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# THE OKLAHOMA BAR Journal

Volume 91 — No. 5 — May 2020



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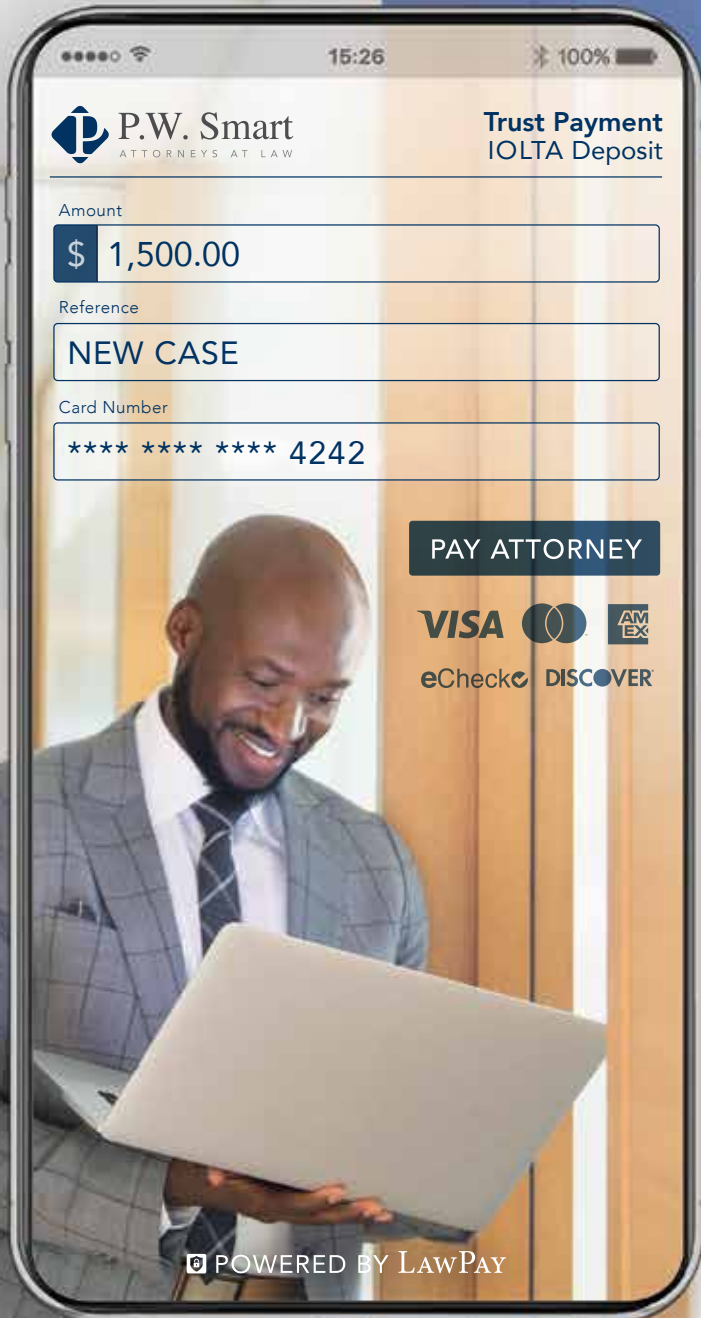
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# THE OKLAHOMA BAR Journal

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# Lawyer Well-Being in the Time of COVID-19

By Susan B. Shields

**A**S I WRITE THIS, Oklahoma lawyers have been doing their best to work from home or social distancing at their offices for many weeks. Courthouses are closed except for emergencies, meetings are by phone or video-conference and mediations and depositions are happening remotely. Children have all moved to online learning. Our calls, emails and letters often begin with “I hope you are well” and end with encouragement to stay well. We have new words and phrases in our vocabularies like “flatten the curve,” “Zoom” and “social distancing.” Important professional and personal events like Law Day celebrations, swearing-in ceremonies, trials and graduations have been postponed or cancelled. Most tragically, many Oklahoma lawyers and their family members are sick or have lost their lives to COVID-19.

Pre-coronavirus, the National Task Force on Lawyer Well-Being designated May 4-8 as “Lawyer Well-Being Week.” The aim of Well-Being Week is to raise awareness and encourage action across the profession to improve

well-being for lawyers and their support teams. On the back page of this issue is a graph from the Lawyer Well-Being website that includes suggestions for wellness action steps, such as focusing on physical and mental health, intellectual growth and connectedness.

In this time of COVID-19 where so many are sick or have lost their livelihood and are struggling, focusing on wellness seems even more critical. At stake is not only lawyers’ individual health and happiness but also our clients’ welfare. For me, remembering that I am not alone in feeling anxious and sad, trying to give back to others in positive ways and getting outside (while social distancing) helps. It’s also been important for my mental health

to stay connected through daily check-in calls and texts with family members and friends and virtual gatherings. I have also enjoyed watching musicians give free performances and authors do book readings online. And how about all the

news shows and late-night television being broadcast from people’s basements? The creativity happening right now is truly amazing. It’s also been good to get a daily laugh from the funny memes being posted on social media and sent around by email and text.

Laughter is not the cure for coronavirus, but it sure can do a lot of good.

All of our lives have been turned upside-down, but I truly believe we are seeing the best of people emerge during this crisis. I am thankful for the health care workers and first responders who are the heroes on the front lines, and I am also proud of the work that the Oklahoma lawyers and the OBA are doing, and will continue to do, to help get us all through this together.

I hope you and your loved ones are well – and stay well. As always, please do not hesitate to contact me with your questions, comments and suggestions at [susan.shields@mcafeetaft.com](mailto:susan.shields@mcafeetaft.com) or 405-552-2311.



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Laughter is not the cure for coronavirus, but it sure can do a lot of good.

## MAY WELLNESS TIP

Read the fantastic article in this issue by Deanna Harris and Ben F. Rogers on “Strategies for Attorneys Managing the Additional Stress of COVID-19” – and remember to BREATHE!

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# THE OKLAHOMA BAR Journal

Volume 91 — No. 5 — May 2020

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The Oklahoma Bar Journal (ISSN 0030-1655) is published monthly, except June and July, by the Oklahoma Bar Association, 1901 N. Lincoln Boulevard, Oklahoma City, Oklahoma 73105. Periodicals postage paid at Oklahoma City, Okla. and at additional mailing offices.

**Subscriptions** \$60 per year that includes the Oklahoma Bar Journal Court Issue supplement delivered electronically semimonthly. Law students registered with the OBA and senior members may subscribe for \$30; all active members included in dues. Single copies: \$3

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





# The Cake and the Constitution

By Micheal Salem

**I**N *MASTERPIECE CAKESHOP, LTD. V. COLORADO CIVIL RIGHTS COMMISSION*,<sup>1</sup> the U.S. Supreme Court initially faced discrimination claims based on sexual orientation and gender identity pitted against First Amendment defenses of “free speech” and “free exercise.” In its decision, the Supreme Court deferred questions about the enforcement of laws regarding sexual orientation or gender identity and instead focused on a claim of anti-religion bias against the defendant expressed by members of the Colorado Civil Rights Commission during their proceedings. In determining the commission displayed hostility to religion in its decision, the Supreme Court reversed the Colorado Court of Appeals<sup>2</sup> (CCOA) decision that affirmed the commission’s finding that Masterpiece Cakeshop discriminated on the basis of sexual orientation.

It was unusual that the CCOA decision attracted six *amici curiae* briefs and also drew the attention of the Colorado attorney general. After the grant of *certiorari* by the Supreme Court, an astounding 95 different *amici* briefs were filed by a wide variety of secular and religious organizations and individuals, including numerous law professors.

With such legal firepower in play, a question may be asked, “Did good cakes make bad law?” The answer is only partial since the Supreme Court did not decide any claims of discrimination on the basis of sexual orientation or gender identity, but did instead issue a warning to judicial fact finders that it is a violation of the Free Exercise Clause to base a decision on an impermissible hostility toward the sincere religious beliefs of litigants.

## FACTS AND PROCEDURAL HISTORY

The facts of the case arise out of a very brief interaction on July 12, 2012, when Charlie Craig and David Mullins, accompanied by Craig’s mother Deborah Munn, went to Masterpiece Cakeshop to consult with its owner Jack C. Phillips about a cake for a same-sex wedding reception.

### *What Happened at Cake Shop Did Not Stay at the Cake Shop*

Craig and Mullins planned to legally marry in Massachusetts where same-sex marriages were legal and then return to Colorado to celebrate with friends and with a cake from Masterpiece Cakeshop as part of that gathering.<sup>3</sup>

It is unclear from the record whether Craig and Mullins sought a custom wedding cake within the special expertise of Phillips, or a more nondescript cake for “our wedding.”<sup>4</sup> The CCOA decision

says the couple “requested that Phillips design and create a cake to celebrate their same-sex wedding” and that “Phillips declined, telling them that he does not create wedding cakes for same-sex weddings because of his religious beliefs.”<sup>5</sup>

Phillips instead said he offered them any of his other baked goods in the store.<sup>6</sup> Phillips contends he “offered to make any other cake for them.”<sup>7</sup> The now unhappy couple (and apparently equally unhappy mother) left the store.

In light of Phillips’ blanket refusal, there were no discussions about details of the design of the cake. As the administrative law judge in the Colorado administrative proceedings found, “[f]or all Phillips knew at the time, [Mullins and Craig] might have wanted a nondescript cake that would have been suitable for consumption at any wedding.”<sup>8</sup>

Phillips claimed that his custom cakes were artistic endeavors of

expression. The joint appendix in the Supreme Court contains photographic examples of wedding cakes designed by Phillips and sold by Masterpiece Cakeshop.

### *Unrequited Cake*

The happy day was not ruined as Craig and Mullins apparently found a cake elsewhere at no cost.<sup>9</sup> In the meantime they filed a charge of sexual orientation discrimination with a division of the commission relying on the Colorado Anti-Discrimination Act (CADA),<sup>10</sup> which forbids discrimination based on “sexual orientation” in public accommodations.<sup>11</sup>

After a review, the division of the commission found probable cause for a violation of the statute. Craig and Mullins then initiated a formal complaint with the Office of Administrative Courts alleging discrimination because of sexual orientation in a place of public accommodation in violation of Section 2434601(2) of CADA.

CCOA said there was no dispute of material facts. Masterpiece Cakeshop and Phillips admitted the shop was a place of public accommodation, but stated they refused to sell the cake because of the intent to use it as part of a same-sex marriage ceremony. After cross-motions for summary judgment, the administrative law judge issued a long decision finding in favor of Craig and Mullins. This order was affirmed by the commission.<sup>12</sup> There were certain remedial actions ordered by the administrative law judge including policy changes, employee training and compliance reporting.

Both Phillips and Masterpiece Cakeshop appealed. CCOA affirmed the commission and the Colorado Supreme Court denied *certiorari*.<sup>13</sup>

Phillips and Masterpiece appealed to the U.S. Supreme Court.

## **THE SUPREME COURT'S DECISION PUNTS THE FREE SPEECH MERITS TO FOCUS ON HOSTILITY TOWARD RELIGION BY THE CCRC**

Court observers might have forecast the eventual decision by carefully listening to Justice Kennedy during oral argument, in particular his questioning of Colorado Solicitor General Frederick Yarger about a comment during the administrative proceedings by one of the commissioners:

JUSTICE KENNEDY: ...  
12 Commissioner Hess says  
freedom of religion used  
13 to justify discrimination is  
a despicable piece  
14 of rhetoric.  
15 Did the Commission ever  
disavow or  
16 disapprove of that statement?  
17 MR. YARGER: There were  
no further  
18 proceedings in which the  
Commission disavowed  
19 or disapproved of that  
statement.  
20 JUSTICE KENNEDY: Do you  
disavow or  
21 disapprove of that statement?  
22 MR. YARGER: I would not have  
23 counseled my client to make  
that statement.  
24 JUSTICE KENNEDY: Do you  
now disavow  
25 or disapprove of that statement?  
  
1 MR. YARGER: I – I do, yes, Your  
2 Honor.<sup>14</sup>

What Justice Kennedy referenced was a comment by one of the commissioners in the public hearing which Kennedy quotes in his majority opinion:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds

of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be – I mean, we – we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to – to use their religion to hurt others.<sup>15</sup>

Fairly enough, Justice Kennedy takes the commissioner’s comments as disparaging of Phillips’ religion in two ways, “by describing it as despicable, and also by characterizing it as merely rhetorical – something insubstantial and even insincere.”<sup>16</sup> Justice Kennedy goes on to note that none of the other commissioners objected to the statements, that these comments were made by an “adjudicatory body” and that Phillips’ argument this was evidence of discriminatory treatment was not directly considered by CCOA.<sup>17</sup>

Justice Kennedy noted that in three other cases, the commission upheld refusals by bakers to make cakes with derogatory words and images, language and images the baker deemed hateful and a message the baker deemed discriminatory, but the refusals were founded in secular objections.<sup>18</sup>

Justice Kennedy concluded, “A principled rationale for the difference in treatment of these two instances cannot be based on the government’s own assessment of offensiveness.”<sup>19</sup>

“The Commission’s hostility was inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decision-maker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in

which this case was presented, considered, and decided.”<sup>20</sup>

Justice Kennedy concluded that the decision of CCOA was reversed without instructions on remand.<sup>21</sup>

In a separate concurring opinion, Justice Kagan joined by Justice Breyer agreed that the comments of the commissioners showed hostility toward Phillips’ religious beliefs, but also analyzed the three secular baker examples used by Justice Kennedy to show why they did not violate the law by refusing to make cakes with disparaging anti-gay comments.<sup>22</sup>

Justice Gorsuch joined by Justice Alito also concurred but disagreed with separate opinions of Justices Kagan and Ginsburg that the commission acted neutrally when it treated Phillips differently from the secular bakers. For Justice Gorsuch the refusal to make cakes that denigrated same sex marriages was a rejection of the religious beliefs of the customer who requested the cakes.<sup>23</sup>

Justice Thomas joined by Justice Gorsuch concurred and analyzed public accommodation laws and how they can impact free speech claims; and when there is a conflict, public accommodation must give way to free speech.<sup>24</sup> Thomas

also challenged a CCOA determination that making cakes was “not sufficiently expressive” to be protected from state compulsion.<sup>25</sup>

Justice Ginsburg joined by Justice Sotomayor dissented and also analyzed the three secular bakers, some of whom agreed to make cakes in the shape of a Bible, but refused to place anti-gay rhetoric on those cakes.<sup>26</sup> The refusal was a decision by those bakers not to discriminate or disparage gays or same-sex couples and was distinguished because they would not sell those cakes to anybody, but Phillips would sell his cakes to anybody but same-sex couples. It could not be said the secular bakers refused the anti-gay cakes based on the religion of the person who ordered the cake. While Justice Ginsburg disparaged the comments made by the commissioner, they were only part of a layered proceeding with no clear evidence that the bias affected the result and in the course of events the result was subsequently reviewed and affirmed by CCOA.

#### **SUGGESTION OF SEGREGATION**

Because the Supreme Court passed over the merits of the case while Justice Kennedy focused on

the discriminatory behavior of the CCRC, the court never reached the discriminatory proposal offered by Masterpiece Cakeshop. Masterpiece Cakeshop’s brief in chief argued that the commission could facilitate narrow tailoring by segregating public accommodations that cater to same-sex weddings:

... Respondents also have expressed an interest in minimizing the instances in which an expressive professional like Phillips declines a same-sex couple’s wedding-related request. But the market already provides existing means to address this, such as private websites apprising consumers of professionals in a geographical area who will celebrate same-sex weddings. See *GayWeddings*, <http://gayweddings.com/> (last visited Aug. 29, 2017); cf. *Brown [v. Entertainment Merchants Association]*, 564 U.S. [786] at 803 [2011] (discussing the video-game industry’s “rating system”). If the Commission thinks that more must be done, it could make similar resources available to the public. That would

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Because the Supreme Court passed over the merits of the case while Justice Kennedy focused on the discriminatory behavior of the CCRC, the court never reached the discriminatory proposal offered by Masterpiece Cakeshop.

provide a ready alternative that protects the interests of all involved. Thus, the Commission's efforts to coerce and punish Phillips are neither necessary nor narrowly tailored.<sup>27</sup>

There is a great deal of difference between reviews that rate video games and an action by the commission to develop lists of same-sex friendly businesses so businesses like Masterpiece Cakeshop need not be bothered. Proposing that the commission maintain such a list is to institutionalize at a government level the very discrimination Colorado sought to prevent in its anti-discrimination enactment.

This suggestion that a list of gay-friendly businesses be maintained harkens back to the days of *The Negro Motorist Green Book* (often shortened to *The Green Book*) used by African Americans to find restaurants, hotels and other accommodations during

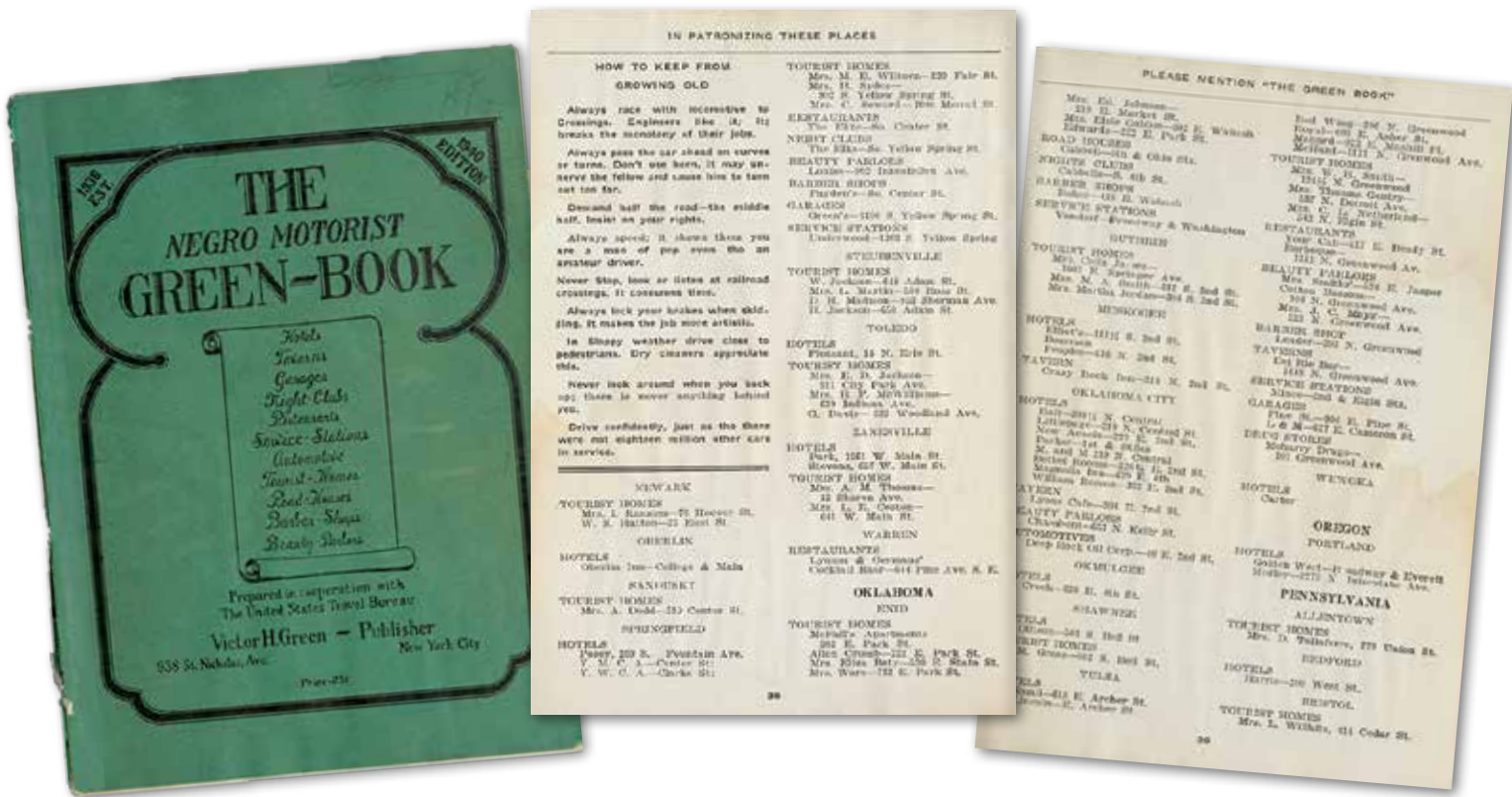
travels through various areas of this country, including areas which imposed state established segregation.<sup>28</sup> This includes segregated Oklahoma<sup>29</sup> as photographs from the 1940 book illustrate.<sup>30</sup>

*The Green Book* was a private business. The first edition was published in 1936 by Victor H. Green, an African American postal carrier in Harlem, and covered only metropolitan New York. Green collected information from his own experience and those of fellow postal service union members. The publication was so popular, Green expanded his collection of information nationwide by again relying on fellow African American members of his postal service union and from travelers who used his books. He published a national edition beginning in 1937 and continued annual publication until 1967, lapsing after passage of civil rights acts of public accommodation.

