visited 1/10/2020).

After consolidation, subsequent filings were made in No. 17-1717.

12. The three individuals are not identified in the Supreme Court opinion but were identified in the 4th Circuit's decision as Steven Lowe, Fred Edwords and Bishop McNeill and described as "nonChristian residents of Prince George's County." *American Humanist Ass'n*, 874 F.3d at 202.

13. Respondent AHA Brief in Opposition to Cert. (AHA BIO Cert.), p. 6 ("...the government owned the Cross from the outset. The Cross was erected on Town property, with the Town's approval, then taken over by the State Roads Commission for highway expansion, and then transferred to the Commission in 1960 for the sole purpose of 'future repair and maintenance.'").

14. The full name of the committee is never used in any of the opinions of the courts. The AHA alleged this was its name and referenced the Joint Appendix at J.A.1118. (AHA BIO Cert., p. 6). AHA said the purpose of the cross was always to be a memorial in the likeness of the Cross of Calvary as described in the Bible. *Id*.

The 4th Circuit said "local media described the proposed monument as a 'mammoth cross, a likeness of the Cross of Calvary, as described in the Bible.'" *American Humanist Ass'n*, 874 F.3d at 200.

The only reference to "Calvary" in the majority opinion of the Supreme Court is to the keynote speech at the time of dedication by Rep. Stephen W. Gambrill, who referenced the "token of this cross, symbolic of Calvary," to "keep fresh the memory of our boys who died for a righteous cause." *American Legion*, 139 S. Ct. at 2077.

15. *American Legion*, 139 S.Ct. at 2077.

16. *American Legion*, *Id.*

17. Justice Alito does not mention religious services even though the district court found evidence religious services occurred at the cross. *American Humanist Ass'n v. Md.National Capital Park & Planning Comm'n*, 147 F. Supp. 3d 373, 379 n. 5 (D. Md. 2015). The 4th Circuit

found Sunday worship services had occurred at the cross. *American Humanist Ass'n*, 874 F.3d at 201. ("Nothing in the record indicates that any of these services represented any faith other than Christianity.").

18. Justice Alito's opinion points out that because the cross' location is on a traffic island, the closest war memorial is 200 feet away and across the road. *American Legion*, 139 S.Ct. at 2077-78. Thus, the cross sits in isolation on the island with the nearest monument a distance over six times the height of the cross.

19. Besides the maintenance costs such sites accrue, AHA claims the county spent $100,000 in 1985 for the renovation of the cross which resulted in a "Rededication Ceremony" to all war veterans. AHA BIO Cert., p. 6. AHA estimates a total of a $250,000 has been spent for cross maintenance. AHA BIO Cert., p. i ("Questions Presented").

Besides that 1985 expenditure, respondents detail the necessity of more expenditures needed to prevent the apparent deterioration of the cross:

> In 2008, the Commission set aside $100,000 for substantial modifications because the Cross is "rapidly deteriorating" with large chunks falling off, even posing a safety hazard.
> In 2009, the Commission reported: "There are two cracks that are getting worse which potentially will cause a face of the [Bladensburg] Cross to fall off."
> - - - - - -
> A 2010 Commissionfunded report referred to the Cross as a "public eyesore seen by hundreds of passing motorists each day."

AHA BIO Cert., pp. 11-12.

20. *American Legion*, 139 S.Ct. at 2077-78. Logically, like any other public park, the space would be available to the public, including the American Legion.

21. In its original form, *Lemon* proposed a three-part test for government action said to violate the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. at 612-13.

There have been some variations of *Lemon*, with the best-known version a later separate concurring opinion by Justice O'Connor which added whether a "reasonable observer evaluates if the challenged governmental practice conveys a message of endorsement of religion." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 630, 109 S. Ct. 3086 (1989) (O'Connor, J., concurring in part and concurring in judgment).

22. *Van Orden v. Perry*, 545 U.S. 677, 698-701, 125 S. Ct. 2854 (2005). In *Van Orden*, Justice Breyer proposed another variation applied to religious symbols intended to remain faithful to the underlying purposes of the Establishment Clause: to assure the fullest possible scope of religious liberty and tolerance for all, to avoid the religious divisiveness that promotes social conflict and to maintain the separation of church and state "that has long been critical to the 'peaceful dominion that religion exercises in [this] country...'" This is a fact-intensive analysis without an exact formulation.

23. *American Humanist Ass'n*., 874 F.3d at 208-212.

24. Justice Kagan did not join Parts II-A and II-D of Alito's opinion, apparently because she does not categorically reject *Lemon*. She agrees, however, that *Lemon* does not solve every Establishment Clause problem, and she would presumably continue to support the use of "purposes" and "effects" in evaluating government action in this area on a "case by case" basis. *American Legion* 139 S. Ct. at 2094.

25. *American Legion*, 139 S. Ct. at 2080-82.

26. Alito notes past decisions where *Lemon* was "expressly declined ... or simply ignored ..." *See American Legion*, 139 S.Ct. at 2080, citing:

> *See Zobrest v. Catalina Foothills School Dist*., 509 U.S. 1, 113 S. Ct. 2462 (1993); *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 114 S. Ct. 2481 (1994); *Rosenberger v. Rector and Visitors of Univ. of Va*., 515 U.S. 819, 115 S. Ct. 2510 (1995); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98, 121 S. Ct. 2093 (2001); *Zelman v. SimmonsHarris*, 536 U.S. 639, 122 S. Ct. 2460 (2002); *Cutter v. Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113 (2005); *Van Orden*, 545 U.S. 677, 125 S. Ct. 2854; *HosannaTabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 132 S. Ct. 694 (2012); *Town of Greece v. Galloway*, 572 U.S. 565, 134 S. Ct. 1811 (2014); *Trump v. Hawaii*, 585 U.S. _, 138 S. Ct. 2392 (2018).

27. *American Legion*, 139 S. Ct. at 2082.

28. *Salazar v. Buono*, 559 U.S. 700, 130 S. Ct. 1803 (2010).

29. *American Legion*, 139 S. Ct. at 2082.

30. *American Legion*, 139 S. Ct. at 2082-83.

31. *American Legion*, 139 S. Ct. at 2084.

32. *American Legion*, 139 S. Ct. at 2084-85.

33. *Van Orden v. Perry*, 545 U.S. at 698-701.

34. *American Legion*, 139 S. Ct. at 2091 (Separate concurring opinion of Breyer).

35. *American Legion*, *Id.*

36. *American Legion*, 139 S. Ct. at 2092. Breyer (and apparently Justice Kagan) disagreed with Justice Kavanaugh's assertion that a "history and tradition" test has been adopted. *American Legion*, 139 S. Ct. at 2091. However, he concluded the plurality opinion considered "particular historical context and its longheld place in the community."

37. *See, American Legion*, 139 S. Ct. at 2092 (Separate concurring opinion of Kavanaugh):

> (1) religious symbols on government property and religious speech at government events; (2) religious accommodations and exemptions from generally applicable laws; (3) government benefits and tax exemptions for religious organizations; (4) religious expression in public schools; and (5) regulation of private religious speech in public forums.

38. *American Legion*, 139 S. Ct. at 2091-92.

39. *American Legion*, 139 S. Ct. at 2094.

40. *American Legion*, 139 S. Ct. at 2094-95.

41. *American Legion*, 139 S. Ct. at 2098-103.

42. *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 67 S. Ct. 504 (1947).

43. This is the preference of a district court opinion involving school prayer later reversed by *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479 (1985). The opinion of Judge W. Brevard Hand of the Southern District Court of Alabama not only declared the "incorporation theory" unconstitutional (holding that states were not forbidden by the Establishment Clause from establishing a religion), Judge Hand, like Justices Thomas and Gorsuch, had little regard for offended person standing:

> The Constitution, however, does not protect people from feeling uncomfortable. A member of a religious minority will have to develop a thicker skin if a state establishment offends him. Tender years are no exception.

Jaffree v. Bd. of Sch. Comm'rs, 554 F. Supp. 1104, 1118, n. 24 (S.D. Ala. 1983).

44. "Original meaning or purpose" would appear to be part of Justice Kavanaugh's test of "history and tradition."

45. Justice Alito has described himself as a "'practical originalist' for the reason that he believes 'the Constitution means something and that that meaning doesn't change.'" Neil Siegel, "The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent," *Yale Law Journal* (Jan. 24, 2017): www.yalelawjournal.org/forum/thedistinctiverole ofjusticesamuelalito (last visited 1/10/2020).

Justice Scalia was a primary proponent of originalism and a "dead Constitution." Bruce Allen Murphy, "Justice Antonin Scalia and the 'Dead' Constitution," *N.Y. Times* (Feb. 14, 2016): www.nytimes.com/2016/02/15/opinion/ justiceantoninscaliaandthedeadconstitution.html (last visited 01/10/2020).

As noted, Justice Kavanaugh joined the opinion of Justice Alito "in full." *American Legion*, 139 S. Ct. at 2092. He is considered an "originalist" in the mold of Justice Scalia. Sol Wachtler, "Brett Kavanaugh Is an Originalist," *New York Law Journal* (Sept. 20, 2018):www.law.com/newyorklawjournal/2018/09/20/ brettkavanaughisanoriginalist/ (last visited 1/10/2020).

Although Justice Gorsuch and Justice Thomas did not concur in Justice Alito's opinion, they both embrace originalism. Eric J. Segall, "Does Originalism Matter Anymore?," *N.Y. Times* (Sept. 10, 2018): www.nytimes.com/2018/09/10/opinion/ kavanaughoriginalismsupremecourt.html (last visited 1/10/2020).

Nina Totenberg, "Judge Gorsuch's Originalism Contrasts With Mentor's Pragmatism" (Feb. 6, 2017):www.npr.org/2017/02/06/513331261/ judgegorsuchsoriginalismphilosophycontrasts withmentorspragmatism (last visited 1/10/2020).

46. Clare Kim, "Justice Scalia: Constitution is 'dead.'" *MSNBC* (Jan. 29, 2013): www.msnbc.com/thelastword/justicescaliaconstitutiondead (last visited 1/10/2020). ("'The judge who always likes the results he reaches is a bad judge,' Scalia told the audience.").

Justice Neil Gorsuch, "Why Originalism Is the Best Approach to the Constitution," *Time Magazine* (Sept. 6, 2019): time.com/5670400/ justiceneilgorsuchwhyoriginalismisthebest approachtotheconstitution/ (last visited 1/10/2020). ("Suppose originalism does lead to a result you happen to dislike in this or that case. So what? The 'judicial Power' of Article III of the Constitution isn't a promise of all good things.").

47. *American Legion*, 139 S. Ct. at 2074.

48. *See* n. 32.

49. AHA BIO Cert., p. 3. Citing *Buono*, 559 U.S. at 72627 (Alito, J., concurring). "The Jewish War Veterans organization has challenged war memorial crosses for this very reason. *See Trunk v. City of San Diego*, 629 F.3d 1099, 1105 (9th Cir. 2011); *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988)."

50. Thomas Jefferson, "Autobiography of Thomas Jefferson," *The Life and Selected Writings of Thomas Jefferson*, edited by A. Kach and W. Peden (New York: Modern Library, 1944), pp. 4042. ("To meet these expenses, all the inhabitants of the parishes were assessed, whether they were or not, members of the established church. Towards Quakers who came here, they were most cruelly intolerant, driving them from the colony by the severest penalties.").

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Keepers of the Word: The Supreme Court Upholds Tribal Treaty Rights in *Herrera v. Wyoming*

By Jennifer N. Lamirand

AT THE TIME OF THE FOUNDING OF THE UNITED STATES, the government approached negotiations with the indigenous people residing in this land as government-to-government negotiations, the very same as their negotiations with foreign nations. Over the first century of the official existence of the United States government, these negotiations resulted in the creation of hundreds of treaties, or official documents confirming the compromises agreed to by the United States and tribal governments. Even though the United States changed its official treaty policy in 1871[1] in favor of formalizing decisions made in negotiations through official acts of Congress, this change in policy did not affect the validity of the treaties of old.

Nonetheless, based on either the assumption that something in the passage of time alters the force and effect of the promises memorialized in treaties, or that societal or territorial changes have such effect, parties consistently ask the courts of the United States to re-evaluate treaty promises and deny their application. The October 2018 term of the U.S. Supreme Court presented multiple such instances. It also produced a decision to uphold a particular hunting rights promise made by the United States in an 1868 treaty with the Crow tribe. While that case, *Herrera v. Wyoming*,[2] seemingly involved only one tribal citizen's quest to exercise his traditional hunting rights in an area of the Bighorn National Forest in Wyoming, the decision itself required an examination of the place of treaties in the United States legal system and their continuing application to today's society. Like the analysis in *Herrera*, this article reviews the basic background on treaty agreements between the United States and tribal nations before looking to the decision in *Herrera* and any forecast it provides on the future of treaty rights.

TREATIES: PAST AND PRESENT

The U.S. Constitution assigns Congress the duty to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[3] Congress exercised this diplomatic duty from the birth of the United States. This grouping of tribal nations in a list of separate, political entities with foreign nations and individual states not only reflects an intention to approach negotiations with tribal governments in a manner similar to negotiations with other governmental entities, but it also identifies the federal government as the proper government to undertake those negotiations. This clause, now referred to as the Indian commerce clause, paired with the delegation of power to the president to make treaties with the advice and consent of two-thirds of the Senate, while forbidding states from doing the same,[4] firmly placed interactions with tribal governments and their people within the province of the federal government.

Courts analyzing these commerce and treaty powers tend to relate them to the powers available for regulation of commerce and agreements with foreign nations, while still finding the application to tribal nations somehow different or separate.[5] Nonetheless, some international legal concepts and principles applicable to treaties with foreign nations still apply just as forcefully to treaties between the United States and tribal nations. The Constitution identifies all treaties, along with all laws of the United States made pursuant to the Constitution, as the "supreme Law of the Land."[6] Additionally, as in the context of treaties with foreign nations, treaties with tribal governments are self-executing; they do not require any subsequent acts of legislation to make them valid and enforceable.[7]

In 1871, Congress ended the practice of memorializing agreements with tribal governments in treaty documents in favor of using official acts of Congress.[8] The congressional act making this change explicitly stated that it did not "invalidate or impair the obligation of any treaty heretofore

lawfully made and ratified with any such Indian nation or tribe."[9] Thus, although it imposed a different contracting method, this change did not alter the validity of the agreements made prior to it. United States law to this day explicitly recognizes the validity of treaties made and ratified prior to 1871.[10]

Yet, while still the "supreme Law of the Land," the supremacy of treaties has not always translated into supreme efforts to comply with their terms. The 1903 case of *Lone Wolf v. Hitchcock*[11] presents just one example of the many failures to uphold the specific rights granted to Native people in their negotiated treaties with the United States government following 1871. *Lone Wolf* involved a challenge by a traditional leader and member of the Kiowa tribe to the allotment of lands within the reservation established for the Kiowa, Comanche and Apache tribes over a succession of treaties in the mid- to late-1800s. The Medicine Lodge Treaty of 1867 provided that each head of a family of the Kiowa tribe would choose 320 acres of land for the exclusive possession of that individual so long as he or his family continued to cultivate the land and then stated that no "treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians occupying the same..."[12] In 1892, the Jerome Commission came to the Kiowa, Comanche and Apache tribes to negotiate the further allotment and cession of reservation lands to open them for settlement by nontribal members.[13] The commission failed to obtain the necessary signatures from three-fourths of the adult, male tribal citizens for the allotment and cession agreement, through either legitimate negotiations or fraudulent means, such as misrepresentations to citizens about the purchase price for the lands.[14] Tribal citizens presented objections to the resulting agreement due to these deficiencies to Congress, but Congress still considered bills to effectuate the agreement and eventually passed a bill in 1900 doing just that, with some changes to the terms.[15] Additional bills in 1901 addressed the specifics of the allotments and opening of the lands for settlement.[16]

Lone Wolf, on behalf of himself as well as other members of the Kiowa, Comanche and Apache tribes, filed a lawsuit challenging the 1892 agreement and subsequent congressional acts executing it.[17] He claimed the agreement violated the treaty rights of the Kiowa, Comanche and Apache tribes as well as the U.S. Constitution as it deprived these tribes and their members of their property without due process of law.[18] For relief in this case, Lone Wolf asked for a temporary and permanent injunction to stop the execution of the terms of the agreement, although the allotment of lands had already started.[19] The Supreme Court of the District of Columbia denied the request for a temporary injunction and sustained a demurrer to the cause as a whole.[20] The case then went to the Court of Appeals for the District of Columbia, which affirmed the trial court decision, and then the U.S. Supreme Court.[21] Shortly after the trial court decision, the president issued a proclamation ordering the opening of the surplus lands of the reservation for settlement despite the appeal.[22]

Even when faced with evidence of the fraudulent means used to prepare the 1892 agreement, the Supreme Court affirmed the lower court decision.[23] The Supreme Court justified this position by recognizing the plenary power of Congress over Indian affairs and categorizing the means used by Congress when exercising this power as a political question not subject to the Supreme Court's judicial review.[24] The Supreme Court merely presumed that Congress must have acted in

good faith and exercised its best judgment in this situation.[25] Of course, this let the allotment and settlement processes march on, taking lands promised to these tribal nations without meeting the treaty terms negotiated and agreed upon a few decades earlier. It also set a precedent of leaving congressional decisions relating to treaty negotiations and treaty fulfillment without checks and balances from the judicial branch of government for years to come.

