

ALSO INSIDE: Civil Rights • Virtual Courtroom • Annual Meeting

THE OKLAHOMA BAR Journal

Volume 91 — No. 7 — September 2020



Mental
Health

THURSDAY,
OCTOBER 15, 2020
9 A.M. - 2:50 P.M.



MCLE 6/1

**PROGRAM PLANNERS/
MODERATORS:**

Kristin Richards, *Bass Law*

Leah Roper, *Center for
Employment Law, Oklahoma City*

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9 - NOON MORNING PROGRAM

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- Evidence seems disjointed and not compelling
- Complex trials require synthesis of volumes of evidence

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THE OKLAHOMA BAR Journal

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The Windshield and the Bug

By Susan B. Shields

THERE IS A SONG CALLED “The Bug,” written by Mark Knopfler, performed by Dire Straits on their final studio album and also sung by Mary Chapin Carpenter. Both versions are excellent, and if you are not familiar with it, I encourage you to take a listen on the music platform of your choice. The chorus of the song goes:

Sometimes you’re the windshield
Sometimes you’re the bug
Sometimes it all comes together, baby
Sometimes you’re a fool in love
Sometimes you’re the Louisville slugger, baby
Sometimes you’re the ball
Sometimes it all comes together, baby
Sometimes you’re gonna lose it all.

I have found myself humming this song frequently in the last few months when yet another COVID-related challenge has arisen. Sometimes I feel like the windshield – looking ahead, feeling on top of things and getting things accomplished. Other times the uncertainty of this time knocks me off my stride and, on these occasions, I feel more like the bug getting squished.

The cancellations of concerts and shows have been one of my personal letdowns as a result of COVID because I am a big music fan and especially enjoy going to see live music. The “bug” in me is disappointed that there have been no in-person music events to enjoy this summer and fall. In past years, you might have found me attending a two- or three-day music festival with my children and friends as a part of a summer vacation.

However, the “windshield” reminds me to look out and enjoy the many options for online music

and entertainment that include everything from symphonies, opera, country and rock to Broadway shows. Getting to watch *Hamilton* or Elton John or Kenny Chesney from the comfort of home, while not the same as watching it live on stage, is still a pretty good thing.

Thanks to the creativity and hard work of John Morris Williams, the OBA staff, our Board of Governors and other bar leaders, the OBA has been doing its best to take a windshield approach in looking out to adapt to the changes of this year and to consider challenges as learning opportunities instead of as problems.

Sometimes it just takes looking at things from a different view. For example, we have learned that OBA members are willing to participate in online section and committee meetings in record numbers and that busy attorneys especially enjoy the flexibility and convenience of being able to participate from their homes or offices.

(continued on page 43)

SEPTEMBER WELLNESS TIP

Medical studies report there are few things that stimulate the brain the way music does. Research has shown that listening to music can reduce anxiety, blood pressure and pain as well as improve sleep quality, mood, mental alertness and memory.



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Requiring Mental Health Treatment and Involuntary Commitment

By John Wylie

EVERY LIVING HUMAN BEING IS EQUIPPED with the equivalent of an electrochemical supercomputer capable of operating your basic bodily functions such as respiration and digestion, operating heavy machinery like your automobile in rush-hour traffic and pondering inchoate problems like what to have for dinner (taking into account the current contents of your refrigerator and determining if you need to stop at the grocery store on your way home) all at the same time. It is no wonder that such a complex organ can be subject to a variety of physical and behavioral conditions that can cause it to produce unexpected results.

Unfortunately, mental health is an area of human life that is heavily loaded with stigma. The prevailing thought seems to be that any mental illness is the equivalent of absolute disability, even though we know of a great number of accomplished people, present and past, who have dealt with and managed bipolar disorder, depression and even schizophrenia. This is probably because there is so much that we do not know about mental health, and the little that we do know is vastly misunderstood. A person may be grappling with a mental health issue without even being aware they are doing so. There are few cures presently available, but there are many effective treatments that can lessen or eliminate the negative effects of mental illness. Again, just like any other medical condition, there is no way to get this relief if one does not first seek treatment.

It is not uncommon for those who should seek treatment for mental health issues to resist. This is not peculiar to the realm of mental health issues. The constitutional right to refuse medical care includes the right to refuse even life-saving measures, if intelligently and clearly expressed.¹ However, because mental health issues may impair a person's ability to clearly determine if they wish to undertake medical care, it is possible in certain specific circumstances to legally require the person to submit to care.²

VOLUNTARY MENTAL HEALTH TREATMENT

The first and best way to help one who may be suffering from a mental health issue is to get them to agree to seek help voluntarily. One of the most common concerns among those who may need to seek mental health assistance is that

they will somehow be determined to be "crazy," and they will have their fundamental rights denied as a result. This fear is not entirely unfounded. Until recently, the black letter law held many provisions regarding "lunatics" and other pejorative terms for the mentally ill. Indeed, the now-defunct Title 35 of the Oklahoma Statutes continues to be titled "Insane and Feeble-Minded Persons," which held the Lunacy Law of 1917 among others. The appropriate statutes regarding the care of the mentally ill have been relocated to Title 43A "Mental Illness." Advancements have been made both in society and the law over recent years to treat those suffering from a mental illness with a much broader degree of respect.

In seeking to persuade one to seek mental health treatment, it may be helpful to show them that the federal HIPPA law prevents

the sharing of mental health records with the same level of protection of any other medical records, but with one key exception. If a mental health provider believes a patient presents a serious and imminent threat to the health or safety of a person (including the patient) or the public, that provider may contact the appropriate individuals or law officials and inform them. The vast majority of people who have mental health issues are not violent and are in no danger of having such referral made. A person who is interested in maintaining their privacy would best accomplish this by voluntarily seeking mental health treatment, rather than allowing a condition to escalate.

FORCED MENTAL HEALTH TREATMENT/INVOLUNTARY COMMITMENT IN OKLAHOMA

The process to place a person involuntarily into mental health treatment is found at 43A O.S. §§5-410 *et seq.* In these proceedings, the district court will determine if the subject individual is a “person requiring treatment” and, if that determination is made, the least restrictive appropriate treatment required.

Typically, the process is begun as the result of some action on the part of the individual that causes those around them fear for the safety of the individual or other

people and law enforcement is summoned to the scene. Any person who appears to be or states they are mentally ill to a degree that immediate emergency action is necessary may be taken into protective custody and detained by law enforcement personnel, also referred to as emergency detention.³

While in emergency detention, the individual must be evaluated within 12 hours by a mental health provider.⁴ The purpose of this evaluation is to determine if the individual should be held in emergency detention. While the individual is held in emergency detention, they retain the right to refuse medical treatment. An individual may be held in emergency detention for a period of five days or 120 hours, excluding weekends, unless a court order provides for a different time period pending a hearing.⁵

The legal process to require an individual to submit to mental health treatment is initiated by the filing of a verified petition for an order requiring treatment in the district court by one of a specified group of persons, which includes immediate members of the individual’s family.⁶ If the individual is being held in emergency detention, the court must be so notified along with the petition, along with

a copy of the medical evaluation made while in detention.⁷

A request for pretrial detention may be included with the petition, regardless of whether the individual is presently in emergency detention. Pretrial detention will be ordered if the court finds that there is probable cause to detain the individual prior to a hearing on the petition.⁸ Upon such a finding, the court sets a hearing on the petition and the individual is ordered to be detained up to three days or 72 hours, excluding weekends, prior to the hearing.⁹ Absent such a finding, the individual is immediately released if in emergency detention.¹⁰ Pretrial detention may be extended by order of the court, including any orders for continuances of the hearing.¹¹ The individual retains the right to refuse medical treatment during pretrial detention. Notice of the hearing must be provided at least one day prior to the hearing to the individual, the person who filed the petition, the individual’s attorney or court-appointed attorney, a treatment advocate or immediate family member of the individual and, if the individual is in emergency detention, the institution where the individual is being held.¹² At the hearing, the court hears evidence and makes

If the individual is found to be a person requiring treatment by clear and convincing evidence, the court must next determine the least restrictive means of treatment consistent with the treatment needs of the individual and the safety of the individual and others.

findings of fact regarding the individual's competency to consent to or refuse medical treatment, including medication.¹³

THE HEARING ON THE PETITION

By default, the hearing on the petition is a bench trial. If deemed necessary by the court or if demanded by the individual, a jury trial before a panel of six jurors is held on the petition, but a jury trial may delay the proceedings an additional five days.¹⁴

At the hearing, the court is required to determine if the individual is a "person requiring treatment" by clear and convincing evidence.¹⁵ A "person requiring treatment" is defined as a person who because of their mental illness or drug or alcohol dependency: 1) poses a substantial risk of immediate physical harm to self as manifested by evidence or serious threats of or attempts at suicide or other significant self-inflicted bodily harm, 2) poses a substantial risk of immediate physical harm to another person or persons as manifested by evidence of violent behavior directed toward another person or persons, 3) has placed another person or persons in a reasonable fear of violent behavior directed towards such person or persons or serious physical harm to them as manifested by serious and immediate threats, 4) is in a condition of severe deterioration such that without immediate intervention, there exists a substantial risk that severe impairment or injury will result to the person or 5) poses a substantial risk of immediate serious physical injury to self or death as manifested by evidence that the person is unable to provide for and is not providing for their basic physical needs.¹⁶

It should be noted that the overarching requirement is the threat of physical harm, or actual

physical harm, to the individual or another person. The mere fact that a person has mental processes that are impaired by reason of advanced years, dementia or Alzheimer's disease, or is a person with an intellectual or developmental disability, a person with a seizure disorder, a person with a traumatic brain injury or a homeless person is expressly insufficient of themselves to sustain a finding that the individual is a person requiring treatment.¹⁷ Adult individuals have the "right to be foolish" and make decisions that are not in keeping with the mainstream of society. Unless their actions form some sort of threat of implied or actual harm to another individual or themselves, there is insufficient basis for a finding that the individual must submit to mental health treatment. In those situations where those near the individual fear that the individual may be incompetent but not violent, they may wish to consider whether obtaining guardianship over the person or the property of the individual is available or appropriate.

If the hearing is held as a bench trial, the court may receive as evidence and act upon the affidavits of the licensed mental health professionals who evaluated the person and the mental health evaluation itself.¹⁸ If the hearing is conducted as a jury trial, the petitioner and any witness on behalf of the petitioner are subject to cross-examination by the attorney for the person alleged to be a person requiring treatment.¹⁹ Likewise, in a jury trial, the person alleged to be a person requiring treatment may also be called as a witness and cross-examined.²⁰ If the individual is not found to be a person requiring treatment, the petition is dismissed and the individual is discharged from any detention.²¹

ORDERED TREATMENT AND CONTINUING JURISDICTION

If the individual is found to be a person requiring treatment by clear and convincing evidence, the court must next determine the least restrictive means of treatment consistent with the treatment needs of the individual and the safety of the individual and others.²² After reviewing the options available, the court may order the individual receive treatment other than hospitalization for a period of time set by the court.²³ The court has continuing jurisdiction over the individual as a person requiring treatment during this treatment.

If the court determines that hospitalization is required, then custody of the individual is given to the Department of Mental Health and Substance Abuse Issues for placement in a facility.²⁴ The individual will remain hospitalized until such time as the person no longer requires treatment as determined by the executive director of the facility where the individual is placed.²⁵ The involuntary nature of the individual's treatment is subject to review by the Department of Mental Health and Substance Abuse Issues every three months.²⁶ The individual, or the attorney for the individual, may request a court review of the order for treatment at any time to be heard within 30 days of the request for review.²⁷

COURT AND NICS RECORDS

Court records regarding these proceedings are not open to public inspection but are available to the individual and their authorized representatives, Department of Mental Health and Substance Abuse Issues personnel and people having a "legitimate interest" including bonded abstractors.²⁸

Court clerks are required to report when a court orders the involuntary commitment of a

person due to mental illness to the Federal Bureau of Investigation or its successor agency for the sole purpose of inclusion in the National Instant Criminal Background Check System (NICS) database and to the Oklahoma State Bureau of Investigation.²⁹ Inclusion in the NICS database will cause the record of the involuntary commitment to prevent the individual from passing a background check necessary for the legal purchase of a firearm. It should be noted that anything short of involuntary commitment will not be referred for inclusion in the state of Oklahoma. Other states may use a different standard.

CONCLUSION

The recent COVID-19 crisis has created massive disruptions in our society and will no doubt give rise to expanded mental health concerns in the general public. Anyone concerned about the mental health of another should seek to open a dialogue with that person, encouraging them to seek mental health treatment. Of course, any threat of harm to others or the individual themselves should be treated as credible and law enforcement should be immediately informed.

A person who voluntarily receives mental health treatment can avoid being “adjudicated mentally defective” or being “committed to a mental institution,” either of which designations may have a detrimental effect in the future. Their treatment records are protected by HIPPA. Merely receiving mental health services is not enough under Oklahoma law to merit inclusion in the NICS database. While there is no “black letter” law to this effect, one can argue that an individual who seeks out necessary mental health services displays enhanced responsibility and stability, despite their mental illness.

ABOUT THE AUTHOR

John Wylie is a 1997 graduate of the OU College of Law. He is an of counsel attorney with Tombs Maxwell LLP, a firm dealing with issues involving tort settlements, estate planning, probates and guardianship issues across the Southwest.