The suggestion that such an instrument of segregation be

maintained by a governmental agency is doubly problematic. Colorado's interest in minimizing conflicts such those that as occurred in this case was for businesses to comply with the law and not initiate an official state-sponsored adaption to segregation.

If *Masterpiece Cakeshop* supported such public lists, an even more efficient method of notice would be for a business to voluntarily post a sign in its window, setting out what goods or services are off limits when same-sex weddings or other gender-related celebrations are concerned, so it would be clear to persons of certain sexual orientations or gender identification that "their kind is not welcome here," at least for particular goods or services. For sure there may be fewer refusals since they would be refused in advance. Perhaps the public could use such signage to make decisions to patronize that business, but such signs of exclusion drag us



Pages from The Negro Motorist Green Book, 1940 edition

back to the Jim Crow era of segregation or even earlier.

In their infancy during the mid-20th century civil rights era, public accommodation laws easily passed over similar claims that religious beliefs justified racial segregation. An example was the U.S. Supreme Court case *Newman v. Piggie Park Enters., Inc.*<sup>31</sup> In *Piggie Park*, the defendant's refusal to provide public accommodation for minority customers was grounded in numerous defenses including "defendants' contention that the Act was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion.'" The Supreme Court called these defenses "patently frivolous" and "not even a borderline case."<sup>32</sup>

Justice Kennedy cites *Newman* in his majority opinion, "Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."<sup>33</sup>

Justice Kennedy apparently anticipated the terrible consequences of such a solution and to some extent telegraphed his view in his opinion:

And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying "no goods or services will be sold if they will be used for gay marriages," something that would impose a serious stigma on gay persons.<sup>34</sup>

Justice Kennedy does not give any clear indication of how to

resolve questions beyond the line he draws in his illustration.

## CONCLUSION

The growing societal acceptance of same-sex relationships and gender identities means issues of discrimination based on these categories will continue to return to the U.S. Supreme Court. The question still remains whether religion and religious belief can or will be allowed as a basis for discrimination in these categories.

Shortly after the *Masterpiece Cakeshop* decision, the Supreme Court granted *certiorari* in *Arlene's Flowers, Inc., v. Washington*, vacated the judgment of the Washington Supreme Court and remanded in light of *Masterpiece Cakeshop*.<sup>35</sup> The case involved a refusal of a flower shop to sell flowers to a longtime customer celebrating his same-sex marriage. On remand, the Supreme Court of Washington reaffirmed its decision<sup>36</sup> and *Arlene's Flowers* again sought *certiorari* on Sept. 11, 2019.<sup>37</sup> At the time of this writing, the case has been circulated to the court for conference four times without any action with the last date of circulation on Feb. 14, 2020.<sup>38</sup>

Other lesbian, gay, bisexual or transgendered (LGBT) customers have sought to patronize *Masterpiece Cakeshop*. In March of 2019, Colorado again brought an action against Phillips and *Masterpiece Cakeshop* on behalf of a gender-transitioned customer who sought a cake celebrating her transition. *Masterpiece Cakeshop* then filed suit in federal court seeking a permanent injunction to prevent the state from enforcing its anti-discrimination LGBT laws against it. A federal judge would not dismiss the case,<sup>39</sup> but both Phillips and the state agreed to mutual dismissals. The complainant said she would revive the complaint individually.<sup>40</sup>

Only the U.S. Supreme Court can resolve issues of a claimed constitutional right to discriminate against same-sex and gender identities in public accommodations based on arguments of religious free exercise and free speech.

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## ABOUT THE AUTHOR

Micheal Salem is a solo practitioner in Norman. His practice areas are federal constitutional law and civil rights. He received his J.D. from the OU College of Law in 1975. He is the recipient of the Oklahoma Courageous Advocacy, Golden Quill, Fern Holland Courageous Lawyer and Joe Stamper Distinguished Service awards from the OBA.

## ENDNOTES

1. 584 U.S. \_\_, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (June 4, 2018); the SCOTUS docket can be seen at [www.supremecourt.gov/docket/docketfiles/html/public/16111](http://www.supremecourt.gov/docket/docketfiles/html/public/16111) (last visited March 31, 2020). Petitions and briefs were not available on the Supreme Court docket page in 2016. However, court filings, briefs and other resources can be found on *SCOTUSblog*, [www.scotusblog.com/casefiles/cases/masterpiececakeshop](http://www.scotusblog.com/casefiles/cases/masterpiececakeshop) [itdvcoloradocivilrightscommn](http://itdvcoloradocivilrightscommn) (last visited March 31, 2020).

2. *Certiorari* was denied by the Colorado Supreme Court. Case references herein will be to the decision of the Colorado Court of Appeals (CCOA). See *Mullins v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, 370 P.3d 272 (Aug. 13, 2015) *cert. den. Masterpiece Cakeshop Inc. v. Colo. Civ. Rights Comm'n*, 2016 Colo. LEXIS 429, 2016 WL 1645027. The decision of CCOA in slip opinion can also be found at [www.scotusblog.com/wpcontent/uploads/2016/08/16111opbelcoloapp.pdf](http://www.scotusblog.com/wpcontent/uploads/2016/08/16111opbelcoloapp.pdf) (last visited March 31, 2020). The decisions of the administrative law judge and the Colorado Civil Rights Commission are not reported.

3. In July 2012, Colorado did not recognize same-sex weddings. At the time of the scene at the *Masterpiece Cakeshop*, the U.S. Supreme Court had not yet considered *Obergefell v. Hodges*, 576 U.S. \_\_, 135 S.Ct. 2584, 192 L. Ed. 2d 609 (June 6, 2015). In fact, *certiorari* was not granted in *Obergefell* until Jan. 16, 2015. *Obergefell* was argued on April 28, 2015, and decided on June 26, 2015. Even so, Colorado had provided limited recognition of same-sex unions in the form of designated beneficiary agreements since July 1, 2009. Colorado approved civil unions after May 1, 2013. Same-sex marriage was recognized on Oct. 7, 2014 when the Colorado attorney general instructed all 64 county clerks to begin issuing same-sex marriage licenses. *Masterpiece Cakeshop*, 370 P.3d at 272, ¶15 and fn. 1. This is the day after the U.S. Supreme Court denied *certiorari* in the same-sex case from the 10th Circuit, *Smith v. Bishop*, 574 U.S. 875, 135 S. Ct. 271 (2014).

4. Respondents' brief in opposition, p. 2-3 (Resp. BIO), see endnote 1.

5. *Masterpiece Cakeshop*, 370 P.3d at 276. In his *certiorari* petition, Phillips contended he is "a Christian who strives to honor God in all aspects of his life, including his art." *Cert. Pet.*, p. 4. "From Masterpiece's inception, Phillips has integrated his faith into his work." He observes Sunday closings and describes other personal interactions with his employees founded in his "religious beliefs." *Id.*

6. It is uncertain from affidavits filed in the case that an offer of other baked goods was shop policy at the time of the incident or later arose as a litigation strategy. The joint appendix in the U. S. Supreme Court contains four affidavits, including an affidavit from Stephanie Schmalz. (J/A, p. 113-16). She described herself as in a committed relationship with another woman, Jeanine Schmaltz. They went to Masterpiece Cakeshop in 2012 to obtain cupcakes for their family commitment ceremony. Once it became clear this was for a same sex-ceremony, they were told by an employee that "... the Cakeshop owners believed in the Bible and that same-sex marriage was not legal in the state of Colorado." Stephanie later had doubts about the authority of the employee, telephoned, and talked to the same person she encountered in the shop who affirmed her authority to make a decision because she was one of the shop owners. Stephanie placed a negative review on Yelp which was answered by "Jack P." who stated such a wedding was not legal in Colorado. (J/A, p. 115). Stephanie later called the shop, spoke to Phillips, said she wanted a cake for a pretend wedding between two dogs. The cake was to be in the shape of a bone. Phillips agreed to make such a cake and gave her a price. (J/A, p. 115). A second affidavit from Samantha Saggio also described a refusal by Masterpiece Cakeshop to provide a cake for a same-sex wedding. (J/A, p. 117-18). Two additional affidavits described similar results with an additional explanation from Phillips that he was "not willing to make a cake for the commitment ceremony for a same-sex couple just as he would not be willing to make a pedophile cake." (J/A, p. 120, 122). A statement in the record of "undisputed facts" from the brief in opposition to complainants' summary judgment motion references an affidavit by Phillips which states:

27. Jack told the two men, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same-sex weddings." (Resp't Aff. ¶179). J/A, p. 152.

At oral argument, counsel for Phillips (Kristen Waggoner) responded to a question from Justice Ginsburg and, in a colloquy with Justice Kennedy and Chief Justice Roberts, stated that a wedding cake purchased off the shelf for a same-sex wedding celebration would not be objectionable because it was not "compelled speech" by Phillips. (Oral Arg. Tr. 4-10). Chief Justice Roberts asked if there was an objection to a pre-made cake being associated with a same-sex wedding and Waggoner said no, the speech was completed and therefore not compelled. There were no follow-up questions such as would there be an objection if Phillips was asked to write (in icing) the date of the wedding or the names of the parties.

7. *Cert. Pet.*, p. 6.

8. Resp. BIO, p. 3 citing Pet. App. 75a.

9. *Cert. Pet.*, p. 6.

10. Colo. Rev. Stat. §§24-34-301 to 24-34-804 (2014).

11. Colo. Rev. Stat., §§2434601(2)(a), (2014). The CCOA noted that the "CADA also bars discrimination in places of public accommodation on the basis of disability, race, creed, color, sex, marital status, national origin, and ancestry." *Masterpiece Cakeshop*, 370 P.3d at 279.

12. *Masterpiece Cakeshop*, 370 P.3d at 277.

13. See endnote 2.

14. Oral Argument Transcript-Supreme Court, p. 51-2, [www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/16111\\_f29g.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16111_f29g.pdf) (last visited, March 31, 2020).

15. Tr. 11-12. *Masterpiece*, 138 S.Ct. at 1729.

16. *Id.* It can be said the commissioner's comments were necessarily disparaging of all religious justifications to discriminate, but by implication that would include Phillips' religion.

17. *Masterpiece*, 138 S.Ct. at 1729-30.

18. *Masterpiece*, 138 S.Ct. at 1728-29, 30-31.

19. *Id.*

20. *Masterpiece*, 138 S.Ct. at 1732.

21. *Masterpiece*, 138 S.Ct. at 1732.

22. *Masterpiece*, 138 S.Ct. at 1732-34 (Kagan, concurring).

23. *Masterpiece*, 138 S.Ct. at 1734-40 (Gorsuch, concurring).

24. Thomas cited *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 572 (1995) and *Boy Scouts of America v. Dale*, 530 U.S. 640, 657-659 (2000).

25. *Masterpiece*, 138 S.Ct. at 1740-48 (Thomas, concurring).

26. *Masterpiece*, 138 S.Ct. at 1748-52 (Ginsberg, dissent).

27. Pet. Br. Merits, pp. 60-61.

28. *The Negro Motorists Green Book* was the last and perhaps the most popular of several publications used by African Americans to find lodging, restaurants and other accommodations when traveling in the United States. Digital images of 23 editions of the publication are available at the New York Public Library Digital Collections, [digitalcollections.nypl.org/collections/theGreenBook](http://digitalcollections.nypl.org/collections/theGreenBook) (last visited March 31, 2020). See "How the Green Book Helped African American Tourists Navigate a Segregated Nation," *Smithsonian Magazine* (April 2016), [www.smithsonianmag.com/smithsonianinstitution/historyGreenBookafricanamericantravelers180958506](http://www.smithsonianmag.com/smithsonianinstitution/historyGreenBookafricanamericantravelers180958506) (last visited March 31, 2020). As noted in the digital copies at the New York Public Library, *The Green Book* contained information not just for travel in the deep South, but numerous other states in the country.

29. In the first chapter of his book, *Blacks in White Colleges*, George Lynn Cross narrates a chilling description of the historical development of segregation in Oklahoma.

30. These images are from the digital collection of the New York Public Library, [digitalcollections.nypl.org/items/dc858e5083d30132226658d385a7b928](http://digitalcollections.nypl.org/items/dc858e5083d30132226658d385a7b928) (last visited March 31, 2020).

31. See *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402, n. 5 (1968).

32. *Id.*

33. *Masterpiece Cakeshop*, 138 S.Ct. at 1727.

34. *Masterpiece Cakeshop*, 138 S. Ct. at 172829.

35. 138 S.Ct. 2671 (June 25, 2018). The initial decision from the Washington Supreme Court is *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 389 P.3d 543, 2017 Wash. LEXIS 216, 2017 WL 629181 (Feb. 16, 2017).

36. *State v. Arlene's Flowers, Inc.*, 193 Wn. 2d 469, 441 P.3d 1203, 2019 Wash. LEXIS 333, 2019 WL 2382063 (June 6, 2019).

37. See [www.supremecourt.gov/docket/docketfiles/html/public/19333.html](http://www.supremecourt.gov/docket/docketfiles/html/public/19333.html) (last visited 03/31/2020); the petition for *certiorari*, [www.supremecourt.gov/DocketPDF/19/19333/115374/20190911110711424\\_USSC%20Petition%20for%20Writ%20of%20Certiorari.pdf](http://www.supremecourt.gov/DocketPDF/19/19333/115374/20190911110711424_USSC%20Petition%20for%20Writ%20of%20Certiorari.pdf) (last visited March 31, 2020).

38. It is difficult to read tea leaves under these circumstances. The failure to relist could mean a decision to deny *certiorari* has been made and a dissent from denial of cert is being composed, or some other reason for delay in relisting.

39. See *Masterpiece Cakeshop, et al. v. Elenis, et al.*, No. 18-cv-02074-WYD-STV, USDC Co. (Jan. 4, 2019). Despite the doctrine of abstention, Judge Wiley Daniel referenced the likelihood of an injunction to enjoin the state court proceedings to avoid "piecemeal litigation," but made it clear this was not a statement regarding the merits. *Id.*, p. 30, [www.adfmedia.org/files/MasterpieceCakeshopMTDenial.pdf](http://www.adfmedia.org/files/MasterpieceCakeshopMTDenial.pdf) (last visited March 31, 2020).

40. See [www.cpr.org/2019/06/06/masterpiecebakerjackphillipsisupagainststyetanotherlegalcomplaint](http://www.cpr.org/2019/06/06/masterpiecebakerjackphillipsisupagainststyetanotherlegalcomplaint) (last visited March 31, 2020).

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# Beyond Biology: *Schnedler v. Lee* and Third-Party Custody

By Virginia Henson

**THE SUPREME COURT OPINION** in *Schnedler v. Lee*,<sup>1</sup> pushes the boundaries of the rights of nonbiological parents – persons who have acted as parents who are not biologically related to the child. With the increasing acceptance of same-sex relationships, many of the cases, like *Schnedler*, arise from the request by a nonbiological same sex partner for custody rights to a child of the relationship. Most of the same-sex cases present to the appellate court as standing cases – does the nonbiological parent have standing to seek visitation with the child? This question has been answered by the case law. However, the case law also affirms a right for the child to have relationships with persons the child views as parents. The dicta in the cases, particularly in *Schnedler*, may foretell a willingness by the court to reform the law around third-party custody and visitation.

In *Schnedler*, the biological mother, Lee, and Schnedler were in a relationship for eight years. They conceived the child with the help of a sperm donor. The sperm donor saw the child periodically and paid some support, although Schnedler was unaware of this. After the end of the relationship, Lee refused to allow Schnedler to have a relationship with the child. Schnedler sued. The sperm donor and the biological mother both objected to Schnedler being involved with the child. The trial court found that since both biological parents objected, Schnedler had no standing to request custody rights. The Court of Appeals affirmed the trial court. The Supreme Court reversed and established a three-part test in same-sex custody actions to give the nonbiological parent standing.

First, the parties must have engaged in family planning with the intent to parent jointly; second, the nonbiological parent requesting custody rights must have acted in a parental role for a length of time sufficient to have established a meaningful emotional relationship with the child; and third, the non-biological parent must have resided with the child for a significant period while holding out the child as his or her own child.

The progression of these kinds of cases continues to expand rights for same-sex parents and their children in custody cases. The series of cases began with *Eldredge v. Taylor*.<sup>2</sup> In *Eldredge*, the same-sex couple had entered into a civil union in New Zealand, where such unions were legal. They agreed to have children and used an anonymous sperm donor. They entered

into a formal parentage agreement. Taylor was the biological parent, but the children were given the surname Eldredge at birth. After the relationship terminated, Taylor asserted her rights as the biological parent and refused to allow Eldredge to have a relationship with the children. Eldredge's custody suit was dismissed at the trial court level for lack of standing, since she lacked a biological relationship with the children.

Eldredge raised the following questions on appeal:

- whether a person has standing to seek a best-interest-of-the-child hearing when the sole biological parent relinquished some of her parental rights to the person by entering into a written co-parenting agreement;





- whether the doctrine of *in loco parentis* can extend to a person who is not legally related to a child when there is no allegation the sole biological parent is unfit;
- whether Title 10, Section 7700–204(A)(5) of the Oklahoma Statutes creates a presumption of parentage in a woman who holds herself out as a parent and resides with a child for at least two years; and
- whether a person who is not legally related to a child can have a constitutionally protected liberty interest in her relationship with children she has helped bring into the world and has continued to raise and support or, alternatively, whether children have a constitutionally protected liberty interest in their relationship with such a person.

The Supreme Court addressed the first question and declined to address the last three. It found that the co-parenting agreement could be enforced as a contract and restored Eldredge’s standing.

The next case in the series was *Ramey v. Sutton*.<sup>3</sup> In *Ramey* there was no parentage agreement and no civil union. Sutton was the

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However, the court does not say how another nonbiological “parent” (a person acting in *loco parentis*) is different from a same-sex parent or how a child from a same-sex relationship is more protected than a child from another type of relationship (such as a stepparent or guardianship relationship where the child has essentially been raised by a nonparent.)

biological parent and claimed Ramey was not entitled to parental rights because, unlike in *Eldridge*, there was no contract to enforce. The trial court agreed. The Supreme Court reversed saying Ramey stood in “*in loco parentis*,” and therefore could compete for custody and visitation with the child, saying:

¶17...This couple and *more importantly*, their child, is entitled to the love, protection and support from the only parents the child has known. Sutton’s argument must fail in light of the equities before this Court. Ramey is recognized as being *in loco parentis* to their child and is entitled to a best interests of the child hearing.