The position of the courts has changed over time. Courts now recognize the duty to conduct judicial review of congressional acts relating to the fulfillment of treaty rights, as well as Constitution limitations on such acts.[26] Yet, even with judicial review in place, courts still vary in their interpretations and recognition of treaty promises. For example, in *Federal Power Commission v. Tuscarora Indian Nation,*[27] the Supreme Court faced a question concerning the ability of the New York Power Authority, as a licensee of the Federal Power Commission, to exercise federal eminent domain powers to take a portion of lands held in fee simple by the Tuscarora Indian Nation in New York for a reservoir for a hydraulic power project on the Niagara River. The Tuscarora Indian Nation purchased the lands over 150 years earlier to use as a part of its reservation land base following the removal from its traditional homelands in North Carolina.[28] After their purchase, the Tuscarora Nation used these lands as a part of, what the United States government referred to in many instances, as its "reservation." Multiple treaties between the United States and the Seneca Nation, which the Tuscarora Nation had joined as a part of the Six Nations Confederation upon settling in the north, guaranteed the Seneca Nation and the affiliated members of the other six nations, the right to free use and enjoyment of their lands until these tribal groups chose to sell them.[29]

If the lands in question fell within a reservation, the Federal Power Act would have required the Federal Power Commission to make a specific finding that the license provided to the New York Power Authority to handle the project and the taking of the land for the reservoir would "not interfere or be inconsistent with the purpose for which such reservation was created or required."[30] However, the act also defined "reservation" to mean "national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws..."[31] The majority decision by the Supreme Court found the Tuscarora Indian Nation lands at issue fell outside of the meaning of "reservation" used in the act, as the land was not owned by the United States, and that the act allowed for the condemnation of the lands under federal eminent domain powers.[32]

Writing in dissent Justice Black noted the absurdity of categorizing the Tuscarora Nation's lands as anything but a reservation encompassed by the language "tribal lands embraced within Indian reservations" in the act. Although not without its own patronizing tone, Justice Black's dissent recalled the promises of the United States to keep faith with tribal nations and to allow them free and undisturbed enjoyment of their recognized lands for as long as they chose to keep them. It ended with a simple, oft-quoted statement that "[g]reat nations, like great men, should keep their word."[33]

HERRERA RECOGNIZES THE CROW TRIBE'S RIGHTS

The *Herrera* case offered another opportunity for the Supreme Court to uphold the word of the United States in a treaty agreement. In *Herrera*, a member of the Crow tribe named Clayvin Herrera argued that the 1868 Treaty Between the United States of America and the Crow Tribe of Indians (1868 treaty)[34] provided him with hunting rights in an area of the Bighorn National Forest and that these rights barred the State of Wyoming from prosecuting him for taking bull elk off-season and without a state hunting license in the national forest. The 1868 treaty provided the Crow tribe with compensation in exchange for ceding most of their territory within the present states of Montana and Wyoming, including "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts."[35] The State of Wyoming had prosecuted Herrera in 2014 for his hunting activities in the national forest in Wyoming, which runs adjacent to the Crow tribe's present reservation in Montana, and a jury convicted him. The trial court then imposed a suspended jail sentence, a fine and a three-year suspension of Herrera's hunting privileges. Herrera appealed the conviction, but the state appellate court affirmed the trial court's judgment and sentence finding the Crow tribe's hunting rights under the 1868 treaty expired at Wyoming's statehood based on a case from 1896 called *Ward v. Race Horse*[36] and, alternatively, a decision in *Crow Tribe of Indians v. Repsis*.[37] Upon the denial of his petition for review by the Wyoming Supreme Court, Herrera took his case to the U.S. Supreme Court.

The Supreme Court vacated the decision and remanded.[38] Essentially, the arguments focused on two primary questions: 1) whether the Crow tribe's off-reservation hunting rights guaranteed by the 1868 treaty expired at statehood; and 2) if they did not, whether the lands in question qualified as unoccupied lands of the United States. Much of the Supreme Court's analysis centered on the application of *Race Horse* and the preclusive effect of *Repsis*, which relied on *Race Horse*. The *Race Horse* case involved the review of a similar hunting rights provision in a treaty between the United States and the Shoshone and Bannock tribes and found that treaty right impliedly extinguished by statehood.[39] *Repsis* involved an analysis of the hunting rights in the 1868 treaty and held, based on the decision in *Race Horse*, that such rights also impliedly expired at Wyoming's statehood.[40] Despite these precedents, Herrera argued that the later case of *Minnesota v. Mille Lacs Band of Chippewa Indians*[41] repudiated *Race Horse* and confirmed the analysis required to find a termination of treaty rights, *i.e.* that only an express statement from Congress can abrogate a treaty right.[42]

The Supreme Court agreed with Herrera. It declared the repudiation of *Race Horse* (and the concept that statehood impliedly extinguishes treaty rights), found *Repsis* did not preclude Herrera's arguments that the 1868 treaty survived statehood (as that case relied on the reasoning and tests established in *Race Horse* and *Mille Lacs* established a change in the legal context), and applied the test in *Mille Lacs* to ultimately hold that no express statement by Congress or in the 1868 treaty extinguished the Crow tribe's hunting rights at Wyoming's statehood.[43] As for the question of whether the Bighorn National Forest represented "occupied" lands, taking it outside of the area available for use for hunting under the treaty, the Supreme Court analyzed the word "unoccupied" in the context of the treaty and determined that the Crow tribe would have understood the term to apply to areas "free of residence or settlement by non-Indians."[44] As such, the creation of the Bighorn National Forest, which reserved it from entry or settlement, did not make it "categorically occupied" and did not exclude it from the area available for hunting under the treaty.[45] The Supreme Court did limit its decision in two ways. It clarified that upon remand the state was still free to argue that the specific lands at issue did qualify as "occupied" under the meaning established in the decision and to argue that conservation concerns make state regulations on hunting in this area applicable to Crow tribe members necessary, an argument not presented or addressed by the Supreme Court.[46]

The dissent from Justice Alito found the decision in *Repsis* wholly determinative due to its preclusion of the relitigation of the survival of hunting rights in the Bighorn National Forest under the 1868 treaty.[47] This conclusion arose not only from skepticism of the exception to preclusion for a change in legal context relied upon by the majority or its finding that *Mille Lacs* effectively overruled *Race Horse*, but also due to a determination that *Repsis* included an alternative holding that interpreted the 1868 treaty, found the lands in the Bighorn National Forest occupied, and did not rely on *Race Horse*.[48] The dissent found this alternative ground for the judgment in *Repsis* independently decisive and preclusive.[49]

TREATY PROMISES CONTINUE ON (AS DO CHALLENGES TO THEM)

If anything, the decision in *Herrera* emphasizes the current division in the Supreme Court on issues relating to tribal rights and federal Indian law. Justice Sotomayor delivered the majority opinion, joined by Justices Ginsburg, Breyer, Kagan and Gorsuch. Justice Alito wrote the dissent. Chief Justice Roberts and Justices Thomas and Kavanaugh joined him. All signs point to the continuation of this treaty-doctrine division as the Supreme Court prepares again to consider treaty promises in its present term. The holding in *Herrera* also fails to establish with certainty the ability of tribal members to assert their hunting rights in the coming years. While the majority opinion confirms that courts must look for express statements from Congress to find a treaty right terminated, it

If anything, the decision in *Herrera* emphasizes the current division in the Supreme Court on issues relating to tribal rights and federal Indian law.

does not conclusively state that the Bighorn National Forest qualifies as "unoccupied" land available for use for traditional hunting by the Crow tribe. This was not lost on the dissent, and it leaves the door open for further litigation on this issue to address the specific application of the meaning of "unoccupied" adopted by the Supreme Court. While *Herrera* advances the recognition of treaty rights, it, unfortunately, only goes so far.

The U.S. Constitution does not lose its force and effect due to the passage of time. Neither do treaties, another component of the supreme law of the land. The promises made in these documents provide a forever future for tribal nations and their citizens and ring with longevity. As confirmed by *Herrera*, treaties do not presuppose that the promises made within them have an end, unless clearly stated. This only makes sense, as the United States agreed to provide permanent and ongoing obligations to tribal governments in order to achieve its own permanent ends, *i.e.* the increase of its land base. It was not contemplated that the United States would only use the lands received in these negotiated contracts for a certain number of years and then return them. Like the Constitution, treaties involve long-term objectives and obligations, and, as observed by Justice Black, *great* nations keep their word.

ABOUT THE AUTHOR

Jennifer Lamirand is an associate at the Oklahoma City office of Crowe & Dunlevy PC. She received her J.D. from the University of Notre Dame Law School and an LL.M. with a focus in international business law from the London School of Economics and Political Science. She currently chairs the Indian Law Section.

ENDNOTES

1. Act of March 3, 1871, 16 Stat. 544, 566 (now codified at 25 U.S.C. §71).
2. *Herrera v. Wyoming*, 139 S.Ct. 1686 (2019).
3. U.S. Const. art. I, §8, cl. 3.
4. U.S. Const., art. II, §2; U.S. Const., art. I, §10, cl. 1.
5. See *U.S. v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194, 197 (1876).
6. U.S. Const. art. VI.
7. *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196 (1876) (citing *Foster and Elam v. Neilson*, 27 U.S. 253, 253 (1829)).
8. Act of March 3, 1871, 16 Stat. 544, 566 (now codified at 25 U.S.C. §71).
9. *Id*.
10. 25 U.S.C.A. §71 (West 2019).
11. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903).
12. *See Lone Wolf*, 187 U.S. at 554.
13. Walter R. Echo-Hawk, *In the Courts of the Conqueror* 175 (2010).
14. Walter R. Echo-Hawk, *In the Courts of the Conqueror* 175 (2010).
15. Walter R. Echo-Hawk, *In the Courts of the Conqueror* 175 (2010).
16. *Lone Wolf*, 187 U.S. at 557-60.
17. *Lone Wolf*, 187 U.S. at 553.
18. *Lone Wolf*, 187 U.S. at 561.
19. *Lone Wolf*, 187 U.S. at 561-62.
20. *Lone Wolf*, 187 U.S. at 563.
21. *Lone Wolf*, 187 U.S. at 563.
22. *Lone Wolf*, 187 U.S. at 563.
23. *Lone Wolf*, 187 U.S. at 568.
24. *Lone Wolf*, 187 U.S. at 565-68.
25. *Lone Wolf*, 187 U.S. at 569.
26. *See, e.g., United States v. Sioux Nation*, 448 U.S. 371, 415 (1980).
27. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).
28. *Tuscarora*, 362 U.S. at 106.
29. *Tuscarora*, 362 U.S. at 137-38.
30. *Tuscarora*, 362 U.S. at 110-11.
31. *Tuscarora*, 362 U.S. at 111.
32. *Tuscarora*, 362 U.S. at 111-12.
33. *Tuscarora*, 362 U.S. at 142.
34. Treaty of Fort Laramie Between the United States of America and the Crow Tribe of Indians, May 7, 1868, 15 Stat. 649 (1868).
35. 1868 Treaty, art. IV, 15 Stat. 649, 650.
36. *Ward v. Race Horse*, 163 U.S. 504 (1896).
37. *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995).
38. *Herrera*, 139 S.Ct. at 1703.
39. *Race Horse*, 163 U.S. at 515-16.
40. *Repsis*, 73 F.3d at 994.
41. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).
42. *Herrera*, 139 S.Ct. at 1696.
43. *Herrera*, 139 S.Ct. at 1697-1700.
44. *Herrera*, 139 S.Ct. at 1700-01.
45. *Herrera*, 139 S.Ct. at 1702-03.
46. *Herrera*, 139 S.Ct. at 1703.
47. *Herrera*, 139 S.Ct. at 1709.
48. *Herrera*, 139 S.Ct. at 1703-13.
49. *Herrera*, 139 S.Ct. at 1713.

Become a Better Lawyer at the OBA 2020 Solo & Small Firm Conference

By Jim Calloway

THE CHOCTAW CASINO Resort in Durant is the location for the 2020 OBA Solo & Small Firm Conference scheduled for June 18-20. There are many educational sessions to help you become a better lawyer.

Our special guests include nationally recognized experts on law office technology and cybersecurity Sharon Nelson and John Simek of Sensei Enterprises. They are both past ABA TECHSHOW chairs.

"Whizbang Cybersecurity Tips on Ebenezer Scrooge's Budget" will be one of their presentations, which will focus on appropriate and affordable tools and techniques for solo and small firm lawyers. They will also present "Deep Fakes: False Evidence Coming Soon to a Courtroom Near You," a program that may become more important for trial lawyers sooner than many may think.

Laura Mahr of Conscious Legal Minds of Asheville, North Carolina, will be another special guest. She will be coming to Oklahoma for the first time to present "Mindfulness for Lawyers: Building Resilience to Stress Using Mindfulness & Neuroscience." Most lawyers have stresses and challenges in their day-to-day practices. She will demonstrate scientifically backed tools and techniques to assist lawyers with those stresses and challenges and help them with building personal resilience. On her website, consciouslegalminds.com, Ms. Mahr notes:

> Neuroscience research discovered that our brains have two operating modes: reactive and responsive. When we are in reactive mode, we think less clearly, are less articulate, and have difficulty concentrating and retaining information. When we are in responsive mode, our brains are fully "online," making it easier to think, problem solve, be productive, and relate to others. Mindfulness helps us notice in which operating mode we are functioning and cues us to return to responsive mode if we notice we are in reactive mode.

We are welcoming back Chelsey Lambert, founder and CEO of *Lex Tech Review*. Her two presentations involve important topics for today's lawyers – "Engineering the Client Experience" and "Digital Marketing: What's Worth Paying For and What's Not!" Those of you who heard Ms. Lambert's high-energy presentations at last year's conference know the audience is in for a treat!

Robert G. Spector, professor emeritus and Glenn R. Watson centennial chair in law at the OU College of Law, will be joining us again this year. He will grace us with his popular presentation titled "Recent Developments in Family Law" and will also cover "Dealing with Relocations and Custody Modifications."

"Representing Tax-Exempt Organizations: Latent Pitfalls for the Unsuspecting Lawyer" is an important topic. Jeri Holmes of Nonprofit Solutions PC will be

covering that subject, providing you with some great information to use the next time a local nonprofit asks for your assistance.