ENDNOTES

1. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).
2. *Washington v. Harper*, 494 U.S. 210 (1990).
3. 43A O.S. §5-207(A).
4. 43A O.S. §5-208(A).
5. 43A O.S. §5-208(A)(3).
6. A treatment advocate as defined in Section 1-109.1 of this title: 1) The father, mother, husband, wife, grandparent, brother, sister, guardian or child, over the age of 18 years, of an individual alleged to be a person requiring treatment; 2) A licensed mental health professional; 3) A person in charge of any correctional institution; 4) Any peace officer within the county in which the individual alleged to be a person requiring treatment resides or may be found; or 6) The district attorney in whose district the person resides or may be found. 43A O.S. §5-410(A).
7. 43A O.S. §5-410(B)(3).
8. 43A O.S. §5-413.
9. 43 O.S. §5-413(A).
10. *Id.*
11. 43A O.S. §5-413(A)(2).
12. 43A O.S. §5-412(B).
13. 43A O.S. §5-415(C).
14. 43A O.S. §5-415(B).
15. 43A O.S. §5-415(C).
16. 43A O.S. §1-103(13)(a).
17. 43 O.S. §1-103(13)(c).
18. 43 O.S. §5-415(C)(2).
19. 43 O.S. §5-415(C)(3).
20. *Id.*
21. 45 O.S. §5-415(D).
22. 45 O.S. §5-415(E).
23. 45 O.S. §5-415(E)(2).
24. 45 O.S. §5-415(E)(3).
25. 45 O.S. §5-415(E)(6).
26. 45 O.S. §5-420(A).
27. 45 O.S. §5-420(B).
28. 45 O.S. §5-415(F).
29. 21 O.S. §1290.27(A).

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Service and Support Animals for People with Mental Impairments

By Amy Gioletti



LEGAL CONFUSION AND PUBLIC OPINION about service and support animals abounds. News stories and internet searches reveal depictions of out of control animals, falsified documents and an unregulated market of companies selling unnecessary products such as vests and certifications. In response, some states, including Oklahoma, have enacted laws to punish individuals who attempt to pass a pet as a service or support animal¹ in the context of rental housing.² Additionally, advocacy groups are calling for federal regulations related to the licensing, training and certification requirements for service and support animals in order to establish a legitimate and regulated commercial industry, rather than an exploitative one.³

From a legal perspective, federal law is the primary vehicle to grant various categories of animals to people with disabilities for use in a variety of settings. Due to its comprehensiveness, the Americans with Disabilities Act (ADA) is perhaps the most frequently cited federal disability law; however, the ADA is not the only law granting rights to people with disabilities to possess and use service and support animals. Unfortunately, this web of varying legal and medical criteria can create confusion about what is allowed, by whom and where. This article will not attempt to persuade the court of public opinion. Instead, this article will offer guidance on some of the most frequently encountered settings invoking the legal rights and responsibilities of people with

mental impairments to have and use service and support animals. This article will focus exclusively on federal law, including the ADA, Fair Housing Act and Air Carrier Access Act.

HISTORY OF THE AMERICANS WITH DISABILITIES ACT

While the Americans with Disabilities Act is the most well-known disability law, it was not the first federal disability rights law. Both the Architectural Barriers Act of 1968 and the Rehabilitation Act of 1973 pre-date the ADA; however, those laws are applicable only to federally funded property and programs, such as the public housing program and public schools.⁴ Thus, the ADA's enactment in 1990 was bold due to its applicability to not

only federally funded property and programs, but also to nearly every private and public setting, offering the promise to radically improve the accessibility of public life for people with disabilities.⁵

Fundamentally, the ADA provides rights to people with disabilities and is administratively enforced, primarily by the Department of Justice. Likewise, because the Americans with Disabilities Act is colossal in its reach, many people turn to the ADA for guidance when faced with questions about service and support animals. Under the ADA, a person with a disability is defined as an "individual [with a] physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such impairment; or

being regarded as having such impairment...⁶ Title I of the ADA applies to private employers.⁷ Title II of the ADA applies to state and local governments.⁸ Title III of the ADA applies to public entities and public transportation.⁹ Under Title III of the ADA, the definition of public accommodation includes a nearly exhaustive list of public places, such as hotels, public transportation, restaurants and bars, movie theaters, auditoriums, retail establishments, office of an accountant or lawyer, parks, schools, museums, fitness centers and other recreational facilities.¹⁰ In terms of the ADA, this article will only focus on the similar requirements of Titles II and III.

SERVICE ANIMALS UNDER TITLE II AND TITLE III OF THE ADA

Following implementation of the ADA's Title II and Title III regulations on July 26, 1991,¹¹ a service animal was defined as any guide dog, signal dog or *other animal* individually trained to do work or perform tasks for the benefit of an individual with a disability.¹² The original Title III regulations did not contemplate restrictions on the types of animals that could be service animals under the ADA and left open the possibility that any animal could be used as a service animal. Even still, the ADA in any iteration, has only ever recognized "service animals," as opposed to other types of supportive animals, such as "emotional support animals," "companion animals" or "assistance animals," which are all terms that have found their way into common parlance.

Importantly, the ADA Amendments Act of 2008 changed the definition of service animal to remove reference to any animal being a service animal and limited the definition to dogs. In pertinent

part, the current definition of a service animal under the ADA is "a dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition."¹³ There is one notable exception: The ADA permits individuals to possess and use miniature horses as service animals, though less common.¹⁴ Thus, in dramatic contrast to the original definition of service animal, the revised definition excludes all other types of animals. Additionally, regarding the exclusion of emotional support animals and comfort animals, the regulations maintain "the crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition."¹⁵

There are two key points here: 1) The definition of service animal includes the provision of assistance to a person with a psychiatric, intellectual or other mental disability and 2) the provision of emotional support, safety or comfort by a dog is not "work or tasks" for purposes of meeting the definition of a service animal. Under the ADA, in order for a person with a mental impairment to legitimately possess and use a service animal, the animal must be individually trained to do work or perform tasks to the individual's benefit, including the work or task of "preventing or interrupting impulsive or destructive behaviors."¹⁶ The bottom line is that while emotional support animals are not service animals, a service animal may be trained to perform work or tasks to benefit a person

with a mental impairment, just as a service animal can be trained to perform work or tasks to benefit a person with a physical impairment.

Further, the right of people with disabilities to have and use service animals is dependent on the provision of a reasonable modification. The ADA requires public entities to make reasonable modifications to policies, practices and procedures to enable equal access for individuals with disabilities.¹⁷ In the case of service animals, the modification is typically to a "no animals allowed" or "no pets" policy. By allowing the service animal in contravention to its no pets policy, the entity is modifying such policy so that the individual with a disability has equal access to the public accommodation and to ensure the covered entity is not engaging in discrimination.

Specifically, when an individual brings a dog into a public entity, the public entity is entitled to assess whether the dog is a service animal. As such, the following two questions may be asked of a person who brings a dog into a covered entity: "(1) Is the dog a service animal required because of a disability? and (2) what work or task has the dog been trained to perform?"¹⁸ If the answer to the first question is affirmative and the answer to the second question indicates the animal has been trained to perform work or tasks, the animal must be permitted to remain in most instances, except for where the animal is not in the handler's control or is not housebroken.¹⁹ ADA regulations specifically state that individuals are not required to produce documentation of the animal's training, such as certifications.²⁰ Therefore individuals who have paid a company to produce a certification have paid for a service that is not actually required by the regulatory framework of the ADA.

The bottom line is that while emotional support animals are not service animals, a service animal may be trained to perform work or tasks to benefit a person with a mental impairment, just as a service animal can be trained to perform work or tasks to benefit a person with a physical impairment.

In summary, the ADA indicates that a dog is the only type of animal that can be classified as a service animal, though in some cases, a miniature horse may be a service animal.²¹ Because no other animals may be service animals under the current iteration of the ADA, only a dog (or miniature horse) is legally allowed to remain with its handler in the public spaces covered by the ADA. An entity is within its legal rights to ask for any other type of animal to be removed from the premises, because any other animal is not legally a service animal. However, although the 2008 ADA Amendments tightened the definition of service animal under the act, the general emphasis on limited inquiries for service animals remains. In 2016, the Department of Justice provided a reminder that “Congress enacted the ADA Amendments Act to restore the understanding that the definition of ‘disability’ shall be broadly construed and applied without extensive analysis.”²² As well, the

ADA includes protections against retaliation and coercion for individuals attempting to exercise their rights under the act.²³ This is an important consideration in any attempt to impose additional requirements to the process beyond the specifications of the law and regulations.

SERVICE ANIMALS AND SUPPORT ANIMALS UNDER THE FAIR HOUSING ACT

Another major federal civil rights law that protects people with disabilities from discrimination is the federal Fair Housing Act of 1968 (FHA),²⁴ administratively enforced by the U.S. Department of Housing and Urban Development.²⁵ The FHA protects individuals from discrimination on the basis of race, color, sex, national origin, familial status, religion and disability.²⁶ Disability was added as a protected class by the Fair Housing Amendments Act of 1988.²⁷ In pertinent part, the Fair Housing Act applies to private owners engaged in the rental of

four or more single family rental dwellings,²⁸ private multifamily dwellings, residential real estate transactions and advertising.²⁹ The act protects individuals engaged in fair housing activities from intimidation, coercion and retaliation.³⁰ The FHA also includes minimum physical accessibility standards for new construction of covered multifamily dwellings³¹ with a date of first occupancy after March 13, 1991.³² Thus, the act reaches nearly all rental housing and most residential real estate transactions. Additionally, courts have found that shelters and other types of transitional housing may be considered dwellings subject to the Fair Housing Act.³³

Regarding people with disabilities, the FHA’s definition of disability is identical to the ADA’s definition.³⁴ Likewise, it requires housing providers to provide reasonable accommodations to individuals with disabilities who request such accommodations,³⁵ including requests for service and support animals. This requirement

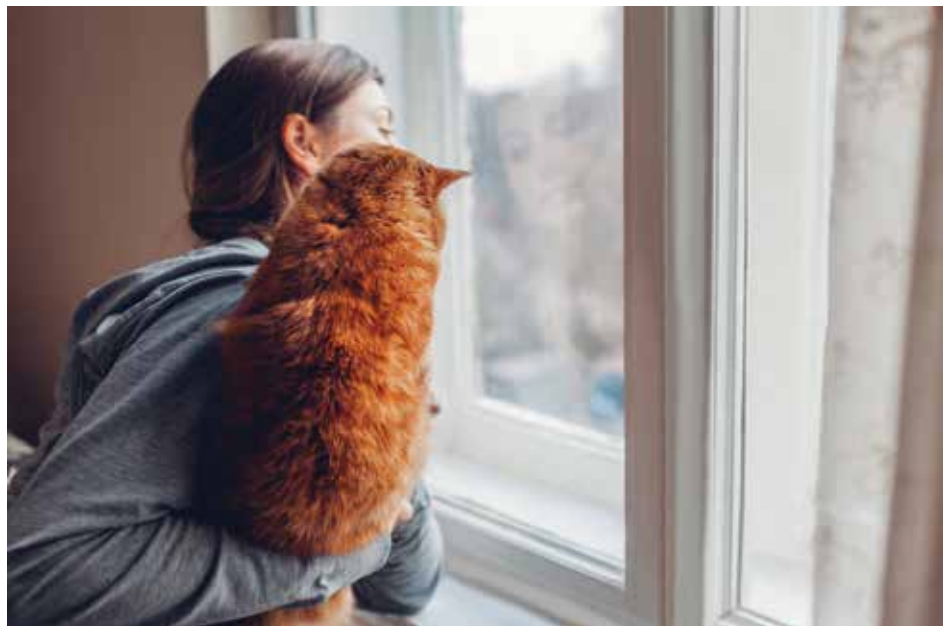
extends to applicants to real estate transactions, including buying, selling and renting, as well as residents and any person associated with an applicant or resident, such as a guest or caregiver.³⁶

In most significant contrast to the ADA, the Fair Housing Act's allowance of animals for people with disabilities is not limited to service animals. Instead, the FHA allows for emotional support animals and other types of animals under the general umbrella term of "support animal" or "assistance animal." Additionally, where the ADA limits service animals to dogs in most cases, the FHA does not definitionally restrict support animals to dogs, and it has never been interpreted by the agency or the courts to restrict the types of animals that may be considered emotional support animals or support animals. However, in a new guidance document published Jan. 28, 2020, FHEO Notice 2020-01, "Assessing a Person's Request to Have an Animal under the Fair Housing Act," the U.S. Department of Housing and Urban Development's Office of Fair Housing and Equal Opportunity (HUD) established certain tests for determining whether an individual's supportive animal must be allowed as a reasonable accommodation in housing.

FHEO Notice 2020-01 indicates the analysis should begin with a determination of whether the animal is a service animal under the ADA.³⁷ If the animal is a service animal under the ADA, it must be permitted in housing. However, if the animal is not a service animal, the analysis must evaluate whether the animal "work[s], perform[s] tasks, provide[s] assistance, and/or provide[s] therapeutic emotional support for individuals with disabilities" under the traditional FHA reasonable accommodations

approach.³⁸ Therefore, in order for an individual with a disability to have and use an emotional support or support animal in housing, the individual, or a person on their behalf (such as a parent or caregiver), must make a verbal or written request for the animal, the housing provider must consider the request, and the housing provider must respond to the request within a reasonable timeframe,³⁹ "generally within 10 days."⁴⁰ In evaluating a request, housing providers are entitled to a minimum amount of information to determine whether the individual is a person with a disability and whether the individual with a disability has a disability-related need for the animal.⁴¹ In contrast to the ADA's treatment of service animals, a housing provider

Additionally, for the first time, HUD's new guidance indicates the housing provider may evaluate the type of animal requested and creates two categories of animals: 1) Animals Commonly Kept in Households and 2) Unique Animals.⁴⁴ Where the requested animal is an animal commonly kept in households, such as a dog, cat, bird, rodent, fish, turtle or "other small domesticated animal traditionally kept in the home for pleasure rather than for commercial purposes,"⁴⁵ and the person has shown a disability-related need for the animal, the housing provider must approve the request for the animal.⁴⁶ However, where the animal is a unique animal, the guidance indicates the individual requesting the animal should



may request supporting documentation from an individual requesting to keep an emotional support or other supportive animal in housing under the FHA.⁴² This supporting documentation may come from a medical or other provider who is familiar with the person, the disability and the person's disability-related need for the animal.⁴³

provide additional documentation showing the disability-related therapeutic need for the specific, unique animal.⁴⁷ Some examples include specific situations where "the animal is individually trained to do work or perform tasks that cannot be performed by a dog," a health care professional indicates the person has allergies to dogs or that the person's symptoms would

“significantly increase” without the animal, or the individual indicates the animal will be kept outside at a house with a fenced enclosure.⁴⁸ If an individual showing of the need for the unique animal is made, the housing provider should permit the unique animal.⁴⁹