¶19 This case is intended to recognize those unmarried same sex couples who, prior to *Bishop* (*cite omitted*) and *Obergefell*, (*cite omitted*) entered into committed relationships, engaged in family

planning with the intent to parent jointly and then shared in those responsibilities after the child was born. Public policy dictates that the district court consider the best interests of the child and extend standing to the nonbiological parent to pursue hearings on custody and visitation. This decision does not extend any additional rights to step-parents, grandparents, or others. Accordingly, we find the district court erred in granting the motion to dismiss, and that Ramey has standing to pursue a best interests of the child hearing.

Again, although the issue presented to the appellate court was a standing issue, the appellate court dicta seems to indicate both the person in *loco parentis* and the child have a protected interest in maintaining a relationship. The court then seeks to limit its decision by saying that the decision should not be read to extend rights to

other nonbiological relationships. However, the court does not say how another nonbiological “parent” (a person acting in *loco parentis*) is different from a same-sex parent or how a child from a same-sex relationship is more protected than a child from another type of relationship (such as a stepparent or guardianship relationship where the child has essentially been raised by a nonparent.) The opinion appears to raise equal protection issues when it limits the protections for a nonbiological parent to same-sex couples.

The dicta in *Schmedler* is even more inclusive. The case came to the appellate court as a standing issue but there is significant dicta which expands the rights of the nonbiological same-sex parent. Can the court expand these rights for same-sex parents while limiting rights for other litigants not in a same-sex relationship? For example, in *Schmedler*, the court set forth the three-step test above to give

standing to a same-sex parent. However, the court abandoned the “*in loco parentis*” analysis set out in *Eldredge*, in favor of a parity standard, saying:

¶20 Indeed, “a person standing *in loco parentis* is one who acts ‘in the place of a parent.’” *United States v. Floyd*, 81 F.3d 1517, 1524 (10th Cir. 1996). Consequently, *in loco parentis* status – at root, a legal fiction – is “by its very nature, a temporary status.” *Id.* Temporary and uncertain parental status only exacerbates the frequency of cases like today’s, and creates an inherently more unstable environment for the children of same-sex couples. Their children see them as mom or dad. The law should treat them as such.

*Eldredge* and *Ramey* stand for the proposition that the same-sex parent has standing but not the same standing as a biological parent because the standing is based on an “*in loco parentis*” analysis which is by its nature temporary. *Schnedler* abandoned that analysis, finding:

¶23 A non-biological same-sex parent stands in *parity* (emphasis added) with a biological parent. Once an individual has standing, the court shall adjudicate any and all claims of parental rights – including custody and visitation – just as the court would for any other legal parent, consistent with the best interests of the child.

¶24 Lori [Schnedler] did not act in the place of a parent; she *is* a parent.

The dissent (by Justice Darby) recognizes the language used by the majority as broad and worries about the extension of the opinion, saying: “¶1 I believe the Court should use judicial restraint in this matter and base the holding on the

narrowest grounds possible.” The dissent compares the language in *Schnedler* to an “advisory opinion,” and would limit the ruling to the “narrowest grounds possible.”

The question is whose rights should be protected? The interests of the parents or persons the child considers parents and the interests of the child are often at odds. Oklahoma law provides that any proceeding to repudiate the presumed paternity of a child must be filed within two years<sup>4</sup> to protect the child. The law is well settled that a biological parent cannot be deprived of custody of a child unless the parent is unfit, unsuited or unavailable, or the custody in the parent will cause actual harm to the child. The Oklahoma Supreme Court in *Matter of Baby Girl L.*<sup>5</sup> held that a prospective adoptive couple may be awarded custody of a child instead of a biological parent if the removal of the child will cause severe and lasting psychological harm to the child. The court found there was no due process claim for a prospective adoptive parent to a continued relationship with the child after a failed adoption but recognized the child may have a countervailing constitutional interest to be balanced against a biological parent’s interests. The court found that 10 O.S. §7505-6.4 controlled and after a failed adoption, the court must hold a “best interests” hearing to determine whether the type of harm described by the court would occur to the child if removed from the prospective adoptive parents. The court placed the burden on the prospective adoptive parents to prove by clear and convincing evidence that severe harm would occur.

Oklahoma statutes in grandparental visitation cases require the grandparent prove actual “harm” would occur if the visitation was

not granted. *Craig v. Craig*<sup>6</sup> and a mere “best interests” standard is not sufficient.

The court did not address in *Baby Girl L.* the types of questions set forth in *Schnedler*. That is, whether a nonbiological parent can approach custody *in parity* with a biological parent. *Schnedler* makes it clear this is the rule in same-sex couple cases, so long as the three-step foundation can be laid by the nonbiological parent. Presumably, the “in parity” language removes the burden of proof from the nonbiological same-sex parent and makes the determination amount to a best interests analysis. *Baby Girl L.* makes it clear in failed adoption cases, a “balancing test” cannot be used – that is the test is not which is the best home, it is whether there would be actual harm to the child if not placed with the biological parent. *Schnedler* holds that if the child is a child of a same-sex couple, the test is exactly that – which “parent” can best provide for the child.

Consider the following scenarios:

Scenario One. A heterosexual couple decides for whatever reason not to marry. The man adopts a child during the relationship with the consent of the woman, who cannot adopt because the parties are not married. The woman is the primary caretaker of the child and rears the child for many years. The man decides to leave the relationship and prevents the woman from having a relationship with the child. Does the woman have standing to seek custody or visitation? *Ramey* specifically denies parental rights to the woman, but there appears to be no rational reason why she wouldn’t have standing in parity with the adoptive father to seek custody under *Schnedler*.

Scenario Two. A child is left with grandparents for many



years, and they are granted guardianship. The biological parents resolve whatever problems prevented them from taking custody of the child, but the child is now 5 years old. The biological parents seek to terminate the guardianship as “no longer necessary.” Assuming the biological parents are now fit, under 30 O.S. §4-804, the court must return the child to the biological parent unless it finds there would be actual harm. May the grandparents in this situation seek custody under a “best interests” standard in parity with the biological parent. Previous case law seems to imply the answer is “no.”<sup>7</sup>

To find that the same test does not apply in other cases where a person or persons who are not biologically related to the child may well violate the child’s rights to equal protection. If the standard is who the child psychologically considers a parent and who the child has love and affection for, regardless of biological relationship, to provide protection for the child only in same-sex relationship cases is problematic. These issues often arise in guardianship, grandparental, stepparent and adoption cases. It is not

uncommon for a child to be reared in a home where there is no biological parent or in a home where one parent is not biologically related to the child. These relationships can go on for years, and the child can view these caretakers as parents.

The 14th Amendment to the U.S. Constitution provides equal protection. Essentially, similarly situated persons should not be treated differently under the law. As stated in *Reno v. Flores*,<sup>8</sup> the Due Process Clause “forbids the government to infringe certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” Under what appears to be the current law in Oklahoma, a child of a same-sex union who has a nonbiological parent, whom the child psychologically views as a parent, enjoys the opportunity to be reared in the best home available. If that same parent is not in a same-sex relationship, even if the child views the nonbiological litigant as a parent, the same standards are inapplicable and the child must be returned to the biological parent unless the biological parent can be

found to be unfit or the nonbiological litigant can prove by clear and convincing evidence that severe psychological harm will occur to the child if a relationship is not continued. If the state’s interest is in the welfare of children, there seems to be no rational reason to distinguish between the two types of nonbiological parents.

The law in this area is changing rapidly. It remains to be seen whether *Schmedler* can be extended into cases not involving same-sex relationships. *Ramey* made it clear the court’s decision in that case does not extend to other types of relationships, but that was before *Schmedler* granted parity status to a nonbiological same-sex parent and before the court abandoned the *in loco parentis* analysis, which makes all third-party custody temporary. Later decisions by the court should help clear this up.

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#### ABOUT THE AUTHOR

Virginia Henson is a sole practitioner with Virginia Henson PLLC in Norman. She received her J.D. from the OU College of Law in 1980 and focuses her practice on family law. She is a fellow of the American Academy of Matrimonial Lawyers.

#### ENDNOTES

1. *Schmedler v. Lee*, 2019 OK 52.
2. *Eldredge v. Taylor*, 2014 OK 92, 339 P.3d 888.
3. *Ramey v. Sutton*, 2015 OK 79, 362 P. 3d 217.
4. 10 O.S. §7700-607 (A). There is an exception when the biological father, the presumed father and the mother all agree, but even then the decision rests on the best interests of the child. 10 O.S. §7700-607 (C).
5. *Matter of Baby Girl L.*, 2002 OK 9, 51 P.3d 544.
6. *Craig v. Craig*, 2011 OK 27, 253 P.3d 57.
7. *In re Guardianship of C.D.A.*, 2009 OK 47, 212 P. 3d 1207.
8. *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed. 2<sup>nd</sup> 1 (1993).

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# Representing Transgender and Gender-Diverse Clients

*By Shannon D. Taylor*



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**L**AST SUMMER, I HAD THE PRIVILEGE of attending the National LGBT<sup>1</sup> Bar Association Annual Conference and Family Law Institute in Philadelphia. Two primary areas of focus for the conference were gender equality and inclusion. Upon registering, I was given my name badge and a choice of stickers from which to select to designate my pronouns, the options being she/her/hers, he/him/his, and they/them/their.<sup>2</sup> Despite my representation of many LGBT clients in the past, the conference was my first introduction to the importance of this question.

My time at the LGBT bar conference was filled with thought-provoking, insightful dialog with other attorneys, judges, and law students from across the country. I met brilliant, energetic lawyers, judges, law professors, law-students and advocates there for the purpose of exchanging ideas and experiences concerning representing LGBT clients. I heard stories, sometimes heart-wrenching, about transgender persons dealing with harassment and discrimination at work, in schools, in athletic organizations and in courtrooms. I listened to stories of personal, professional, and legal battles of LGBT attorneys from around the nation, battles for equality, inclusion and respectful recognition. I learned about laws in other states insofar as adoption, name changes, athletics, education, civil rights and more, and gained an understanding of the impact of these issues in the legal community.

To effectively represent transgender, gender-diverse and LGBT clients, we have a duty to stay current on the law and legal issues, and we must also have a general idea of current social and cultural issues pertaining to these clients. We may have longstanding prejudices or unexamined preconceptions that could inadvertently undermine representation of persons in the LGBT community. We must become aware of our own internal biases and explore ways to overcome them. We must become more empathetic and understanding.

Effective representation of transgender, gender-diverse and LGBT clients may also require that we explore implicit biases lurking in our offices, such as, client intake forms with only male/female gender options or honorific choices limited to Mr./Mrs./Ms. We may need to examine ways to make our offices more welcoming to transgender, gender-diverse and LGBT

clients. We may need to evaluate restroom policies and other office policies and procedures to eliminate implicit bias or prejudice.

It is my hope that this article will be informative and helpful as to LGBT terminology and issues our clients may be facing in this emerging and rapidly changing area of law.

#### **BASIC TERMINOLOGY**

With the onset of the year 2020, most people are familiar with the acronym LGBT<sup>3</sup> and its recent expansion to LGBTQ,<sup>4</sup> but what about LGBTQQIAAP,<sup>5</sup> LGBTTTQQIAA<sup>6</sup> or LGBTQIA+?<sup>7</sup>

As the acronym LGBTQIA+ suggests, there are multiple words that each letter of such acronyms can represent. For example, the G in LGBTQIA+ can refer to gay, genderqueer, gender-nonconforming or gender variant, the last three all referring to people whose gender identity is either both male and female, neither male nor female or

who in some ways identify with a sex different from that assigned to them at birth.<sup>8</sup>

Pronouns typically reflect a person's gender identity.<sup>9</sup> A transgender person may prefer to be identified using third-person singular pronouns (e.g., she or he and her or him), third-person plural pronouns (e.g., they and them) or alternative pronouns (e.g., ze/hir, ze/zir, per/pers, ey/em, xe/xem).<sup>10</sup>

"Sexual orientation" typically describes the direction of a person's romantic and physical attractions.<sup>11</sup>

"Gender identity" is one's internal sense of being male, female, both or neither.<sup>12</sup>

"Sex" typically refers to the genetic factors and physical anatomy of a person.<sup>13</sup>

"Gender" typically refers to characteristics within a person that begin to develop in infancy and can include masculine feelings, feminine feelings or a mixture of both.<sup>14</sup> Gender can also include characteristics that are uncommon for the culture in which the person lives.<sup>15</sup> Although many cultures have historically viewed gender as binary, either male or female, today's increased visibility and open dialog are leading to increased recognition of gender as nonbinary.<sup>16</sup>

"Transgender" typically refers to an individual whose gender identity or expression does not, in some way, conform stereotypical expectations based on their assigned gender.<sup>17</sup> "Transsexual" typically refers to an individual whose body and gender identity do not match and who transitions by undergoing medical treatment.<sup>18</sup> Although the two terms are commonly used interchangeably, transgender is becoming more widely used.<sup>19</sup> A search for transgender case law should include both terms.<sup>20</sup>

"Female to male" (FTM) are those who are assigned the female sex at birth but identify as male; post-transition, they may identify as FTM, transgender man, transman, transgender or simply as a man.<sup>21</sup>

"Male to female" (MTF) are those who are assigned the male sex at birth but identify as female; post-transition, they may identify as MTF, transgender woman, transwoman, transgender or simply as a woman.<sup>22</sup>

In addition to transgender, other terms used for persons whose assigned sex at birth does not conform to their identified gender include, but are not limited to: gender-nonconforming, gender nonbinary, gender fluid, gender queer and gender-diverse.<sup>23</sup>

"Cisgender" refers to people whose internal sense of gender conforms with the sex they are assigned at birth.<sup>24</sup> It is not indicative of gender expression, sexual orientation, hormonal composition, physical anatomy or how one is perceived in daily life.<sup>25</sup>

It is also important to know the difference between gender identity (one's internal sense of being male, female, both or neither), gender expression (the way in which a person expresses gender identity through mannerisms, behavior, dress or appearance) and sexual orientation (typically used to describe the direction of a person's romantic and physical attractions).<sup>26</sup> It is also important to note that transgender, gender-diverse and cisgender persons alike may be straight, gay, bisexual or pansexual. Sexual orientation refers to whom someone wants to sleep with, whereas gender identity refers to someone who wants to sleep as.<sup>27</sup>

"Gender transition" or just "transition" is the process by which a transgender person begins to live in accordance with their gender

identity.<sup>28</sup> Gender transition may include medical treatments, such as hormone therapy and surgery, but is often limited to social transition.<sup>29</sup> In a 2018 federal case in the United States District Court of Idaho, the court reasoned, "[n]ot all transgender people choose to undergo surgery as a part of the transition process. This is due to numerous potential factors, including whether surgery is medically necessary, and personal and financial factors such as lack of insurance coverage."<sup>30</sup> In other words, for many transgender and gender-diverse people, comfort is found within embracing their gender identity, role and expression without the desire or need for surgery; for others, surgery is essential and medically necessary to alleviate their gender dysphoria.<sup>31</sup>

"Gender dysphoria" is defined as the clinically significant distress experienced when gender identity or expression is incongruent with societal/cultural expectations based on the sex a person is assigned at birth, not the gender incongruence itself.<sup>32</sup> "Gender Identity Disorder" (GID) is the underlying medical or psychological diagnosis used to identify persons who experience gender dysphoria.<sup>33</sup> Many, if not all, LGBTQIA+ persons have endured ridicule, rejection, hatred, bullying, abuse and more. Many, if not all, have experienced some form of distress relating to fear of being outed before they are ready or to people from whom they fear such as rejection, ridicule, mistreatment, loss of relationships, loss of employment, loss of religious or spiritual community and so on.

The World Professional Association for Transgender Health (WPATH), formerly known as the Harry Benjamin International Gender Dysphoria Association, has developed



internationally accepted standards of care (SOC) which provide recommendations and guidance for diagnosis and best practices for care and treatment of gender dysphoria and GID.<sup>34</sup> The WPATH's SOC affirm that treatment is individualized.<sup>35</sup> In other words, the requirements for gender transition cannot be satisfied by a single treatment or medical protocol. I cannot overstate the importance of this, particularly with respect to gender marker cases in states and jurisdictions where the court and/or vital records offices require a physician's letter stating that the patient (client) has completed the full transition process. In many states, there is no statutory framework to change a gender marker. In my experience, some courts or vital records representatives interpret the phrase "gender transition" to mean complete medical/surgical body modification. However, not every person has full, or even partial, gender confirmation surgery. Some people choose not to have surgery and have hormone therapy only. Others may choose only to change their name and/or dress in a manner consistent with their identified gender. Thus, the transition process is very individualized.<sup>36</sup>

"Transitioning" is commonly used to describe the process of change from one's assigned sex to one congruent with one's gender identity.<sup>37</sup> There are various medical treatments available to help with transitioning, but not all transgender persons elect to have gender affirmation, or gender confirmation, surgery, or otherwise alter their physical bodies.

Once a person has completed their individualized transition process, whatever that process entails for the particular person, they may describe themselves as FTM or MTF or simply male

or female.<sup>38</sup> Some transgender persons may have difficulty exhibiting enough outward features to look like, or pass as, their identified gender.<sup>39</sup> "Passing" refers to the ability to blend into society without being detected as a transgender person.<sup>40</sup> In some cases, transgender individuals choose to go "stealth," meaning they choose not to reveal that their sex assigned at birth is anything other than who they are now.<sup>41</sup> Conversely, some transgender and gender-diverse persons are extremely open about their transition, life history and experiences.

### HISTORICAL NOTES

As far back as settlement of the Americas, many Native American tribes have recognized gender as a spiritual aspect of a person, describing five genders.<sup>42</sup> A person with a male or female body could have a spirit that corresponded with their biological sex, or a spirit opposite their biological sex, or the fifth gender, two-spirit, a biological male or female with both a male and female spirit.<sup>43</sup> Two-spirited people were recognized as spiritual leaders and held a special place in tribal society.<sup>44</sup> With the coming of the Europeans in the 1500s and 1600s, two-spirits were called derogatory things, often suppressed or even killed.<sup>45</sup> Recognition and acceptance of two-spirits is reemerging in today's society.<sup>46</sup>

Upon the emergence of psychology during the late 19th and 20th centuries, transgender and gender diverse persons were viewed as having some form of pathology, and in 1952, with the first publication of the DSM,<sup>47</sup> began the pathologizing of people who varied from societal norms relating to male and female behavior. While there were some who resisted the idea of transgender

as a disorder, later editions of the DSM coined the term gender identity disorder.<sup>48</sup>

In 1966, Harry Benjamin published his groundbreaking book, *The Transsexual Phenomenon*,<sup>49</sup> wherein he argued against pathologizing transgender persons and asserted that gender and gender identity should be viewed as a spectrum between male and female.<sup>50</sup> Benjamin was also one of the first professionals to address mental health issues common to transgender and gender-diverse persons, bringing to light the impact of societal and environmental pressures on transgender and gender-diverse persons, which, in turn, places them at increased risk for depression, anxiety, poor treatment by medical professionals, self-harm, homelessness and substance abuse.<sup>51</sup>

### REPRESENTATION ISSUES

Legal issues impacting and affecting transgender, gender-diverse and LGBTQIA+ persons can arise in a variety of areas within the justice system and legal proceedings.