Interested in appellate practice tips? "COCA and the Chamber of Secrets: Mysteries of the Court of Civil Appeals Revealed" will be taught by Bevan G. Stockdell, staff attorney to Justice M. John Kane IV of the Oklahoma Supreme Court. She previously worked for the Oklahoma Court of Civil Appeals.

Thomas Hosty believes that the most important trait a lawyer can use and develop is empathy, so he is going to show us how to become "The Empathetic Trial Lawyer." He shared his thoughts about the subject with me and this is going to be a really great presentation.

We have sessions tailored toward the new or young lawyer like "The Basics of Business Organization (With Forms)" from Oklahoma City attorney Mark Robertson. Some of you may remember his standing-room-only program on LLC operating agreements at the 2018 conference.

Deborah Reheard, past OBA president and accomplished trial lawyer, will give us a program targeted to a most important skill set – "Intake and Analysis of the Criminal Law Case." Young lawyers focusing on criminal defense practice will want to make sure to attend this program.

As most readers know, Sharon Nelson is my podcast teammate on the *Digital Edge* podcast. We have been encouraged by both the conference planning committee and our friends at The Legal Talk Network to do a live demonstration and recording of our podcast. At "Inside the Podcast – A Live Recording of *Digital Edge* Podcast," we will talk about podcasting as a communication tool for lawyers and will have a special guest join us. A live demonstration – even typing the phrase makes me nervous! Come join us for the fun and the unexpected.

There are many more interesting educational programs including "Legislative Update – What Happened at the Capitol This Year" with Miles Pringle, "Tools and Techniques I Use in My Small Firm Bankruptcy Practice" with Jason Sansone and "Advising the Cannabis Client" with Evan King.

FUN EVENTS

There will be great social and networking events. Since we are beginning the '20s again, we are paying homage to the Roaring '20s, so plan on attending our *Great Gatsby*-themed party on Friday night. More details on that to come. The Choctaw Casino Resort has many activities for you and your guests in addition to gaming including spas, swimming pools, a bowling alley, four first-run movie theaters and laser tag.

The last time we visited the Choctaw Casino Resort, it was one of our biggest conferences in terms of attendance during the last several years, so don't delay in registering. You don't want to miss out on this year's educational activities and fun events. The conference website is www.okbar.org/solo, so check in frequently for updated information.

Reserve your room now for the conference at our special discounted rate by calling 800-788-2464. Refer to the room block name "OBA – Oklahoma Bar Association." The room block discounted rate expires on June 2, or whenever the rooms are filled. There will also be a link on the conference website to reserve rooms online.

Mr. Calloway is OBA Management Assistance Program director and staff liaison to the Solo & Small Firm Conference Planning Committee, chaired by Charles R. Hogshead.

CHOCTAW CASINO RESORT | DURANT

June 18–20

Noted legal technology and cybersecurity experts Sharon Nelson and John Simek will be our featured guests this year. OU Professor Emeritus Robert Spector will enlighten us on family law, including a presentation on post-decree issues like relocation and visitation modification. Other subjects include appellate practice, advising nonprofits, doing business with Indian tribes and wellness for lawyers. Since we are kicking off the '20s, the Friday night social will be a *Great Gatsby*-themed event.

ONLINE REGISTRATION
www.okbar.org/solo

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

FAX FORM
405-416-7092

REGISTRANT INFORMATION

Full Name: _____ OBA #: _____

Address: _____

City/State/Zip: _____

Phone: _____ Fax: _____

Email: _____

Name and city as it should appear on badge if different from above:

_____

GUEST INFORMATION

Adult guest name: _____

Child guest name: _____

Child guest name: _____

Child guest name: _____

Child guest name: _____

Do you or your guests have special requirements, including dietary restrictions?

If yes, please specify: _____

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

STANDARD RATES FOR OBA MEMBERS
admitted before Jan. 1, 2018

	CIRCLE ONE
Early Attorney Only Registration **(on or before June 2)**	**$225**
Late Attorney Only Registration **(June 3 or after)**	**$275**
Early Attorney and One Guest Registration **(on or before June 2)**	**$325**
Late Attorney and One Guest Registration **(June 3 or after)**	**$375**
Early Family Registration **(on or before June 2)**	**$375**
Late Family Registration **(June 3 or after)**	**$425**

SPECIAL RATES FOR OBA MEMBERS OF TWO YEARS OR LESS
admitted on or after Jan. 1, 2018

	CIRCLE ONE
Early Attorney Only Registration **(on or before June 2)**	**$150**
Late Attorney Only Registration **(June 3 or after)**	**$175**
Early Attorney and One Guest Registration **(on or before June 2)**	**$250**
Late Attorney and One Guest Registration **(June 3 or after)**	**$275**
Early Family Registration **(on or before June 2)**	**$300**
Late Family Registration **(June 3 or after)**	**$325**

PAYMENT INFORMATION

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

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

Total to be charged: $_____ Credit Card #: _____ CVV#:____

Expiration Date: _____ Authorized Signature: _____

REGISTRATION AND POLICIES

CANCELLATION POLICY
Cancellations will be accepted at any time on or before June 4 for a full refund; a $50 fee will be charged for cancellations made on or after June 5. **No refunds after June 9.**

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

HOTEL RESERVATIONS
Visit www.okbar.org/solo or call 800-788-2464 for hotel reservations. Refer to Oklahoma Bar Association or block code 2006OBAIPO for a discount. Discount rooms are available until 5 p.m. June 2 or until sold out.

2020 Solo & Small Firm Conference Schedule

THURSDAY | JUNE 18			
3–6:30 p.m.	**Conference Registration**		
6:30 p.m.	**Opening Reception**		
7 p.m.	**Dinner and Entertainment (Come and go event)**		
FRIDAY | JUNE 19			
7–9 a.m.	**Breakfast**		
8:25 a.m.	**Welcome** *OBA President Susan Shields*		
8:35–9:35 a.m.	**60 Tips in 60 Minutes** *Sharon Nelson, John Simek and Jim Calloway*		
9:35–9:45 a.m.	**Break**		
9:45–10:40 a.m.	**Whizbang Cybersecurity Tips on Ebenezer Scrooge's Budget** *Sharon Nelson and John Simek*	**COCA and the Chamber of Secrets: Mysteries of the Court of Civil Appeals Revealed** *Bevan Stockdell*	**Doing Business with Indian Tribes** *Jennifer Lamirand*
10:40–10:55 a.m.	**Break**		
10:55–11:55 a.m.	**Recent Developments in Family Law** *Professor Robert Spector*	**The Empathic Trial Lawyer** *Thomas Hosty*	**Automated Document Assembly 2020** *Jim Calloway and Julie Bays*
Noon–1 p.m.	**Lunch (included in seminar registration fee)**		
1–2 p.m.	**Legislative Update – What Happened at the Capitol This Year** *Miles Pringle*	**Tools and Techniques I Use in My Small Firm Practice** *Jason Sansone*	**The Basics of Business Organization (With Forms)** *Mark Robertson*
2–2:10 p.m.	**Break**		
2:10–3:10 p.m.	**Mindfulness for Lawyers: Building Resilience to Stress Using Mindfulness & Neuroscience** *Laura Mahr*		
6:30 p.m.	**Dinner and Evening Entertainment**		
SATURDAY | JUNE 20			
7–9 a.m.	**Breakfast**		
8:25 a.m.	**Welcome** *OBA Executive Director John Morris Williams*		
8:30–9:20 a.m.	**Lawyers Behaving Badly – Lessons in Professionalism (1 hour MCLE Ethics credit)** *OBA Ethics Counsel Richard Stevens and OBA Professionalism Committee members*		
9:20–9:30 a.m.	**Break**		
9:30–10:30 a.m.	**Inside the Podcast – A Live Recording of *Digital Edge* Podcast** *Jim Calloway, Sharon Nelson & John Simek*	**Intake and Analysis of the Criminal Law Case** *Deborah Reheard*	**Engineering the Client Experience** *Chelsey Lambert*
10:30–10:50 a.m.	**Break (Hotel check out and luggage secured)**		
10:50–11:50 a.m.	**Dealing With Relocations and Custody Modifications** *Professor Robert Spector*	**Representing Tax-Exempt Organizations: Latent Pitfalls for the Unsuspecting Lawyer** *Jeri Holmes*	**Advising the Cannabis Client** *Evan King*
11:55 a.m.	**Lunch (included in seminar registration fee)** **Lawyers I Have Met Along the Way** *Charles "Buddy"Neal*		
12:45–1:35 p.m.	**Deep Fakes: False Evidence Coming Soon to a Courtroom Near You** *Sharon Nelson and John Simek*	**Digital Marketing: What's Worth Paying For and What's Not!** *Chelsey Lambert*	**Serving the Underserved – Limited Scope Services and More** *Julie Bays*
1:35–1:40 p.m.	**Break**		
1:40–2:30 p.m.	**What's Hot and What's Not in Law Office Management & Technology** *Sharon Nelson, John Simek, Chelsey Lambert, Jim Calloway, Charles Hogshead and Julie Bays*		

Committee Strives to Keep Members Informed

By Miles Pringle

IN FEBRUARY, THE OKLAHOMA Legislature kicked off the second regular session of the 57th Legislature. In conjunction, the Legislative Monitoring Committee hosted its Legislative Kickoff – formerly Reading Day – on Saturday, Feb. 1. We had "90 Bills in 90 Minutes," a cannabis ethics presentation from Chief Justice Gurich and a panel of lawyer legislators to discuss their expectations for the upcoming session.

A big thank you to all our speakers including Chief Justice Gurich, Sonja Porter, Noel Tucker, Stephanie Alleman, Dan Woska, Richard Mildren, Matthew Wade, Keith White, Haley Drusen, Rhonda McLean and Rachel Bussett. We also want to extend a big thank you to our panelists Rep. Emily Virgin, Rep. Chris Kannady and Sen. Kay Floyd, as well as moderator Clay Taylor. Last, but definitely not least, the Legislative Kickoff could not have happened without the hard work of the staff of the Oklahoma Bar Association. It is important for OBA members to know how strong a staff we have.

In the "90 Bills in 90 Minutes" segment of the kickoff, speakers discussed filed bills relating to family law, criminal law, estate planning, government, civil procedure/courts, environmental/natural resources, schools, Native American/real estate and cannabis law. Clearly, we could not cover all the more than 2,000 newly filed bills; however, the Communities page for the Legislative Monitoring Committee has an explainer on how to track legislation thanks to Angela Ailles-Bahm. A note for those tracking legislation – most of the bills filed in the first session of the Legislature can still become law. So, there are technically more than 4,500 pieces of legislation for legislators to consider (however, most will not make it through the committee process).

Attendees of Legislative Kickoff heard "90 Bills in 90 Minutes."

BUSINESS AT THE LEGISLATURE

The Legislature began by hearing from the governor at his state of the state address on Feb. 3 in which he asked for some fiscal saving measures (*e.g.,* a constitutional amendment to increase the Oklahoma's Rainy Day fund to 30% and to set aside $100 million for fiscal year 2021), as well as education reform to allow school districts to "unlock more local dollars." The big area Gov. Stitt wants the Legislature's help with is consolidation. He called for consolidating: 1) the Department of Corrections with the Pardon and Parole Board,

Administrative Director of the Courts Jari Askins, OBA President Susan Shields and Legislative Monitoring Committee Chair Miles Pringle

2) Department of Health, the Health Care Authority, and Department of Mental Health and Substance Abuse with others to create one central health care agency, 3) Department of Transportation with the Oklahoma Turnpike Authority and 4) Department of Emergency Management with the Office of Homeland Security.

He further requested reform to the state's employment practices that "allows agency directors discretion to offer bonuses, within the confines of their budgets, for employees to receive a promotion out of their restricted classified positions. Through this attrition model, I am casting a vision for the majority of the state's work force to be unclassified in the next five years."

After hearing from the governor, the Legislature got to work considering legislation. Committee leadership has a great deal of influence on schedule and which bills get heard. Important deadlines in the House were Feb. 17 (deadline for House bills and House Joint Resolutions to make it out of subcommittee), Feb. 19 (deadline language for shell bills to be submitted to Majority Floor Leader's Office) and Feb. 27 (deadline for both houses for measures to make it out of the full committees).

March 12 is the deadline for the third reading of a bill or joint resolution in both the House and the Senate. In the House, March 30 is the deadline for Senate bills and Senate Joint Resolutions to make it out of subcommittee. In April both chambers will be working on measures that passed the opposite chamber.

REMINDER

Neither the OBA nor the committee takes any institutional positions on particular legislation – unless affirmatively approved at the OBA's Annual Meeting, which rarely occurs. The purpose of the committee is to inform members of ongoing legislation and to offer our membership as a resource to legislators who may have questions when considering legislation. Currently, there are 15 lawyer legislators out of 149 members (less than 10%). As such, committee members attempt to make themselves available for legislators to answers questions they may have, which is particularly helpful when the attorney has experience in that area of law. Please join the committee by logging in to MyOKBar if you would like to get more involved or receive more information about our events!

Mr. Pringle is general counsel for The Bankers Bank and serves as the Legislative Monitoring Committee chairperson.

Professional Responsibility Commission Annual Report

As Compiled by the Office of the General Counsel of the Oklahoma Bar Association Jan. 1, 2019 – Dec. 31, 2019 | SCBD 6890

INTRODUCTION

Pursuant to the provisions of Rule 14.1, Rules Governing Disciplinary Proceedings (RGDP), 5 O.S. 2011, ch. 1, app. 1-A, the following is the Annual Report of grievances and complaints received and processed for 2019 by the Professional Responsibility Commission and the Office of the General Counsel of the Oklahoma Bar Association.

THE PROFESSIONAL RESPONSIBILITY COMMISSION

The Professional Responsibility Commission is composed of seven persons – five lawyer and two non-lawyer members. The attorney members are nominated for rotating three-year terms by the President of the Association subject to the approval of the Board of Governors. The two non-lawyer members are appointed by the Speaker of the Oklahoma House of Representatives and the President Pro Tempore of the Oklahoma Senate, respectively. Terms expire on December 31st at the conclusion of the three-year term.

Attorney members serving on the Commission during 2019 were R. Richard Sitzman, Oklahoma City; Heather Burrage, Durant; Phillip J. Tucker, Edmond; Sidney K. Swinson, Tulsa; Richard Stevens, Norman; and Karen A. Henson, Shawnee. Ms. Henson was appointed to the Commission on October 18, 2019, to replace Mr. Stevens after he resigned to take the position of Ethics Counsel with the Oklahoma Bar Association. The Non-Lawyer members were John Thompson, Oklahoma City, and James W. Chappel, Norman. Mr. Chappel was appointed to the Commission on October 1, 2019, by the President Pro Tempore. R. Richard Sitzman served as Chairperson. Commission members serve without compensation but are reimbursed for actual travel expenses.

RESPONSIBILITIES

The Professional Responsibility Commission considers and investigates any alleged ground for discipline, or alleged incapacity, of any lawyer called to its attention, or upon its own motion, and takes such action as deemed appropriate to effectuate the purposes of the Rules Governing Disciplinary Proceedings. Under the supervision of the Commission, the Office of the General Counsel investigates all matters involving alleged misconduct or incapacity of any lawyer called to the attention of the General Counsel by grievance or otherwise, and reports to the Commission the results of investigations made by or at the direction of the General Counsel. The Commission then determines the disposition of grievances or directs the instituting of a formal complaint for alleged misconduct or personal incapacity of an attorney. The attorneys in the Office of the General Counsel prosecute all proceedings under the Rules Governing Disciplinary Proceedings, supervise the investigative process, and represent the Oklahoma Bar Association at all reinstatement proceedings.