Importantly, not only is the reasonable accommodation approval pertinent to allowing the animal in housing, it also removes the animal from consideration as a pet; thus, pet fees, pet deposits, pet weight restrictions and pet breed restrictions do not apply, regardless of whether the animal is a service animal or other supportive animal.⁵⁰ However, the individual is required to maintain control of the animal, as well as feed, maintain and provide veterinary care for the animal, with or without the assistance of family members or caregivers.⁵¹ As with all other reasonable accommodation requests made under the FHA, the housing provider may deny a request if the specific request would result in a fundamental alteration of the housing provider’s program; approval would result in an undue financial and administrative burden; or the animal would pose a direct threat to the health and safety of others.⁵² The HUD guidance reiterates longstanding policy that the direct threat defense can only be used to deny a request for an animal where the housing provider has objective credible information about the behavior of the specific animal in question, and it cannot be based on subjective feelings or stereotypes about dangerous breeds.⁵³

AIR CARRIER ACCESS ACT

The Air Carrier Access Act (ACAA) is a federal law that specifically applies to accessibility and nondiscrimination for people with disabilities in air travel⁵⁴ and is administratively enforced by

the Department of Transportation (DOT).⁵⁵ The definition of an individual with a disability under the Air Carrier Access Act is substantially similar to the ADA and FHA definition.⁵⁶ However, currently the ACAA maintains its own unique definition of service animal, which differs from the definition of service animal under the ADA. Specifically, the Air Carrier Access Act defines a service animal as “any animal that is individually trained or able to provide assistance to a person with a disability; or any animal that assists persons with disabilities by providing emotional support.”⁵⁷ Additionally, in contrast to the ADA, but similar to the FHA, the ACAA allows airline carriers to request documentation on letterhead from a licensed mental health professional establishing that the individual is a person with a mental impairment and has a disability-related need for an emotional support animal in evaluating a request for an emotional support animal.⁵⁸ Similar to the other laws, the ACAA requires the handler to maintain control of the animal.⁵⁹

Notably, on Aug. 8, 2019, the DOT released clarifying guidance to airlines regarding enforcement of the service animal provisions of the ACAA.⁶⁰ The Department of Transportation notes that compliance with this guidance is voluntary on the part of airlines, which may lead to implementation of individual airline standards, while the underlying ACAA continues to require uniform compliance.⁶¹ The guidance indicates the DOT will pursue enforcement action where airlines categorically exclude dogs, cats and miniature horses from airlines and may pursue enforcement action for categorical exclusion of other types of animals, except for “snakes, other reptiles, ferrets, rodents, and spiders.”⁶²

Furthermore, the guidance indicates airlines should not place categorical limitations on the number of service animals an individual may possess; impose weight restrictions except to factor whether the animal could be transported in the aircraft cabin; impose age restrictions on animals, noting that enforcement actions will likely not be pursued in the case of very young animals; and flight length restrictions, except for questions about whether and how the animal will relieve itself in a way that does not cause a sanitation issue on flights over eight hours.⁶³

However, the above requirements and definitions under the ACAA may change substantially – and soon. On Feb. 5, 2020, the DOT published a “Notice of Proposed Rulemaking on Travel by Air with Service Animals.”⁶⁴ The proposed rule cites numerous complaints about service animals, inconsistent federal definitions of service animals, issues with unique service animals, misbehaving service animals and pets on aircrafts among other justifications for the proposed rulemaking.⁶⁵ In a sweeping change, DOT proposes to align the definition of service animal under the ACAA with the definition of service animal under the ADA. If DOT adopts these changes, the ACAA will define service animals to include only dogs.⁶⁶ Additionally, the ACAA will explicitly exclude emotional support animals, comfort animals, companionship animals, and service animals in training from its definition of service animal.⁶⁷ While the regulations have not yet changed, the Department of Transportation has signaled that more stringent requirements are very likely forthcoming.

CONCLUSION

This article attempts to unravel the confusing web of laws concerning service and assistance animals; however, each situation remains unique. There is no one-size-fits-all approach, and the evaluation of any request requires at least a minimal amount of legal analysis. However, understanding and following the specific tests and procedures outlined in federal law, regulations and agency guidance will help resolve disputes before they arise. The bottom line is this: While the ADA applies to most situations in public life, it does not always apply, or it may apply in conjunction with another law. Therefore, an important first consideration when evaluating service and support animal requests is to always determine which laws and agency guidance are applicable to the setting. While recent agency guidance and proposed rulemaking indicates a more consistent approach is on the horizon, the current landscape of service and support animal guidance is not so simple.

ABOUT THE AUTHOR

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Finding the Keys to Unlock Behavioral Health Records

By Robin Moore

HAVE YOU EVER SUBMITTED A SUBPOENA to an alcohol and drug counselor, a licensed professional counselor or a psychiatric facility and received a form letter denying you the records you requested? Perhaps you've submitted what you thought was a properly executed consent for release of medical records only to receive a similar denial?

When it comes to medical records, our analysis often begins and ends with the Health Insurance Portability and Accountability Act (HIPAA). However, we often fail to realize that other federal and state laws have been adopted in addition to (and sometimes conflicting with) HIPAA or that different and/or additional procedural steps are required to obtain mental health and substance abuse records. While HIPAA is a good place to start for unlocking the disclosure of behavioral health and substance use disorder information, one must also become familiar with 42 C.F.R. Part 2, 43A O.S. §1-109 and O.A.C. 450:15-3-20.1.

WHY ARE BEHAVIORAL HEALTH AND SUBSTANCE USE DISORDER RECORDS TREATED DIFFERENTLY?

Hypertension may not affect one's employment, their right to own a firearm or visitation with their children; however, diagnosis and treatment of bipolar disorder may affect all these areas. Approximately one in five Americans with mental health

conditions do not receive the treatment they need, in large part due to stigma.¹ When a person receives treatment, documentation of the illness can not only deter initial diagnosis but also continued treatment compliance. To see the stigma it perpetuates, one only needs to look at one of the most popular holidays in America: Halloween. Images of haunted asylums or terms like "psycho" are prevalent during this holiday. These images aren't just limited to Halloween. This past season, I attended a highly competitive band competition. One Oklahoma school's performance was titled *Insanity*, where the students wore straitjackets, mimicked being physically restrained and rolled their heads around. Stigma is one of the largest barriers to treatment in the U.S., including in Oklahoma.

A BRIEF HISTORY OF FEDERAL REGULATION OF MENTAL HEALTH AND SUBSTANCE USE RECORDS

Section 42 C.F.R. Part 2 (Part 2) refers to 42 U.S.C. §290dd and its implementing regulations. The HIPAA Privacy Rule is found in

45 C.F.R. Parts 160, 162 and 164. The Privacy Rule and Part 2 are two separate, distinct and sometimes conflicting bodies of law. Part 2 protects the privacy of substance use disorder records and applies to any individual or program that is federally assisted and holds itself out as providing alcohol or drug abuse diagnosis, treatment or referral for treatment.² Part 2 originated in the 1970s as an effort to encourage individuals to enter and stay in substance use disorder treatment.³

When HIPAA was enacted in 1996, the Privacy Rule covered all medical records. The main objective of HIPAA was to protect health insurance coverage for individuals when they changed jobs. A related objective was to streamline healthcare transactions between providers and insurance companies, and therefore, privacy rules were also implemented to protect patient health records. When the Privacy Rule was first issued, the Department of Health and Human Services (HHS) determined that HIPAA and Part 2 do not conflict in most situations.⁴ As

electronic medical records (EMRs) became more prevalent, the Health Information Technology (HITECH) Act was enacted in 2009 to promote the growth of EMRs and set forth standards of how medical records are shared and provided penalties for unauthorized disclosures. The HITECH Act did not change the Privacy Rule as far as the circumstances of when and under what circumstances disclosure is allowed, such as consent, disclosures during medical emergencies and disclosures for abuse reporting.⁵

SUBPOENAS ARE NOT SUFFICIENT TO OBTAIN MENTAL HEALTH AND SUBSTANCE USE RECORDS

One common area where the bodies of law conflict is whether a subpoena is sufficient to disclose records that would otherwise be protected. Although it is frustrating being denied access to records after sending a subpoena, the added protection is necessary to maintain the sensitive nature of behavioral health and substance use disorder records. The release of substance use disorder records pursuant to Part 2 is more stringent than HIPAA when considering if records can be disclosed pursuant to a subpoena. While HIPAA allows the disclosure of medical records, which includes behavioral health records pursuant to a



subpoena,⁶ Part 2 provides that a subpoena is not sufficient to compel substance use disorder records.⁷ Thus, if someone requesting records only considered HIPAA in their analysis of when disclosure is permitted, their conclusion would not be correct if the records they are requesting contain information relating to a substance use disorder.

An additional twist that further complicates the pursuit of behavioral health or substance use disorder records are requirements for obtaining such records under state law. HIPAA is the federal “floor” for privacy protections; it allows states to have laws that are contrary to the Privacy Rule in certain circumstances.⁸ HIPAA provides that state confidentiality laws will control if they are more restrictive or protective than HIPAA. Section 45 C.F.R. Part 160, Subpart B contains the requirements for state law preemption and provides four ways state law can preempt the Privacy Rule. Section 45 C.F.R. §106.203(b) is the applicable authority for state law preemption:

§160.203 General rule and exceptions. A standard, requirement or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law. This general rule applies, except if one or more of the following conditions is met:

b) The provision of State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter.⁹

Oklahoma has adopted the Part 2 subpoena rule for all behavioral health records.¹⁰ Section 43A O.S. §1-109(D) states:

Except as otherwise permitted, mental health and alcohol or substance abuse treatment information may not be disclosed without valid patient authorization or a valid court order issued by a court of competent jurisdiction. For purposes of this section, a subpoena by itself is not sufficient to authorize disclosure of mental health and alcohol or substance abuse treatment information.¹¹

WHAT ARE THE REQUIREMENTS FOR A VALID COURT ORDER?

If a subpoena is insufficient to obtain mental health and substance use disorder records and a request has not been authorized by a patient, a court order is necessary to obtain these records. What are the required elements for the order? Section 43A O.S. §1-109 does not specify the requirements for the order. The statute requires a “valid court order issued by a court of competent jurisdiction.”¹² HIPAA does not have any standards or criteria for a court order, but Part 2 is more specific. For civil cases, Part 2 requires a requesting party to provide the patient whose records are sought and the provider both notice and an opportunity to respond.¹³ If the order is sought for release of the records for purposes of investigating or prosecuting a patient, only the program or provider needs to be notified.¹⁴ The application and hearing must also be done in a manner that does not disclose patient identifying information. Part 2 sets forth the following criteria for entry of an order in a civil proceeding:

- 1) Other ways of obtaining the information are not available or would not be effective; and
- 2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.¹⁵

Although notice is only required to be given to the provider in criminal cases, Part 2 has more extensive criteria for entry of an order to disclose records in a criminal case:

- 1) The crime involved is extremely serious, such as one that causes or directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon and child abuse and neglect.
- 2) There is a reasonable likelihood that the records will disclose information of substantial value in the investigation or prosecution.
- 3) Other ways of obtaining the information are not available or would not be effective.
- 4) The potential injury to the patient, to the physician-patient relationship and to the ability of the Part 2 program to provide services to other patients is outweighed by the public interest and the need for the disclosure.
- 5) If the applicant is a law enforcement agency or official that:
 - a) The person holding the records has been afforded the opportunity to be represented by independent counsel; and
 - b) Any person holding the records who is an entity within federal, state or



local government has in fact been represented by counsel independent of the applicant.¹⁶

Furthermore, the content of the order must limit the disclosure of records to only the purpose specified, limit the release of records to only those “whose need for information is the basis for the order” and “include other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services.”¹⁷ Often, this is accomplished by sealing the application and order and holding the hearing in chambers or limiting courtroom access to only those parties necessary to the issue of disclosure of records.

OBTAINING ‘PSYCHOTHERAPY NOTES’ REQUIRES A SEPARATE AUTHORIZATION

Taking into account HIPAA, Part 2 and 43A O.S. §1-109, a party presents a properly executed court order and/or authorization for release of behavioral health or substance use disorder records. Upon receiving the records, the party realizes portions of the records are redacted, or they did not receive

all the information they expected. An authorization for release of records (and depending on the language in your order) is not sufficient for the release of “psychotherapy notes” under the Privacy Rule.¹⁸ “Psychotherapy notes” are not progress notes. Progress notes are typically kept with medical records and are used by the entire treatment team in accessing an individual’s responsiveness to treatment. “Psychotherapy notes” are required to be kept separate from the individual’s medical and billing records and are for the therapist’s use. Records may also be redacted to protect the patient or another person if released.¹⁹ Prior to releasing the records, the treating physician may conduct a review to determine if there is any information that would “likely cause substantial harm to the individual or another person.”²⁰ Therefore, obtaining these notes requires the court order to specifically provide for the release of psychotherapy notes or a separate consent form authorizing the release of psychotherapy notes.

CHANGES ARE ON THE HORIZON

Subpoenas and consent requirements are not the only differences in the bodies of law that govern access to mental health and substance use disorder records, but they are the most commonly encountered. Federal regulations are not set in stone, and change is on the horizon. SAMHSA promulgated a series of rule changes in 2016 to Part 2. The first set of changes was effective Feb. 17, 2017, and the second set of changes was effective Feb. 2, 2018. SAMHSA proposed additional rule changes in 2019, but those have not been promulgated. In a response to public comments, SAMHSA stated these proposed revisions “better reflect changes in the health care system, such as the increasing use of electronic health records and drive toward greater integration of physical and behavioral health care. Despite efforts to enhance integration, SAMHSA remains committed to protecting the confidentiality of patient records.”²¹

In 2019, lawmakers in both the House and Senate reintroduced legislation to align Part 2 with HIPAA. Identical bills have been introduced in previous sessions but have subsequently failed to pass due to opposition from privacy advocacy groups and a handful of congressmen. Proponents for changing Part 2 believe that making these records easier to share would enhance the coordination of patient care across various settings. The name of the House version was “The Overdose Prevention and Patient Safety Act.” In 2018, the effort to change Part 2 fizzled out when the American Medical Association warned congressional leadership such a change would deter patients from seeking treatment. However, the American Society of Addiction Medicine applauded the introduction of the legislation and other proponents

believe keeping substance use disorder records separate from the rest of a patient's medical record denies them a fully informed diagnosis and treatment, increases the chance of unintended prescribing errors and places patients at risk for dangerous drug interaction and overutilization.