The following list is compiled from *Transgender Family Law, A Guide to Effective Advocacy*,<sup>52</sup> and is intended to raise awareness of advocacy issues and areas of law that may be impacted by gender identity, sexual orientation and related issues. This list is not an all-inclusive list nor is it a detailed resource. For further information, please refer to *Transgender Family Law, A Guide to Effective Advocacy*:<sup>53</sup>

## **Recognition of name and sex/gender**

- Change of legal name
- Change of legal sex/gender

## **Changing name and/or gender/sex designation on identity documentation**

- Birth records
- Driver's license or state identification cards
- Passport
- Social Security Database and Social Security Card

## **Relationship recognition and protection**

- Pre-transition marriage and marriage equivalents
- Post-transition marriage and marriage equivalents
- Marriage based social security benefits
- Marriage based immigration benefits
- Issues regarding transgender people in non-marital relationships

## **Divorce and relationship dissolution**

- Dissolution of marriage
- Impact of gender transition on marriage
- Issues potentially impacted by gender transition
  - Annulment
  - Gender transition as grounds for divorce and impact on support and property division
  - Dissolution of marriage equivalents
  - Dissolution of nonmarital relationships
- Issues surrounding a non-transgender spouse's use of the transgender spouse's gender identity or gender transition in divorce and dissolution cases
  - Defensive – defending the transgender spouse's gender identity or failure to come to consciousness about transgender status prior to marriage from allegations of fault, maliciousness or deception
  - Offensive – alerting the court to factors such as to how a transgender spouse may be impacted by transgender status, such as employment discrimination, future financial vulnerability, medical care expenses and societal discrimination

## **Protecting parental rights**

- Legal parentage
- Attempts to terminate legal parentage due to transgender status
- Child biologically related to transgender parent
  - Medical consents and legal agreements
  - Prebirth decrees, parentage judgments and adoption
- Child adopted by transgender parent
  - Stepparent adoption
  - Agency adoption
- Child born of a marriage and not biological related to transgender parent
- Child born to unmarried parents and not biological related to transgender parent
- Issues concerning discrimination against transgender parents in custody/visitation disputes or anti-LGBTQIA+ biases and restrictive parenting orders
- Issues concerning bias and restrictive parenting orders
- Protecting children from parental alienation and psychological abuse based on a parent's LGBTQIA+ status

## **Custody disputes concerning transgender children**

- Standards of parental fitness and best interests of the child
- When parents agree on how to deal with a transgender child
  - Supportive and non-supportive parents
  - Obtaining professional guidance
- When parents do not agree on how to deal with a transgender child
- Legal Standards regarding a transgender child's medical care
- Determining and allocating parental authority over medical decision making for transgender children
- Qualifications of court-appointed experts such as a Guardian *ad Litem* or other court appointed evaluator – insist on expertise dealing with transgender children
- Keep the focus on the child's best interests

## Legal protections for transgender children and youth (“the small ts”)<sup>54</sup>

- Who is the client?
- Social transition
  - Name change
    - ◆ When both parents consent
    - ◆ When only one parent consents
    - ◆ When neither parent consents
  - Sealing records and protecting the child client’s privacy
- Medical transition
  - Extent of medical procedures
  - Timing of medical procedures
  - Payment for medical procedures
  - Insurance coverage
- Supportive counseling
- Emancipation
- Transgender youth in state custody
  - Foster care
  - Juvenile justice system
- Transgender youth in shelters
- Education and transgender and gender nonconforming youth in schools
  - Use of child’s desired name and gender marker
  - Change of name, pronouns and gender marker in student records
  - School forms
  - Dress codes and uniforms
  - Bathrooms and locker rooms
  - Curricula and inclusive classroom practices
  - Special education laws
  - Bullying
  - Discrimination and harassment prevention and other school policies
  - Nondiscrimination laws

## Intimate partner violence (IPV) involving a transgender spouse or partner

- Incidence of abuse – research, tools and strategies concerning the prevalence of IPV in LGBTQIA+ communities<sup>55</sup>
- When the LGBTQIA+ person is abused – examples of abuse
  - Physical, economical, emotional or intellectual abuse
  - Threats to “out” the LGBTQIA+ person to family, an employer or spiritual or religious community
  - Silencing – capitalizing on fears to keep an LGBTQIA+ person “closeted”
  - Interfering with gender transition (withholding, destroying or otherwise interfering with medication)
  - Refusal to use post-transition name and pronouns/honorifics
  - Identity theft
  - Destroying or withholding gender specific clothing and accessories
  - Obstructing access to support groups, medical care
  - Ridiculing the LGBTQIA+ person’s body or challenging authenticity of gender identity
- When the abuser is LGBTQIA+
  - Getting help for the abuser
  - Addressing institutional biases against transgender, bisexual, gay and lesbian people
  - Focus on behavior, not gender identity or sexual orientation
- Impact of IPV on family law – legal and emotional hurdles
  - Challenges for survivors
  - Challenges for abusers
  - Protective orders
  - Criminal advocacy
  - Immigration remedies for survivors in IPV
    - ◆ Specific domestic violence remedies that can be used by immigrant IPC survivors<sup>56</sup>

- Safety planning
  - Screening questions
  - Sex-segregated services/facilities
  - Resources for abusers

### **Estate planning and elder law**

- Surviving spouse or partner's ability to inherit
  - Importance of formalizing the relationship and testamentary wishes of a transgender person and their spouse whenever possible
  - Intestacy
    - ◆ Contingent upon recognition of marriage or nonmarital relationship
    - ◆ May depend on legal recognition of the transgender spouse or partner's post-transition sex/gender
  - Probate
    - ◆ Post-mortem "outing" to relatives or others who were otherwise unaware of the person's transgender identity
    - ◆ Legal standing or lack of standing of unmarried surviving partner
  - Non-testamentary dispositions to avoid potential challenges in probate or intestacy proceedings
    - ◆ Life insurance policies
    - ◆ Retirement accounts
    - ◆ Investment and bank accounts
    - ◆ Importance of insuring beneficiary designations are properly recorded, particularly where a beneficiary has changed their name
    - ◆ Income, gift or estate tax consequences
    - ◆ Medicaid or Supplemental Security Income considerations
- Medical decision making
  - Particular vulnerabilities of transgender persons in medical emergencies
  - Guardianship can be a quasi-public process that can result in "outing" a transgender person against their wishes
  - Health care proxy or Power of Attorney for Health Care
  - HIPAA compliant documents
  - Drafting end-of-life decision-making documents – advance directives
- Financial decision making
  - Durable power of attorney (POA)
    - ◆ The POA should clearly acknowledge the client's transgender status and all names the client, or principal, has ever been known by
    - ◆ If a named agent has changed their name, the document should include all names the agent has ever been known by
    - ◆ To remain effective after disability or incapacity of the client, or principal, the document must be titled "Durable Power of Attorney" and must set forth within the intent that the document shall not be affected (invalidated) by subsequent disability or incapacity of the principal, or lapse of time
    - ◆ Immediate effectiveness or contingent effectiveness
- Post-mortem matters, particularly concerning unmarried life partners
  - Post-mortem instructions should be stated clearly in a "directive as to remains" or similar document, as well as in the client's last will and testament and possibly a health care proxy or POA for Health Care
  - Include instructions as to the client's preferred name and gender to be used

### **Housing issues for transgender elders**

- Bias and discrimination in elder housing
- Negative treatment stemming from pervasive bias, lack of knowledge, information and education
- The transgender elder's reluctance to speak out about discrimination or bias
- The transgender elder's wishes concerning self-identifying as transgender to staff and fellow residence in subsidized housing, assisted living or skilled care facilities

### **Social security and veteran's benefits**

In each of these areas, it may be necessary to address bias and educate opposing counsel, the judiciary, jury and court personnel.

## PRACTICE TIPS

As with any case, be aware of the client's goals and objectives. Use the client's post-transition name and pronouns in legal proceedings unless inconsistent with client's priorities. For example, some clients may not prefer to reference a change in gender or pronouns in public documents, for fear of repercussions. Ask courts to refer to litigants with their preferred pronoun and, if appropriate and consistent with the client's priorities, call ahead to inform the judge's staff of client's preferred pronouns or honorifics. Be aware of privacy concerns, potential media coverage, and/or social media attention.

Be aware of the client's financial situation. Retaining experts may be unaffordable but often the client's medical or mental health care providers can provide adequate testimony. Be aware that litigation is not always the answer.

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As with any case, be aware of the client's goals and objectives. Use the client's post-transition name and pronouns in legal proceedings unless inconsistent with client's priorities.

Be detail oriented and proactive about neutralizing and challenging discriminatory tactics. Be vigilant about protecting the client from irrelevant and discriminatory facts, arguments, and lines of questioning.<sup>57</sup> Consider asking the court to seal records of minors.

In addressing bias and educating opposing counsel, the judiciary, jury and court personnel, it may be necessary to use expert witnesses such as psychological or medical professionals, cite social science research in briefs or, in jury trials, educating the jury through voir dire.<sup>58</sup> Premise your arguments and representation with education. Reach out to local and national resources for information, support and guidance.

## WHAT ELSE CAN WE DO?<sup>59</sup>

- Watch films, interviews and performances by trans people. Listen to their stories, their own voices and experience. Many are available on YouTube.<sup>60</sup>
- Explore resources listed with this article online.
- Attend community forums and conferences, visit with panelists and other attendees.

- Attend LGBTQIA+ or Trans Pride events, observe Pride Month (June), Transgender Day of Remembrance (November 20) and International Transgender Day of Visibility (March 31).

- Imagine realizing you identify as a gender different from the sex you were assigned at birth.
  - How would you feel?
  - What concerns would you have?
  - Imagine sharing this with your friends, family, and your colleagues.
  - Consider how these people would respond.
- Imagine yourself moving through your day in a gender identity different than the sex you were assigned at birth.
  - What would be different?
  - What might you encounter or feel?
  - How might your perceptions of the world around you change?
  - How might your perceptions of those around you change?
- Explore implicit bias.
  - How would you feel if your parent came out as transgender and began to transition?
  - How would you feel if your parent came out as gay or lesbian?
  - If your child came out as transgender or gay or lesbian? What about your spouse?
  - What about your child's teacher?
  - What about your boss or a colleague or co-worker?
  - What questions, if any, might emerge for you?
- Explore training programs, that include gender identity protections.

For additional notes, resources and case references pertaining to this article, visit [okbar.org/barjournal/may2020/obj9105taylor/](http://okbar.org/barjournal/may2020/obj9105taylor/).

*Author's Note: Special thanks to Ann Butler, Oklahoma City University 3L and executive editor of the OCU Law Review, for proofreading and cite-checking this article. Additionally, Oklahoma attorney Alyssa Bryant was a contributor to Transgender and Gender Diverse Persons, A Handbook for Service Providers, Educators, and Families, a publication upon which I have heavily relied in compiling this article. Alyssa is an invaluable resource, mentor, and friend. At the time of this writing, she is a staff attorney at Legal Aid. Kudos, Alyssa, and thank you!*

## ABOUT THE AUTHOR

Shannon Taylor is a solo practitioner in Oklahoma City focusing on guardianship, adoption, probate and LGBTQ+ advocacy. She graduated from the OCU School of Law in 2005 and is a member of the Oklahoma County Bar Association, National LGBT Bar Association and Association of Family and Conciliation Courts.

## ENDNOTES

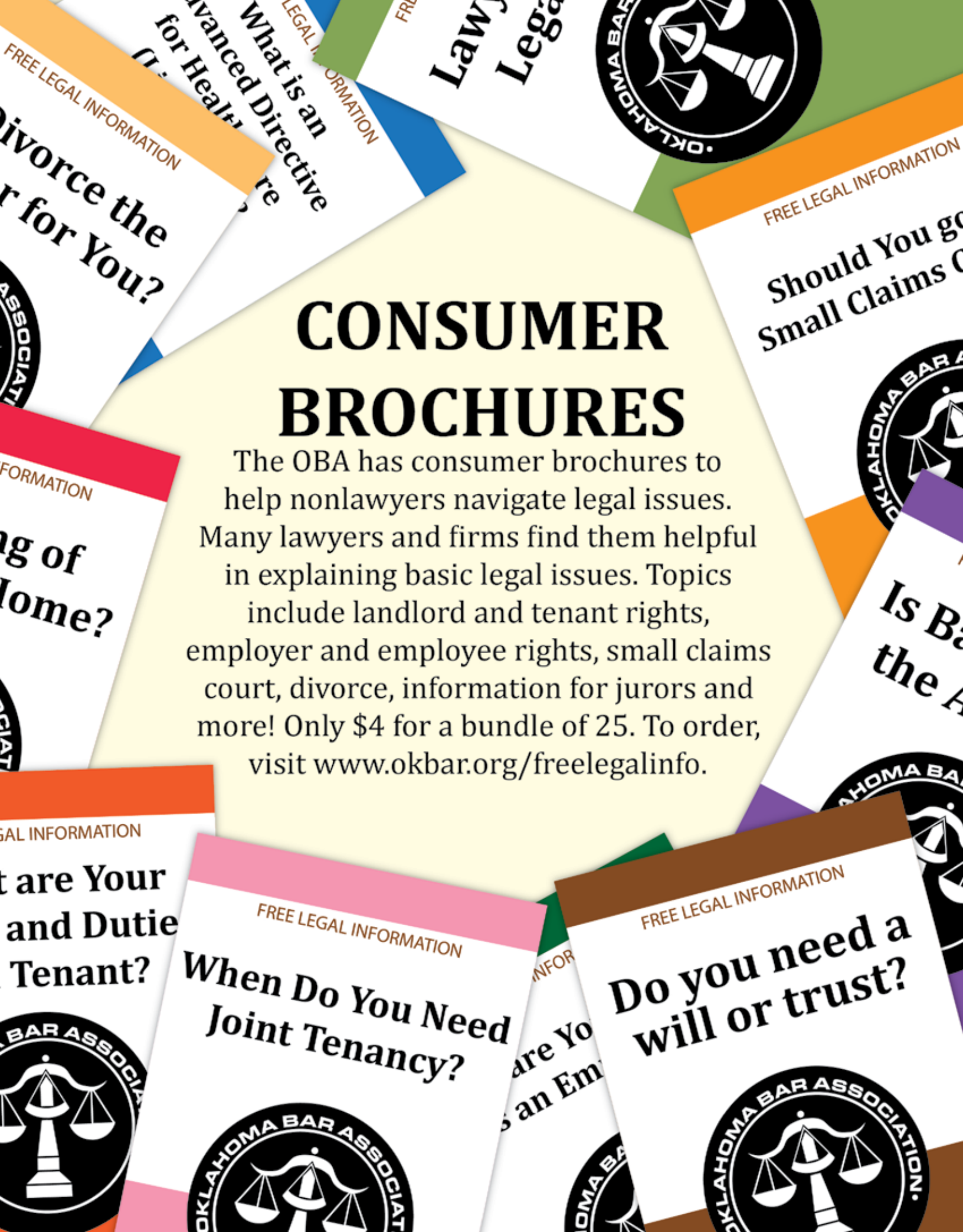
1. Lesbian, Gay, Bisexual, Transgender.
2. Jennifer L. Levi and Elizabeth E. Monnin-Browder eds., *Transgender Family Law, A Guide to Effective Advocacy* (n ed. 2012). Other pronouns include: ze/hir or ze/zir, per/pers, ey/em, xe/xem, etc. See also [www.mypronouns.org/](http://www.mypronouns.org/).
3. Lesbian, gay, bisexual, transgender.
4. Lesbian, gay, bisexual, transgender, queer or questioning.
5. Lesbian, gay, bisexual, transgender, queer, questioning, intersex, asexual, ally, pansexual.
6. Lesbian, gay, bisexual, transgender, transsexual, two-spirit (Native American), queer, questioning, intersex, asexual, ally. See KW Counselling Services, *OK2BME*, [www.ok2bme.ca/resources/kids-teens/what-does-lgbtq-mean/](http://www.ok2bme.ca/resources/kids-teens/what-does-lgbtq-mean/) (last visited Feb. 26, 2020).
7. Currently the most inclusive acronym, with each letter representing multiple terms, i.e. lesbian, gay/genderqueer/gender fluid, bisexual/bigender, trans/transgender, queer/questioning, intersex, asexual/aromantic/agender/abrosexual/bboromantic/ally. The + is intended to encompass all others. See *Urban Dictionary*, [www.urbandictionary.com](http://www.urbandictionary.com). See also [www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html](http://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html).
8. *Id.*

9. Jennifer L. Levi and Elizabeth E. Monnin-Browder eds., *Transgender Family Law, A Guide to Effective Advocacy* 5 (n ed. 2012).
10. *Id.*
11. *Id.* at 2.
12. *Id.*
13. Alfred F. Carozzi and Kurt T. Choate eds., *Transgender and Gender Diverse Persons, A Handbook for Service Providers, Educators, and Families* 10 (Routledge 1<sup>st</sup> ed. 2019).
14. *Id.*
15. *Id.*
16. *Id.*
17. Jennifer L. Levi and Elizabeth E. Monnin-Browder at 2.
18. *Id.* at 3.
19. *Id.*
20. Jennifer L. Levi and Elizabeth E. Monnin-Browder at 3.
21. *Id.* at 4.
22. *Id.*
23. Alfred F. Carozzi and Kurt T. Choate at 11.
24. *Id.* at 11 and 54.
25. See [www.transstudent.org/definitions](http://www.transstudent.org/definitions).
26. Jennifer L. Levi and Elizabeth E. Monnin-Browder at 2.
27. Alfred F. Carozzi and Kurt T. Choate at 12. See also, [www.transstudent.org/definitions](http://www.transstudent.org/definitions).
28. Jennifer L. Levi and Elizabeth E. Monnin-Browder at 3.
29. World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 71, 97 (7<sup>th</sup> ed. 2012).
30. *F.V. v. Barron*, 286 F.Supp.3d 1131, 1137 (D. Idaho 2018).
31. World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 71, 97 (E. Coleman, W. Bockting, M. Botzer, P. Cohen-Kettenis, G. DeCuypere, J. Feldman, et al. eds. 7<sup>th</sup> ed. 2012).
32. Alfred F. Carozzi and Kurt T. Choate at 3 and Jennifer L. Levi and Elizabeth E. Monnin-Browder at 11.
33. *Id.*
34. Jennifer L. Levi and Elizabeth E. Monnin-Browder at 5.
35. See WPATH Standards of Care.
36. *Id.*
37. Alfred F. Carozzi and Kurt T. Choate at 13.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. Alfred F. Carozzi & Kurt T. Choate at 14-15.
44. *Id.*
45. *Id.*
46. *Id.*
47. Diagnostic and Statistical Manual of Mental Disorders. Alfred F. Carozzi and Kurt T. Choate at 15.
48. *Id.*
49. Harry Benjamin, *The transsexual phenomenon*, Transactions of the New York Academy of Sciences, 29(4), 428-430 (February 1967) (retrieved from [doi.org/10.1111/j.2164-0947.1967.tb02273.x](http://doi.org/10.1111/j.2164-0947.1967.tb02273.x)). Benjamin, H. (1966). *The transsexual phenomenon*. New York: The Julian Press.
50. Alfred F. Carozzi and Kurt T. Choate at 15.
51. *Id.*
52. See generally Jennifer L. Levi and Elizabeth E. Monnin-Browder.
53. *Id.*
54. Alfred F. Carozzi and Kurt T. Choate at 118, referencing the "small 'ts' in LGBT," and quoting M. Tiefer, M. Tollit, C. Pace and K. Pang (2017). *Australian standards of care and treatment*

- guidelines for trans and gender diverse children and adolescents*. Melbourne: The Royal Children's Hospital, "Increasing evidence demonstrates that with supportive, gender affirming care during childhood and adolescence, harms can be ameliorated and mental health and wellbeing outcomes can be significantly improved."
55. See Additional Resources section online at [okbar.org/barjournal/may2020/obj9105taylor/](http://okbar.org/barjournal/may2020/obj9105taylor/).
  56. Jennifer L. Levi and Elizabeth E. Monnin-Browder at 195.
  57. Jennifer L. Levi and Elizabeth E. Monnin-Browder at 119 (citing *In re Custody of T.J.*, No. C2-87-1786, 1988 WL 8302, at \*3 (Minn. Ct. App. Feb. 9, 1988), wherein the appellate court affirmed a protective order issued by the trial court precluding one parent from getting information about the other parent's transgender support group or deposing the group's members. The trial court and appellate court viewed this as harassing discovery. This case also affirmed a trial court order granting custody to the transgender parent, noting, among other things, that the transgender parent's status as transgender "does not automatically disqualify him from having a relationship with his child." See also *In re Welfare of V.H.*, 412 N.W.2d 389 (Minn. Ct. App. 1987) father's transvestism was no bar to his custody of daughter); *Summers-Horton v. Horton*, No. 88AP-622, 1989 WL 29421, at \*2 (Ohio Ct. App. 1989); and *Christian v. Randall*, 516.P2d. 132.
  58. See generally Jennifer L. Levi and Elizabeth E. Monnin-Browder.
  59. See generally Jennifer L. Levi and Elizabeth E. Monnin-Browder and Alfred F. Carozzi & Kurt T. Choate.
  60. YouTube videos: [www.hrc.org/resources/coming-out-living-authentically-as-lgbtq-black-americans](http://www.hrc.org/resources/coming-out-living-authentically-as-lgbtq-black-americans); [youtu.be/QLK5hfovEi0](http://youtu.be/QLK5hfovEi0) (Dwyane Wade talks about his child coming out as transgender); [youtu.be/1MfxtM9N3fw](http://youtu.be/1MfxtM9N3fw) (It Got Better featuring Laverne Cox).