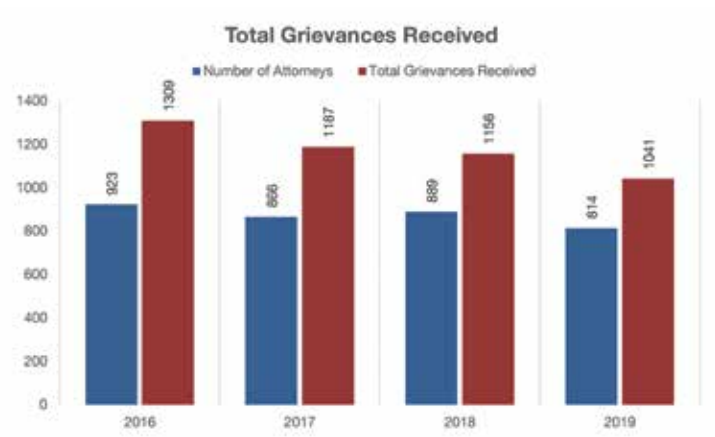
VOLUME OF GRIEVANCES

During 2019, the Office of the General Counsel received 212 formal grievances involving 158 attorneys and 829 informal grievances involving 656 attorneys. In total, 1,041 grievances were received against 814 attorneys. The total number of attorneys differs because some attorneys received both formal and informal grievances. In addition, the Office handled 191 items of general correspondence, which is mail not considered to be a grievance against an attorney.[1]

On January 1, 2019, 147 formal grievances were carried over from the previous year. During 2019, 212 new formal grievances were opened for investigation. The

carryover accounted for a total caseload of 359 formal investigations pending throughout 2019. Of those grievances, 179 investigations were completed by the Office of the General Counsel and presented for review to the Professional Responsibility Commission. Therefore, 180 investigations were pending on December 31, 2019.

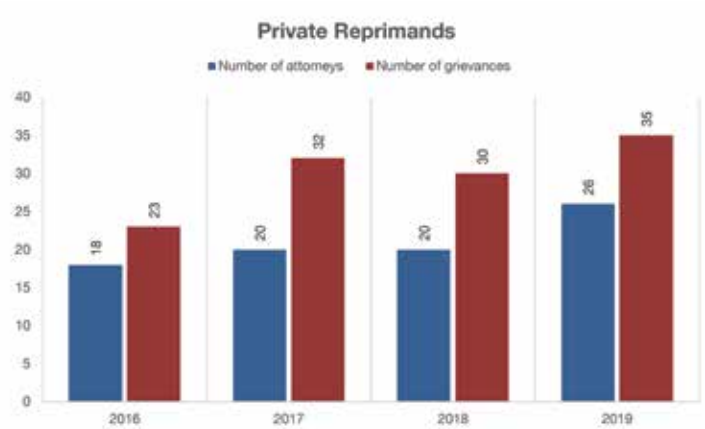
The time required for investigating and concluding each grievance varies depending on the seriousness and complexity of the allegations and the availability of witnesses and documents. The Commission requires the Office of the General Counsel to report monthly on all informal and formal grievances received and all investigations completed and ready for disposition by the Commission. In addition, the Commission receives a monthly statistical report on the pending caseload. The Board of Governors is advised statistically each month of the actions taken by the Commission.



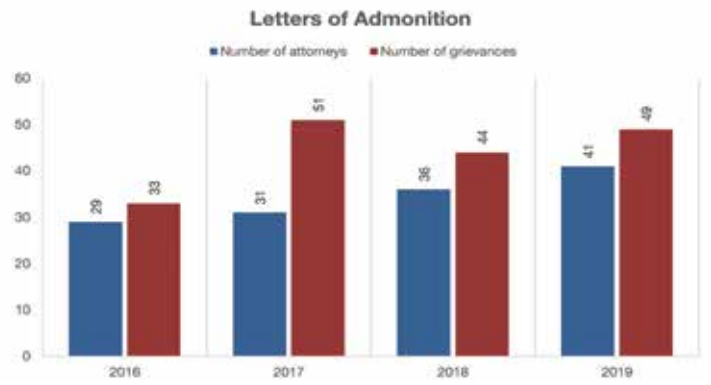
DISCIPLINE IMPOSED BY THE PROFESSIONAL RESPONSIBILITY COMMISSION

Formal Charges. During 2019, the Professional Responsibility Commission voted the filing of formal disciplinary charges against 14 lawyers involving 25 grievances. In addition, the Commission also oversaw the investigation of 12 Rule 7, RGDP matters filed with the Chief Justice of the Oklahoma Supreme Court.

Private Reprimands. Pursuant to Rule 5.3(c), RGDP, the Professional Responsibility Commission has the authority to impose private reprimands, with the consent of the attorney, in matters of less serious misconduct or if mitigating factors reduce the sanction to be imposed. During 2019, the Commission issued private reprimands to 26 attorneys involving 35 grievances.



Letters of Admonition. During 2019, the Professional Responsibility Commission issued letters of admonition to 41 attorneys involving 49 grievances cautioning that the conduct of the attorney was dangerously close to a violation of a disciplinary rule which the Commission believed warranted a warning rather than discipline.



Dismissals. The Professional Responsibility Commission dismissed eight grievances due to the resignation of the attorney pending disciplinary proceedings, a continuing lengthy suspension or disbarment of the respondent attorney. Furthermore, the Commission dismissed one grievance upon successful completion of a diversion program by the attorney. The remainder were dismissed where the investigation did not substantiate the allegations by clear and convincing evidence.

Diversion Program. The Professional Responsibility Commission may also refer respondent attorneys to the Discipline Diversion Program where remedial measures are taken to ensure that any deficiency in the representation of a client does not occur in the future. During 2019, the Commission referred 26 attorneys to be admitted into the Diversion Program for conduct involving 31 grievances.

The Discipline Diversion Program is tailored to the individual circumstances of the participating attorney and the misconduct alleged. Oversight of the program is by the OBA Ethics Counsel with the OBA Management Assistance Program Director involved in programming. Program options include: Trust Account School, Professional Responsibility/Ethics School, Law Office Management Training, Communication and Client Relationship Skills, and Professionalism in the Practice of Law class. In 2019, instructional courses were taught by OBA Ethics Counsels Joe Balkenbush and Richard D. Stevens, and OBA Management Assistance Program Director Jim Calloway, and OBA Practice Management Advisor Julie Bays.

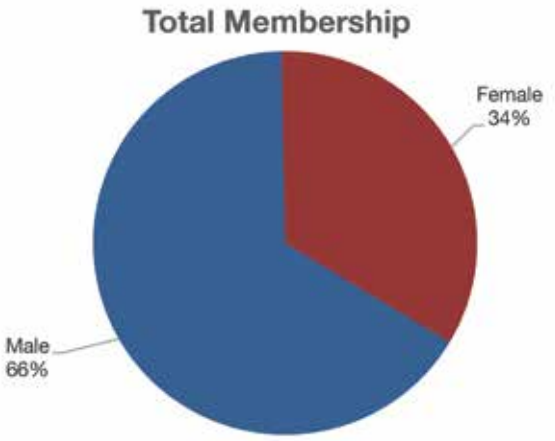
As a result of the Trust Account Overdraft Reporting Notifications, the Office of the General Counsel is now able to monitor when attorneys encounter difficulty with management of their IOLTA accounts. Upon recommendation of the Office of the General Counsel, the Commission may place those individuals in a tailored program designed to instruct on basic trust accounting procedures.

2019 Diversion Program Curriculum	Number of Lawyers
Law Office Management Training	9
Communication and Client Relationship Skills	12
Professionalism in the Practice of Law	6
Professional Responsibility / Ethics School	11
Client Trust Account School	7
Law Office Consultations	4

SURVEY OF GRIEVANCES

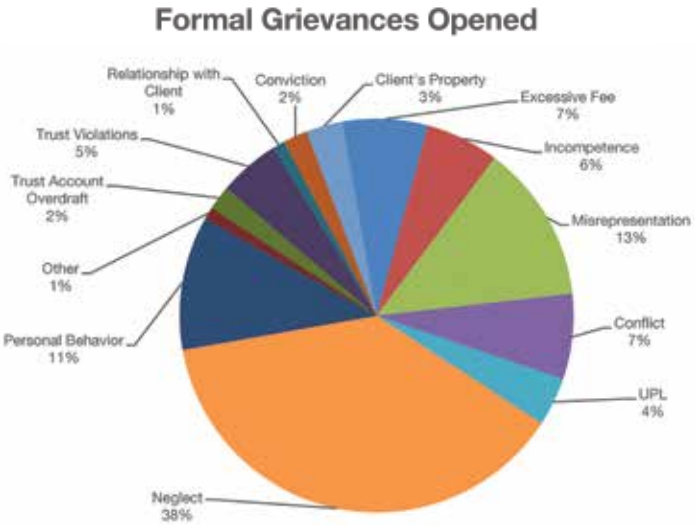
In order to better inform the Oklahoma Supreme Court, the bar, and the public of the nature of the grievances received, the numbers of attorneys complained against, and the areas of attorney misconduct involved, the following information is presented.

Total membership of the Oklahoma Bar Association as of December 31, 2019 was 18,240 attorneys. The total number of members include 12,055 males and 6,185 females.

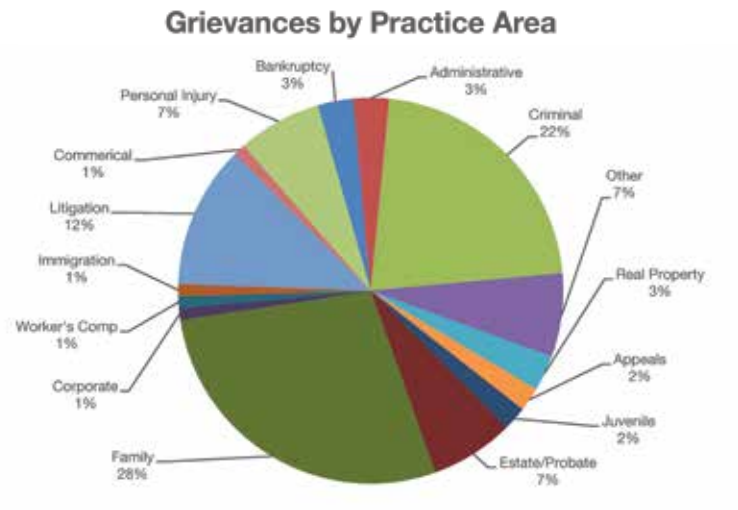


Formal and informal grievances were received against 814 attorneys. Therefore, less than five percent of the attorneys licensed to practice law in Oklahoma received a grievance in 2019.

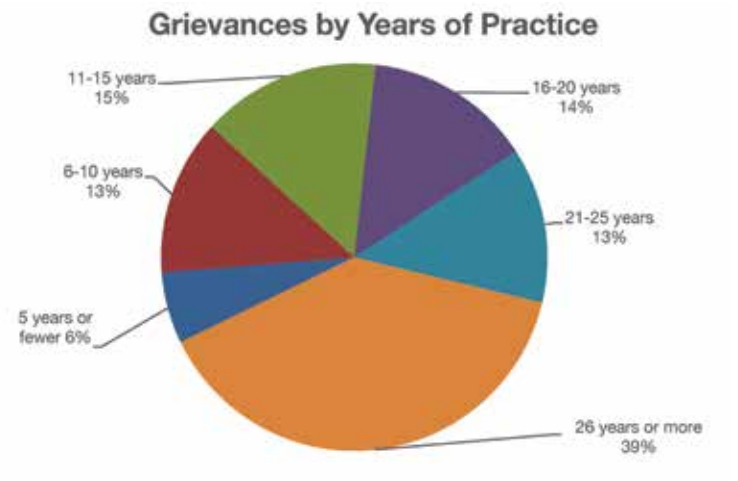
A breakdown of the type of attorney misconduct alleged in the 212 formal grievances opened by the Office of the General Counsel in 2019 is as follows:



Of the 212 formal grievances, the area of practice is as follows:



The number of years in practice of the 158 attorneys receiving formal grievances is as follows:



The largest number of grievances received were against attorneys who have been in practice for 26 years or more. The age of attorneys involved in the disciplinary system is depicted below.

Type of Complaint Filed	Rule 6, RGDP	Rule 7, RGDP	Rule 10, RGDP	Rule 8, RGDP
Number of Attorneys Involved	11	12	2	1
Age of Attorney				
21-29 years old	0	0	0	0
30-49 years old	3	7	0	0
50-74 years old	8	4	2	1
75 or more years old	0	1	0	0

Type of Discipline Imposed	Dismissals	Confidential Suspension	Disciplinary Suspension	Resignation Pending Disciplinary Proceedings	Disbarment
Number of Attorneys Involved	10	2	7	5	1
Age of Attorney					
21-29 years old	0	0	0	0	0
30-49 years old	5	0	4	2	1
50-74 years old	4	2	3	3	0
75 or more years old	1	0	0	0	0

DISCIPLINE IMPOSED BY THE OKLAHOMA SUPREME COURT

In 2019, discipline was imposed by the Oklahoma Supreme Court in 25 disciplinary cases. The sanctions are as follow:

Disbarment

Respondent	Order Date
Bednar, Alexander L.	3/12/19

Resignations Pending Disciplinary Proceedings Approved by Court
(Tantamount to Disbarment)

Respondent	Order Date
Patton, Matthew	3/4/19
Claborn, Charlotte	3/25/19
Darley, III, Lon J.	6/10/19
Tripp, Douglas S.	9/10/19
Rule 10 Confidential	12/10/19

Disciplinary Suspensions

Respondent	Length	Order Date
Rule 10 Confidential	Indefinite	1/28/19
Rule 10 Confidential	Indefinite	5/28/19
Withers, Shad K.	90 days	6/18/19
Moisant, Jay P.	6 months	9/10/19
Stout, Richard E.	3 months	10/1/19
Arnett, Emma B.	2 years + 1 day	10/7/19
Koss, Jr., Theodore	2 years + 1 day	10/29/19
Watkins, Brandon D.	2 years + 1 day	11/19/19
Elsey, Jackie D.	2 year deferred	12/17/19

Dismissals

Respondent	Order Date
Barteaux, Timothy L. (Misdemeanor Conviction; Rule 7, RGDP)	2/4/19
Rogers, Jason T. (Misdemeanor Conviction; Rule 7, RGDP)	3/25/19
Sill, James D. (Misdemeanor Conviction; Rule 7, RGDP)	4/22/19
Gragg, Brandi L. (Misdemeanor Conviction; Rule 7, RGDP)	6/17/19
Collier, Creighton C. (Misdemeanor Conviction; Rule 7, RGDP)	6/17/19
Kurth, T. Elaine (Dismissed due to death of Respondent)	8/27/19
Glapion, Raphael T. (Misdemeanor Conviction; Rule 7, RGDP)	9/9/19
Hall, Adam C. (Misdemeanor Conviction; Rule 7, RGDP)	9/9/19
Kennedy, Curtis L. (Misdemeanor Conviction; Rule 7, RGDP)	10/21/19

There were 16 discipline cases filed with the Supreme Court as of January 1, 2019. During 2019, 26 new formal complaints were filed for a total of 42 cases pending with the Supreme Court during 2019. On December 31, 2019, 17 cases remain filed and pending before the Oklahoma Supreme Court.[2]

REINSTATEMENTS

There were three Petitions for Reinstatement pending before the Professional Responsibility Tribunal and two Petitions for Reinstatement pending with the Supreme Court as of January 1, 2019. There were three new Petitions for Reinstatement filed in 2019. In 2019, the Supreme Court granted two reinstatements, denied one reinstatement, and two were withdrawn by the Petitioners. On December 31, 2019, there were two Petitions for Reinstatement pending before the Professional Responsibility Tribunal and two Petitions for Reinstatement pending before the Oklahoma Supreme Court.