COVID-19 has significantly changed the way behavioral health and substance use disorder services are rendered. To effectively treat Americans without disruption in services, Congress included previously proposed language to bring Part 2 more in line with HIPAA in the CARES Act. This legislation also incorporates parts of HIPAA with Part 2, such as breach notification, civil and criminal penalties, notice of privacy practices and accounting of disclosures.²² Although the "to whom" requirement has changed effective Aug. 17, 2020, the subpoena rule has not. Some new changes do not

take effect until March 2021, and rulemaking will further define the scope of confidentiality in America.

ABOUT THE AUTHOR

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4. Standards for Privacy of Individually Identifiable Health Information (HIPAA Privacy Rule), 65 Fed. Reg. 82480-83 (Dec. 28, 2000) (to be codified at 45 CFR Parts 160 and 164),

available at www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/privacyrule/prdecember2000all8parts.pdf.

5. The HITECH Act also increased penalties for breaches.
6. 45 C.F.R. §164.512(f)(1).
7. 42 C.F.R. §2.61(b).
8. Does HIPAA Privacy Rules Preempt State Laws? www.hhs.gov/sites/default/files/adminsimpregtext.pdf. Accessed on April 16, 2020.
9. 45 C.F.R. §160.203.
10. 43A O.S. §1-109.
11. *Id.*
12. 43A O.S. §1-109(D).
13. 42 C.F.R. §2.64.
14. 42 C.F.R. §2.65.
15. 42 C.F.R. §2.64(d).
16. 42 C.F.R. §2.65(d).
17. 42 C.F.R. §2.64(e) and §2.65(e).
18. 45 C.F.R. §164.524 and 43A O.S. §1-109(B)(1).
19. 45 C.F.R. §164.524 and 43A O.S. §1-109(B)(4) and (7).
20. 45 C.F.R. §164.524(a)(3)(ii).
21. 83 F.R. 249.
22. Adam J. Hepworth and Jennifer J. Hennessy, "COVID-19: CARES Act Overhauls Federal Substance Use Disorder Privacy Law," *Coronavirus Resource Center, Health Care Law Today*, March 26, 2020, available at www.foley.com/en/insights/publications/2020/03/covid19-cares-act-federal-substance-privacy-law.



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What's Sex Got to Do With It?

The Landmark Cases Before the Supreme Court That Broadened the Meaning of 'Sex'

By Katherine Mazaheri and Hannah Lunsford

ON JUNE 15, 2020, the Supreme Court of the United States (SCOTUS) made a landmark decision changing the lives of many in the lesbian, gay, bisexual, transgender and queer or questioning (LGBTQ+) community, making it illegal for employers to discriminate against them because of sexual orientation or gender identity. This decision broadened the meaning of "sex" within Title VII of the Civil Rights Act of 1964 (Title VII).¹ The historic decision, *Altitude Express v. Zarda*, was split 6-3, with Justice Neil Gorsuch writing the majority opinion. He was joined by Chief Justice John Roberts Jr. and the court's liberal wing – Justice Ruth Bader Ginsburg, Justice Stephen Breyer, Justice Sonia Sotomayor and Justice Elena Kagan. Justices Brett Kavanaugh and Samuel Alito Jr. wrote separate dissents with Justice Clarence Thomas joining Alito's dissent.

The three cases brought before SCOTUS were *Bostock v. Clayton County*, *Altitude Express v. Zarda*, and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*. These cases involved the sexual stereotyping of LGBTQ+ employees who claimed they were fired because of their sexual identities. Prior to this decision, the federal government did not recognize discrimination based

on sexual orientation or gender identity claims under Title VII, and many employment law advocates brought cases for LGBTQ+ discrimination in the form of "sex stereotyping." In fact, "Only 22 states had individual protections for sexual orientation and 21 had them for gender identity."² In this article, we will explore the history of discrimination laws regarding gender/sex, the facts of the three cases heard before SCOTUS and how the justices arrived at their historic decision.

I AM WHO I AM: HISTORY OF SEX IN THE SUPREME COURT

The 1989 Supreme Court case *Price Waterhouse v. Hopkins*³ laid the foundation for the arguments that were heard before the Supreme Court in *Bostock*. *Price Waterhouse* defined "sex stereotyping," as discrimination that "is a person's nonconformity to social or other expectations of that person's gender."⁴ Ann Hopkins, the plaintiff in *Price Waterhouse*, was a senior manager at Price Waterhouse. Although her office prepared a statement highlighting her character and success, she was not considered for partnership. After Hopkins' employers told her she was more likely to become partner if she acted more feminine, Hopkins

sued Price Waterhouse based on gender discrimination in violation of Title VII. The sex stereotype characteristics Hopkins allegedly possessed included using profanity, she was overly aggressive, and she was somewhat masculine. The court found that Price Waterhouse impermissibly based Hopkins' employment decision on gender stereotypes and her inability to conform to gender-specific expectations considered the norm. The lawyers in *Bostock* before the Supreme Court used the decision of *Price Waterhouse*, that "discrimination against an employee on the basis of sex stereotyping ... constitutes impermissible sex discrimination, in violation of Title VII"⁵ to argue their cases when an effeminate male or less than "feminine female do not conform to gender specific roles."

DON'T GO TAKING MY EQUALITY: THE LANDMARK TRIO

The first two cases of the trio, *Bostock v. Clayton County*⁶ and *Altitude Express v. Zarda*,⁷ were consolidated into one case in front of the Supreme Court. Both involved the firing of two gay men from their places of employment due to their sexual orientation.



The petitioner in *Zarda* was a skydiving instructor who worked for Altitude Express.⁸ Part of Mr. Zarda's job was to participate in tandem dives with clients who were strapped in close proximity to him for safety. To make female clients more comfortable during tandem skydives, he would disclose that he was a gay man. Zarda argued that he was terminated when a female client accused him of inappropriately touching her and that he used his sexual orientation as an excuse to commit such behavior.⁹ Zarda's boss promptly fired him, claiming it was based on her reference to him being gay. Mr. Zarda brought suit against Altitude Express for violating Title VII when they terminated him because of his sexual orientation.¹⁰ The district court found that Title VII does not protect against sexual

orientation discrimination. After the ruling, the Equal Employment Opportunity Commission (EEOC) issued an opinion in a separate case that said Title VII covers sexual orientation under the "basis of sex" language.¹¹ Zarda appealed to the 2nd Circuit Court of Appeals after the district court declined to reinstate his claim. The 2nd Circuit upon rehearing vacated the district court's judgment regarding the Title VII claims held that Title VII does protect sexual orientation.¹² The Supreme Court granted a *writ of certiorari* from the appeal of Altitude Express.¹³

In *Bostock*, the petitioner was a gay man working at child welfare services in Clayton County, Georgia, when he was fired due to his sexual orientation.¹⁴ Mr. Bostock had worked for 10 years at Clayton County and received many positive

performance evaluations and accolades. However, he was terminated by Clayton County for "conduct unbecoming of its employees" after participating in a gay recreational softball league.¹⁵ Bostock's claim of discrimination was further supported because he was the target of offensive comments regarding his sexual orientation during the time he worked at child welfare services. After his termination, Mr. Bostock filed a charge with the EEOC, and three years later filed a lawsuit alleging discrimination based on his sexual orientation under Title VII. The district court dismissed his lawsuit for failure to state a claim because his claim was not supported under Title VII. The 11th Circuit Court of Appeals affirmed the district court's holding.¹⁶ The Supreme Court granted a *writ of certiorari* from the appeal of *Bostock*.

LET'S TALK ABOUT YOU AND THEM

Pamela S. Karlan, attorney for *Bostock* and *Zarda*, argued that discrimination based on sexual orientation is discrimination based on sex, because under Title VII, Section 703(a), the adverse employment action is based on plaintiffs *Bostock* and *Zarda*'s failure to conform to a particular expectation about how men should behave; that they should be attracted to only women.¹⁷ The discrimination falls under Title VII because of the nonconformity with an expectation about how men should behave, and any attempt to carve this discrimination out of the act cannot be done with consistency or integrity.¹⁸ Additionally, Ms. Karlan argued that policies of denying employment to the gay community amount to double discrimination.¹⁹ Double discrimination is discrimination against men who do not conform to a male stereotype, and conversely would discriminate against women who do not conform to an expectation about female stereotypes.²⁰ Double discrimination does not follow Title VII's original intention, which is to make sure that men are not disadvantaged relative to women and vice versa.²¹

Jeffrey M. Harris, attorney for Clayton County and *Altitude Express*, argued that "sex and sexual orientation are independent and distinct characteristics, and sexual orientation discrimination by itself does not constitute discrimination because of sex under Title VII."²² In his arguments, Mr. Harris referred to *Oncale v. Sundowner Offshore Servs., Inc.*²³ claiming the case at hand is a mirror image of *Oncale*, where the Supreme Court reversed a 5th Circuit decision that held that same-sex harassment claims are categorically excluded from Title VII. The Supreme Court held in *Oncale* that all requirements of Title VII

must be met, including the critical inquiry into whether men and women are being treated differently because of their sex.²⁴ Attorney Harris argued that the lower court in both *Bostock* and *Altitude Express* replaced sex with sexual orientation and adopted a rule of per se inclusion giving *Bostock* and *Zarda* a free pass around the inquiry into whether men and women are being treated differently because of their sex.²⁵

The final case of the trio, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, involved Aimee Stephens, former funeral director at R.G. & G.R. Harris Funeral Homes, Inc.²⁶ Ms. Stephens lived and presented as a man for most of her life; however, when she made her boss aware that she intended to transition to female, she was fired. After filing a complaint with the EEOC for sex discrimination, the EEOC sued Harris Funeral Homes for violating Title VII. The basis for the Title VII claim was that Ms. Stephens was terminated on the basis of being transgender and her refusal to conform to sex-based stereotypes.²⁷ The district court granted summary judgment for the defendant, and Ms. Stephens appealed this determination. The 6th Circuit Court of Appeals reversed the holding that the termination of Stephens based on her transgender status constituted sex discrimination under Title VII.²⁸

Attorney for Harris Homes, John J. Bursch, focused his argument on the treatment of men and women. He argued that sex and transgender status are independent concepts, and equal treatment of men and women does not warrant treating men as women.²⁹ Title VII says that sex-based differentiation is not the same as sex discrimination. Mr. Bursch then used what he called a "parade of horrors" style argument, discussing the negative results that would

come with a sex-specific policy.³⁰ He claimed that Harris Homes fired Ms. Stephens not because she was a transgender woman, but because she violated dress code, and the sex-specific dress policy does not violate Title VII. Mr. Bursch also argued that adding transgender status to Title VII protection is adding in a classification that Congress had not intended to be in the statute.³¹

David D. Cole, attorney for Aimee Stephens, stated in oral arguments that the term "sex" included sexual orientation encompassing biological sex and sex assigned. The claim before the court was that Harris Homes treated Ms. Stephens differently because of her sex assigned at birth, and she was not terminated because of its sex-specific dress code policy. Mr. Cole urged the court not to ask whether something discriminates when it refers to sex but whether it differentiates in a way that injures. *Burlington Northern*³² supported this argument stating that a rule can impose a significant burden as to some people and a trivial burden as to others.³³ Thus, a rule that is sex-specific can affect anyone, because it discriminates against them, and a reasonable person in their shoes would experience a significant harm.³⁴ Mr. Cole reflected on *Price Waterhouse* giving the powerful argument that Ann Hopkins would lose her case were she transgender.³⁵ The objection to a transgender person is the ultimate sex stereotype, because it says that if a person is assigned at birth a certain sex, that is how they must live their life, and that was the but-for cause of Ms. Stephens' termination. Ultimately, Mr. Cole did not argue Title VII to be updated or to redefine sex within it, he simply stated that Harris Homes fired Ms. Stephens because she was transgender, and that is sex discrimination.³⁶

LET'S TALK ABOUT SEX

In the landmark ruling, Justice Gorsuch began his opinion determining the meaning of “sex” in Title VII. To determine the definition of “sex” as used in Title VII, the court interpreted it according to the ordinary public meaning at the time of enactment.³⁷ The defendants argued that in 1964, the Title VII drafters could not have anticipated that “sex” would include sexual orientation and sexual identity,³⁸ and very few people in 1964 would anticipate such application.³⁹ However, the court concluded “The limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it is no contest. Only the written word is law”⁴⁰ Although there was a dissonance in the parties’ definition of “sex,” the court

into, “What did ‘discriminate’ mean in 1964?”⁴⁴ The court states that “discrimination” means “intentionally treat[ing] a person worse because of” his or her sex.⁴⁵ The court disagrees with the defendants that a policy of not hiring based on sexual orientation does not discriminate because it affects both genders equally. Title VII does not apply to both genders as a whole, and it explicitly states that employers are prohibited against certain actions against *individuals*, so the employers’ argument does not stand.⁴⁶

After the Supreme Court established the court’s interpretation on sex, they turn to application of the meaning. The court finds, “An employer violates Title VII when it intentionally fires an individual employee based in part on sex.”⁴⁷ The court discusses whether sexual orientation and sexual identity fall under “sex,”

an employer to intentionally treat individual employees differently because of their sex.”⁴⁹ Illustrating with a hypothetical, the court expanded on the point. In this hypothetical, an employer has two employees who are identical in every sense including attraction to men; however, one employee is male and the other is female. If the male employee is fired based on this, then the employer has discriminated against him due to his sex. It does not matter that the male employee was fired for other reasons as well, because so long as sex was one factor of his termination, due to the but-for test, the employer has violated Title VII. Therefore, the defendant employer’s argument that firing based on sexual orientation involves two factors, sex and sexual orientation, does not stand because sex is a factor and that is enough to satisfy the but-for test.⁵⁰

Further, the employer’s argument that discrimination based on sexual orientation or identity is not intent to discriminate based on sex. The court rejects the employer’s position by analyzing the employer’s reliance on sex in the creation of the workplace policy. Despite policy being titled in a nondiscriminatory manner, an employer’s policy may still discriminate based on sex.⁵¹ Specifically “[a]n employer who discriminates on these grounds inescapably intends to rely on sex in its decision making.”⁵² Despite an employer’s intention, discrimination based on sexual orientation or identity is sex-based discrimination prohibited by Title VII.