# CONSUMER BROCHURES

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# Decision Time for the U.S. Supreme Court: Will Title VII Prohibit LGBT Discrimination?

By Alyssa J. Bryant

**M**S. AIMEE STEPHENS, an employee at a funeral home, came out as transgender.<sup>1</sup> Mr. Gerald Bostic joined a gay softball league.<sup>2</sup> Mr. Donald Zarda, a skydiving instructor, joked with a female client in harness for a tandem dive that she should not worry because he was gay.<sup>3</sup> All were fired because of their natures, and all brought claims under Title VII of the Civil Rights Act of 1964 (Title VII). All but Mr. Bostock were successful at the circuit court level. On April 22, 2019, the United States Supreme Court granted petitions for writs of *certiorari* on two questions:

- Whether Title VII prohibits discrimination against transgender people based on 1) their status as transgender or 2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U. S. 228 (1989).
- Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination “because of ... sex” within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.<sup>4</sup>

There are an estimated 11.5 million lesbian, gay and bisexual people aged 13 and older living in the United States, and of that group, an estimated 7.1 million are LGB workers (aged 16 and older).<sup>5</sup> The United States is home to at least 1.55 million transgender people (aged 13

and older).<sup>6</sup> The resolution of these cases may have far-reaching impact in other areas of the law such as discrimination claims under Title IX of the United States Educational Amendments of 1972 and Section 1557 of the Affordable Care Act.<sup>7</sup>

Lesbian, gay and bisexual people report being fired from or denied a job at a significantly higher rate than heterosexuals.<sup>8</sup> Fifteen percent of transgender respondents to the 2015 large-scale United States Transgender Survey (USTS) reported being unemployed, triple the national unemployment rate at the time of the survey.<sup>9</sup> Twice as many transgender respondents to the USTS live in poverty compared to the national average.<sup>10</sup> A September 2019 report by UCLA’s William Institute entitled “Discrimination Against LGBT People in Oklahoma” found elevated levels of workplace discrimination

against an estimated 117,000 LGBT Oklahomans, particularly against transgender Oklahomans.

During oral arguments in the cases now pending before the U.S. Supreme Court, “conservative” advocates before the court spoke of the intent of legislators in 1964 while “liberal” advocates stressed a strict construction of the phrase “because of sex.” The 11th Circuit has demonstrated it is theoretically possible to have different rulings, separating the LGB from the T in the civil rights each group enjoys.

As of the date this article was submitted, decisions are still pending. Rather than speculate on possible results, the emphasis here is to provide context to whatever the United States Supreme Court ultimately decides in this blockbuster trilogy of cases.





### 1964 TO 1989 – FROM PASSAGE TO PRICE WATERHOUSE

On Feb. 8, 1964, avid segregationist Rep. Howard Smith, proposed an amendment to what would become the Civil Rights Act of 1964. Rep. Smith proposed to amend the bill by adding the word “sex” after the word “religion” in five places. Before Rep. Smith’s amendment, sex was not to be protected in the nascent civil rights act.<sup>11</sup>

Rep. Smith, as chairman of the House judiciary committee, had refused to permit the bill to leave his committee but was forced to allow the bill to the floor after the assassination of President Kennedy. Many viewed his proposed amendment as a tactic to poison the bill.

Rep. Smith maintained several times that he was serious even as laughter roiled the chamber. Rep.

Smith read a letter from a female constituent into the record decrying the “imbalance of spinsters” shut off from the “right to have a husband of her own.” This, Rep. Smith maintained, was a “real grievance of the minority sex.”<sup>12</sup> Rep. Martha Griffith of Michigan replied, “Mr. Chairman, I presume that if there had been any necessity to have pointed out that women were a second-class sex, the laughter would have proved it.”<sup>13</sup> The bill, with Rep. Smith’s amendment, passed the house on Feb. 10, 1964. On July 2, 1964, a few days after three civil rights workers were murdered in Mississippi, President Johnson signed the bill into law.

The law has evolved to reflect our national consensus that sex discrimination is pernicious. We have since added provisions to outlaw sex discrimination in education,

health care and other areas. Sexual harassment and a “hostile work environment” can now violate Title VII.<sup>14</sup> In an opinion written by Justice Scalia upholding a discrimination claim of same-sex sexual harassment, Title VII’s protections extended beyond the “principal evil” imagined by Congress at the time of enactment.<sup>15</sup>

In *Price Waterhouse v. Hopkins*,<sup>16</sup> the U.S. Supreme Court ruled on whether discrimination based on sex-based stereotypes can constitute Title VII sex discrimination. In 1982, Ms. Ann Hopkins unsuccessfully vied to become the eighth woman of 663 partners of the international accounting firm of Price Waterhouse. Ms. Hopkins had secured a \$25 million contract for her firm and was acknowledged to be highly competent.<sup>17</sup>

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## Before *Price Waterhouse*, courts rarely granted rights to transgender persons under Title VII.

However, some partners wrote she was “macho,” “overcompensated for being a woman,” should “take a course at a charm school” and swore too much. A supporter wrote that Ms. Hopkins had “... matured from a tough-talking somewhat masculine hard-nosed manager to an authoritative, formidable, but much more appealing lady partner candidate.”<sup>18</sup> The partner who placed Ms. Hopkins’ partnership on hold, wrote that to improve her chances of making partner, she should, “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>19</sup>

In finding *Price Waterhouse* discriminated against Ms. Hopkins based upon her sex, the U.S. Supreme Court held “... we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for, [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”<sup>20</sup>

### THE IMPACT OF PRICE WATERHOUSE ON LGBT RIGHTS UNDER TITLE VII

Before *Price Waterhouse*, courts rarely granted rights to transgender persons under Title VII.<sup>21</sup>

For example, the plaintiff in one case had served in air combat over Vietnam with the United States Army from 1965 until 1968. Ms. Karen Ulane received the Air Medal with eight clusters. Before transitioning, she logged over 8,000 flight hours as a flight instructor but was fired by Eastern Airlines when she came out as transgender.<sup>22</sup>

Downplaying the importance of sex discrimination generally, the court noted that the “... sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute’s prohibition against race discrimination.”<sup>23</sup>

In discussing the nature of transgenderism, the appellate court opined that “... even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case.”<sup>24</sup> The court held Eastern Airlines did not discriminate against Ms. Ulane because she was female but instead because she was a “transsexual”<sup>25</sup> which the court defined as “a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.”<sup>26</sup>

This view of sex and gender influenced *Etsitty v. Utah Transit Authority*.<sup>27</sup> In *Etsitty*, a transgender employee was fired because

she used the women’s bathroom and had not had gender surgery.<sup>28</sup> *Etsitty* affirmed the grant of summary judgment against Ms. Etsitty’s Title VII claims citing to *Holloway*, *Sommers* and *Ulane*. Although *Etsitty* held that “transsexuals” are not a protected class, it also held that a transgender person, like anyone else, is empowered to bring a *Price Waterhouse* claim against an employer for sex stereotyping. Further, the court allowed that “[s]cientific research may someday cause a shift in the plain meaning of the term ‘sex’ so that it extends beyond the two starkly defined categories of male and female.”<sup>29</sup>

*Etsitty* compared *Brown v. Zavaras*<sup>30</sup> which allowed the possibility that “transsexuals” might be a protected class for purposes of the Equal Protection Clause of the 14th Amendment to the United States Constitution. *Brown* noted that “[r]ecent research concluding that sexual identity may be biological suggests reevaluating *Holloway*.”<sup>31</sup>

However, *Brown* “... declined to make such an evaluation in this case because ... Brown’s allegations are too conclusory to allow proper analysis of this legal question.”<sup>32</sup> Likewise, *Etsitty*’s acknowledgment that scientific research might someday cause a shift in the “plain meaning of the term ‘sex,’” could not be explored in *Etsitty* “... at this point in time and with the record and arguments before this court.”<sup>33</sup>

*Etsitty* notwithstanding, Ann Hopkin's victory against Price Waterhouse heralded a sea-change in the law with respect to transgender protection under Title VII. *Glenn v. Brumby*<sup>34</sup> noted that since the decision in *Price Waterhouse*, federal courts have recognized with "near-total uniformity" that "the approach in *Holloway*, *Sommers*, and *Ulane* ... has been eviscerated..."<sup>35</sup> This change was driven by *Price Waterhouse*'s holding that "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms."<sup>36</sup>

*Price Waterhouse* did not have a comparable impact for gay Americans.<sup>37</sup> However, in 2015, the EEOC concluded that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."<sup>38</sup>

The U.S. Court of Appeals, 7th Circuit, followed suit in *Hively v. Ivy Tech Community College of Indiana*<sup>39</sup> holding that "... a person who alleges that she experienced

employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes." As will be noted below, in *Zarda* the 2nd Circuit took the same approach, citing to *Baldwin* and *Hively*.

### PENDING CASES

For additional context, a brief description is provided of the earlier proceedings in the cases now pending before the U.S. Supreme Court:

#### *Bostock v. Clayton County Board of Commissioners*<sup>40</sup>

The Georgia District Court dismissed Gerald Bostock's claim of employment discrimination under Title VII. The U.S. Court of Appeals, 11th Circuit, found that a recent decision, *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248 (11<sup>th</sup> Cir. 2017), was binding precedent which mandated the affirmation of the dismissal of Bostock's Title VII claim.

#### *Zarda v. Altitude Express, Inc.*<sup>41</sup>

Mr. Zarda alleged he was fired from his job at Altitude Express Inc. because he failed to conform to male sex stereotypes by referring to his sexual orientation. The court

cited long history of precedent that "... claims that being gay or lesbian constitutes nonconformity with a gender stereotype, are not cognizable under Title VII."<sup>42</sup> However, citing to the 2015 ruling by the EEOC, the 2nd Circuit noted that "legal doctrine evolves..."<sup>43</sup>

Further, the 2nd Circuit noted two circuits had revisited the question;<sup>44</sup> therefore, the court convened *en banc* to reevaluate the issue. The 2nd Circuit held that "[f]or purposes of Title VII, firing a man because he is attracted to men is a decision motivated, at least in part, by sex."<sup>45</sup> *Zarda* applied a "but for" causation test and concluded that a gay woman who is subject "... to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women." The court held "... sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination."<sup>46</sup>

In both *Bostock* and *Zarda*, the plaintiffs argued that firing someone for being gay or lesbian is *per se* gender stereotyping for a perceived failure to comply with heterosexual norms. In neither case, for example, were the men fired for acting in a manner in conflict with societal expectations regarding gender expression.

#### *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*<sup>47</sup>

Defendant operated three funeral homes in Michigan. Aimee Stephens (formally known as Anthony Stephens) was fired by the funeral home shortly after she disclosed an intent to transition. The 6th Circuit held "... the Funeral Home fired Stephens because she refused to abide by her employer's stereotypical conception of her sex."<sup>48</sup> Therefore, the court concluded, "[d]iscrimination against



employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII.<sup>49</sup>

## CONCLUSION

The cases now pending before the U.S. Supreme Court will likely do more than decide the momentous question of the applicability of Title VII to LGBT persons. In deciding whether a person's sexual orientation or gender identity is separate from or a part of a person's "sex," these decisions may well speak to the nature of millions of gay and transgender Americans and, thereby, influence numerous evolving areas of the law which impact these populations.

## ABOUT THE AUTHOR

Alyssa J. Bryant currently works with victims of crime for Legal Aid Services of Oklahoma Inc. in Oklahoma City. She is a frequent speaker on the legal and societal treatment of transgender Americans and co-authored a chapter entitled "Transgender Politics: The Civil Rights of Transgender Persons" in a book recently published by Routledge.

## ENDNOTES

1. *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019). "Transgender" is an adjective describing people whose gender identity is different from the gender they were thought to be when they were born.
2. *Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019).
3. *Altitude Exp., Inc. v. Zarda*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019).
4. The question before the court in *Zarda* is substantively identical: "Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination 'because of ... sex' encompasses discrimination based on an individual's sexual orientation."
5. K. Conron and S. Goldberg, Williams Inst., *LGBT Protections from Discrimination: Employment and Public Accommodations* (2019), available at [williamsinstitute.law.ucla.edu/wp-content/uploads/NonDiscrimWorkPubAccom.pdf](http://williamsinstitute.law.ucla.edu/wp-content/uploads/NonDiscrimWorkPubAccom.pdf).
6. J. Herman et al., Williams Inst., *Age of Individuals Who Identify as Transgender in the United States* (2017), available at [Report.pdf; see also A. Flores et al., Williams Inst., \*How Many Adults Identify as Transgender in the United States?\* \(2016\), available at \[williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf\]\(http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf\).

  7. \*Roberts v. Colorado State Bd. of Agric.\*, 998 F.2d 824, 832 \(10th Cir.1993\).
  8. I. Meyer, Williams Inst., \*Experiences of Discrimination among Lesbian, Gay and Bisexual People in the US\* \(2019\).
  9. USTS, note 4, at 5.
  10. See \*id.\* at 144-45.
  11. 110 Cong. Rec 2577 \(1964\).
  12. \*Id.\*
  13. \*Id.\* at 2578.
  14. \*Meritor Sav. Bank, FSB v. Vinson\*, 477 U.S. 57, 66-67 \(1986\); \*Burlington Indus., Inc. v. Ellerth\*, 524 U.S. 742, 752 \(1998\).
  15. \*Oncale v. Sundowner Offshore Servs., Inc.\*, 523 U.S. 75, 79 \(1998\).
  16. \*Price Waterhouse v. Hopkins\*, 490 U. S. 228 \(1989\).
  17. \*Id.\* at 232.
  18. \*Id.\* at 235.
  19. \*Id.\* at 272.
  20. \*Id.\*, citing \*Los Angeles Dept. of Water and Power v. Manhart\*, 435 U.S. 702, 707, n.13 \(1978\).
  21. \*Holloway v. Arthur Anderson & Co.\*, 566 F.2d 659, 662-63 \(9th Cir. 1977\) \(upholding dismissal of an accountant after she informed her superior of intent to undergo gender surgery\); \*Sommers v. Budget Marketing, Inc.\*, 667 F.2d 748, 750 \(8th Cir. 1982\) \(upholding dismissal of a transgender person for "misrepresenting himself \(sic\) as female."\).
  22. \*Ulane v. Eastern Airlines\*, 742 F.2d 1081 \(7th Cir. 1984\).
  23. \*Ulane\* elaborated that when Congress enacted the Civil Rights Act of 1964 it was primarily concerned with race discrimination. "Sex as a basis of discrimination" was added as a floor amendment one day before the House approved title VII, without prior hearing or debate." \*Id.\* at 1085, citations omitted.
  24. \*Id.\* at 1086.
  25. "Transsexual" is an "... older term for people whose gender identity is different from their assigned sex at birth who seeks to transition." National Center for Transgender Equality \(NCTE\), available at <http://transequality.org/issues/resources/transgender-terminology>. "Transition" is the process in which a person goes from living and identifying as one gender to living and identifying as another. Transition is a process that is different for everyone, and it may or may not involve social, legal or physical changes. NCTE, available at \[transequality.org/issues/resources/transgender-terminology\]\(http://transequality.org/issues/resources/transgender-terminology\).
  26. \*Ulane, supra\*, at 1087.
  27. \*Etsitty v. Utah Transit Authority\*, 502 F3d 1215 \(10th Cir. 2007\).
  28. Various labels are used to describe such surgery, e.g. the archaic "sex change operation," "gender affirmation surgery," "bottom surgery," etc. and a variety of surgeries are available. It is important to note that the surgeries a transgender person obtains, if any, vary from person to person and from gender to gender. It appears in this case the employer was requiring the transgender employee to undergo vaginoplasty as a condition to using the women's bathroom.
  29. \*Id.\* at 1222, citing \*Schroer v. Billington\*, 424 F.Supp. 2d 203, 2012-13 \(D.D.C. 2006\) \(noting "... complexities stemming from real variations in how the different components of biological sexuality interact with each other, and in turn, with social psychological, and legal conceptions of gender."\)](http://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAge</a></li></ol></div><div data-bbox=)

30. *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995).
31. *Id.* at 971, citing *Dahl v. Secretary of the United States Navy*, 830 F.Supp. 1319, 1324, n.5 (E.D. Cal. 1993) (collecting research suggesting that gender identity is biological).
32. *Id.*
33. *Etsitty, supra*, at 1222.
34. *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011).
35. *Id.*, at 1318, n. 5.
36. *Id.*, citing *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004).
37. See, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) ("Title VII does not proscribe harassment simply because of sexual orientation."); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) ("Simonton has alleged that he was discriminated against not because he was a man, but because of his sexual orientation. Such a claim remains noncognizable under Title VII.").
38. *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015) quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242, (1989).
39. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 351-52 (7th Cir. 2017).
40. *Bostock v. Clayton County Board of Commissioners*, 723 Fed.Appx 964 (11th Cir. 2018), cert. granted 139 S. Ct. 1599 (2019).
41. *Zarda v. Altitude Express, Inc.*, 883 F3d 100 (2nd Cir. 2018), cert. granted, 139 S.Ct. 1599 (2019).
42. *Id.* at 105, citing, along with other cases, *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000).
43. *Id.* at 107-08, citing *Baldwin, supra*.
44. *Id.* at 108, citing *Hively, supra*, at 340-41.
45. *Id.* at 114.
46. *Id.* at 119.
47. *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2017), cert. granted, 139 S.Ct. 1599 (2019).
48. *Id.* at 600.
49. *Id.*

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# Strategies for Attorneys Managing the Additional Stress of COVID-19

By Deanna Harris and Ben F. Rogers

**LAWYERS ARE PROBLEM** solvers. Lawyers are helpers. Lawyers are supposed to have the answers and solutions to the tough life questions and guide their clients through major life events. The COVID-19 pandemic has stirred up feelings of being helpless and hopeless in the world population, and lawyers are not exempt from the effect of these difficult and uncertain times. In fact, since lawyers struggle with greater anxiety, depression and substance abuse than the general population, the volume has been turned up. Our existing issues are exacerbated.

In the state of Oklahoma, there are approximately 18,000 attorneys. According to the ABA's statistical analysis of attorneys with substance abuse and mental health issues,<sup>1</sup> Oklahoma has roughly 3,500 attorneys with existing substance abuse disorders and more than 5,200 attorneys suffering from depression, anxiety or other more serious mental health problems. Now more than ever, the case can be made for paying attention to mental health in the profession of law.

## WHAT CAN I CONTROL?

Asking yourself this question can redirect your thoughts to the very things you can control. We don't know what is coming next, and we want to know that whatever it is, it will be better. Uncertainty

breeds fear and often as we seek out sources to reassure us the uncertainty will pass, we actually increase our uncertainty and fear. If we can learn to accept the uncertainty of any situation and especially a crisis, we will free ourselves to focus on the actions we can take that are within our control, which will lead to lower levels of anxiety.