TRUST ACCOUNT OVERDRAFT REPORTING

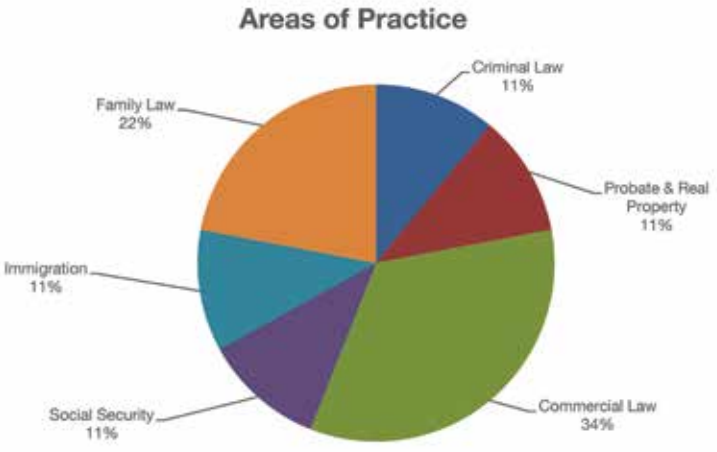
The Office of the General Counsel, under the supervision of the Professional Responsibility Commission, has implemented the Trust Account Overdraft Reporting requirements of Rule 1.15(j), Oklahoma Rules of Professional Conduct, 5 O.S. 2011, ch. 1, app. 3-A (ORPC). Trust Account Overdraft Reporting Agreements are submitted by depository institutions. In 2019, 48 notices of overdraft of a client trust account were received by the Office of the General Counsel. Notification triggers a general inquiry to the attorney requesting an explanation and supporting bank documents for the deficient account. Based upon the response, an investigation may be commenced. Repeated overdrafts due to negligent accounting practices may result in referral to the Discipline Diversion Program for instruction in proper trust accounting procedures.

UNAUTHORIZED PRACTICE OF LAW

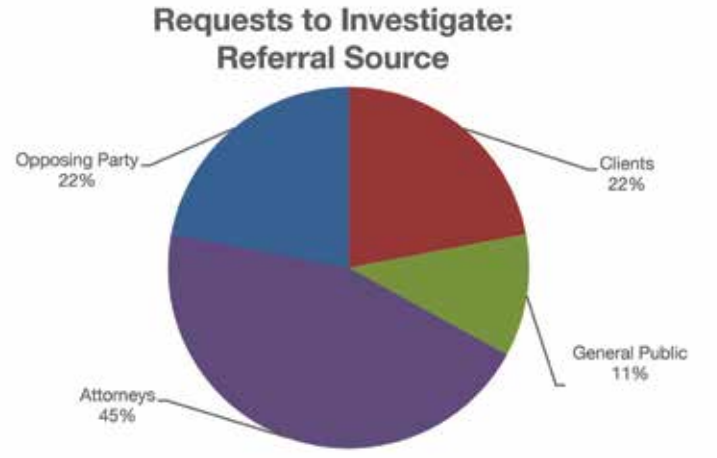
Rule 5.1(b), RGDP, authorizes the Office of the General Counsel to investigate allegations of the unauthorized practice of law (UPL) by non-lawyers, suspended lawyers and disbarred lawyers. Rule 5.5, ORPC, regulates the unauthorized practice of law by lawyers and prohibits lawyers from assisting others in doing so.

Requests for Investigation. In 2019, the Office of the General Counsel received nine complaints for investigation of the unauthorized practice of law. The Office of the General Counsel fielded many additional inquiries regarding the unauthorized practice of law that are not reflected in this summary.

Practice Areas. Allegations of the unauthorized practice of law encompass various areas of law. In previous years, most unauthorized practice of law complaints involved non-lawyers or paralegals handling divorce matters, but that trend has declined over the last few years. However, in 2019, a significant number of UPL complaints involved commercial law matters.

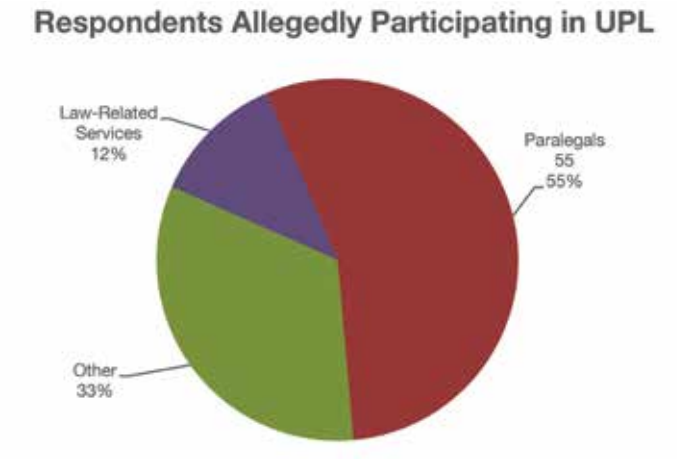


Referral Sources. Requests for investigations of the unauthorized practice of law stem from multiple sources. In 2019, the Office of the General Counsel received the most complaints from attorneys.



Respondents. For 2019, most requests for investigation into allegations of the unauthorized practice of law related to paralegals.

For purposes of this summary, the category "paralegal" refers to an individual who advertises as a paralegal and performs various legal tasks for their customers, including legal document preparation.

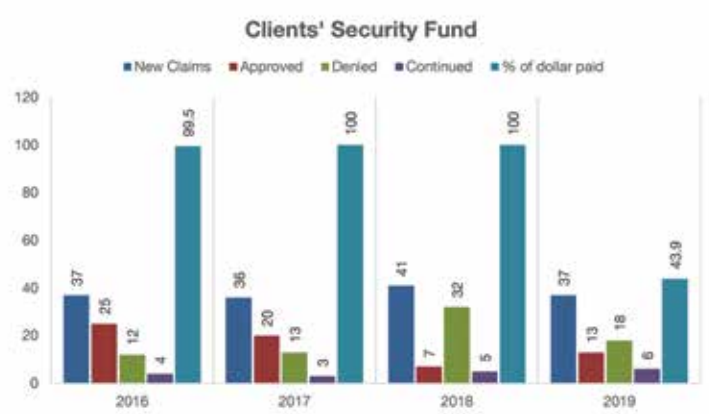


Enforcement. In 2019, of the nine matters received, the Office of the General Counsel took formal action in one matter. Formal action includes issuing cease and desist letters, initiating formal investigations through the attorney discipline process, referring a case to an appropriate state and/or federal enforcement agency, or filing the appropriate district court action. Four matters were closed for no finding of the unauthorized practice of law. The remainder of the matters are under investigation.

CLIENTS' SECURITY FUND

The Clients' Security Fund was established in 1965 by Court Rules of the Oklahoma Supreme Court. The Fund is administered by the Clients' Security Fund Committee which is comprised of 17 members, 14 lawyer members and 3 non-lawyers, who are appointed in staggered three-year terms by the OBA President with approval from the Board of Governors. In 2019, the Committee was chaired by lawyer member Micheal Salem, Norman. Chairman Salem has served as Chair for the Clients' Security Fund Committee since 2006. The Fund furnishes a means of reimbursement to clients for financial losses occasioned by dishonest acts of lawyers. It is also intended to protect the reputation of lawyers in general from the consequences of dishonest acts of a very few. The Board of Governors budgets and appropriates $175,000.00 each year to the Clients' Security Fund for payment of approved claims.

In years when the approved amount exceeds the amount available, the amount approved for each claimant will be reduced in proportion on a prorata basis until the total amount paid for all claims in that year is $175,000.00. The Office of the General Counsel reviews, investigates, and presents the claims to the committee. In 2019, the Office of the General Counsel presented 37 new claims to the Committee. The Committee approved 13 claims, denied 18 claims, and continued 6 claims into the following year for further investigation. In 2019, the amount available for reimbursement was increased by the OBA Board of Governors resulting in payment of $349,542.88 on 13 approved claims from the Clients' Security Fund.



CIVIL ACTIONS (NON-DISCIPLINE) INVOLVING THE OBA

The Office of the General Counsel represented the Oklahoma Bar Association in several civil (non-discipline) matters during 2019. Two cases carried forward into 2020. The following is a summary of all 2019 civil actions against or involving the Oklahoma Bar Association:

Alexander Bednar v. Farabow, Willis, Blasier and Oklahoma Bar Association, Oklahoma County Case No. CJ-2017-1192. Bednar filed suit against the OBA Defendants on February 28, 2017, alleging, among other things, that Defendants exhibited a pattern of harassment and attacks against him and requested the district court declare that his prior attorney discipline was not based on ethical violations and enjoin the OBA from further investigating his actions. Bednar also filed a Motion for Special Master to Investigate, Motion to Quash Administrative Subpoenas and for Protective Order, Motion to Seal Confidential Information and a Supplemental Petition. The OBA moved to dismiss the matter, and, after argument, an Order of Dismissal with Prejudice was entered by Judge Dixon and filed August 4, 2017. Bednar filed a Motion to Set Aside for Good Cause on September 5, 2017. After the OBA response and argument, the Court allowed Bednar to supplement his filing with a transcript from the motion to dismiss hearing. At the hearing on January 19, 2018, Judge Davis reconsidered Judge Dixon's order and dismissed Bednar's suit *without* prejudice to

refiling. At the hearing, Bednar indicated he filed another lawsuit that morning against Defendants (see below). Thereafter, Bednar filed a Supplemental Petition, Application for Emergency Orders and other documents. After response and argument, Bednar's motions were overruled, and the case was transferred to another county.

Alexander Bednar v. Hammond, et al., Oklahoma County Case No. CJ-2018-373 (before the Honorable Paul Hesse, Canadian County). Bednar filed suit against OBA Defendants Farabow, Hendryx, Blasier and Willis on January 19, 2018, alleging, among other things, that the court must stop Defendants from discussing private bar investigation matters with judges, attorney and attorneys and that one OBA defendant acted outside the scope of employment while investigating him. Bednar also filed an Application for Emergency Orders, Application to Consolidate and/or Reassign Case to Judge Davis, and an Application for Discovery Master. Less than a month later, Bednar filed a Supplemental Application for Emergency Orders and to Transfer and/or Reassign Case to Judge Davis. The OBA filed a Motion to Dismiss. After argument, the court dismissed Bednar's Motion for Discovery Master and for an injunction against employees of the OBA. Bednar filed or caused to be filed two Applications to Intervene in Support of a Motion for Special Master. The OBA responded to said applications and filed a supplemental motion to dismiss. After argument, the applications were denied and the motions to dismiss were granted. Thereafter, Bednar filed a First Amended Petition and other motions. The OBA again responded to Bednar's filings and filed another Motion to Dismiss. In the interim, Bednar unsuccessfully attempted to have Judge Hesse recuse. Bednar then filed a Motion to Set Aside the Order Denying Recusal to which the OBA responded. This case was then transferred to Oklahoma County and back to Canadian County. On February 1, 2019, the OBA's Motion to Dismiss was sustained and the matter was dismissed with prejudice. On March 7, 2019, Bednar filed a "Motion to Set Aside Default Judgment Received Within Thirty Days."

Vance-1 Properties, LLC, v. Energy Production Services, LLC, Oklahoma County Case No. CJ-2017-4737. On June 25, 2018, "Plaintiff, Compulsory Cross Claimant" Kris Agrawal filed a Petition for Damages in Fraud by Chris Holland and Lawyers Upon Courts to Steal Money of a Non-Judgment Debtor-Energy Production Services, LLC. Agrawal requested that "Nominal Defendant Oklahoma Bar Association" make rules to "punish Lawyers who abuse Court Procedures, who are thieves, and enforce the current Rules of Professional Conduct." The OBA filed a Motion to Dismiss based on lack of subject matter jurisdiction. On September 6, 2018, the court granted the OBA's Motion to Dismiss with Prejudice.

Vance - Properties, LLC, v. Energy Production Services, LLC, v. Kris K. Agrawal v. Daniel Delluomo, Chris Holland, et al, and Oklahoma County Court Clerk, Michael T. Bridwell, Jerry Parent, Sunoco Partners Marketing and Terminals, Jerry Kite, and Oklahoma Bar Association, Supreme Court Case Nos. 117553, 117554, 117555, 117556, 117557, 117558. On November 26, 2018, Agrawal initiated six appeals. The Oklahoma Bar Association responded to the Petitions in Error. The cases were consolidated to Case No. 117554. On August 29, 2019, upon motion of the Appellant, the appeal was dismissed as to the Oklahoma Bar Association.

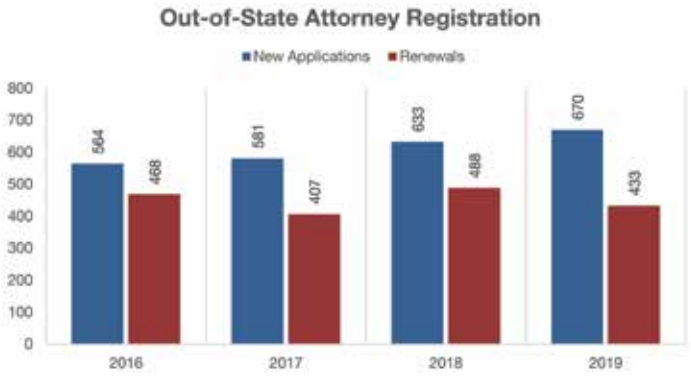
Brande Samuels v. State of Oklahoma et al., United States District Court for the Northern District of Oklahoma, Case No. 4:18-cv-267. Mr. Samuel's filed a complaint on May 17, 2018 against 52 defendants, including "Oklahoma Bar Association City of Tulsa" and multiple members of the Oklahoma Bar Association's Board of Governors. Mr. Samuels did not serve any of the Oklahoma Bar Association defendants. On December 14, 2018, the Court dismissed the case, specifically noting that Mr. Samuels failed to include any factual allegations or specific references to the individually named OBA Board of Governors. After judgment was issued, Mr. Samuels appealed the case to the Tenth Circuit Court of Appeals, Case No. 19-5002. The case was terminated without judicial action on April 24, 2019.

Rickey White v. Oklahoma Bar Association, Court of Criminal Appeals of Oklahoma, Case No. MA-2019-825, filed November 12, 2019. Mr. Rickey petitioned the court for an order directing the Oklahoma Bar Association to re-open and investigate a grievance he filed against an attorney. The Oklahoma Bar Association was not served. On December 4, 2019, the Court of Criminal Appeals declined jurisdiction.

Johnson & Johnson ex rel., Stephen P. Wallace v. State of Oklahoma, et al., United States District Court for the District of New Jersey, Case No. CIV-19-14189. Mr. Johnson filed suit against multiple Oklahoma defendants alleging RICO and other violations. The facts underlying the suit are not easily discernable from Mr. Wallace's filings. Johnson & Johnson notified the court that they were not (despite Mr. Wallace's filings) associated with this case in any way. The OBA filed a Motion to Dismiss on September 26, 2019. Plaintiff filed various "Emergency" and "Supplemental Emergency" Motions. Plaintiff must respond to the Motion to Dismiss by February 7, 2020.

ATTORNEY SUPPORT SERVICES

Out-of-State Attorney Registration. In 2019, the Office of the General Counsel processed 670 new applications and 433 renewal applications submitted by out-of-state attorneys registering to participate in a proceeding before an Oklahoma Court or Tribunal. 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 Oklahoma Bar Association. 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."



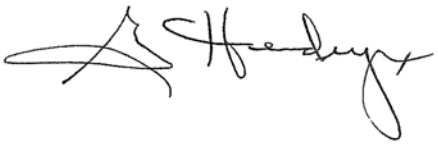
Certificates of Good Standing. In 2019, the Office of the General Counsel prepared 999 Certificates of Good Standing/Disciplinary History at the request of Oklahoma Bar Association members.

ETHICS AND EDUCATION

During 2019, the General Counsel, Assistant General Counsels, and the Professional Responsibility Commission members presented more than 100 hours of continuing legal education programs to county bar association meetings, attorney practice groups, OBA programs, all three state law schools, and various legal organizations. In these sessions, disciplinary and investigative procedures, case law, and ethical standards within the profession were discussed. These efforts direct lawyers to a better understanding of their ethical requirements and the disciplinary process, and informs the public of the efforts of the Oklahoma Bar Association to regulate the conduct of its members. In addition, the General Counsel was a regular contributor to *The Oklahoma Bar Journal*.