Although the court agrees with the employers that sexual orientation and sexual identity are separate concepts from “sex.” Discrimination based on sexual orientation or sexual identity cannot happen without first discriminating by sex.⁵³ It is the same with sexual harassment; sexual

The court discusses whether sexual orientation and sexual identity fall under “sex,” using the previously established definition of sex, indicating biological features.

interpreted the meaning of “sex” as the biological distinction between male and female.⁴¹

The court explained the inquiry into the definition of sex is only the beginning, and the real question is what Title VII says about sex.⁴² The court stated Title VII prohibits certain actions based on sex created but-for causation.⁴³ The but-for test then led to the inquiry

using the previously established definition of sex, indicating biological features. The court stated, “It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”⁴⁸ “[H]omosexuality and transgender status are inextricably bound up with sex... [T]o discriminate on these grounds requires

harassment is separate from “sex,” but it cannot happen without discriminating by sex and therefore falls under discrimination prohibited by Title VII. The court stated, “When Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.”⁵⁴

Thus, discrimination based on “sex” includes the broad range of orientation, sexual identity or gender. The court rejected the defendant employer’s argument that potential bills could have been passed to amend Title VII to include sexual orientation and sexual identity.⁵⁵ Justice Gorsuch continued, saying it would be “particularly dangerous” to base an interpretation on the speculation about why Congress had not yet adopted new legislation to address discrimination based on sexual orientation or gender identity.

STICK TO THE SCRIPT: THE DISSENTS

Justice Alito, joined by Justice Thomas, begins his dissent stating that the court participated in an impermissible role. He states, “There is only one word for what the Court has done today: legislation.”⁵⁶ Justice Alito agrees with the employers that because no amendment has been made to Title VII, “Discrimination because of ‘sex’ means what it always meant.”⁵⁷ “This meant discrimination because of genetic and anatomical characteristics.”⁵⁸ He stated that the duty of the court is to interpret statutes as intended when drafted, and the court updated the term “sex” to follow current values and include sexual orientation and sexual identity.⁵⁹ Justice Alito contends there is no evidence the term was meant to be interpreted in such a way when Title VII was enacted.⁶⁰ Justice Alito asserts the majority opinion is in error because employers can discriminate based on sexual

orientation without knowing the sex of the employee.⁶¹

Additionally, he argues that because neither sexual orientation nor gender identity are covered by Title VII, employers are free to decide whether sexual orientation and gender identity are relevant to them.⁶²

Justice Kavanaugh’s dissent also reflects the belief that the court acted impermissibly taking the responsibility of Congress. He argues that the court updated Title VII by taking the literal meaning of “sex” as opposed to the ordinary meaning.

Justice Kavanaugh stated that the court must use the ordinary meaning rather than the literal meaning for two main reasons: rule of law and democratic accountability.⁶³ The citizens governed by the rule of law must be able to understand it.⁶⁴ Also, following the ordinary meaning facilitates the accountability of the representatives elected by the citizens for the laws they pass.⁶⁵

Justice Kavanaugh then turns to what he believes is the main issue, “Does the ordinary meaning of [‘discrimination because of sex’] encompass discrimination because of sexual orientation?”⁶⁶ He analyzes sources indicating ordinary meaning, including common parlance, common usage by Congress, the practice of the Executive Branch, the laws in the states and the decisions of the Supreme Court. These sources all indicate discrimination based on sexual orientation is not included in discrimination based on sex.⁶⁷ Justice Kavanaugh states the plaintiffs needed to prove that the literal meaning of sex overrides ordinary meaning or that discrimination because of sexual orientation is included in the ordinary meaning of discrimination because of sex, which common usage indicates is not the case.⁶⁸

Despite this major victory for the LGBTQ+ community, the court’s opinion prohibiting discrimination based on sexual orientation or gender identity seems to be limited by religious freedom statutes. The court stated, “This Court has also recognized that the First Amendment can bar the application of employment discrimination laws ‘to claims concerning the employment relationship between a religious institution and its ministers.’”⁶⁹ The court also stated the Religious Freedom Restoration Act of 1993 acts “as a kind of super statute ... [and] it might supersede Title VII’s commands in appropriate cases.”⁷⁰ However, the court stated that how they interacted would be a question for the future. As of July 8, 2020, we can already see the court carving out exceptions to this ruling, particularly regarding religiously affiliated employers.⁷¹ Some in the LGBTQ+ community may consider this a setback upon such a monumental equal rights victory, but it is clear the opinion has limitations that remain to be litigated.

Plaintiffs, employment lawyers and the LGBTQ+ community know and understand these decisions will change their legal rights drastically under federal law. The Supreme Court decision in *Obergefell v. Hodges* in June 26, 2015, legalized same-sex marriage in all 50 states and changed the landscape for family law in the U.S. This is a step forward toward equality for all, but the opinion raises some questions as to potential issues with religious freedom. Time will tell what restricts this landmark case in the future as we see challenges come before the court. Until then, equality for all is one step closer.

ABOUT THE AUTHORS

Katherine Mazaheri is the founder and managing attorney of Mazaheri Law Firm, an all-female team of attorneys who have gained a reputation for taking on cases that attack various social injustices and help families in crisis. She's passionate about employment litigation and educating on legal issues in online seminars regarding COVID-19 and employment law, sexual harassment and other Title VII best practices.

Hannah Lunsford is a recent graduate of the OU College of Law. She found a love of employment law while working at Mazaheri Law. She looks forward to a career that allows her to help her community and strive for integrity in everything she does.

ENDNOTES

1. Pub. L. No. 88-352, 701,78 Stat. 241 (codified as amended 42 U.S.C. §2000e (2020)). "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex ..." 42 U.S.C.S. § 2000e-2 (a)(1) (2020).
2. Anna North, "How the LGBTQ rights cases before the Supreme Court affect all Americans," VOX, (Oct. 8, 2019, at 10:10 a.m.), www.vox.com/2019/10/8/20903088/supreme-court-lgbt-lgbtq-case-scotus-stephens.
3. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
4. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Justia (last visited March 23, 2020), supreme.justia.com/cases/federal/us/490/228/#tab-opinion-1957938.
5. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Justia (last visited March 23, 2020) supreme.justia.com/cases/federal/us/490/228/#:~:text=Discrimination%20against%20an%20employee%20on,Civil%20Rights%20Act%20of%201964.
6. No. 17-1618.
7. No. 17-1623.
8. *Altitude Express v. Zarda*, Oyez, www.oyez.org/cases/2019/17-1623 (last visited March 24, 2020).
9. *Id.*
10. *Id.*
11. *Complainant v. Anthony Foxx, Sec'y, Dep't of Transp. (Fed. Aviation Admin.)*, Agency, EEOC DOC 0120133080 2015 WL 4397641 at *10 (July 16, 2015).
12. *Id.*
13. *Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019).
14. *Bostock v. Clayton County*, Oyez, www.oyez.org/cases/2019/17-1618 (last visited March 24, 2020).
15. *Id.*
16. *Id.*

17. *Oral Argument*, Oct. 8, 2019, 00:43, *Bostock v. Clayton County*, Oyez, www.oyez.org/cases/2019/18-107 (last visited March 23, 2020).
18. *Id.* at 1:05.
19. *Id.* at 2:10.
20. *Id.* at 2:13.
21. *Id.* at 3:50.
22. *Id.* at 26:18.
23. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).
24. *Id.* *Oral Argument*, Oct. 8, 2019, at 26:33.
25. *Id.* at 27:14.
26. No. 18-107.
27. *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, Oyez, www.oyez.org/cases/2019/18-107 (last visited March 23, 2020).
28. *Id.*
29. *Oral Argument*, Oct. 8, 2019, 24:29, *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, Oyez, www.oyez.org/cases/2019/18-107 (last visited March 23, 2020).
30. *Id.* at 25:12.
31. *Id.* at 32:03.
32. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).
33. *Oral Argument*, Oct. 8, 2019, 5:34, *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, Oyez, www.oyez.org/cases/2019/18-107 (last visited March 23, 2020).
34. *Id.* at 9:22.
35. *Id.* at 16:42.
36. *Id.* at 23:54.
37. *Bostock v. Clayton Cty., Georgia*, 17-1618, 2020 WL 3146686, at *1 (U.S. June 15, 2020).
38. *Id.* at *3.
39. *Id.* at *15.
40. *Id.* at *3.
41. *Id.* at *4.
42. *Id.*
43. *Id.*
44. *Id.* at *5.
45. *Id.*
46. 42 U.S.C.A. § 2000e-2(a)(1).
47. *Bostock*, 2020 WL 3146686, at *6.
48. *Id.* at *7.
49. *Id.*
50. *Id.* at *13.
51. *Id.* at *7.
52. *Id.*
53. *Id.* at *11.
54. *Id.*
55. *Id.* at *12.
56. *Id.* at *18.
57. *Id.* at *19.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at *21.
62. *Id.*
63. *Id.* at *58.
64. *Id.*
65. *Id.*
66. *Id.* at *60.
67. *Id.* at *64.
68. *Id.*
69. *Id.* at *17.
70. *Id.*
71. *Our Lady Guadalupe School v. Morrissey-Berru*, 591 U.S. _ (2020).

The Oklahoma District Attorneys Council (DAC) is pleased to announce that DAC has been designated by the U.S. Department of Justice to award and disburse loan repayment assistance through the John R. Justice (JRR) Loan Repayment Program. The State of Oklahoma has received a total of \$34,312.00 to be divided equally among eligible full-time **public defenders and prosecutors (including tribal government)** who have outstanding qualifying federal student loans.

Applications for new and renewal applicants are currently available online. For more information about the JRR Student Loan Repayment Program and how to apply, please go to <http://www.ok.gov/dac>. Under "About the DAC", click on the "John R. Justice Student Loan Repayment Program" link. Application packets must be submitted to the DAC or postmarked no later than **October 30, 2020** for consideration.



The Virtual Courtroom is Now in Session

By Dallas L. Jones



“THERE IS NOTHING wrong with change, if it is in the right direction.”¹ The COVID-19 pandemic has instigated change in our lives and touched every industry across the country. For schools, students were moved to online platforms in place of classrooms. Gyms and yoga studios were limited to offering various workouts and classes online. For many businesses with office settings, employees traded in cubicles and conference rooms for a laptop and Zoom subscription. The practice of law is no exception. This article is intended to highlight the current trend of the virtual courtroom and law practice, to discuss the positives and negatives behind this trend and to feature why the future practice of law may be dependent on a law firm’s acceptance of the trend.

THE GROWING USE

In Oklahoma, state courts are authorized to use videoconferencing in place of court appearances.² The rule “is intended to provide a judge presiding over any matter in district court with broad discretion regarding the use of videoconferencing.”³ Meanwhile, in response to the COVID-19 pandemic, federal courts in Oklahoma have provided instruction for implementing similar

videoconferencing for several types of proceedings. In the Northern District of Oklahoma, proceedings may be conducted by videoconferencing for detention hearings, initial appearances, preliminary hearings, waivers of indictment, arraignments, probation and supervised release revocation proceedings, pretrial release revocation proceedings, misdemeanor pleas and sentencings, among other proceedings.⁴ The Western District of Oklahoma has issued a nearly identical order.⁵

Not surprisingly, this innovative answer to the COVID-19 pandemic is not limited to Oklahoma. There are other stark examples of courts across the country implementing similar procedures. Many states began holding virtual hearings by early April. Meanwhile, Texas has already performed an entire trial on Zoom.⁶

In addition, examples of face-to-face business taking place in a virtual world have already reached incredible heights. On the night of April 23, 2020, 15.6 million viewers tuned in to watch the first round of the NFL Draft.⁷ This broke the previous record by more than 3 million viewers.⁸ How was this possible during a global pandemic? Every NFL team’s draft rooms went virtual, connecting by video conference through an online

platform for four straight hours of draft coverage. Granted, this substantial result may be somewhat attributable to fans going six prior weeks with no sports. However, it also serves as a clear indication that these virtual capabilities can be used on a significant stage. On April 23, that point was on display for a large portion of the country.

THE PROS

Although the virtual courtroom may have started as a short-term fix to an unprecedented crisis, going forward, it is likely that its positive aspects will be too attractive to turn away. According to a 2019 Business Travel Report, an average business trip costs \$1,293.⁹ Those numbers are only expected to rise in the future.¹⁰ Imagine the money clients will save when a large percentage of traveling expenses are eliminated. Say you have a deposition in Philadelphia that would normally take two days away from the office. You pay for roundtrip air travel and cross your fingers that the delayed, connecting flight at O’Hare still gets you in on time. You reserve two hotel nights just in case someone shows up late or comes down ill the following day. Then, factor in meals, as well as some form of transportation in an unfamiliar city. Compare that scenario with

a potential alternative. You log on from your office or conference room, videoconference with the deponent from 9:00 to 3:00, and still have time to finish up some research before you are home before 6 p.m. that same day.

On top of the financial savings, the virtual courtroom could open the doors to unparalleled efficiency. Think of the time saved for attorneys who no longer must spend hours (or days) going to-and-from a hearing that otherwise would take an hour. Those six hours spent driving back-and-forth across the state could instead be used to fine-tune that brief that needs a little more discussion or to get started on those discovery responses with which an inevitable deadline looms at the end of the week.

Not only could this time-savings apply to attorneys, but judges as well. In Queens, New York, one justice described his virtual courtroom experience, stating “[e]verybody’s home, it’s amazing.”¹¹ The judge “drank a cup of coffee, put on a shirt and tie and got ready to face his courtroom.”¹² Even more striking, Judge Cohen of the 11th Judicial Circuit Court in Miami recently described the evolution in the following way: “I don’t think this is going away ... I think this is going to be a game changer. Both civil, family and probate divisions as well. Lawyers will not have to come in to wait to see the judge.”¹³

There are additional factors that point towards virtual courtrooms becoming more prevalent. No one wants to see another global crisis like the one we have been maneuvering through over the past several weeks. However, if something like COVID-19 did strike again, the lawyers and courts who embrace these changes will be far more prepared to operate in as much of a “business as usual” mode as possible. These changes will not only

apply to virtual court appearances. You can count on client meetings, witness preparations, mediations and the like to also use this new wave of efficiency.