## STAY IN THE PRESENT

Pay attention to where your thoughts are – past, present or future? Lawyers are trained to plan for all of the “what if”

scenarios. Paid worriers, if you will, see potential problems everywhere. This is exactly where anxiety lies, in the future and in the uncertainty. To practice staying in the present, name one thing you can smell, taste, hear, see and touch or name five objects in the room or space you occupy. Most importantly, remember to breathe deep.

## LIMIT YOUR NEWS INTAKE TO 30 MINUTES ONCE OR TWICE DAILY

No one really ever knows what will happen next, but constant speculation on outcomes can increase our level of uncertainty which leads to greater fear. We learn new things every day, and we have no idea what the implications of this world health crisis may have on our lives going forward.

After the H1N1 pandemic of 2009, a study was done on people's inability to tolerate uncertainty and what affect increased levels of that uncertainty had on their anxiety levels during that crisis.<sup>2</sup> What the researchers found was the higher one's level of intolerance for uncertainty, the higher one's level of anxiety rose. They also found the public was often confused by the threat level of the virus and what information related to the disease they could trust. In part, their fears were fed by government

## ADDITIONAL RESOURCES

### Suicide Prevention Lifeline

Free, confidential 24/7 support for people in distress, prevention and crisis resources for oneself and others  
[www.suicidepreventionlifeline.org](http://www.suicidepreventionlifeline.org)  
 800-273-TALK

### ABA Commission on Lawyer Assistance Programs

Full list of resources including virtual support groups  
[www.americanbar.org/groups/lawyer\\_assistance](http://www.americanbar.org/groups/lawyer_assistance)

### Legal Talk Network Podcasts

[www.legaltalknetwork.com](http://www.legaltalknetwork.com)



health agencies that “often walk the line of minimizing the threat to prevent panic, but simultaneously emphasize the importance of action” to prevent an even wider worldwide pandemic. Even with their best intentions, our government and news outlets can contribute to our fears. By limiting one’s exposure to the constant speculation and mixed signals broadcast by news agencies, one can reduce anxiety levels.

### **MANAGE YOUR INEVITABLE ANXIETY**

We are often driven to want to distract ourselves from feeling anxious. Instead, focus on noticing and accepting feelings of anxiety. When we fight against the feeling, we actually create an internal battlefield that can increase the anxiety and take us in the opposite direction of where we want to be. Accept you are feeling anxious,

notice where you are feeling it in your body and give yourself a few minutes to just experience it.

### **STAY CONNECTED**

Reaching out to family, friends and colleagues is important. Staying connected helps us debrief and get ideas from others and contributes to a sense of belonging. If you isolate, you have no idea others are experiencing the same issues and are having some of the same struggles. It can contribute to a reduction of fear and anxiety.

### **TAKE CARE OF YOURSELF**

Exercise, eat healthy foods and get plenty of sleep. If you didn’t make time for this before the pandemic, it is critical to do it now. It’s hard to effectively continue to care for others when you are not caring for yourself. Put yourself on your calendar and schedule one hour a day to care for you. Watch

what you are putting in your body. Booze and twinkies will not make you more effective. Get moving – get outside and walk, ride a bike or do some stretching. It doesn’t take hours a day to reap the benefits – 30 minutes three times a week will have a positive impact on overall health and mental health.

### **FIND A WAY TO BE HELPFUL TO OTHERS**

Research has long shown practicing pro-social behavior is another way to improve our daily well-being.<sup>3</sup> Helping others regulate their emotions actually helps us regulate our own and decreases symptoms of depression and ultimately improves our emotional well-being.<sup>4</sup> Consider mentoring younger, less experienced attorneys through their fears by giving them hope that this situation will eventually pass. In convincing them of their possibilities going

forward, it may very well help us to realize a more positive approach to our own situation.

As Admiral William McRaven reminds us in his best-selling book on leadership and the little things each of us could do to change the world,<sup>5</sup> “At some point we will all confront a dark moment in life ... that leaves [us] wondering about [our] future. In that dark moment, reach deep inside yourself and be your very best.” The best we may be able to do for ourselves is reflected in how much we can contribute to others and their lives, especially in times like these. Attorneys never sit on the sidelines in any crisis. They always have a role in the solutions of traumatic events. This is yet another time for us to help bring some order to the chaos. It’s our role. It’s what we do.

Remember, it’s always all right to ask for help. It doesn’t take a crisis to make a phone call. Contact the Lawyers Helping Lawyers hotline 24/7 at 800-364-7886.

#### ABOUT THE AUTHORS

Ms. Harris is a licensed clinical social worker in Oklahoma City. She has worked with the Lawyers Helping Lawyers Assistance Program for nine years as a clinician with the past five years helping the committee administer the program. She also manages her own private practice.

Mr. Rogers is a practicing attorney and business consultant in Norman. He has mentored men and women struggling with substance abuse, eating disorders, gambling and depression for more than 35 years. He has been a Lawyers Helping Lawyers Committee member since 2017.

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# Be Sure to Nominate Leaders Who Deserve Recognition

*By Kara I. Smith*



**WE ARE IN A CHALLENGING** and unprecedented time right now, a time where the lives we all once knew have now been changed in the mist of COVID-19. It has impacted our families, friends, communities, clients, businesses, services, the legal profession, the world and many more than I am able to list in this article. As I wrestle with all that is going on, I take solace in reflecting on inspiring quotes such as this one from Former First Lady Michelle Obama:

You should never view your challenges as a disadvantage. Instead, it's important for you to understand

that your experience facing and overcoming adversity is actually one of your biggest advantages.

Our advantage as we are all adjusting to the times we are in is that we have this unique opportunity to honor exceptional individuals and groups who have positively lead and influenced our community, who have chosen to serve the public and who have chosen to serve our legal profession. I believe I can speak for more than just myself when I say that the time we are in right now heightens our appreciation for those who choose to lead and serve more than we ever have before.

In closing, I invite you to join the OBA Awards Committee in its efforts to find deserving individuals and groups. Please share with your colleagues and friends how important it is to submit a nomination and that this organization appreciates their time and effort.

---

#### **ABOUT THE AUTHOR**

Kara Smith is the chief assistant attorney general in the Civil Rights Enforcement Unit of the Office of the Oklahoma Attorney General. She serves as Awards Committee chairperson.

### **NOMINATION RULES AND TIPS**

- The **deadline is 5 p.m. Wednesday, July 1**, but get your nomination in EARLY! Nominations, complete with all supporting material, **MUST** be received by the deadline. Submissions or supporting material received after the deadline will not be considered.
- Length of nomination is a maximum of five 8 ½ x 11-inch, one-sided pages including supporting materials and the form, if used. No exceptions.
- Make sure the name of the person being nominated and the person (or organization) making the nomination is on the nomination.
- If you think someone qualifies for awards in several categories, pick one award and only do one nomination. The OBA Awards Committee may consider the nominee for an award in a category other than one in which you nominate that person.
- Submission options (pick one):
  - 1) email: [awards@okbar.org](mailto:awards@okbar.org) (you will receive a confirmation reply);
  - 2) fax: 405-416-7089;
  - 3) mail: OBA Awards Committee, P.O. Box 53036, Oklahoma City, OK 73152.
- Visit [www.okbar.org/awards](http://www.okbar.org/awards) for the nomination form if you want to use one (not required), history of previous winners and tips for writing nominations.

## INDIVIDUALS FOR WHOM AWARDS ARE NAMED

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

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

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

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

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

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

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

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

## AWARDS

**OUTSTANDING COUNTY BAR ASSOCIATION AWARD** – for meritorious efforts and activities

*2019 Winners: Kay County Bar Association and Oklahoma County Bar Association*

**HICKS EPTON LAW DAY AWARD** – for individuals or organizations for noteworthy Law Day activities

*2019 Winner: Ray Vaughn, Mounds*

**GOLDEN GAVEL AWARD** – for OBA committees and sections performing with a high degree of excellence

*2019 Winner: Legislative Monitoring Committee*

**LIBERTY BELL AWARD** – for nonlawyers or lay organizations for promoting or publicizing matters regarding the legal system

*2019 Winner: Karen Keith, Tulsa*

**OUTSTANDING YOUNG LAWYER AWARD** – for a member of the OBA Young Lawyers Division for service to the profession

*2019 Winner: Nathan Richter, Mustang*

**EARL SNEED AWARD** – for outstanding continuing legal education contributions

*2019 Winner: Kathryn McClure, Lawton*

**AWARD OF JUDICIAL EXCELLENCE** – for excellence of character, job performance or achievement while a judge and service to the bench, bar and community

*2019 Winner: Retired Judge Patricia G. Parrish, Oklahoma City*

**FERN HOLLAND COURAGEOUS LAWYER AWARD** – to an OBA member who has courageously performed in a manner befitting the highest ideals of our profession

*Not awarded in 2019*

**OUTSTANDING SERVICE TO THE PUBLIC AWARD** – for significant community service by an OBA member or bar-related entity

*2019 Winner: Oklahoma County Bar Association Young Lawyers Division*

**AWARD FOR OUTSTANDING PRO BONO SERVICE** – by an OBA member or bar-related entity

*2019 Winner: Corry S. Kendall, Altus*

**JOE STAMPER DISTINGUISHED SERVICE AWARD** – to an OBA member for long-term service to the bar association or contributions to the legal profession

*2019 Winner: William H. Hoch III, Oklahoma City*

**NEIL E. BOGAN PROFESSIONALISM AWARD** – to an OBA member practicing 10 years or more who for conduct, honesty, integrity and courtesy best represents the highest standards of the legal profession

*2019 Winner: Judge Dana L. Rasure, Tulsa*

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

*2019 Winner: Ed Abel, Oklahoma City*

**ALMA WILSON AWARD** – for an OBA member who has made a significant contribution to improving the lives of Oklahoma children

*2019 Winner: Eugenia “Genie” Baumann, Edmond*

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

*Not awarded in 2019*

# Celebrate Diversity With an Award Nomination

**THE DIVERSITY COMMITTEE** is now accepting nominations for the Ada Lois Sipuel Fisher Diversity Awards to be presented in November. The three award categories are members of the judiciary, licensed attorneys and organizations that have championed the cause of diversity. All nominations must be received by **Friday, July 31**.

For additional information, please contact Diversity Committee Chair Telana McCullough at 405-522-9528 or visit [www.okbar.org/diversityawards](http://www.okbar.org/diversityawards).

## SELECTION CRITERIA

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

- Developed and implemented an effective equal opportunity program as demonstrated by the organization's commitment to the recruitment, retention and promotion of individuals of underrepresented populations regardless of race, ethnic origin, gender, religion, age, sexual orientation, disability or any other prohibited basis of discrimination;
- Promoted diversity initiatives that establish and foster a more inclusive and equitable work environment;

- Demonstrated continued corporate responsibility by devoting resources for the improvement of the community at large; and
- Exhibited insightful leadership to confront and resolve inequities through strategic decision-making, allocation of resources and establishment of priorities.

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

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

## NOMINATIONS AND SUBMISSIONS

- Include name, address and contact number of the nominee.
- Describe the nominee's contributions and accomplishments in the area of diversity.
- Identify the diversity award category (organization, licensed attorney or member of the judiciary) in which the nominee is being nominated.
- The submission deadline is July 31.
- Submissions should not exceed five pages in length.
- Submit nominations to [diversityawards@okbar.org](mailto:diversityawards@okbar.org).



*Ada Lois Sipuel Fisher*

**ADA LOIS SPUDEL FISHER** leaves a legacy that impacted the legal profession and the Civil Rights Movement. Born in Chickasha, she graduated in 1945 with honors from Langston University, which did not have a law school. Segregation existed and blacks were prohibited from attending white state universities. Fisher decided to apply for admission to the OU College of Law to challenge the state's segregation laws and to accomplish her lifelong goal of becoming a lawyer. State statutes prohibited the college from accepting her. A lawsuit was filed that resulted in a three-year legal battle. After an unfavorable ruling by the Oklahoma Supreme Court, an appeal was filed with the U.S. Supreme Court. Another barrier was erected with the creation of a separate law school thrown together in five days exclusively

for her to attend. She refused to attend on the grounds the new school could not provide a legal education equal to OU's law school. A state court ruled against her, and the state Supreme Court upheld the decision. Ms. Fisher's lawyers planned to again appeal to the U.S. Supreme Court, but Oklahoma's attorney general declined to return to Washington, D.C. to argue the case. She was admitted to the OU College of Law on June 18, 1949, and graduated in August 1952.

*Photo Credit: Courtesy Western History Collections, University of Oklahoma Libraries, Ada Lois Sipuel Fisher 3.*



Law Day contest winner ceremony

# Thank You!

**THE OBA LAW DAY COMMITTEE** appreciates the contributions that helped make this year's community service possible. Sadly because of the pandemic, most activities had to be postponed or cancelled; however, the *Ask A Lawyer* TV show premiered April 30 and Ask A Lawyer free legal advice helped hundreds of Oklahomans who emailed their questions. Fortunately, the ceremony for contest winners was held early before orders limited gatherings.

Chief Justice Noma Gurich  
 OBA President Susan Shields  
 Melissa DeLacerda  
 OETA Television  
 LawPay  
 Oklahoma County Bar Association  
 Young Lawyers Division  
 Scott's Printing  
 Volunteer lawyers statewide who answered legal questions by email





**POSTPONED**

## **The Sovereignty Symposium XXXIII**

For 32 years, The Sovereignty Symposium has established itself as the premier gathering for the exchange of legal and scholarly discussions regarding and relating to Native American law. Because this extraordinary event requires months of planning and relies on the generosity of faculty and attendees from all over the world, we must consider the current circumstances surrounding the COVID-19 virus and the attempts to curtail it as soon as possible.

This uncertain time leads us to conclude that The Sovereignty Symposium currently scheduled for June 10-11, 2020, in Oklahoma City be postponed until it is safe to travel and hold public gatherings. Safety and health are our priority. Please check back for an announcement as to when it will be rescheduled. In the meantime, stay safe and healthy.

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

*“Thank you”  
is not enough.*

*The Oklahoma Lawyers for America’s Heroes Program provides legal advice and assistance to those who have honorably served this country and are unable to afford to hire an attorney.*

*To volunteer, visit*

*[www.okbarheroes.org](http://www.okbarheroes.org)*



# New Lawyers Take Oath at Historic Admissions Ceremony

**BOARD OF BAR EXAMINERS CHAIRPERSON** Juan Garcia announces that 73 applicants who took the Oklahoma Bar Examination on Feb. 25-26, were admitted to the Oklahoma Bar Association on Monday, April 20, or by proxy at a later date. Due to the social distancing requirements caused by the COVID-19 state of emergency, Oklahoma Supreme Court Chief Justice Noma Gurich administered the Oath of Attorney to the candidates via a videoconferencing ceremony from her office at the Oklahoma Judicial Center in Oklahoma City. A total of 110 applicants took the examination.

Other members of the Oklahoma Board of Bar Examiners are Vice Chairperson Tommy R. Dyer Jr., Jay; Robert Black, Oklahoma City; Nathan Lockhart, Norman; Bryan Morris, Ada; Loretta F. Radford, Tulsa; Roger Rinehart, El Reno; and Tom Wright, Muskogee.

**THE NEW ADMITTEES ARE:**

Mian Umar Ali  
Nelson Nzalli Anaback  
Auziah Destinee Antwine

Shannon Rashelle Beesley  
Jeremy Jay Bennett  
Sara Elizabeth Bobbitt  
Adam James Boutross

William Bradley Brents  
Taylor Noel Brown  
Katherine Michelle Bushnell  
Ismail Marzuk Calhoun  
Brian Todd Candelaria  
Madison Danielle Cataudella  
Kayla Nicole Caudle  
Christopher James Cavin  
Laura Jessica Chesnut  
Melissa Diane Cianci  
Tristan Lane Davis  
Joseph Carlson DeAngelis  
Kayla DeLaine Dupler  
Zachary Andrew Enlow  
Mark William Espenshade  
Cameron Scott Farnsworth  
Melissa Ann Ferguson  
Justin Mathew Ferris  
Matthew Joshua Flynn  
Cherlyn Rae Gelinis  
Matthew Allen George  
Nicholas Lee Goodwin  
Lindsay Ann Gray  
Erica Lynn Grayson  
Macy Renay Griswold  
Christopher Jay Hall  
Fareshteh Hamidi  
Jacob Duane Heskett  
Colin Wade Holthaus  
Jayce Taylor Hudiburg  
Kristin Michelle Josephs



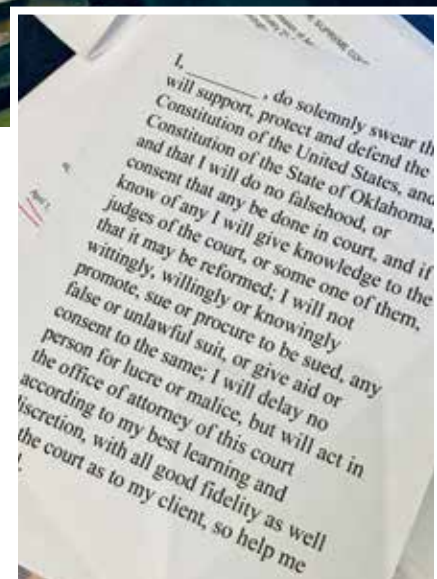
Elizabeth "Liz" Stevens participates in the remote swearing-in ceremony from Albuquerque, New Mexico, while her parents OBA members Peggy Stockwell and Richard Stevens witness the event via FaceTime.



*Supreme Court Chief Justice Noma Gurich administers the Oath of Attorney to candidates in one of a series of three historic first-time videoconferencing admissions ceremonies. Powers of attorneys were obtained from each candidate to authorize the Board of Bar Examiners to sign the Roll of Attorney on their behalf. Bar cards and official certificates were mailed.*

Kelsee Beth Kephart  
 Taylor Nathan Kincanon  
 Jonathan Lance Kurz  
 Caroline Grace Lindemuth  
 Natalie Joyce Marra  
 Vanessa Oliva Martinez  
 Kaitlin Nicole McCorstin  
 Cannon Patrick McMahan  
 Brittany Faithe McMillin  
 Laurie Ann Mehrwein  
 Guillermo Mejia  
 Miranda Jade Moorman  
 Molly Kathryn Newbury  
 Samantha Katlyn Oard  
 Kathleen Viola O'Donnell

Keri Denman Palacios  
 Nicholas Wesley Porter  
 Paul Dillon Pratt  
 Susan Elisabeth  
 Proctor-Dickenson  
 William Chancellor Rabon  
 Andrew John Rasbold  
 Benjamin Gary Rose  
 Dalton Bryant Rudd  
 Marcos Chavez Sierra  
 Alina Ruth Carlile Sorrell  
 Elizabeth Nicole Stevens  
 Jonathan Wesley Sutton  
 Heather Shay Talley  
 Samantha Leigh Thompson



Adam Michael Trumbly  
 Justin Thomas Vann  
 Jessica Ann Vice  
 Hannah Kacie White  
 Larra Jane Williams  
 Kyla Krystine Willingham

# Legislative Monitoring Report Update

By Miles Pringle

**A**S WITH EVERYTHING ELSE, the 2020 session of the Oklahoma Legislature has been hijacked by the COVID-19 virus. The Legislature first responded to the crisis on March 16 by amending rules to allow attendance flexibility for some legislative work and by adopting an emergency rule authorizing each caucus to designate a proxy representative who can vote on behalf of others. The following day the Capitol closed to the public after a member of the Oklahoma Senate staff tested positive for COVID-19, and on March 20 the House and Senate announced the Legislature would be shut down due to the spread of the virus. It appears the Legislature will remain closed for the remainder of the session, except to address certain critical items.

As a result, almost all legislation that does not relate to the pandemic response or the budget has come to a standstill. Issues the Legislature has addressed include Senate Bill 661, which amended the Open Meeting Act to allow government bodies to meet via teleconference until Nov. 15, 2020, or the end of Oklahoma's statewide emergency designation – whichever comes first.