The attorneys, investigators, and support staff for the General Counsel's office also attended continuing education programs in an effort to increase their own skills and training in attorney discipline. These included trainings by the Oklahoma Bar Association (OBA), National Organization of Bar Counsel (NOBC), and the Organization of Bar Investigators (OBI).

RESPECTFULLY SUBMITTED this 7th day of February, 2020, on behalf of the Professional Responsibility Commission and the Office of the General Counsel of the Oklahoma Bar Association.



Gina Hendryx, General Counsel
Oklahoma Bar Association

ENDNOTES

1. The initial submission of a trust account overdraft notification is classified as general correspondence. The classification may change to a formal grievance after investigation.

2. Four cases were stayed by the Court and are still considered pending by the Office of the General Counsel: SCBD 6318, Rule 7, RGDP; SCBD 6354, Rule 7, RGDP; SCBD 6512, Rule 7, RGDP; SCBD 6723, Rule 6, RGDP.

Old Bar Journals

By John Morris Williams

An OBA member asked me for a copy of an old *Oklahoma Bar Journal*. Before I could get online and get it, the member responded, "Never mind, I went to HeinOnline and have it now. Thanks." That all happened in less than one minute.

I recall, further back into the last century than I may want to admit, a time when many law office libraries had old bar journals in binders once sold by the OBA. I suspect that many of our younger members do not recall those days. There is a bit of history to all this.

Prior to OSCN.net putting opinions online quickly after their release, the *Oklahoma Bar Journal* court issues were the quickest way for Oklahoma lawyers to get updates on the law. Publishing companies supplied advance sheets to subscribers, but those usually came several days, if not longer, after the court issue had already been published.

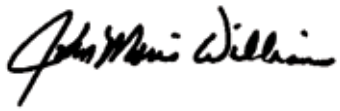
Now, the OBA publishes court issues online as PDFs. The decision was made to continue publishing it in an electronic format so mandates and unpublished opinions could still be readily accessed. There is still no method to efficiently get this information other than these electronic versions. Since published opinions are posted on OSCN.net so quickly though, reading them in a court issue is not the fastest source for them. Perhaps at some point we may simply use hyperlinks to those opinions in the court issue. That would make the document smaller and members would get the exact same content they are seeing now.

As of now, we are printing 10 *Oklahoma Bar Journal* theme issues annually. These theme issues are now in color on glossy paper. For those new to the OBA, until we stopped printing court issues a few years ago, all bar journal publications were on newspaper stock and mostly without color. Reducing the number of printed publications from 34 to 10 has led to a significant cost savings in printing and postage. The bar journal has never been a news publication in the sense that it was a source for breaking news. The lead time between editing and final printing is usually about a month. However, thanks to social media, our website and other electronic communication tools, the OBA can give immediate or timely reporting on issues of significance to Oklahoma lawyers in other ways.

I must admit that I like paper and used to keep old bar journals for a significant period. I still do keep the theme issues. Other than being a fire hazard and an eye sore, there is not much need to hang on to the old bar journals though. First, right now the OBA has 12 years of the theme issues readily accessible online at www.okbar.org/barjournal (or click the "Bar Journal" link under the members tab of the homepage). This year's court issues are also on that page. Second, for several years we have offered HeinOnline as a free member service, accessible through your MyOKBar account. It is totally free and when coupled with Fastcase, most lawyers have all the legal research capacity they need for free.

HeinOnline has a very fast search engine. So rather than going through stacks of old bar journals, a quick search gets you the *Oklahoma Bar Journal* article you were looking for. There is just no reason to have a bunch of old bar journals sitting around unless you have a paper and dust mite fetish. Having a few months around is okay I suppose, the color versions are nice to look at.

There is just no need to save old bar journals. You have them all at your fingertips. The OBA has you covered in being able to retrieve them in a matter of seconds. HeinOnline is just one of many member services the OBA provides to enhance your professional life. If you have not used this resource, I think you will like it a lot! Now get out there, recycle those old bar journals and prepare for the re-emergence of cassette tapes.



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

(continued from page 4)

to help victims with legal matters such as guardianships, estates and probate, workers' comp, personal injury, media, insurance claims and property issues. I think the OBA's service during that time, and in response to other disasters like tornadoes and flooding, makes the OBA and its Disaster Response Committee part of the "Oklahoma Standard" that became a rallying cry for the generosity of the Oklahoma community after the Murrah bombing.

CLE SEMINAR TO REFLECT BACK ON EVENTS

Four OBA members lost their lives in the bombing: Susan Jane Ferrell, Jules Alfonso Valdez, Michael D. Weaver and Clarence Eugene Wilson Sr. To honor them and the other lives lost and forever changed by the events of April 19, the OBA CLE Department, in conjunction with OCU Law's Murrah Center on Homeland Security Law & Policy and the Oklahoma City National Memorial and Museum, will be having an all-day seminar on Friday, April 17, at the OCU School of Law titled "The Crime, The Trial, The Response: OBA Remembers the Oklahoma City Bombing."

Located two blocks from the Murrah Building, windows were blown out of Susan's office. Light fixtures and ceiling tiles also fell as a result of the bomb's blast.

Program planners and former OBA presidents Melissa DeLacerda and Stephen Beam, along with Bob Burke as moderator, have assembled presentations by two of the FBI agents who initially investigated the crime, the sheriff who arrested Timothy McVeigh, Brian Hermanson, a current OBA Board of Governors member and defense counsel for Terry Nichols, former Oklahoma Supreme Court Justice Steven Taylor who presided over the trial of Terry Nichols, and a panel that includes survivors, former Gov. Frank Keating and former Oklahoma City Fire Chief Gary Marrs.

It will be an opportunity to hear first-person accounts of the events of April 19 and the court trials and to tour the memorial and museum. Hearing about the legal aspects of the bombing and its aftermath from those who were there is an important part of the anniversary remembrance and the history of that tragic event. I hope you will attend.

As always, please do not hesitate to contact me with your questions, comments and suggestions at susan.shields@mcafeetaft.com or 405-552-2311.

According to OBA records, 143 lawyers were assigned 153 cases, and attorneys donated more than 3,000 hours to help victims with legal matters such as guardianships, estates and probate, workers' comp, personal injury, media, insurance claims and property issues.

Meeting Summary

The Oklahoma Bar Association Board of Governors met Jan. 16 at the Oklahoma Bar Center in Oklahoma City.

REPORT OF THE PRESIDENT

President Shields reported she attended the December Oklahoma Attorneys Mutual Insurance Co. board meeting, worked on Annual Meeting planning, worked on committee appointments and other planning for 2020, continued work on the Uniform Bar Examination Advisory Committee, spoke at the Garfield County Bar Association meeting and participated in a conference call with the search committee for the new director of educational programs.

REPORT OF THE PRESIDENT-ELECT

President-Elect Mordy reported he attended the budget hearing before the Supreme Court and participated in a conference call with the search committee for the new director of educational programs.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the monthly staff celebration, two Legislative Monitoring Committee meetings, staff directors meeting and Judicial Conference Legislative Committee meeting. He worked on the Law for People website, attended meetings to organize website materials and also worked on a plan for replacing the retiring director of educational programs that included participating in a conference call with the search committee.

REPORT OF THE PAST PRESIDENT

Past President Chesnut reported he participated in a conference call with the director of educational programs search committee and attended the retirement reception for Judge Bill Culver.

BOARD MEMBER REPORTS

Governor Beese reported he attended the Legislative Monitoring Committee meeting and Legal Internship Committee meeting. **Governor DeClerck** reported he attended the Garfield County Bar Association meeting, which featured a presentation by President Shields. **Governor Hermanson** reported he attended two District Attorneys Council Executive Committee meetings, two Oklahoma District Attorneys Council meetings and two Oklahoma District Attorneys Association board meetings. He also served as day chair for the Ponca City Leadership Class day at the courthouse.

Governor McKenzie, unable to attend the meeting, reported via email he attended the Pottawattamie County Bar Association meeting. **Governor Pringle** reported he chaired the December Legislative Monitoring Committee meeting, published an article in the Oklahoma County Bar Association's *Briefcase* and worked on OBA Legislative Kickoff.

Governor Williams reported his bar activities have been related to his role as chief master of the OBA Professional Responsibility Tribunal, and he attended the January Diversity Committee meeting.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Haygood reported the division cancelled its January meeting because of weather and will hold its first meeting in February.

BOARD LIAISON REPORTS

Executive Director Williams said the **Solo & Small Firm Conference Planning Committee** is moving along with confirmation of several vendors and a speaker on mindfulness. Governor Williams said the **Diversity Committee** met and is enthusiastic about the coming year. Their event to interest people in going to law school will be moved up to earlier in the year. They are working on reaching out across the state to promote the event and want to include the tribes. The committee is interested in justice reform as the topic for their banquet speaker. It was noted there were several good speakers on this topic at the recent Southern Conference of Bar Presidents meeting in Atlanta. Governor Hermanson said the **Law Day Committee** is working on *Ask A Lawyer* TV show segments, which will feature segments on a law school clinic, military law and medical marijuana. OETA is expected to confirm the date the

show will air in late April by the end of January. Law Day contest entries for children pre-K to 12th grade were due Wednesday and are still coming in. Legal Aid Services offices around the state were drop off locations this year. The contest theme is Your Vote, Your Voice, Our Democracy: The 19th Amendment at 100. Judging will take place in February. He said the committee chair met with Chief Justice Gurich this week to confirm the date for the contest award ceremony and to work with the judiciary in encouraging judges to host or become involved in their county bar Law Day events. Governor Pringle said the **Legislative Monitoring Committee's** Legislative Kickoff is coming up Feb. 1. Three legislators are committed to participate in a panel discussion, and Chief Justice Gurich will speak.

Governor Hermanson said the Law Day Committee is working on *Ask A Lawyer* TV show segments, which will feature segments on a law school clinic, military law and medical marijuana.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx updated board member on pending litigation. A written report of PRC actions and OBA disciplinary matters from Dec. 7-31, 2019, was submitted to the board for its review.

BOARD OF EDITORS

The board approved President Shields' appointment of Antonio Morales, Shawnee, to the District 8 position on the Board of Editors, term expires 12/31/22.

COUNCIL ON JUDICIAL COMPLAINTS

The board voted to appoint Glen Huff as a special member to the council due to the recusal of a council member. Mr. Huff will act upon current and any future complaints filed against the subject judge.

ABA YLD DELEGATE

Governor Haygood has a conflict that will prevent him from attending the upcoming ABA Midyear Meeting in Austin, Texas. The board approved Vice President Nowakowski as a substitute for Governor Haygood to serve as a Young Lawyers Division delegate at this meeting.

COMMITTEE LEADERSHIP APPOINTMENTS

President Shields said she is still working on a list of committee chairpersons and vice chairpersons for 2020.

2020 BOARD MEETINGS

President Shields reviewed the updated meeting schedule that includes a few changes. She proposed board members get together for an informal Thursday evening dinner before Friday meetings in Oklahoma City. Everyone will pay for their own dinner.

NEXT MEETING

The Board of Governors met in February and early March. A summary of those actions will be published in the *Oklahoma Bar Journal* once the minutes are approved. The next board meeting will be at 10 a.m. Friday, April 3, in Bartlesville.

Are You Ready to Rock?!

THE OKLAHOMA BAR Foundation will host its second annual "Rock the Foundation – Lip Sync for Justice" fundraiser this summer. You don't want to miss local law firms competing in this epic lip sync battle to raise funds for legal services. Ticket information will be available soon, but for now save the date of June 5 at Tower Theater in Oklahoma City.

SCHOLARSHIPS AND AWARDS

The Oklahoma Bar Foundation is proud to announce its 2019-2020 scholarship and awards recipients from OCU, OU and TU law schools. Every year, the OBF recognizes law students who meet the criteria set forth in OBF Scholarship and Awards Resolutions. These include: Chapman-Rogers Scholarship, Maurice H. Merrill Scholarship, Phillips Allen Porta Memorial Award, Thomas L. Hieronymus Memorial Award, W. B. Clark Memorial Scholarship and the OBF Fellows Scholarship.

2019-2020 OKLAHOMA BAR FOUNDATION

Scholarship and Award Recipients

Victoria Carrasco
OCU School of Law
Chapman-Rogers Scholarship

Kevin McIlwain
TU College of Law
Chapman-Rogers Scholarship

Caroline Turner
OU College of Law
Chapman-Rogers Scholarship

Casey Osborn
OCU School of Law
W.B. Clark Scholarship

Alauna Crawford
OCU School of Law
Fellows Scholarship

Grayson Kirk
TU College of Law
Fellows Scholarship

Jennie Mook
OU College of Law
Fellows Scholarship

Jack Bowker
TU College of Law
W.B. Clark Scholarship

Taylor Peshehonoff
OU College of Law
Maurice H. Merrill Award

Courtney Keeling
OU College of Law
Phillips Allen Porta Award

Andrew Rader
OU College of Law
Thomas L. Hieronymus Award

Cole Nimmo
OU College of Law
W.B. Clark Scholarship

Andrew Kirby
OU College of Law
W.B. Clark Scholarship

Michael Lewis
TU College of Law
W.B. Clark Scholarship

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WAYS TO SUPPORT THE

OKLAHOMA BAR FOUNDATION

Fellows Program

An annual giving program for individuals.

Community Fellows Program

An annual giving program for law firms, businesses and organizations.

Event Sponsor

Become a sponsor of OBF's annual fundraiser, Rock the Foundation - Lip Sync for Justice. Proceeds support OBF Grantees providing access to justice programs.

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.

Unclaimed Trust Funds

Direct funds to the OBF by mailing a check with the following information on company letterhead: client name, case number and any other important information.

Memorials & Tributes

Make a gift in honor of someone — OBF will send a handwritten card to the honoree or their family.

Interest on Lawyer Trust Accounts

Prime Partner Banks give higher interest rates creating more funding for OBF Grantees. Choose from the following Prime Partners for your IOLTA:

Bank of Cherokee County · Bank of Oklahoma · BancFirst · Security Bank (Tulsa)
Bank of Commerce (Duncan) · Herring (Altus) · Grand Savings (Grove)
The First State Bank (MWC, OKC) · NBC · First National Bank (Okmulgee)
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OPENING YOUR LAW PRACTICE
MAY 5 | OKLAHOMA BAR CENTER

A free seminar for new lawyers or those going into private practice
Registration required - contact Nickie Day at 405-416-7050

8:30 a.m.	**Registration and Continental Breakfast**
9 a.m.	**The Business of Law** Jim Calloway, OBA Management Assistance Program
10 a.m.	**How to Manage Everything!** Jim Calloway and Julie Bays, OBA Management Assistance Program
11 a.m.	**Break**
11:10 a.m.	**Fastcase, MyOKBar & More** Jim Calloway and Julie Bays, OBA Management Assistance Program
11:30 a.m.	**Professional Liability Insurance & Risk Management** Phil Fraim, President, Oklahoma Attorneys Mutual Insurance Company (OAMIC)
Noon	**Lunch** Provided by Oklahoma Attorneys Mutual Insurance Company (OAMIC)
12:30 p.m.	**Professionalism in the Practice of Law** Presiding Judge David Lewis, Oklahoma Court of Criminal Appeals
1:10 p.m.	**Break**
1:20 p.m.	**Trust Accounting and Legal Ethics** Gina Hendryx, OBA General Counsel
2 p.m.	**Tools of the Modern Law Office** Jim Calloway and Julie Bays, OBA Management Assistance Program
2:50 p.m.	**Break**
3 p.m.	**How to Succeed in Law Practice** Jim Calloway, OBA Management Assistance Program
4 p.m.	**Adjourn**

Sponsored by Oklahoma Attorneys Mutual Insurance Company
This program does not qualify for MCLE credit.