THE CONS

A virtual courtroom is not without its potential issues. The online platform Zoom is currently blocked by the Oklahoma Administrative Office of the Courts due to security concerns.¹⁴ However, applications like Skype, BlueJeans, Microsoft Teams and GoToMeeting remain readily available. Plus, Zoom now has features that protect security and authenticates its users, much like many of the other online platforms.¹⁵ There are certainly possible issues with reliance on audio, video and internet connection. One does not have to stretch the imagination too far to envision a computer screen going to black in the middle of an oral argument or a party losing all audio in the middle of a judge’s instruction. The long-standing tradition and allure of a courtroom may be difficult to replicate when all parties join in from their remote locations.

Further, the learning curve for new users will be unavoidable. This issue brings up additional questions centered around fairness. One legal author recently framed the issues of privacy and fairness quite succinctly. She stated how “moving from a physical to virtual space can impact the experiences and treatment of participants.”¹⁶ It is a valid concern. More specifically, the article points out how videoconferencing could have a negative impact on a judge or adverse party’s ability to assess other parties’ credibility, emotions and body language.¹⁷ Moreover, there could be wide-ranging differences of “technological competence” between adverse parties.¹⁸ Issues of objectivity could even

arise in cases where one party has less advanced technology, impacting how lawyers and witnesses could be perceived.¹⁹

THE FUTURE

Part of the practice of law will always have standing in a historical model and tradition. However, at the same time, the practice is ever evolving. Look no further than the reactions to our global crisis of the past weeks. The response by courts and lawyers throughout the country seems to point towards this virtual system becoming much more widespread in the future. Following the 2020 NFL Draft, coaches and general managers across the league used the words “awesome,” “fantastic” and “outstanding” in describing the virtual experience.²⁰ Les Snead, general manager of the Los Angeles Rams, stated, “The draft may have just evolved.”²¹ While no one has a crystal ball, all signs seem to indicate that if law firms do not embrace these changes and advancements in technological efficiency, they may be left behind.

This article was originally published in the June 2020 Tulsa Lawyer and is reprinted with permission from the Tulsa County Bar Association.

ABOUT THE AUTHOR

Dallas L. Jones is an associate attorney at Titus Hillis Reynolds Love in Tulsa. He practices mainly in the areas of commercial and business litigation. He received his J.D. with highest honors from the TU College of Law.

ENDNOTES

1. This quote is credited to Winston Churchill. It is thought to have come from an exchange in the House of Commons with Philip Snowden when Churchill defended his first budget in 1924. See Karl-Georg Schon, *Wit & Wisdom*, FINEST HOUR 100, 50 (Autumn 1998), winstonchurchill.org/publications/finest-hour/finest-hour-100/wit-wisdom-10/.

2. Okla. Stat. tit. 12, Ch. 2, App., R. 34.

3. *Id.* at R. 34(C).

4. See *In re Video Teleconferencing or Tel. Conferencing of Certain Criminal Proceedings Under the Coronavirus Aid, Relief, and Economic Security Act*, GO-20-07 (N.D. Okla. Mar. 30, 2020).

5. See *In re Use of Video and Tel. Conferencing for Criminal Proceedings During the COVID-19 Pandemic*, G.O. 20-9.1 (W.D. Okla. Mar. 31, 2020).

6. See Angela Morris, *Now Trending in Texas: Full-Blown Bench Trials via Zoom*, TEXAS LAWYER (Apr. 21, 2020), www.law.com/texaslawyer/2020/04/21/now-trending-in-texas-full-blown-bench-trials-via-zoom/#.

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8. *Id.*

9. *The Average Business Trip Costs \$1,293 and Prices Will Increase in 2020*, BUSINESSWIRE (Oct. 3, 2019), www.businesswire.com/news/home/20191003005109/en/Average-Business-Trip-Costs-1293-Prices-Increase.

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11. David Brand, *Courtroom Goes Virtual for Emergency Judge Joseph Esposito*, QUEENS DAILY EAGLE (Apr. 13, 2020), queenseagle.com/all/courtroom-goes-virtual-for-emergency-judge-joseph-esposito.

12. *Id.*

13. Hank Tester, *Coronavirus Impact: Pandemic Could Bring About Virtual Courtrooms*, CBS MIAMI (Apr. 3, 2020), miami.cbslocal.com/2020/04/03/coronavirus-virtual-courtrooms-miami-dade/.

14. See SCAD No. 2020-36 (Apr. 29, 2020).

15. Charlie Osborne, *Zoom Security: Your Meetings Will be Safe and Secure if you do These 10 Things*, ZERO DAY (Apr. 22, 2020), www.zdnet.com/article/make-sure-your-zoom-meetings-are-safe-by-doing-these-10-things/.

16. Amy Salyzyn, *"Trial by Zoom": What Virtual Hearings Might Mean for Open Courts, Participant Privacy and the Integrity of Court Proceedings*, SLAW (Apr. 17, 2020), www.slaw.ca/2020/04/17/trial-by-zoom-what-virtual-hearings-might-mean-for-open-courts-participant-privacy-and-the-integrity-of-court-proceedings/.

17. *Id.*

18. *Id.*

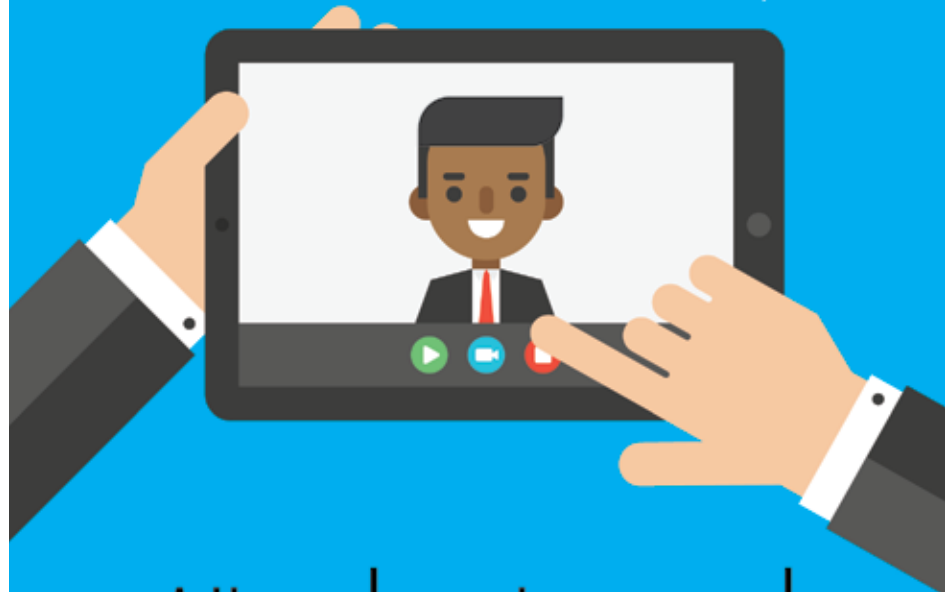
19. *Id.*

20. Jeremy Fowler, *Stories Inside the Virtual 2020 NFL Draft: 10 GMs on What They Learned*, ESPN (Apr. 29, 2020), www.espn.com/nfl/draft2020/story/_/id/29110271/stories-virtual-2020-nfl-draft-10-gms-learned.

21. *Id.*

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Ben Munda

Criminal Defense Lawyer



Ben has a BS in Chemical Engineering from the University of Oklahoma and graduated Order of the Coif from the Oklahoma University College of Law. In Ben's last year at the Oklahoma County Public Defender's Office, he obtained not-guilty jury verdicts in three first degree murder trials and was awarded the Barry and Johnny Albert Award for Excellence in Advocacy.

Ben joined the Overman Legal Group in August, 2020. If you need a Criminal Defense Lawyer, you will find no one more capable or who will work harder for you than Ben.

Ben Munda

Overman Legal Group
809 NW 36th Street,
Oklahoma City, Oklahoma 73118
(405) 971-4769

BOUNCING BACK OKLAHOMA BAR ASSOCIATION ANNUAL MEETING NOV. 2020

HIGHLIGHTS

KEYNOTE SPEAKER: LAURA MAHR

If you were among the 500+ people who took part in the May 5 webinar on tools to keep you cool during the COVID crisis, you'll remember Laura Mahr. She's back for the bar convention – whether it's in Oklahoma City or virtually! She'll speak on:

- A Resilient Mindset: Coming Back Stronger After a Global Crisis
- Five Things Every Lawyer Needs to Know About Burning Out and Bouncing Back
- Tapping into the Wisdom of the Body to Optimize Your Life



PRESIDENT SUSAN SHIELDS SHARES INSIGHT INTO THEME AND MEETING FORMAT



I certainly did not anticipate a global pandemic when I decided to focus on attorney wellness during my year as OBA president. However, wellness issues have become increasingly important as we do our best to navigate the evolving changes due to COVID. The theme for our 2020 OBA Annual Meeting is “Bouncing Back,” and we are planning programs on topics such as legal issues related to COVID, a panel discussion with the attorneys involved in the first major opioid trial that took place in Oklahoma, as well as wellness programs that include strategies for “bouncing back.” We will make a decision in early September about the format of the Annual Meeting scheduled for November. Whether our 2020 annual meeting is in-person or virtual, I hope you will plan to attend and celebrate being a part of the OBA and our Oklahoma legal community.

DIVERSITY AWARDS EVENT



The Diversity Committee will honor its award recipients in an event that is part of this year's Annual Meeting. Speaking will be Keith and Dana Cutler, a husband and wife team who are trial lawyers in Kansas City, Missouri, and presiding judges of the two-time Emmy-nominated, nationally syndicated daytime TV show *Couples Court with the Cutlers*. Whether they are speaking in person at a dinner or virtually, you won't want to miss their presentation.

IN-PERSON OR VIRTUAL MEETING?

That decision will be made after this magazine goes to press. More details and registration information will be available soon. Check the website and watch your email for the most current updates.

www.okbar.org



2021 OBA BOARD OF GOVERNOR VACANCIES

Nominating Petition Deadline: 5 p.m. Friday, Sept. 4, 2020

OFFICERS

President-Elect

Current: Michael C. Mordy, Ardmore
(One-year term: 2021)

Mr. Mordy automatically becomes
OBA president Jan. 1, 2021

Nominee: **James R. Hicks, Tulsa**

Vice President

Current: Brandi N. Nowakowski,
Shawnee

(One-year term: 2021)

Nominee: **Charles E. Geister III,
Oklahoma City**

BOARD OF GOVERNORS

Supreme Court Judicial

District One

Current: Brian T. Hermanson,
Newkirk

Craig, Grant, Kay, Nowata,
Osage, Ottawa, Pawnee, Rogers,
Washington counties

(Three-year term: 2021-2023)

Nominee: **Vacant**

Supreme Court Judicial

District Six

Current: D. Kenyon Williams Jr., Tulsa
Tulsa county

(Three-year term: 2021-2023)

Nominee: **Vacant**

Supreme Court Judicial

District Seven

Current: Matthew C. Beese,
Muskogee

Adair, Cherokee, Creek, Delaware,
Mayes, Muskogee, Okmulgee,
Wagoner counties

(Three-year term: 2021-2023)

Nominee: **Benjamin R. Hilfiger,
Muskogee**

Member At Large

Current: Brian K. Morton,
Oklahoma City

Statewide

(Three-year term: 2021-2023)

Nominees:

Cody J. Cooper, Oklahoma City

**Elliott C. Crawford,
Oklahoma City**

NOTICE

This issue went to press before
the deadline, and the list of nom-
inees is not complete. See [www.
okbar.org/governance/bog/
vacanices](http://www.okbar.org/governance/bog/vacanices) for updates.

Summary of Nominations Rules

Not less than 60 days prior
to the annual meeting, 25 or
more voting members of the
OBA within the Supreme Court
Judicial District from which

the member of the Board of
Governors is to be elected that
year, shall file with the executive
director, a signed petition (which
may be in parts) nominating a
candidate for the office of mem-
ber of the Board of Governors for
and from such judicial district, or
one or more county bar associ-
ations within the judicial district
may file a nominating resolution
nominating such a candidate.

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

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

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

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

Elections for contested positions will be held at the House of Delegates meeting Nov. 6, during the OBA Annual Meeting. Terms of the present OBA officers and governors will terminate Dec. 31, 2020.

Nomination and resolution forms can be found at www.okbar.org/governance/bog/vacancies.

OKLAHOMA BAR ASSOCIATION NOMINATING PETITIONS

(See Article II and Article III of the OBA Bylaws)

OFFICERS

President-Elect

James R. Hicks, Tulsa

Nominating Petitions have been filed nominating James R. Hicks, Tulsa for President-Elect of the OBA Board of Governors for a one-year term beginning Jan. 1, 2021.

A total of 175 signatures appear on the petitions.

Vice President

Charles E. Geister III, Oklahoma City

Nominating Petitions have been filed nominating Charles E. Geister III, Oklahoma City for Vice President of the OBA Board of Governors for a one-year term beginning Jan. 1, 2021.

A total of 196 signatures appear on the petitions.

BOARD OF GOVERNORS

Supreme Court Judicial District No. 7

Benjamin R. Hilfiger, Muskogee

Nominating Petitions have been filed nominating Benjamin R. Hilfiger for election of Supreme Court Judicial District No. 7 of the OBA Board of Governors for a three-year term beginning Jan. 1, 2021.

A total of 25 signatures appear on the petitions.

Member at Large

Cody J. Cooper, Oklahoma City

Nominating Petitions have been filed nominating Cody J. Cooper, Oklahoma City for election of Member at Large of the OBA Board of Governors for a three-year term beginning Jan. 1, 2021.

A total of 52 signatures appear on the petitions.