On April 2, Gov. Stitt declared a health emergency, which triggered a special session of the Legislature – the first of this

current Legislature – in order to concur with or terminate the governor's declaration. The declaration only lasts for 30 days. Given the nature of this pandemic, additional declarations, as well as additional special sessions, may be required. The governor has issued numerous other executive orders relating to COVID-19.

Another issue the Legislature has had to address is significant budgetary shortfalls. In addition to the virus closing the economy, oil prices have been disrupted, causing a separate drop in revenue and job losses. Consequently, in early April, the state projected revenue collections to fall \$220 million short for fiscal year 2020 (ending June 30) with a shortfall of \$415 million for fiscal year 2021. To address those deficits, the Legislature responded with SB 617 (allowing the Office of Management and Enterprise Services to withdraw up to half of the balance of the Revenue Stabilization Fund to distribute to agencies to avoid cuts owing to the revenue failure); SB 199 (appropriating \$302,339,481 from the State's Rainy Day Fund); and SB 1053 (appropriating \$201,559,654 from the Constitutional Reserve Fund to the Revenue Stabilization Fund, as allowed by the governor's emergency declaration).

This prompted a showdown between the governor and the Legislature. Citing that no funds were allotted to his Digital Transformation Fund, Gov. Stitt cancelled a scheduled meeting of the State Board of Equalization to avoid its declaring a revenue failure. This could have prevented pulling money from the Rainy Day Fund. In response, House Speaker Charles McCall and Senate President Pro Tem Greg Treat filed a suit with the Oklahoma Supreme Court, following which the governor set a new meeting time for the board.

It is unclear if these measures will be enough. Given the number of unemployment claims and the economic freeze, Oklahoma may well have to tap into additional reserves. This, however, does not even account for the shortfalls municipalities will have in their budgets. Cities and towns are hit particularly hard by stay-at-home orders in Oklahoma, because they are limited to sales taxes for revenue sources. Oklahoma municipalities will likely need federal assistance in order to get through this emergency.

With all the pandemic news, it may be forgotten that we are in an election year. While the November election may be held without issue, earlier elections

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– for example the April 7 elections – were rescheduled. Currently, state primary elections are scheduled for June 30, and the registration deadline to vote is June 6. There is a very important balancing act between public health and democratic principles in determining when and how to hold elections.

#### COMMITTEE UPDATE AND LEGISLATIVE DEBRIEF

The Legislative Monitoring Committee is continuing to meet via videoconferencing during this time of social distancing. If you haven't already, we'd love to have you join the committee! Our Legislative Debrief has been scheduled for 2 p.m. on Wednesday, Aug. 19. Hope you'll be able to attend.

If you have any suggestions or questions, please feel free to contact me through the LMC Communities page.

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



# Opportunities and Affirmations

By John Morris Williams

**F**ROM THE BEGINNING OF the COVID-19 disruptions, I have been consistently reminded there are many learning opportunities to embrace. At times many of us found ourselves using the cliché “drinking from a fire hydrant.” Given our experience here in Oklahoma with disasters, I suspected that many lawyers and firms had prepared themselves to work remotely for a short period of time. Unfortunately, I suspect not many of us anticipated a prolonged separation from our workplaces and the courts in all counties being shut down.

While these times have tested our capacities in so many ways, I first want to thank President Susan Shields who I have worked with closely every day, including weekends, to ensure the OBA remained operational providing services to its members and to the public. Next, to our other volunteer leaders and certainly the OBA staff who stepped up to try to keep things as normal as possible – meeting each new challenge with vigor – thank you!

I often hear these times referred to as “challenging.” That is an understatement even on the good days. Almost everyone has been impacted by COVID-19 and the resulting emergency orders from the governor and the Oklahoma Supreme Court. From the shutting down of the courts, to the economic impact, to the cancellation

of meetings and a host of other issues, there is a lot to deal with for Oklahoma lawyers as we make our ways through these times. Although I have witnessed and experienced challenges, I have seen Oklahoma lawyers working hard to meet each

of them and sharing information. I am confident that ingenuity and generosity will continue, and the OBA is here to be a positive partner in all those endeavors.

We are a profession that has been scientifically proven to be at



higher risks of adverse effects from prolonged periods of stress and anxiety. The OBA Lawyers Helping Lawyers Assistance Program is available and offers free resources to those of us who may be feeling overwhelmed at the moment. Do not be afraid to reach out for help if you need it. All assistance is confidential, and we need everyone to be as healthy as possible as we start the process of recovery.

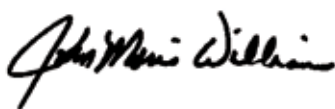
Some OBA members have suffered from this horrible virus, and with much sadness, I continue to learn of those for whom it was fatal. To those who have suffered the ultimate loss, I extend my sincerest condolences to their families and others who were included in their circles of affection.

The OBA is committed, and will continue to be committed, to being a valuable resource of information, recovery assistance and productive tools to assist Oklahoma lawyers in any way it can. During this intense learning period, we are trying to be very self-aware of our shortcomings and also generous in sharing any solutions we discover. We appreciate feedback and information that makes all of us better.

Some of the things I have learned more about include electronic notaries, drive-up will signings and about every remote meeting platform that exists. I suspect some of these new involuntarily learned skills may very

well impact how we live and work forever more. One thing I hope that does not change forever more is people coming together. Shelter in place, social distancing and self-quarantine are new words of the day. I am positive old words like “we” and “together” coupled with the knowledge we have gained during this time will guide us to a better day.

Yes, we have had some learning opportunities, but more importantly, I have experienced some inspiring affirmations. Attorneys are essential. Susan Shields and the rest of the OBA volunteer leaders are wise and kind leaders and people. The OBA staff is resilient and committed to good member service. Oklahoma lawyers are intelligent, creative, caring and inspirational even in the worst of circumstances. All of us are capable of learning new skills and ways to do what lawyers do best – solve problems. Oklahoma lawyers will help guide all of Oklahoma to better days and better ways.



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To contact Executive Director Williams, email him at [johnw@okbar.org](mailto:johnw@okbar.org).

# Coping With Profound Change

By Jim Calloway

**T**HE PREVIOUS FEW DECADES brought many changes to the practice of law or so most practitioners believed. Many of these changes related to rapid advances in information technology, but others were due to the law increasing in complexity and court infrastructure not keeping pace with the increasing population.

Access to justice advocates have long argued that greater systemic changes are needed to make the courts and our legal system more user friendly, and progress has been made on some fronts.

But, now this ...

Today we really are the world – as the entire world faces the same crisis of pandemic.

Much has changed, and much will change.

It appears we are undergoing an event that will mark us all permanently like the Great Depression and the world wars. Today's young people will tell and retell the story to future generations. We have to hope this is not the first of future similar crises.

Whatever the long-term future holds and however uncertain our personal and professional futures seem right now, there's one thing about the future that seems assured. There will be profound and significant changes to many aspects of our personal and professional lives.

We are losing people – colleagues, mentors, friends and relatives.

Institutions are shaken. Many local businesses may not survive.

Some part of legal work will change as well as some laws. Most of us noted how rapidly home delivery of wine and liquor was approved in Oklahoma as it became inadvisable to go out in public unnecessarily. That would have generated quite a political battle here in normal times had it been proposed on a referendum ballot. Now we will see if that emergency measure becomes permanent either by regulation or statute.

While it seems almost crass to discuss business goal planning as we see real life and death issues play out, the practice of law will very likely have more changes ahead. Many law firms and lawyers will face severe financial consequences because of COVID-19. Things are changing now. Firms will dissolve. Some practice areas will expand, and some will shrink. Some could go away almost entirely.

It impacts courthouse lawyers when the courthouses are closed, even partially. They cannot assist clients in the way they normally would. Matters move more slowly. Fee applications are impacted. Real estate filings with the county clerk do not go as smoothly. There are many challenges to lawyers in every type of practice setting.

## VIDEOCONFERENCING IS THE 'NEW' ESSENTIAL LAWYER SKILL

The use of videoconferencing has greatly increased, and that trend will continue. The legal profession will use this as a tool, and almost all lawyers will have to get onboard. If you are not set up to do this, go online now and purchase a USB external webcam and a USB headset with a microphone. There may be some delays in fulfilling that order because of demand, but it is best to get in the line now. Among the possible futures we see outlined are the crisis dragging on for a long time or reoccurring in the fall, so being able to videoconference as easily as making a voice telephone call is becoming an essential lawyer skill. It is also very possible that many clients will prefer videoconferencing in the future, especially during future cold and flu seasons. With the blinding clarity of hindsight, we might ask why we haven't been offering that option for years.

Videoconferencing will cause lawyers with slow internet connections to upgrade when they have an option. Zoom has emerged as the de facto standard for videoconferencing tools. It is easy to use, and the free version is serviceable. Most lawyers will decide to subscribe to the Zoom Pro plan at \$14.99 per month or \$149.90 per year. That gives you the ability to record all or part of





a videoconference with a single click and makes scheduling meetings simple.

There are new things to learn about videoconferencing. Your background is important for video quality and personal privacy. (The internet now has many videos of spouses unknowingly walking behind the camera not attired for public sharing.) Pay attention to lighting. You almost certainly want an external microphone even though your laptop has a built-in microphone. Poor sound quality will seriously impair a videoconference or a posted video.

Zoom had a stumble some time ago when the company was criticized for installing what many believed was overly intrusive tracking software on Mac users. They did reverse that practice. Their videoconferences are encrypted, and

the head of Zoom has made several media statements saying the only information the company retains after a videoconference is that it occurred and how long it was. We are also hearing of Zoom bombing, others breaking into a conference to disrupt them. Password protecting Zoom meetings and not posting the login information on public websites can combat that. Clearly, there are alternatives other than Zoom for videoconferencing, but this is starting to feel like VHS vs. Betamax or Word vs. WordPerfect all over again.

#### IMPORTANT ZOOM TIPS

Zoom has a chat feature allowing one to send text messages to all participants or a single participant. One might assume those were private, but if the host who set up the meeting provides

a transcript to the attendees, it will include the contents of all of those one-to-one conversations. That aspect alone will make many lawyers want to be the host for their meetings. Private comments that are off topic or indicate lack of attention are best done by phone text messages, if at all.

#### PROCESSING ELECTRONIC PAYMENTS

If your law firm does not accept electronic payments, that is something you need to reconsider. Electronic payments are preferable today for many reasons.

Accepting credit cards is critical. You also want to be able to process automated clearing house, or ACH, payments. Some have loosely referred to this as e-checks because the client provides the routing number and account number from

## DAILY TIPS FOR PRACTICING IN A CRISIS

The pandemic has created numerous challenges for lawyers. The OBA Management Assistance Program now provides daily tips for dealing with today's challenges. Working from home with everyone else trapped there is challenging. From scan-to-PDF phone apps to online tools to manage your practice to information about tools like the Remote Online Notary Act, our tips are intended to help you weather this particular storm.

The daily tip is on my department's home page at [www.okbar.org/map](http://www.okbar.org/map). You can see all our daily tips by clicking the link in the side menu on the MAP page.

If you want email notices of the tips, visit my *Law Practice Tips* blog at [www.lawpracticetipsblog.com](http://www.lawpracticetipsblog.com) and sign up to "subscribe by email" to receive notifications on a one-day delayed basis. An RSS newsfeed is also available.

a check. Depending on the specifics of the transaction, using ACH may result in lower transaction charges although receipt of payment will be several days slower than a credit card charge.

Switching to electronic billing for most clients is likely to be an improved client communication and providing an electronic payment link in those e-bills may facilitate clients more quickly paying their bills.

OBA member benefit LawPay provides these services for lawyers. The staff of the OBA Management Assistance Program is also available to discuss electronic payments with OBA members.

### PLANNING FOR AN UNCERTAIN FUTURE

As we head into this strange summer, lawyers contemplating their careers and futures need to separate their short-term pain from the coming long-term changes and challenges.

Know thyself. The ancient Greek aphorism is very apt for us today.

What are your best legal skills? What are you the happiest doing? Is there a type of work you did in the past that you could easily do today with a brief refresher? Those are arguably the most important questions before you deal with the nuts and bolts of pivoting

your practice, profitability and the potential new clients in the market.

Some lawyers will emerge from this with a changed set of priorities. I recall a lawyer who told me the best decision he ever made was mid-career, when he stopped doing work that he hated. Later, he was able to stop doing work he just didn't like doing.

If you have down time, you can plan for the future. If you have down time, you can enjoy the present time with your family. Both are laudable pursuits.

As you contemplate your future, don't forget to take notes. Organize your priorities. Now this thought process is planning, not daydreaming.

Change is all around us. Your personal life. Your professional life. We are not going to reset back to where everything was. Some lawyers' practices will change relatively little, but others will change a lot.

Providing for yourself and your family is very important. It is high on Abraham Maslow's hierarchy of needs. Charting your law practice's future is also very important. There are the obvious personal and professional reasons. There are those who need your help. Some have urgent legal problems as they deal with their own profound changes.

Over the summer months, I encourage you to monitor our department's Daily Tips for Practicing in a Crisis (see sidebar) and visit my Law Practice Tips Blog at [www.lawpracticetipsblog.com](http://www.lawpracticetipsblog.com).

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Mr. Calloway is OBA Management Assistance Program director. Need a quick answer to a tech problem or help solving a management dilemma? Contact him at 405-416-7008, 800-522-8060, [jimc@okbar.org](mailto:jimc@okbar.org). It's a free member benefit.



# LOOKING FOR SOMETHING?

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## 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](http://www.legaldirectories.com). A free digital version is available at [tinyurl.com/2018oklegaldirectory](http://tinyurl.com/2018oklegaldirectory).

# Law Practice in the Time of Coronavirus\*

\*With apologies to Gabriel García-Márquez

By Richard Stevens

**T**HE PRACTICE OF LAW IS challenging and stressful in the best of times. Recently, we have all gained experience in the practice of law in a time of emergency. What ethical duties do lawyers have in these times and are their duties different than at other times? What can lawyers do to prepare for the seemingly inevitable disaster? ABA Formal Opinion 482 outlines the basics of a lawyer's ethical duty during a civil emergency.

Lawyers ethical duties that are affected by emergency or disaster situations fall into a few broad categories.

## COMMUNICATION

ORPC 1.4 requires that a lawyer communicate with his or her clients. Lawyers must determine,

during and after a civil emergency, the available methods of communication. Weather, seismic or other such disasters may limit methods of communication available, while emergencies such as the recent pandemic may limit the ability of the lawyer to locate or access the client. Lawyers should therefore keep abreast of technology in order to determine the available methods of communication. Lawyers should also consider providing clients with methods to contact the lawyer in an emergency. Such information may be provided in an engagement letter or contract.

## CONTINUED REPRESENTATION

Lawyers who continue to provide legal services in the area affected by a disaster or civil

emergency have the same ethical obligation as before but may be able to provide services outside their normal area of expertise. Comment [3] of ORPC 1.3 states:

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

Lawyers have a duty to take reasonable steps to preserve trust account records, documents and property of clients. Paper files may not be accessible after a disaster, so lawyers must evaluate in advance the desirability of storing files electronically in order to have access to those files if electronic devices and the internet are operable. It is imperative to choose a reputable firm and take reasonable steps to ensure confidentiality.

Lawyers must also be aware of court dates, deadlines and any extensions due to the disaster. Backup storage of calendars is essential. Lawyers must also

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If a lawyer knows of impending disaster or civil emergency, the lawyer should review open files with an eye toward taking steps to minimize the effect of the emergency on the client.

ensure access to the client funds the lawyer is holding in trust. All lawyers should consider providing a trusted signatory on trust accounts in the event of incapacity, unavailability or death. If a lawyer knows of impending disaster or civil emergency, the lawyer should review open files with an eye toward taking steps to minimize the effect of the emergency on the client. The lawyer should also take reasonable steps to minimize the harm to the client if the disaster affects a financial institution in which funds are held.

#### WITHDRAWAL AFTER DISASTER

ORPC 1.16 requires a lawyer to withdraw if representation will cause the lawyer to violate the rules of professional conduct or if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client. When these conditions or other conditions permitting withdrawal are present following a disaster or civil emergency, the lawyer must assess whether he or she can provide the timely legal services the client needs.

#### LOSS OF FILES AND OTHER CLIENT PROPERTY

Lawyers who maintain only paper files or electronic files on a local computer are at greater risk of losing those records in a disaster. Under ORPC 1.4 lawyers are obligated to notify the client of the loss of documents and other client property which has intrinsic value. Lawyers need not notify the client of the loss of documents of no value or those for which there are copies, although the lawyer must answer honestly, if asked.

Lawyers have a duty to reconstruct the records to the extent possible. To prevent this situation, lawyers should maintain an electronic copy in an off-site location.

#### SOLICITATION AND ADVERTISING

While lawyers may want to offer legal services to persons affected by disaster, they must be cognizant of the rules regarding solicitation and advertising. ORPC 7.1 through 7.3 govern these issues. Live person-to-person contact, either in person, by telephone or any other electronic means, where a significant motive for doing so is the lawyer's pecuniary gain is generally prohibited. Lawyers may solicit in person to

offer pro bono legal services to disaster victims.

ABA Formal Opinion 482 contains a great deal more information than is contained in this summary. While we may hope that any subsequent review of our actions will consider the circumstances during and after a disaster or civil emergency, 482 makes clear that a disaster does not excuse violations of ethical duties. I recommend that *before* the next disaster strikes lawyers consult this opinion and other relevant sources.

An ounce of prevention is worth a pound of cure.

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Mr. Stevens is OBA ethics counsel. Have an ethics question? It's a member benefit, and all inquiries are confidential. Contact him at [richards@okbar.org](mailto:richards@okbar.org) or 405-416-7055. Ethics information is also online at [www.okbar.org/ec](http://www.okbar.org/ec).

## Meeting Summary

*The Oklahoma Bar Association Board of Governors met on March 9 at the Oklahoma Bar Center in Oklahoma City.*

### EXECUTIVE SESSION

The board voted to go into executive session to discuss the status of litigation. The board met and voted to come out of session.

### KELLER POLICY

The board voted to make additional amendments to the *Keller* policy to include 1) a neutral decision maker, 2) notice to members of expenditures, 3) timing of claim and manner in which the claim is accepted, 4) opt-out for legislative activity calculation on the dues statement and treatment of dues during dispute.

### REPORT OF THE PRESIDENT

President Shields reported she attended a meeting with Communications Committee leaders, planning meetings for upcoming board meetings and Annual Meeting and Lawyers Helping Lawyers presentation with Clif Gooding and Peggy Stockwell at the OU College of Law. She had discussions with the Awards Committee chair and Disaster Response and Relief Committee chair and vice chair and wrote the March *Oklahoma Bar Journal* president's message.

### REPORT OF THE VICE PRESIDENT

Vice President Nowakowski reported she attended the YLD

February board meeting and a portion of the Oklahoma Bar Foundation board retreat.

### REPORT OF THE PRESIDENT-ELECT

President-Elect Mordy reported he attended the swearing-in ceremony of Justice Dustin Rowe to the Oklahoma Supreme Court and Oklahoma Bar Foundation board retreat and meeting.

### REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the YLD board meeting and dinner, meetings with staff and others, event for Law for People, a meeting with President Shields and Communications Committee leaders and Oklahoma County Bar Association Chili Cookoff event.

### REPORT OF THE PAST PRESIDENT

Past President Chesnut reported he participated in discussions with counsel concerning the pending lawsuit.