Activities Include Supplying Bar Exam Takers With Survival Kits

By Jordan Haygood

HERE WE ARE ALREADY in March – is it just me or has this year already flown by? Thankfully, Punxsutawney Phil didn't see his shadow, so here is hoping Oklahoma will give us the early spring we are all craving.

This past month we got to finally "roast" our Immediate Past Chair Brandi Nowakowski. Current and past board members spent the night celebrating Brandi's successful year as chair. The roast is always a fun time reminiscing on how much fun being part of the legal profession and a bar that provides so much support to its young lawyers. On behalf of the YLD board, we thank Brandi for her service to the legal profession and the bar. We know her role as OBA vice president will bring a lot of positive support to President Shields.

The board also met in February to put together our bar exam survival kits (BESK) for the new test takers. The board gets together twice a year to assemble the BESK and each meeting it is so much fun; however, I do admit, I still have flashbacks and get a little anxiety thinking about walking into the National Cowboy & Western Heritage Museum to take that exam. That is probably why I enjoy passing out BESK to the test takers – I remember the feeling of seeing young lawyers there who woke up just as early as we did, just to give us a simple smile and good luck. For those who want to help assemble or pass out BESKs, we will be doing it again in July and would love to have you.

At the ABA Midyear Meeting in Austin, Texas, are Oklahoma delegates (from left) April Moaning, YLD chair-elect; Caroline Shaffer Siex, new District 24 representative; and Brandi Nowakowski, YLD immediate past chair and OBA vice president.

The YLD also attended the American Bar Association Young Lawyers Division Midyear Meeting in Austin, Texas. Young lawyers meet from across the nation to discuss the issues, regulations and trends that are shaping the future of our profession. This is a time where we are able to represent Oklahoma across the nation. Something interesting that a lot of people do not know is that Oklahoma and Arkansas switch off every two years by having a district representative for both states. This year YLD Secretary Caroline Shaffer Siex will be the ABA/YLD District 24 representative. With this position she will also serve on the ABA Disaster Relief Committee and help out if the president of the United States ever declares a natural disaster in either Oklahoma or Arkansas. I appreciate Caroline for her work and know she will represent our district well.

This month is important as the association hosts OBA Day at the Capitol. This is always an important event for our bar as we get to talk to the legislators about issues happening within or against our profession. Surprisingly, legislators appreciate hearing from their constituents, too. Legislators and legislative staff are very important, and it is very beneficial for us to have events like this to develop relationships with staff assigned to issues impacting the bench and bar. Remember, they are elected to represent us, so it is crucial that we not only use time like Day at the Capitol, but any day of the year.

Go forth. Let your voices be heard.

Mr. Haygood practices in Oklahoma City and serves as the YLD chairperson. He may be contacted at jordan.haygood@ssmhealth.com. Keep up with the YLD at www.facebook.com/obayld.

HEY!

Checked out your OBA member benefits lately?

What are you waiting for? Visit www.okbar.org/memberbenefits.

For Your Information

OKLAHOMA NEWS ORGANIZATIONS SELECTED TO RECEIVE LEGAL SUPPORT FROM NATIONAL GROUP

Oklahoma is one of five states selected by the Reporters Committee for Freedom of the Press to receive pro bono legal support to assist news organizations in pursuing public records and access to public meetings and in defending against legal actions.

The Reporters Committee chose Oklahoma, Colorado, Oregon, Pennsylvania and Tennessee as the initial sites of its Local Legal Initiative, which is being funded primarily through a $10 million investment by the John S. and James L. Knight Foundation as part of its commitment to strengthening local journalism.

The committee, based in Washington, D.C., will hire an attorney in each state to work with participating news organizations to bolster their efforts to obtain public records, gain access to hearings and meetings and defend against legal threats and lawsuits.

"We are eager to expand our legal services to help more local journalists pursue stories that inform and strengthen their communities," said Bruce Brown, executive director of the Reporters Committee. "We are looking forward to working closely with our partners in each of these states to support thriving local journalism."

The five launch states were selected from more than 45 submissions that the Reporters Committee received last year from more than 30 states, regions and territories nationwide.

LHL DISCUSSION GROUP HOSTS APRIL MEETINGS

"Dealing With Difficult Judges" will be the topic of the April Lawyers Helping Lawyers discussion groups. The Oklahoma City group will meet April 2 at the office of Tom Cummings, 701 NW 13th St., and the Tulsa group will meet April 9 at the office of Scott Goode, 1616 S. Main St. Both groups will meet from 6 to 7:30 p.m. and are facilitated by committee members and a licensed mental health professional. There is no cost to attend and snacks will be provided. RSVPs to ken.skidmore@cox.net (OKC) and Scott@militarylawok.com (Tulsa) are encouraged to ensure there is food for all.

OBA MEMBER REINSTATEMENT

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

Anita Marie Lamar
OBA No. 30618
P. O. Box 2558
Tucker, GA 30085

ASPIRING WRITERS TAKE NOTE

We want to feature your work on "The Back Page." Submit articles of 500 words or less related to the practice of law, or send us something humorous, transforming or intriguing. Poetry and photography are options too. Send submissions 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:

Justin John Barth
OBA No. 30841
11455 Lily St N.W.
Coon Rapids, MN 55433

Peggy B. Cunningham
OBA No. 2102
P.O. Box 850564
Yukon, OK 73085

Jeffrey Lee Hatfield
OBA No. 3981
2804 Plymouth Ln.
Oklahoma City, OK 73120

Randolph C. Jackson
OBA No. 20563
Jones, Jackson, Moll, et al.
P.O. Box 2023
Fort Smith, AR 72902-2023

John G. Jacobs
OBA No. 4601
Jacobs Kolton, Chtd.
150 N. Michigan Ave., Ste. 2800
Chicago, IL 60601

Gregory Alan James
OBA No. 10664
3000 United Founders Blvd., Ste. 119
Oklahoma City, OK 73112

Patrice Amber James
OBA No. 33011
Shriver Center on Poverty Law
67 E. Madison St. #2000
Chicago, IL 60616

Richard Hilard Magnis
OBA No. 10381
43 Vanguard Way
Dallas, TX 75243

Martha L. Marshall
OBA No. 5712
3857 Bent Elm Lane
Fort Worth, TX 76109

David Glenn Nixon
OBA No. 10424
4100 Wagon Wheel Rd.
Springdale, AR 72762

Michael Laurence Pate
OBA No. 10921
3420 E. 76th Street
Tulsa, OK 74136

Douglas Lee Perry
OBA No. 7051
4508 Blackberry Run
Oklahoma City, OK 73112

Jessica Lynn Schumacher
OBA No. 22708
623 Autumnwood Forest Dr.
Lake St. Louis, MO 63367

Michael Raymond Shirley
OBA No. 8189
P.O. Box 947
Ozark, MO 65721

Carol Adamson Voiles
OBA No. 11717
7805 Pineridge Dr.
Amarillo, TX 79119

Bench and Bar Briefs

KUDOS

Monica Ybarra was one of five members appointed to the Board of Adjustment for the City of Oklahoma City. The board makes final decisions on applications for special exceptions, variances, oil/gas-related cases, appeals from other city commissions and appeals from the decisions of the director.

Judge Jodi B. Levine was awarded the TU College of Law Alumni Association 2019 Outstanding Senior Alumna Award. The award honors those who exemplify strong leadership within the practice of law throughout their career and demonstrate remarkable personal achievement, personal integrity and an ongoing commitment to the TU College of Law.

Michael Chitwood was elected president of the Oklahoma Association of Defense Counsel for 2020. **Kari Hawthorne** will serve as vice president, **Liz Oglesby** will serve as treasurer, **Eric Clark** will serve as secretary and **Angela Ailles Bahm** will serve as legislative director. Also serving as board members for 2020 are **Brock Bowers**, **Meredith Lindaman**, **Carrie McNeer**, **Shawn Arnold**, **Michelle Harris**, **Lauren Marciano**, **Tyler Brooks**, **Christopher Davis** and **Reign Karpe**.

AT THE PODIUM

Mark Swiney presented a lecture titled "Tulsa's Gilcrease Museum and the Federal Native American Graves and Repatriation Act (NAGPRA)" at the Athens Institute for Education and Research's annual conference in Athens, Greece.

ON THE MOVE

Sterling E. Pratt has been named partner at the Oklahoma City firm of Fenton, Fenton, Smith, Reneau & Moon. Mr. Pratt practices primarily in the areas of civil litigation, insurance defense, bad faith, product liability, employment law and construction litigation. **Emily E. Allen** has joined the firm as an associate. Ms. Allen practices primarily in the areas of insurance defense, transportation litigation and general civil litigation.

Cody J. Cooper has been named shareholder and director at the Oklahoma City firm of Phillips Murrah PC. He is a member of the firm's Intellectual Property and Commercial Litigation practice groups and practices primarily in intellectual property, including patent prosecution and litigation, trademark and copyright matters and commercial litigation in state and federal courts.

Lytle, Soulé & Curlee PC has changed its name to Lytle, Soulé & Felty PC. Firm members include **Michael C. Felty**, **Shawn E. Arnold**, **Gore Gaines**, **Jason C. Hasty**, **Robert Ray Jones Jr.** and **Matthew K. Felty**.

Jesse C. Chapel, **Michael A. Furlong** and **Ashley L. Powell** have been named partners at the Oklahoma City firm of Hartzog Conger Cason. Mr. Chapel received his J.D. From the OCU School of Law in 2008 and an LL.M. in taxation from the University of Florida Levin College of Law in 2009. He practices primarily in the areas of tax, estate planning and corporate law. Mr. Furlong received his J.D. from the OU College of Law in 2012 and practices primarily in the areas of labor and employment, commercial, energy, tax and appellate litigation matters. Ms. Powell received her J.D. from the OU College of Law in 2013 and practices primarily in the areas of family law, contested probate, guardianship matters and commercial litigation.

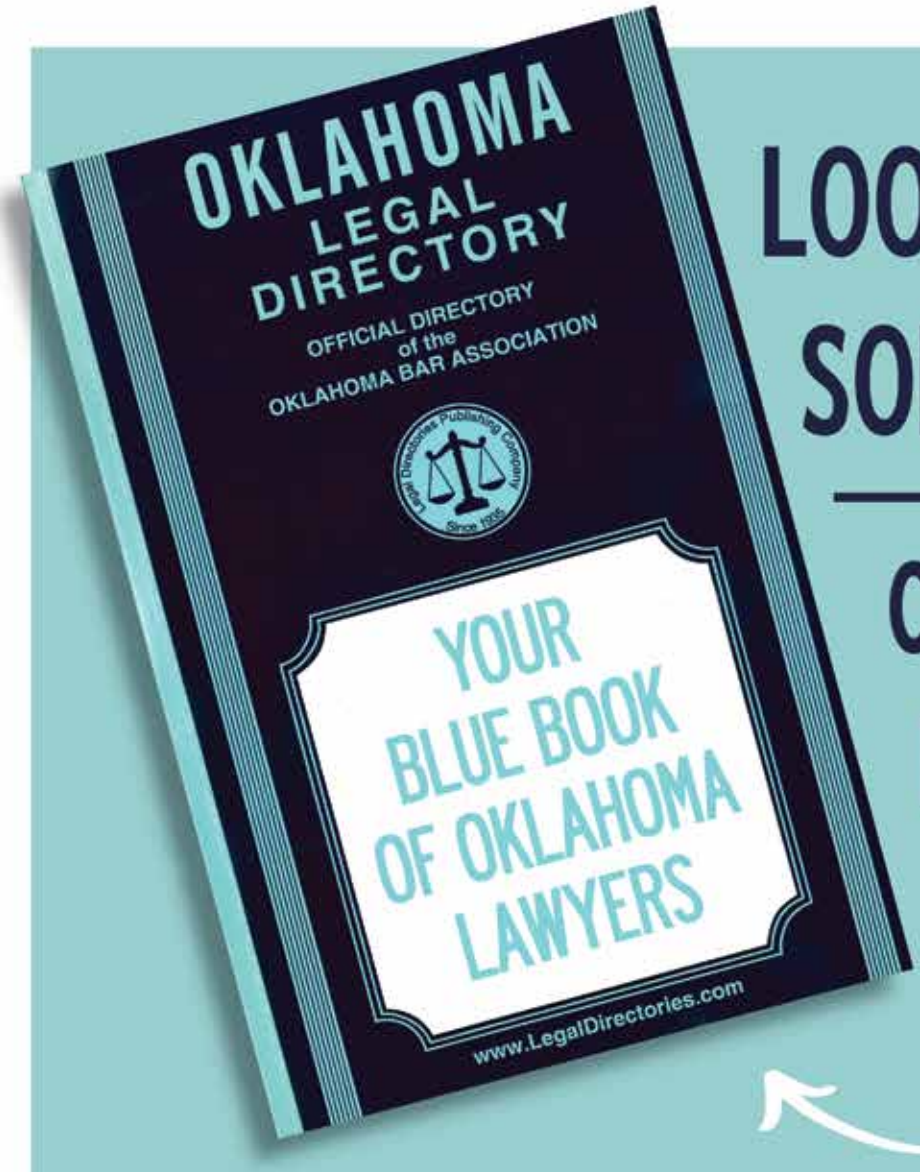
Travis Weedn has been named deputy general counsel of the Petroleum Storage Tank Division with the Oklahoma Corporation Commission. Mr. Weedn received his J.D. from the OCU School of Law in 2014.

Laura Farris has been appointed associate district judge for Creek County by Gov. Kevin Stitt. She has worked in the Creek and Okfuskee County District Attorney's Office for 20 years. Ms. Farris received her J.D. from the TU College of Law in 1999.

Andre' Caldwell has been elected shareholder of the Oklahoma City office of Ogletree Deakins. He received his J.D. from the OU College of Law in 2008.

CONSUMER BROCHURES

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



LOOKING FOR SOMETHING?

CHECK YOUR BLUE BOOK!

It's all in here!

The Oklahoma Legal Directory is the official OBA directory of member addresses and phone numbers, plus it includes a guide to government offices and a complete digest of courts, professional associations including OBA committees and sections. To order a print copy, call 800-447-5375 ext. 2 or visit www.legaldirectories.com. A free digital version is available at tinyurl.com/2018oklegaldirectory.

In Memoriam

Dennis Ray Butler of Lawton died Dec. 2, 2019. He was born July 26, 1944, in Wagoner. He obtained a bachelor's degree from OSU and received his J.D. from the TU College of Law in 1971. He began his practice in Lawton and spent over 40 years working there as an attorney before retiring in 2018. Memorial contributions may be made to the Salvation Army or to Cancer Centers of Southwest Oklahoma at 104 NW 31st St., Lawton, 73505.

Burton J. Johnson of Oklahoma City died Jan. 7. He was born May 16, 1920, in Providence, Rhode Island. **At the age of 18, Mr. Johnson joined the U.S. Army. He remained active duty during WWII and became a reserve officer through 1953.** He began his legal career in 1950 and remained in Oklahoma City for more than 60 years. Memorial contributions may be made to the VA in Norman or the Gary Sinise Foundation.

William J. Joyce of San Antonio died Jan. 21. He was born Dec. 9, 1930, in Tulsa. Mr. Joyce received his J.D. from the TU College of Law in 1956. **He served in the U.S. Air Force as active duty for 26 years.** After his service, Mr. Joyce joined the legal staff of Boeing's Wichita division as a senior attorney before retiring and returning to Tulsa in 1993. He moved to San Antonio in 2012. Memorial contributions may be made to the Colonel William J. and Pat R. Joyce Endowed Scholarship of Law at the TU College of Law.

Mary Kathryn "Kathy" Kunc of Oklahoma City died Dec. 22, 2019. She was born May 21, 1964, in Oklahoma City. Ms. Kunc graduated from Bishop McGuinness Catholic School in 1982 and attended Trinity University in San Antonio. She received her J.D. from the OCU School of Law in 1994. Memorial contributions may be made to St. Jude Children's Research Hospital or the Oklahoma City Ballet.