Elliott C. Crawford, Oklahoma City

Nominating Petitions have been filed nominating Elliott C. Crawford, Oklahoma City for election of Member at Large of the OBA Board of Governors for a three-year term beginning Jan. 1, 2021.

A total of 53 signatures appear on the petitions.



HOUSE OF DELEGATES

Dear County Bar Presidents:

Thank you to the county bar presidents of:

Beaver, Blaine, Choctaw, Cimarron, **Cleveland, Comanche, Creek, Delaware, **Ellis, Grant, Jackson, Love, Mayes, Okfuskee, Oklahoma, Ottawa, Pushmataha, **Tulsa, **Washington, Washita, Woods and **Woodward counties for submitting your Delegate and Alternate selections for the upcoming OBA Annual Meeting. (**Reported, awaiting election)

Listed below are the counties that have not sent their Delegate and Alternate selections to the offices of the OBA as of August 17, 2020. Please help us by sending the names of your Delegates and Alternates now.

In order to have your Delegates/Alternates certified, send Delegate certifications to: OBA Executive Director John Morris Williams, c/o Debbie Brink, P. O. Box 53036, Oklahoma City, OK 73152-3036, fax: 405-416-7001 or email debbieb@okbar.org.

Adair	Craig	Jefferson	McIntosh	Rogers
Alfalfa	Custer	Johnston	Murray	Seminole
Atoka	Dewey	Kay	Muskogee	Sequoyah
Beckham	**Ellis awaiting	Kingfisher	Noble	Stephens
Bryan	<i>election</i>	Kiowa	Nowata	Texas
Caddo	Garfield	Latimer	Okmulgee	Tillman
Canadian	Garvin	LeFlore	Osage	**Tulsa awaiting
Carter	Grady	Lincoln	Pawnee	<i>election</i>
Cherokee	Greer	Logan	Payne	Wagoner
**Cleveland awaiting	Harmon	Major	Pittsburg	**Washington awaiting
<i>election</i>	Harper	Marshall	Pontotoc	<i>election</i>
Coal	Haskell	McClain	Pottawatomie	**Woodward awaiting
Cotton	Hughes	McCurtain	Roger Mills	<i>election</i>

In accordance with the Bylaws of the Oklahoma Bar Association (5 OS, Ch. 1, App. 2), "The House of Delegates shall be composed of one delegate or alternate from each County of the State, who shall be an active or senior member of the Bar of such County, as certified by the Executive Director at the opening of the annual meeting; providing that each County where the active or senior resident members of the Bar exceed fifty shall be entitled to one additional delegate or alternate for each additional fifty active or senior members or major fraction thereof. In the absence of the elected delegate(s), the alternate(s) shall be certified to vote in the stead of the delegate. In no event shall any County elect more than thirty (30) members to the House of Delegates."

"A member shall be deemed to be a resident, ... of the County in which is located his or her mailing address for the Journal of the Association."

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Trying to Meet My First Global Pandemic in the Lawyer Way

By John Morris Williams

IN THE LAST FIVE MONTHS I have faced issues and questions I never dreamed I would have encountered. I usually give my best guess and follow it with, "I hope this works; this is my first global pandemic." For all of us that is the rock-bottom truth. I applaud those who have been innovative, those who have been generous with their kindness and resources, and those who persevere in light of at times staggering difficulties.

These are hard times. I say let's call them what they are and meet them with what tools we have to make the best of it. This quarter and the last have been some of the worst in the legal sector in our lifetime. The legal sector is not alone. The difference is that as lawyers we are called upon not only to handle our own personal challenges, but to be there for our clients and our communities. That is the lawyer way!

I like to think of myself as an optimist and am thankful that I have a glass whether it has something in it or not. There are days as your executive director that I am amazed at how well everyone seems to be doing and days where personal stories are conveyed to me that leave me a bit bewildered. I know how incredibly blessed I am to work for you, and it saddens me to see the effects of this pandemic in the toll in human life and suffering and the economic impact it has had upon people I dearly love.

Repeatedly I have asked OBA members to let us know what we can do to help. We have given lots

of free CLE courses this year, and I suspect that our Kick It Forward dues assistance fund may be depleted this year. Since the YLD cannot host its fundraiser due to the social distancing guidelines, if you have an extra dollar or two please include this contribution in your dues statement this year. This fund is totally made up of volunteer contributions to aid members who may be struggling with their finances to an extent they may not be able to pay dues. Food for your family versus paying your dues is not a choice any OBA member should have to face. I have given before, and I will give this year for sure.

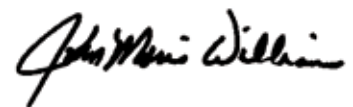
Every social resource and charity is experiencing strain, and resources are being exhausted. For any future generation that might read this, I now totally understand my grandparents who survived the Great Depression and saved bread sack ties saying, "Don't throw that out we might need it someday." While we don't have a bread sack tie shortage (that I know of), for the first time in my life I have witnessed food and household product shortages of this magnitude. People who worked hard, played by the rules and did the right thing always are finding themselves without work and resources. Never have I seen a time when we all seem to need each other so much – yet seem so divided.

As I said before, this is my first global pandemic of this magnitude, and I am not certain in everything

I am doing or asking of the OBA staff. I ask your indulgence, patience and for your wisdom to make sure we are doing the right thing, at the right time and in the right way. Please let me, any of the staff or our elected leaders know how we can help. There are some challenges that are beyond us, and I apologize for that beforehand.

When I came to the OBA, I did not want us at headquarters to be thought of as "those people in Oklahoma City." Being from Stonewall, I knew what that meant, and given the distance we all must keep from each other, I don't want us to be thought of as "those people over at the OBA." We are here with you and for you. Never have I known a time when we may need to be together more and yet are forced into separation. If you need us, we are here.

This is my first global pandemic of this magnitude. But we have a job and a mission to do, and all of it is about serving you and keeping us together the best we can. Please call on me, and I promise I will do my best to try and help in any way I can. After all, that is the lawyer way.



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

FROM THE PRESIDENT



(continued from page 4)

The Lawyers Helping Lawyers Assistance Program sponsored free CLE in May with Laura Mahr called “Calm in the Storm: Tools to Keep Your Cool in the Corona Crisis” had more than 500 attendees and was so successful that Laura Mahr will be coming back as one of our speakers at the OBA Annual Meeting. In fact, from January to July of this year, OBA members have logged almost 38,000 hours of CLE online, much of it free. This is an increase of about 40% from last year for the same period. Looking ahead

to fall, you will continue to see the OBA offer CLE and meeting opportunities online, and we will be making a decision about having a virtual Annual Meeting instead of an in-person meeting in early to mid-September, so stay tuned for that information.

Wishing all of you more days as the windshield instead of the bug – and hoping that you and your loved ones are continuing to do well and stay well. As always, please do not hesitate to contact me with your questions, comments and suggestions at susan.shields@mcafeetaft.com.

Sometimes it just
takes looking at
things from a
different view.

Top Tips for Practicing Law During a Crisis

By Jim Calloway

PRACTICING LAW during a pandemic is both challenging and exhausting.

The OBA Management Assistance program began posting daily tips on practicing in a crisis in March. Like so many things in 2020, this has gone on much longer than we anticipated. Some readers may have missed some of our most popular tips, so we decided to feature some of our top tips so far for 2020. We hope readers will take the opportunity to review the collection for any tips you may have missed. The index to the crisis tips is at www.okbar.org/lpt_category/jcdt-crisis-tips. You can also go to Jim Calloway's Law Practice Tips blog at www.lawpracticetipsblog.com and enter your email address to receive the tips via email.

TODAY'S TIMES DEMONSTRATE THAT LAWYERS MUST ACCEPT ELECTRONIC PAYMENTS

As shelter-in-place took hold, the most common questions we received from lawyers had to do



with electronic payments. So, we recorded a short video for this tip with a rep from OBA member benefit LawPay. If you don't know when you can use ACH processing to save on processing fees or how to easily incorporate client payment links into your billing and website, this is the video for you. There are more processing tools today than a few years ago so this video is worth the time investment. (May 12)

www.okbar.org/lpt_articles/todays-times-demonstrate-that-lawyers-must-accept-electronic-payments



A PASSWORD MANAGER IS A GREAT SECURITY TOOL AND A TIME-SAVING CONVENIENCE

After former ABA TECHSHOW Chair Tom Mighell did a comprehensive set of blog posts on how to select the best password manager, I invited him for a video interview to discuss his findings, and the result was "Take the Pain Out of Selecting

a Password Manager with Tips from Tom Mighell." (May 26)

www.okbar.org/lpt_articles/take-the-pain-out-of-selecting-a-password-manager-with-tips-from-tom-mighell

LEARN FROM YOUNGER LAWYERS

I'm a baby boomer. Maybe that is why I found the millennial take on lessons learned so far in the crisis so interesting – "Navigating the Pandemic by Embracing the Wisdom of Millennials." (June 22)

www.okbar.org/lpt_articles/navigating-the-pandemic-by-embracing-the-wisdom-of-millennials

A SCREEN CAPTURE UTILITY TRILOGY

Capturing an image or video from your computer screen has many uses for lawyers. We provided three tips on this subject featuring 1) A free utility included in Windows – the Snipping Tool, 2) An inexpensive and more powerful tool – SnagIt and 3) A shopper's guide to video recording utilities.



- “The Snipping Tool – A Useful Screen Capture Utility Built Into Windows” (Aug. 3)
www.okbar.org/lpt_articles/the-snipping-tool-a-useful-screen-capture-utility-built-into-windows
- “The Snipping Tool is Good, but a More Powerful Tool is Snagit” (Aug. 4)
www.okbar.org/lpt_articles/the-snipping-tool-is-good-but-a-more-powerful-tool-is-snagit
- “What is the Best Way to Make a Video Recording of What You See on Your Screen?” (July 27)
www.okbar.org/lpt_articles/what-is-the-best-way-to-make-a-video-recording-of-what-you-see-on-your-screen

GET MORE OUT OF FASTCASE AND ‘UPGRADE’ TO VERSION 7

Fastcase is a member benefit for OBA members. In this video Fastcase CEO Ed Walters gives us a brief tour of Fastcase features, some research tips and covers free training options. OBA members are currently defaulted to Fastcase 6. Ed also shows us how to toggle to Fastcase 7 for a more modern interface and improved tools. “Improve Your Legal Research with Fastcase Tips from Ed Walters” (April 22)

www.okbar.org/lpt_articles/improve-your-legal-research-with-fastcase-tips-from-ed-walters

AUTOMATE KEYBOARDING OPERATIONS WITH ACTIVEWORDS



ActiveWords is a piece of software that automates keystrokes. It is inexpensive and has a generous free trial period. Many automation tools work within Microsoft Word, but ActiveWords works across all platforms, allowing one to create automation tools for any situation that allows the entry of text. This short video demonstrates the different ways you can use ActiveWords for a variety of functions, including creating signature blocks, opening your favorite websites or inserting pages of formatted text into the document you are creating. (June 15)

www.okbar.org/lpt_articles/automating-keyboarding-operations-is-easy-with-activewords



WORKING FROM HOME

Many lawyers and other law firm employees found themselves working from home this spring. Between uncertainty over whether school classes will be virtual and the fact that everyone waking up with cold or fever symptoms this fall means that people should be working remotely, it seems working from home is not over for this year. One of our early tips was “The Burneys: Bears & Boundaries & Conference Calls.”

Legal technology consultant Brett Burney and his wife, Stephanie, already had years of experience with a lawyer working from home and the potential conflicts with online schooling and other activities happening there. It is a cute video. We hope you enjoy it. (March 30)

www.okbar.org/lpt_articles/the-burneys-bears-boundaries-conference-calls

NEW VIDEO SHARES TIPS TO BOOST YOUR PRODUCTIVITY



With many Oklahoma lawyers finding it necessary to work from home due to the COVID-19 pandemic, it is an excellent time to invest in practice management tools.

For lawyers who already had all of their client file information organized in a cloud-based practice, it has been a smooth transition from working in an office to working from home. They have been able to work remotely and access all necessary client information, eliminating the need to carry around heavy, paper files.

Lawyers and law firm staff would be able to easily work from home if they had the right practice management solution tools. OBA Practice Management Advisor Julie Bays has recorded a new video explaining the basic features of several of these tools.

Find Julie's video with tips and assistance for which practice management solution would work best for your law office at www.okbar.org/lpt_articles/a-practice-management-software-solution-is-a-critical-office-management-tool.

WORKING FROM HOME 2

Here's another post that's exactly what the title says – "Some More Great Tips on Working from Home." (July 21)

www.okbar.org/lpt_articles/some-more-great-tips-on-working-from-home

IF YOU ARE DEALING WITH WI-FI DEAD ZONES, YOU NEED MESH WI-FI

This goes double for larger homes where work from home and online schooling is happening simultaneously. In this post, we link to articles explaining how mesh Wi-Fi works and reviews



of many popular systems. My personal purchasing decision was based on ease-of-installation and knowing several who had used a previous model of the product. "Consider Upgrading Your WiFi to a Mesh System." (July 20)

www.okbar.org/lpt_articles/consider-upgrading-your-wifi-to-a-mesh-system

WRAP-UP

So that's it for our self-selected, top pandemic crisis practice tips, but there will be new tips posted each weekday.

OBA MAP is available to provide advice and answers to your law practice management questions. We are now scheduling virtual presentations for county bar associations through the end of 2020. CLE topics include Tips on Practicing in a Pandemic, Delivering Limited Scope Legal Services Effectively and Safely and Law Office Technology Update. Contact MAP Assistant Nickie Day to schedule a virtual presentation for your county bar. Her email address is NickieD@okbar.org, and her phone number is 405-416-7050.

ABOUT THE AUTHOR

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. It's a free member benefit.

WOMEN IN LAW COMMITTEE

Clothing Drive



BENEFITTING SUITED FOR SUCCESS | SEPT. 26 - OCT. 10

Time to clean out those closets and get ready for fall! Donate your new or gently worn professional clothing, casual clothing, evening wear, sportswear, shoes, accessories and jewelry. Drop off your items from September 26 to October 10 at:

**1st Impression Resale Clothiers, 4557 NW 23rd Street, Oklahoma City
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Suited for Success is a 501(c)(3) organization that assists women with professional clothing and employment related services to gain and maintain sustainable employment. Their clients come to them through community referral partners. Suited for Success also operates a resale clothier shop for the general public to generate funds for other needs of the organization.