### BOARD MEMBER REPORTS

**Governor Beese** reported he attended the Muskogee County Bar Association meeting and served as a judge for the American Bar Association's National Appellant Advocacy Competition. **Governor Davis** reported he attended a Title IX training sponsored by the Association of Title IX Administrators, Bryan County Bar

Association meeting and North Texas Civil Rights Roundtable. He also gave a presentation to the Southeastern Oklahoma State University Pre-Law Society on employment law. **Governor DeClerck** reported he attended the Garfield County doctor/lawyer dinner and Communications Committee meeting. **Governor Edwards** reported he volunteered for a mock trial for a Pontotoc County Ninth Grade Career Day. **Governor Hermanson** reported he attended the Law Day Committee meeting. **Governor Hutter**, unable to attend the meeting, reported via email he attended the Cleveland County Bar Association meeting. **Governor Morton** reported he attended the Member Services Committee meeting. **Governor Rochelle** reported he attended the Comanche County Bar Association meeting and Department of Corrections presentation on community sentencing.

### REPORT OF THE YOUNG LAWYERS DIVISION

Governor Haygood reported the American Bar Association representatives from Oklahoma's three law schools are being added to the YLD board. He chaired the YLD board meeting and helped prepare for assembling bar exam survival kits. He attended the YLD dinner and roast for immediate past YLD Chair Brandi Nowakowski.

## REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported there are no changes on the lawsuits mentioned at the last meeting. A written report of PRC actions and OBA disciplinary matters from Feb. 1-29 was submitted to the board for its review.

## BOARD LIAISON REPORTS

Governor Davis said the **Law Schools Committee** will hold the last of its law school visits at the TU College of Law and submit its report in August. Governor DeClerck said **Communications Committee** leaders met with President Shields and Executive Director Williams to discuss their purpose. Executive Director Williams said he talked to the **Disaster Response & Relief Committee** chair. The committee has a connection with FEMA,

and if there is a need to provide assistance via the website, there is a plan. Governor Hermanson said the **Law Day Committee** will hold its ceremony for first-place contest winners this week in the Supreme Court courtroom at the State Capitol. Governor Morton said the **Member Services Committee** will be hearing a presentation from Lexology, a source of international legal update, to consider as a potential member benefit. Governor Garrett said the **Women in Law Committee** held social hours in Tulsa and Oklahoma City.

## AWARDS COMMITTEE RECOMMENDATIONS

Awards Committee Chair Kara Smith said the committee reviewed the awards the OBA has presented in the past and considered two suggestions from board members.

She said it is the committee's recommendation to present the same awards it has in the past with no changes. She said the *Oklahoma Bar Journal* May issue will contain a story about the awards requesting nominations. The board approved the committee's recommendation.

## LEGISLATIVE SESSION UPDATE

Legislative Liaison Clay Taylor said he has worked with the OBA for six years. He reviewed the contents of his handout. He said this is an election year for all House members and half the Senate; however, only a handful of members are term limited, which means there will be mainly incumbent races. He identified four bills that deal with bar issues. He encouraged board members to develop a relationship with their legislators. Discussion followed about priorities for Day at the Capitol. Executive Director Williams noted the only bill the bar has a position on is SB 1815.

## LAW FOR PEOPLE WEBSITE

Executive Director Williams said work continues adding content to the website.

## NEXT MEETING

The Board of Governors met remotely in early April. A summary of those actions will be published in the *Oklahoma Bar Journal* once the minutes are approved. The next board meeting will be Friday, May 15, in Oklahoma City.

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Executive Director Williams said he talked to the Disaster Response & Relief Committee chair. The committee has a connection with FEMA, and if there is a need to provide assistance via the website, there is a plan.

# Where Do Vulnerable People Turn When a Pandemic Collides With Oklahoma's Residential Landlord and Tenant Act?

By Richard Klinge

**I**N 2018, A GRANT FROM the Oklahoma Bar Foundation allowed the OCU School of Law to launch its Housing Eviction Legal Assistance Program (HELP). HELP's mission is to provide effective access to justice for people who otherwise have limited access to legal assistance when they are facing evictions from their homes or other landlord/tenant disputes.

Since its launch in 2018, HELP has provided pro bono legal representation for more than 650 families facing eviction or other residential landlord disputes in Oklahoma County. Its client base cuts across all race, ethnicity and age categories. Although HELP does not have income or legal status qualifiers for its services, approximately 98% of our clients are at the bottom of the economic scale and almost all are rent burdened – paying well in excess of 30% of their income toward housing. They do not have the funds to retain private firms to represent their legal interests in housing related issues.

With the ongoing support of the OBF, HELP has provided zealous legal representation for its

clients both in eviction proceedings and subsidized housing administrative proceedings. We also render advice on understanding and exercising their tenant rights whether they arise under statutory, contractual, agency, tort, constitutional or other applicable legal principles.

It is safe to say that in 2018 neither the OBF nor OCU knew or even contemplated that in March 2020, HELP would be confronting novel, complex and unique legal issues for its tenant clients arising

government issued new COVID-19-related regulations for subsidized housing and then enacted the Coronavirus Aid, Relief and Economic Security (CARES) Act. Additionally, HELP had to gain an immediate understanding of Oklahoma's Health Emergency Powers Act (OHEPA) and how its provisions generally and its pre-emption provisions in particular can be potentially used to protect and expand tenant rights.

The ongoing OBF funding has allowed HELP to gain a thorough



HOUSING EVICTION  
LEGAL ASSISTANCE  
PROGRAM

out of the COVID-19-related emergency orders issued by Gov. Stitt and Oklahoma City Mayor David Holt and by the COVID-19-related orders of the Oklahoma Supreme Court. These issues were further complicated as the federal

understanding of tenant rights under both Oklahoma and federal law. This foundational knowledge in turn has enabled HELP to quickly identify and analyze how these COVID-19-related orders and statutes will impact and expand tenant rights.



Although the Supreme Court orders have effectively delayed most eviction proceedings, an eviction tsunami is building on the horizon as thousands of Oklahomans are losing their jobs and thus their ability to meet their rent and other financial obligations. In the calm before the storm, HELP is analyzing case specific legal issues that have arisen out of conflicting provisions of those emergency orders. It is also analyzing how the preemption provisions of OHEPA can be used to potentially override provisions of applicable Oklahoma statutes which otherwise limit tenant rights. The CARES Act is being carefully analyzed so that HELP is prepared to both zealously advocate for the tenant protections and aggressively enforce the landlord obligations thereunder.

Additionally, HELP is working with other community organizations both in Oklahoma County and statewide to inform them about the new COVID-19-related statutes and regulations and the legal issues arising thereunder so that they also can become aware of and use them to help their tenant

clients. Since its launch, HELP has focused on the education of community and governmental organizations that are the first responders when tenants seek assistance on eviction or other landlord/tenant disputes.

Thus, the answer to the question “Where do vulnerable people turn when a pandemic collides with Oklahoma’s Residential Landlord and Tenant Act?” is simple. They turn to HELP and other legal organizations funded by the OBF that are focused on serving vulnerable and underserved members of society to ensure they have effective access to our system of justice. Without that funding, too many families are left without legal representation needed to successfully navigate the complex legal system which threatens to evict them and their families from their homes and places to shelter in these challenging COVID-19 times in which they find themselves.

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Mr. Klinge is director of the Pro Bono House Eviction Legal Assistance Program at the OCU School of Law.



*The Oklahoma Bar Foundation fundraiser, Rock the Foundation – Lip Sync for Justice, is postponed until further notice. Check out our Virtual Lip Sync Challenge on the OBF Facebook page at [www.facebook.com/okbarfoundation](http://www.facebook.com/okbarfoundation).*

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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:*

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# Kickball Tournament is Back!

By Jordan Haygood

**I HOPE EVERYONE IS STAYING** healthy and safe. I don't think any of us could have guessed this pandemic would have such an impact on our practices and, generally, life. Unfortunately, it is unexpected things like a pandemic that can cause any lawyer, whether or not they are in-house, solo practice or large firm, to experience financial hardships. Many attorneys, particularly young attorneys, find themselves struggling to keep up with their expenses, climbing further into debt while still trying to provide legal services to their clients.

In 2014, the Young Lawyers Division saw a need for a financial assistance program for attorneys who were struggling to pay their annual bar dues. In response to this need, the Kick It Forward Fund was created. Attorneys of any age must apply to receive this assistance, and the OBA reviews those applications on an annual basis. This year the program paid 11 members' dues totaling \$3,025. The number of attorneys who receive assistance depends on the funding available. That is where we need your help!

Since many attorneys who benefit from this program are YLD members, it is a program that is near and dear to the YLD. In August 2015, the YLD hosted the inaugural Kick It Forward Kickball Tournament. This year, the YLD decided to bring back the

## KICK IT FORWARD TOURNAMENT

Sept. 26  
Oklahoma City

tournament to raise more awareness and funding, especially with the unexpected implications the pandemic is having on the legal community.

The tournament will be held on Saturday, Sept. 26, in Oklahoma City. The YLD is currently looking for tournament sponsors, which can be law firms, companies and individuals. All money raised will go straight to the fund, so ask your law firms, colleagues, family and friends if they would be interested in making a donation. It is now, more than ever, we need to step up and help our fellow attorneys who have to choose between paying a medical or other bill versus their own license to practice.

We are also looking for people who are interested in playing in the tournament. This event is open to everyone, lawyers and nonlawyers alike. Teams must consist of a minimum of eight players and a maximum of 12. You can also sign up as an individual, and we will

compile a team out of those individual players. Registration forms will be coming out soon, so watch the bar journal, eNews and YLD Facebook ([facebook.com/obayld](https://facebook.com/obayld)) for more information. Entry fee for players will be \$25 per person, and spectators will be \$10 per person. Not that you'd need any extra incentive to play, but there will be prizes for the first-place team and best team theme.

We anticipate having food and drink vendors, so if you know of any food/beverage truck vendors who would be interested in attending, t-shirt sponsors or anyone who would like to donate to the tournament, please reach out to Laura Talbert, Kick it Forward Committee chair, at [Ltalbert@stocktontalbert.com](mailto:Ltalbert@stocktontalbert.com). Laura can answer any questions you have regarding the tournament or fund.

As we have recently seen, a lot of things can happen between now and September, so keep up with our social media for updates regarding the tournament. I hope to see everyone in September!

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

## ON THE MOVE

The office of Edinger, Leonard and Blakly PLLC has been relocated to 6301 N. Western, Suite 250, Oklahoma City, 73118. Firm members include **Ken Blakley, Travis W. Brown, Jonathan Buxton, Mark Christiansen, Elaine DeGiusti, Robert Edinger, David Herber, Ryan Leonard, Jason Reese and Jacqueline Stone.**

**Riley Mulnix** has established Redbud Law, located at 105 South Jones Avenue in Norman. The firm may be reached at 405-237-5777. Mr. Mulnix received his J.D. from the OU College of Law in 2011.

**Jeff Fields and Jennifer Struble** have been named partners of the Tulsa-based firm Secrest, Hill, Butler & Secrest. Mr. Fields received his J.D. from the TU College of Law in 1999 and practices primarily in insurance defense including medical malpractice, nursing home defense and construction defect cases. Ms. Struble received her J.D. from the TU College of Law and practices primarily in insurance defense including professional negligence, construction defect cases, employment law and appellate law.

## KUDOS

**V. Burns Hargis** was awarded *The Journal Record's* Legacy Award at the 11<sup>th</sup> annual Oklahoma's Most Admired CEOs and Financial Stewardship Awards. Mr. Hargis is the third recipient of this award. He received his J.D. from the OU College of Law in 1970.

**Mike Voorhees** has been appointed to the Cleveland County Sheriff's Office Community Advisory Board. The board facilitates communication and interaction between the sheriff's office and citizens in the community and provides suggestions to the sheriff regarding the detention center's policy, procedure and rules.

## AT THE PODIUM

**Mark Christiansen** presented the 2020 Institute for Energy Law Deans of Oil and Gas Practice Lecture at the 71<sup>st</sup> annual Oil and Gas Law Conference in Houston, Texas, on Feb. 21.



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## IN MEMORIAM

**Judge Lynn Burris** of Talequah died Mar. 12. He was born Jan. 5, 1937, in Muskogee. Judge Burris played football for Muskogee High School and was on the 1955 State Championship team. He then went on to play at OU and was on the 1956 National Championship team there, as well as the 1958 Northeastern State University National Championship team. He received his J.D. from the OU College of Law in 1968. Early in his career, Judge Burris served as assistant district attorney in Sequoyah and Cherokee counties and worked in private practice. He was first appointed to the Cherokee Nation Judicial Appeals Tribunal in 1983. He was appointed to the Cherokee Nation Supreme Court and was a justice from 2015 until his death. Memorial contributions may be made to the Cherokee Nation Foundation or the NSU Foundation.

**Thomas K. Butler** of Okmulgee died Mar. 7. He was born Apr. 5, 1937, in Okmulgee. Mr. Butler received his J.D. from the OU College of Law in 1967. In addition to his more than 50 years in the legal field, **Mr. Butler also served in the U.S. Army.** He also represented his community as a state senator.

**Robert Cheadle** of Ada died Jan. 31. He was born Oct. 19, 1946, in Marlow. **After high school, Mr. Cheadle enlisted in the U.S. Marine Corps, serving in Vietnam until January 1969. He received a Purple Heart for his service.** Mr. Cheadle was elected as tribal judge for the Chickasaw Nation in 1983 and was part of the original court that drafted the Chickasaw Nation's first constitution. In 1989, his term ended and

he graduated from East Central University. He received his J.D. from the OU College of Law in 1992. He worked for Fannie Mae in Dallas and returned to Oklahoma in 1996 to work alongside Choctaw Governor Bill Anoatubby. He became the Chickasaw Nation's first attorney general and was appointed by President Bill Clinton to the Consumer Advocacy Council of the Federal Reserve.

**Donald W. Davis** of Oklahoma City died Feb. 21. He was born Feb. 1, 1934, in Sapulpa. **Upon his graduation from Booker T. Washington High School, Mr. Davis enlisted in the U.S. Air Force.** He earned a bachelor's degree from the University of Colorado before receiving his J.D. from the University of Wyoming College of Law in 1968. Mr. Davis practiced law for 41 years and was the first African American appointed special judge in the Oklahoma City Municipal Court. He was a recipient of the OBA Trailblazer Award and was a founding member of the J.L. Bruce Legal Society, of which he once served as chairman.

**John Joseph Ely Jr.** of Oklahoma City died Mar. 9. He was born June 9, 1956, in Evergreen Park, Illinois. His family lived in St. Louis and Kansas City before settling in Bartlesville. Mr. Ely received his J.D. from the OU College of Law in 1981 and started working for Legal Aid Services of Oklahoma. He went into private practice before joining the Department of Human Services Adult Protective Services as of counsel, where he worked until his death.

**Vincent J. Faggioli** of Mililani, Hawaii, died Oct. 2, 2018. He was born Nov. 12, 1946, in Salt Lake City. Mr. Faggioli received his J.D. from the University of Utah College of Law in 1978. He also received a LL.M. from the U.S. Army Judge Advocates School. **Mr. Faggioli served in the United States Army for 30 years.** He worked as an attorney with the Civilian Senior Executive Service.

**William O. Green III** of Edmond died Mar. 18. He was born Jan. 7, 1940, in Enid. Mr. Green received his undergraduate degree from OU. He then received his J.D. from the OU College of Law in 1964. He started a private practice in Enid before becoming a district judge for Oklahoma. He went on to work in environmental law for a corporation before retiring. Memorial contributions may be made to the National Alliance on Mental Illness – Greater OKC, P.O. Box 5304, Edmond, 73083.

**Justice Robert Eugene Lavender** of Oklahoma City died Mar. 23. He was born July 19, 1926, in Muskogee. Justice Lavender graduated from Catoosa High School in 1944. **Immediately following his graduation, he enlisted in the U.S. Navy and served through 1946.** Justice Lavender received his LL.B. from the TU College of Law in 1953. He first served as the assistant city attorney in Tulsa before entering private practice. In 1965, he was appointed to the Oklahoma Supreme Court by Gov. Henry Bellmon, making him the youngest judge to serve on the court at the age of 37. He served on the Supreme Court for over 42 years, setting a record

for the longest serving justice in Oklahoma. Justice Lavender was chief justice from 1979-1981. In 1993, he was a recipient of the TU Distinguished Alumni Award. Memorial contributions may be made to the charity of your choice.

**R**obert Perry “Bob” Moore of Oklahoma City died Feb. 24. He was born Sept. 20, 1942, in Oklahoma City. Mr. Moore graduated from Harding High School before earning his bachelor’s degree at OU where he was student body president. He received his J.D. from the OCU School of Law in 1968. **After law school, Mr. Moore served as a captain in the United States Army.** He was a special judge of the Oklahoma City municipal court for 12 years, served on the OCU alumni board and was founder and president of the Japan America Society of Oklahoma. He was awarded Man of the Year in 1985 by the OU Gamma-Kappa chapter of Kappa Sigma fraternity.

**R**obert N. Naifeh of Norman died Mar. 29. He was born Oct. 3, 1957, in Norman. He graduated from Norman High School in 1975 and went on to pursue a bachelor’s degree in journalism at OU. Mr. Naifeh received his

J.D. from the OCU School of Law in 1983. He joined Pierce Couch Hendrickson Johnston & Basinger after law school. In 1989, he joined Dewberry, Quigley, Solomon & Blankenship, now Dewberry & Naifeh LLP, and became partner in 1992. At the time of his death, he was president and managing partner of the firm. He practiced primarily in insurance law and served as general counsel to the Oklahoma Property and Casualty Insurance Guaranty Association.

**J**ohn Edward Rooney Jr. of Tulsa died Mar. 21. He was born July 23, 1956. Mr. Rooney attended the University of Notre Dame and graduated in 1978 with honors before receiving his J.D. from the Georgetown University Law Center in 1998. He returned to Tulsa to practice at Hall Estill. Mr. Rooney spent most of his career with the firm of Moyers, Martin, Santee and Imel. Memorial contributions may be made to Cascia Hall Preparatory School or the Notre Dame Club of Tulsa.

**G**ary Wayne Wolfe of Ponca City died Feb. 11. He was born June 10, 1963, in Ponca City. Mr. Wolfe received his J.D. from the OU College of Law in 2002.

#### 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 August issue must be received by July 1.*

## 2020 ISSUES

### 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@bundyloffice.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@bundyloffice.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.*



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LEGAL AID SERVICES OF OKLAHOMA is looking for a Managing Attorney for the Division of Parent Representation within LASO's Tulsa office. See information on page 35.



*Wellness action steps provided by the National Task Force on Lawyer Well-Being. For more information, go to [lawyerwellbeing.net/well-being-week-resources](http://lawyerwellbeing.net/well-being-week-resources).*

RESCHEDULED FOR  
**FRIDAY,**  
**JULY 24, 2020**  
9 A.M. - 2:50 P.M.

**MCLE 6.5/1**

**PROGRAM PLANNER:**

**Sonja Porter, "The DUI Diva"**  
*Sonja Porter Attorney at Law, PLLC*

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# DEFENDING THE DUI-DRUG CASE

**PROGRAM DESCRIPTION:**

DUI-drug cases, especially those involving prescription drugs or medical marijuana, pose different challenges for the defense attorney. Our speakers will talk about Field tests, DRE's, blood tests, saliva tests, and what it actually means to be "under the influence" of a particular drug, especially in a "per se" state. Finally, we will talk about the latest in driver's license issues and any pending legislation.

**TOPICS INCLUDE:**

- The A, B, C's of SFTS, ARIDE, & DRE
- Drugs in the Blood Analysis Explained
- Understanding the Effects of Drugs in the Blood
- Defending the DUI Drug case
- Cross-Examination of the ARIDE Officer
- DUI Law Updates
- Ethics

**TUITION:** Early-bird registration by July 17, 2020 is \$150.00 and \$175.00 thereafter. 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](mailto:ReneeM@okbar.org) to register.



Fifteen awards to choose from, including those for lawyers, nonlawyers, organizations and bar associations. All nominations and supporting materials must be received by 5 p.m. July 1.

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