Norman R. Manning of Oklahoma City died May 1, 2017. He was born Oct. 10, 1928, in Wichita. He moved to Oklahoma for his senior year of high school and graduated from Classen High in 1946. He attended OU for his bachelor's degree. **Mr. Manning served as a lieutenant in the U.S. Air Force and was stationed at Luke Air Force Base in Arizona.** He then returned to Oklahoma and received his J.D. from the OCU School of Law in 1960. At his retirement, he was serving as vice president of the Oklahoma Farm Bureau Mutual Insurance Co.

James A. Mitchell of Oklahoma City died Jan. 10. He was born Sept. 1, 1938. Mr. Mitchell received his J.D. from the OU College of Law in 1970.

Kayla Bower Muse of Oklahoma City died March 1, 2018. She was born Oct. 31, 1946, in Lafayette, Indiana. Ms. Muse received her J.D. from the OU College of Law in 1979. She spent much of her life working at the Oklahoma Disability Law Center.

David M. Nichols of Broken Arrow died Jan. 17. He was born July 4, 1950, in Joplin, Missouri. Mr. Nichols graduated from Wyandotte High School in Kansas City and went on to earn his bachelor's degree from Phillips University. He then pursued a master's degree from TU and received his J.D. from the TU College of Law in 1981. Memorial contributions may be made to Forest Park Christian Church at 9102 South Mingo, Tulsa, 74033.

Robert "Bob" Peregrin of Oklahoma City died Jan. 10. He was born July 3, 1957, in Plainfield, New Jersey. He received his J.D. from the OU College of Law in 1982. He was a founding member and shareholder of Daugherty, Fowler, Peregrin, Haught & Jensen PC. His legal practice focused on assisting clients on FAA and international registry matters involving the sale, registration, leasing and financing of private, corporate and commercial aircraft. Memorial contributions may be made to Boys Ranch Town at 5100 E 33rd St., Edmond, 73013.

John Pevehouse of Norman died Jan. 17. He was born Aug. 12, 1967, in Oklahoma City. After college, Mr. Pevehouse worked as a youth minister at Waterloo Road Baptist Church, where he remained until 1996. He received his J.D. from the OU College of Law in 2003. He worked as an assistant district attorney in the Cleveland County District Attorney's Office until his death.

Evelyn A. Reiss of Anadarko died Jan. 5. She was born July 6, 1948. Early in her professional career, Ms. Reiss was a certified professional secretary in Dallas, working directly for the CEO of JCPenny. After returning to Oklahoma, she started teaching public school in Fort Cobb while attending law school at night. She received her J.D. from the OCU School of Law in 1985. Ms. Reiss served as an assistant district attorney in Caddo County and eventually launched her own solo practice. She tried and won the first capitol court case in Oklahoma utilizing DNA evidence.

William Beauchamp Selman of Tulsa died Jan. 8. He was born April 15, 1945, in Oklahoma City. Mr. Selman graduated from Edison High School in 1963 and from Northwestern University in 1967. **After college, he enlisted with the U.S. Marine Corp and was deployed in 1968 to Vietnam.** He received his J.D. from the OU College of Law in 1973. Memorial contributions may be made to the aquatics program at the Tandy Family YMCA at 5005 S. Darlington Ave., Tulsa, 74135.

Kenneth Leon Wood II of Oklahoma City died Nov. 15, 2019. He was born Dec. 20, 1964, in Oklahoma City. Mr. Wood graduated from Del City High School in 1983 and earned his bachelor's degree from OU. He received his J.D. from the OCU School of Law in 1993. Memorial contributions may be made to the American Diabetes Association.

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 to:

Laura Wolf
Communications Dept.
Oklahoma Bar Association
405-416-7017
barbriefs@okbar.org

Articles for the May issue must be received by April 1.


CONQUER YOUR MOUNTAIN
FREE 24-HOUR CONFIDENTIAL ASSISTANCE
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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.
Oklahoma Bar Association
Lawyers Helping Lawyers
Assistance Committee

2020 EDITORIAL CALENDAR

2020 ISSUES

APRIL
Law Day
Editor: Carol Manning

MAY
Gender in the Law
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Jan. 1, 2020

AUGUST
Children and the Law
Editor: Luke Adams
ladams@tisdalohara.com
Deadline: May 1, 2020

SEPTEMBER
Bar Convention
Editor: Carol Manning

OCTOBER
Mental Health
Editor: C. Scott Jones
sjones@piercecouch.com
Deadline: May 1, 2020

NOVEMBER
Alternative Dispute Resolution
Editor: Aaron Bundy
aaron@bundylawoffice.com
Deadline: Aug. 1, 2020

DECEMBER
Wellness
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Aug. 1, 2020

2021 ISSUES

JANUARY
Meet Your Bar Association
Editor: Carol Manning

FEBRUARY
Marijuana and the Law
Editor: Virginia Henson
virginia@phmlaw.net
Deadline: Oct. 1, 2020

MARCH
Probate
Editor: Patricia Flanagan
patriciaaflanaganlaw office@gmail.com
Deadline: Oct. 1, 2020

APRIL
Law Day
Editor: Carol Manning

MAY
Personal Injury
Editor: Cassandra Coats
cassandracoats@leecoats.com
Deadline: Jan. 1, 2021

AUGUST
Tax Law
Editor: Tony Morales
tony@stuartclover.com
Deadline: May 1, 2021

SEPTEMBER
Bar Convention
Editor: Carol Manning

OCTOBER
DUI
Editor: Aaron Bundy
aaron@bundylawoffice.com
Deadline: May 1, 2021

NOVEMBER
Elder Law
Editor: Luke Adams
ladams@tisdalohara.com
Deadline: Aug. 1, 2021

DECEMBER
Labor & Employment
Editor: Roy Tucker
RTucker@muskogeeonline.org
Deadline: Aug. 1, 2021

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

What's Online

Positive Experiences for Your Clients

Ensuring your clients have a positive experience while dealing with you and your law firm is crucial to your success as an attorney. Here are three things you can implement to ensure your client's experience is positive.

tinyurl.com/positiveclientexperience

Five Benefits of Remote Work

Whether or not remote work is beneficial for a company has been a hot topic the last several years. Research institutions including Gallup, Harvard University, Global Workplace Analytics and Stanford University have studied the topic of workplace flexibility and this is what they found.

tinyurl.com/5remotework

Lucky St. Patrick's Day Food

Think only green food can bring you luck on St. Patrick's Day? Think again! Here are 60 authentic Irish dishes that are sure to be festive, satisfying and bring you an extra dose of good luck.

tinyurl.com/goodluckdishes

Eight Facts About Daylight Saving Time

Daylight saving time begins this month. Have you ever wondered who started daylight saving time or which country was the first to implement daylight saving time? Check out these eight facts about the time changing tradition.

tinyurl.com/dls2020

MUSCOGEE (CREEK) NATION DISTRICT COURT

Presents the 18th Annual

INDIAN LAW CONTINUING LEGAL EDUCATION CONFERENCE

APRIL 30 - MAY 1, 2020

RIVER SPIRIT & MARGARITAVILLE CASINO RESORT, TULSA, OK

CONFERENCE REGISTRATION

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

LODGING

FOR CONFERENCE RATE ($98/NIGHT), CALL 888-748-3731 BY 4/1/20 AND MAKE ROOM RESERVATION AS AN "MCN DOING BUSINESS CLE ATTENDEE"

REGISTER NOW!

VISIT OUR WEBSITE FOR MORE INFORMATION:

HTTPS://MCNDISTRICTCOURT.EVENTBRITE.COM

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.

Don't let distance keep you from getting involved

Attend section and committee meetings remotely via BlueJeans.

Use a mobile device, phone or computer. Visit www.okbar.org/bluejeans.

Classified Ads

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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.

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

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POLYGRAPH EXAMINATIONS

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Fellow - ACFEI	FBI National Academy

Arthur Linville 405-736-1925

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OFFICE SPACE

LUXURY OFFICE SPACE AVAILABLE - One office available for $670/month lease in the Esperanza Office Park near NW 150th and May Ave. The Renegar Building offers a reception area, conference room, full kitchen, fax, high-speed internet, security, janitorial services, free parking and assistance of our receptionist to greet clients and answer telephone. No deposit required. Gregg Renegar, 405-488-4543.

TWO MONTHS FREE RENT
with 3-year lease agreement
Perimeter Center Office Complex, located at 39th and Tulsa Avenue currently has available suites for lease. Offices range in size from 613 to 5,925 square feet.

EXECUTIVE SUITES
Single unfurnished offices with month to month lease term. Amenities include conference rooms, breakroom, fax, copy and answering services.

Please call 405-943-3001 M-F from 8-5 for additional information or appointment to tour our facilities

FOR SALE

READY FOR COURT IN 2020! Sentencing in Oklahoma (4th Ed.) by Bryan Dupler. The practical guide for judges and attorneys. $35, incl. tx & ship. Email orders to oksentencinglaw@gmail.com.

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.

ENID, OKLAHOMA LAW FIRM INVITES ASSOCIATES WITH 3+ YEARS' EXPERIENCE TO JOIN OUR TEAM. We are looking for a candidate who is hard working and a self-starter and is knowledgeable in multiple practice areas, including litigation and family law. Candidates must have excellent research skills, analytical thinking skills and writing skills. Salary compensable with experience and can be $100,000+, benefits and 401K. If hired, must live in Enid or surrounding area. Send resumes to "Box Z," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

SEEKING ASSOCIATE FOR GROWING CIVIL LITIGATION PRACTICE IN NW OKC. Candidates must be in good standing with the Oklahoma Bar Association, have excellent research and writing skills and be proficient with technology. Ideal candidate is an Oklahoma licensed attorney in good standing with 2-5 years in a complimentary practice area, comfortable in a court room, with former litigation and deposition experience, good interpersonal skills including a heart for social justice. Plus if candidate has ability to speak a foreign language, barred in federal court, multi-state bar licenses. We are an equal opportunity employer, prohibiting job discrimination based on race, color, sex, national origin, religion, age, equal pay, disability, or genetic information. Job Type: Full-time. Please send resume and writing samples to Marquita@mazaherilaw.com.

NORMAN BASED FIRM IS SEEKING A SHARP AND MOTIVATED ATTORNEY to handle HR-related matters. Attorney will be tasked with handling all aspects of HR-related items. Experience in HR is required. Firm offers health/dental insurance, paid personal/vacation days, 401(k) matching program and a flexible work schedule. Members of our firm enjoy an energetic and team-oriented environment. Position location can be for any of our Norman, OKC or Tulsa offices. Submit resumes to justin@polstontax.com.

NORTHERN OKLAHOMA LAW FIRM SEEKING ATTORNEY WITH EXPERIENCE in the area of Social Security disability. Competitive salary, health insurance and 401K available. Send resume to "Box P," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

DeWITT PARUOLO & MEEK IS SEEKING AN ATTORNEY with a minimum of 1 years' experience in civil trial practice, insurance defense litigation and insurance coverage. Please submit your resume, cover letter and a writing sample to Derrick Morton, P.O. Box 138800, Oklahoma City, OK 73113 or by email to morton@46legal.com.

THE OKLAHOMA BAR ASSOCIATION SEEKS A DIRECTOR OF EDUCATIONAL PROGRAMS. The position manages and directs the OBA's CLE Department and other educational events for the association. The OBA CLE Department offers comprehensive and unique live programming for Oklahoma lawyers and has an impressive list of online programs that are available to lawyers nationwide. For more information and directions on how to apply, please see display ad on page 35 of this bar journal.

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 405-416-7086 or heroes@okbar.org.

COFFEY, SENGER & MCDANIEL SEEKS EXPERIENCED ATTORNEY for our high-volume practice. Preferred candidate will have 5-7 years of experience in areas of transportation and insurance defense. Research, corporate, construction and health care law are a plus. Excellent benefits. Salary is based on experience. Send resumes to amy@csmlawgroup.com.

COFFEY, SENGER & MCDANIEL (TULSA, OK) IS SEEKING AN ATTORNEY with 5-7 years of experience. Must have research and writing skills. Our firm offers health insurance benefits, paid vacation, 401(k) and life insurance. Salary is based on experience. Send resumes to amy@csmlawgroup.com.

MEDIUM SIZE AV-RATED DOWNTOWN TULSA FIRM IS SEEKING AN ATTORNEY with at least 12 years of business and civil litigation experience. The candidate must have jury trial experience. The ideal candidate will have solid litigation experience, excellent communication skills and be well-organized. Candidates seeking a firm with a team approach to litigation and a firm characterized by an environment encouraging faith and family will be interested in this unique opportunity. The compensation package is commensurate with level of experience and qualifications. Having some book of business is preferred. An exceptional benefit package includes bonus opportunity, health insurance, life insurance and 401K with match. Applications will be kept in strict confidence. Please send resume to resumereplies06@gmail.com.

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A GUIDE TO 42 U.S.C. § 1983 LITIGATION:
UPDATES AND HOT TOPICS

THURSDAY, MAY 8, 2020
9 A.M. - 2:50 P.M.

Oklahoma Bar Center
1901 N. Lincoln Blvd.
Oklahoma City, OK 73106

MCLE 6/0

PROGRAM PLANNER/ MODERATOR:

David W. Lee
Riggs, Abney, Neal, Turpen, Orbison & Lewis

Topics Include:

Recent Developments in Section 1983 Litigation

Settlements and Litigation Tactics in a Section 1983 Case

Pleadings and Defenses in a Section 1983 Case

Jail and Prison Litigation Under Section 1983

Due Process and Liberty Interests in Section 1983

Due Process and Liberty Interests in Section 1983

THIS PROGRAM WILL NOT BE LIVE WEBCAST

Stay up-to-date and follow us on

TO REGISTER GO TO WWW.OKBAR.ORG/CLE

TUITION: Early-bird registration by May 1, 2020 is $150.00. After May 1st, registration is $175.00 and walk-ins are $200.00. Registration includes continental breakfast and lunch. All programs may be audited (no materials or CLE credit) for $50 by emailing ReneeM@okbar.org to register.

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FRIDAY, MAY 1, 2020

9 A.M. - 3 P.M.

Oklahoma Bar Center
1901 N. Lincoln Blvd.
Oklahoma City, OK 73106

MCLE 6/1

PROGRAM PLANNERS:

G. Gail Stricklin, ***Oklahoma City***

Ginger Decoteau, MS, M.Ed.,
Dir., Community Learning Council

THIS PROGRAM WILL NOT BE LIVE WEBCAST

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TO REGISTER GO TO WWW.OKBAR.ORG/CLE

This course qualifies for required DV training per 43 O.S. 120.7 for guardians ad litem, parenting coordinators, custody evaluators or any other person appointed by the court in a custody or visitation proceeding involving children.

UNDERSTANDING DOMESTIC VIOLENCE
TO ENSURE THE BEST INTEREST OF CHILDREN

During this workshop, participants will hear from a licensed therapist, a child welfare specialist and an attorney. Each professional will discuss their role and the steps they take (individually and together) to help children and non-offending parents find a safe place as they work toward a healthy future.

LEARNING OBJECTIVES INCLUDE:

- **Define domestic violence, coercive control and trauma**
- **Review current facts and statistics of domestic violence**
- **Classify the effects of domestic violence on children**
- **Explain Intergenerational Violence**
- **Review and discuss safety planning**
- **Identify assessment tools recognized in court proceedings**
- **and much, much more**

TUITION: Early-bird registration by April 24, 2020 is $150.00. After April 24th registration is $175.00 and walk-ins are $200.00. Registration includes continental breakfast and lunch. Members licensed 2 years or less may register for $75 for the in-person program (late fees apply). All programs may be audited (no materials or CLE credit) for $50 by emailing ReneeM@okbar.org.