‘Significantly Harmful’: Prospective Clients and Disqualification

By Richard Stevens

PROSPECTIVE CLIENTS are a hazard for violating ethics rules and a reason to keep logs of all who seek representation from a lawyer. ORPC 1.18 defines a prospective client as “A person who consults with a lawyer about the possibility of forming a client-lawyer relationship” Under certain circumstances, when a lawyer consults with a prospective client, a conflict arises in subsequent representations. Rule 1.18 defines when a potential conflict arises, how to tell whether it is an actual conflict and how to resolve that conflict. Recently released ABA Formal Opinion 492 provides a detailed discussion of the rule and its application.

PROSPECTIVE CLIENT

The first question to be answered under Rule 1.18 is, “Who is a prospective client?” Comment [2] provides that:

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer’s advertising in any medium,

specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response.

Comment [2] further provides:

A consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer’s education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a ‘prospective client.’ Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a “prospective client.”

Rule 1.9 requires that information shall not be revealed or used to the disadvantage of a former client except as provided by the Rules of Professional Conduct.

CONFIDENTIAL INFORMATION

Once a determination has been made that a person is a “prospective client,” the issue becomes one of confidential information. Rule 1.18 (b) requires that information learned during a consultation be kept confidential:

Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

Rule 1.9 requires that information shall not be revealed or used to the disadvantage of a former client except as provided by the Rules of Professional Conduct.

DISQUALIFICATION AND ‘SIGNIFICANTLY HARMFUL’ INFORMATION

Rule 1.18 (c) provides for disqualification arising from the consultation. That section states:

A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client

in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter

Comment [1] clarifies that “prospective clients should receive some but not all of the protection afforded clients.”

That distinction can be seen more clearly when contrasting Rule 1.9 with Rule 1.18 regarding possible conflicts of interest. Under Rule 1.9 Comment [3], “A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter.” Such substantial relationship creates a conflict of interest, but under ORPC 1.18 (c) a lawyer is disqualified from representation only if the lawyer received “information from the prospective client that could be significantly harmful to that person in the matter” A determination of whether given information is “significantly harmful” is painstakingly fact-sensitive and fact-specific and varies from jurisdiction to jurisdiction.

I encourage you to read ABA Formal Opinion 492 for guidance about avoiding and resolving disqualification issues with prospective clients.

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 or 405-416-7055. Ethics information is also online at www.okbar.org/ec.

Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City and remotely on Friday, June 19.

INTRODUCTION OF NEW DIRECTOR

Executive Director Williams introduced Janet Johnson, director of educational programs.

REPORT OF THE PRESIDENT

President Shields reported she attended Annual Meeting planning meetings and the Legislative Monitoring Committee debrief meeting. She participated in Women in Law Conference planning calls, interviews for the director of educational programs, initial telephone interviews for the director of strategic communications and marketing position, county bar association presidents video meeting and presentation of Uniform Bar Examination advisory task force recommendations to the Supreme Court.

REPORT OF THE VICE PRESIDENT

Vice President Nowakowski reported she attended the Annual Meeting planning meeting, Audit Committee meeting and county bar association presidents meeting.

REPORT OF THE PRESIDENT-ELECT

President-Elect Mordy reported he participated in the meeting and interviews for the position of director of educational programs

and the meeting with county bar association presidents. He also attended the Oklahoma Attorneys Mutual Insurance Co. Board of Directors meeting.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended Annual Meeting planning meetings, Legislative Monitoring Committee meetings, YLD board meeting, meetings regarding foreclosure and eviction issues and Audit Committee meeting. He participated in interviews for the director of educational programs and director of strategic communications and marketing positions, disaster relief call, county bar association presidents video meeting and several conferences with President Shields. He shared that face masks with the OBA logo have been ordered and will be given to people taking the bar exam. Additional masks may be ordered for Annual Meeting.

REPORT OF THE PAST PRESIDENT

Past President Chesnut reported he participated in interviews for the director of educational programs position and attended the county bar association presidents meeting and Lawyers Helping Lawyers Assistance Program meeting.

BOARD MEMBER REPORTS

Governor Beese reported he attended the Audit Committee meeting and May Legislative Monitoring Committee meeting. **Governor Edwards** reported he attended the county bar association presidents meeting and Professionalism Committee meeting. He also drafted one of the bar exam questions for the Board of Bar Examiners. **Governor Garrett** reported she attended the Women in Law Committee meeting and Audit Committee meeting. **Governor Hermanson** reported he presided over the Justice Assistance Grant Board meeting and attended the Legislative Monitoring Committee May meeting, two District Attorneys Council meetings, two Oklahoma District Attorneys Association meetings, OBA Professionalism Committee meeting, Association of Prosecuting Attorneys Capital Litigation Committee meeting, Violence Against Woman Act Grant Committee meeting and numerous DAC Executive Committee meetings. **Governor McKenzie** reported he attended the Lawyers Helping Lawyers Assistance Program meeting. **Governor Morton** reported he attended the Lawyers Helping Lawyers Assistance Program meeting. **Governor Pringle** reported he planned the Legislative Debrief and participated in the county bar association presidents meeting, Audit Committee meeting and May

Legislative Monitoring Committee meeting. **Governor Williams** reported he presided over a two-day hearing of a complaint before the PRT and attended the May Tulsa County Bar Association Board of Directors meeting, June OBA Diversity Committee meeting, county bar association presidents meeting and Audit Committee meeting.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Haygood reported he chaired the division board meeting and exec meetings. He attended the YLD Kick It Forward Committee meeting and county bar association presidents meeting.

focus on advance directives and end-of-life care documents. They are in the planning stages but are looking for volunteers and help promoting the event once a date and location are set.

REPORT OF THE SUPREME COURT LIAISON

Justice Rowe reported the court is staying busy.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported a written report of PRC actions and OBA disciplinary matters for May was submitted to the board for its review.

Law Schools Committee liaison all three law school deans were very happy about the Supreme Court's decision to move to the uniform bar examination that will go into effect July 2021. Discussion followed. Governor Edwards said the **Professionalism Committee** was planning on doing a CLE at the Solo & Small Firm Conference and is now looking at moving it to Annual Meeting. On behalf of the **Disaster Response and Relief Committee**, Executive Director Williams shared with the board a discussion he had with Oklahoma City leaders regarding an upcoming need for mediation related to pandemic issues and the need for many volunteer lawyers to help mediate. Governor Williams said the **Diversity Committee** is working on its annual awards dinner to take place in conjunction with the Annual Meeting. Award nominations are due July 31. He said they are considering speakers who are entertaining, including attorneys Dana and Keith Cutler who host a TV show called *Couples Court With the Cutlers*. Governor Beese said at the request of the **Legal Internship Committee**, the Oklahoma Supreme Court granted a temporary suspension of the rule requiring licensed legal interns to complete a minimum of four hours in court each month. The waiver is approved through July 31. Governor Morton said the **Lawyers Helping Lawyers Assistance Program Committee** held a webinar on May 5 that drew

The YLD has decided to host its Wills for Heroes event specifically for COVID first responders. They are going to add advance directives in addition to wills or just focus on advance directives and end-of-life care documents.

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BOARD LIAISON REPORTS

Vice President Nowakowski said the **Awards Committee** is accepting nominations that are due July 1. Governor Davis said as

500 participants. He said discussion groups have been converted from in person to virtual, which allows both Tulsa and Oklahoma City to be combined. Governor Pringle said the **Legislative Monitoring Committee** will hold its Legislative Debrief July 21 at 2 p.m. as a webinar. He said the speakers are lined up, and the legislative panel will be prerecorded. Governor Garrett said the **Women in Law Committee** has finalized the agenda for its conference on Oct. 16. Oklahoma City attorney Kelli Masters will be the keynote speaker. The conference will include a judicial panel speaking on the response to COVID-19 and programs with civility and ethics components.

LAW DAY COMMITTEE REPORT

Committee Chairperson Ed Wunch reviewed the committee's results and modifications made to offering the statewide free legal advice and TV show during the pandemic. The contest and its ceremony took place before sheltering was recommended. He also reviewed the committee's goals for continued improvements next year. President Shields shared her rewarding experience at the contest winner ceremony at the state capitol with family members. The committee was thanked for its work.

OKLAHOMA BAR FOUNDATION BOARD OF TRUSTEES

The board approved President Shields' appointment of Barbara F. Klepper, Oklahoma City, for a one-year term to the OBF board expiring 12/31/2021.

PROFESSIONAL RESPONSIBILITY TRIBUNAL APPOINTMENTS

The board approved President Shields' reappointment of Angela Ailles Bahm, Oklahoma City, and Jody R. Nathan, Tulsa, and appointment of Charles W. Chesnut, Miami; Jennifer Irish, Oklahoma City, and Patricia G. Parrish, Oklahoma City, to the PRT with terms expiring 6/30/2023.

SUPREME COURT APPLICATION

Executive Director Williams summarized the draft of an application to the Supreme Court requesting approval for a one-time allowance to conduct the House of Delegates vote by an alternative method if circumstances require the in-person Annual Meeting to be moved to a virtual meeting.


The board voted to authorize Executive Director Williams to submit the application to the Supreme Court.

EXECUTIVE SESSION


The board voted to go into executive session to discuss a new OBA strategic communications and marketing director position and status of litigation. They met and voted to come out of executive session.

NEXT MEETING

The Board of Governors met in July and August. A summary of those actions will be published in the *Oklahoma Bar Journal* once the minutes are approved. The next board meeting will be Sept. 25.



Talley, Turner, Stice & Bertman officially announces their new firm name and the addition of former Judge Steven L. Stice as Partner.



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WAYS TO SUPPORT THE OKLAHOMA BAR FOUNDATION



Fellows Program

An annual giving program for individuals.



Community Fellows Program

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



Event Sponsor

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



Cy Pres Awards

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



Unclaimed Trust Funds

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



Memorials & Tributes

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



Interest on Lawyer Trust Accounts

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

Bank of Cherokee County • Bank of Oklahoma • BancFirst • Security Bank (Tulsa)
Bank of Commerce (Duncan) • Herring (Altus) • Grand Savings (Grove)
The First State Bank (MWC, OKC) • NBC • First National Bank (Okmulgee)
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Technology as a Solution for 2020 OBF Court Grant Recipients

By Candice Pace

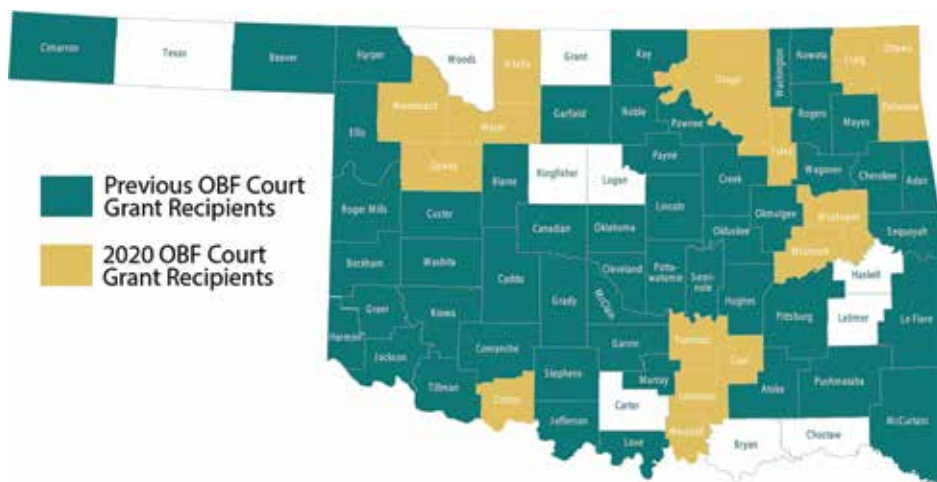
OVER THE PAST several years, most of us have come to rely on technology to make informed decisions about our lives. Whether tech-savvy or not, we are all using more technology day to day than ever before. We ask Siri to find a recipe, or we type an address into the maps application on our phone to find an unfamiliar location. The COVID-19 pandemic and new ways of relating, like social distancing, have pushed us to embrace technology to connect with each other and perhaps utilize other solutions we have long been avoiding. The experience has been no different for our courts.

While technology has provided great solutions for many problems our courts deal with, it also comes with challenges. One challenge is its rapid progression, which has left many of our courthouses in dire need of modern equipment and updates. Since budget funds for these types of updates are limited, the OBF has established, with the aid of generous cy pres awards, a special fund specifically to improve the administration of justice through important courtroom technology.

Each one of our 77 county courthouses has its own unique needs for technology. During the early years of court grants, the

OBF received many requests for audiovisual equipment updates. In recent years, requests for smartboards and tablets have increased tremendously. This year, more applicants requested Skype CART. Here are a few examples of how Skype CART provide solutions for issues our courts are currently facing:

- Smaller counties sharing court reporters will often have multiple hearings on the same date and time that require court reporters. Skype CART provides options for court reporters to cover all counties more effectively.
- Skype CART provides parents in deprived cases a way to appear remotely if they are unable to travel to court, they allow mental health defendants to appear for hearings from mental health facilities if necessary and they enable juveniles in detention to appear via Skype if they are housed in places across the state that are different from where their cases are adjudicated.





- Through Skype CART, initial appearances and arraignments of defendants can occur while the defendants are safely housed in county jails, thereby eliminating the need to publicly transport them to and from courtrooms.
- Skype CART provides ways for young children to testify in accordance with the Uniform Child Witness Testimony by Alternative Methods Act without having to face their rapists, molesters and abusers. Skype CART permits the child to testify without being in the courtroom, and at the same time, allows counsel and the defendant to see and hear the testimony and provide for cross-examination.

The OBF recently approved court grant requests for Skype CART, smartboards and other technology in the amount of \$139,279.89. Court grant recipients for 2020 are:

District Court	Grant Amount	Technology Grant
Alfalfa County	\$8,748.75	Skype CART and accessories
Coal County	\$5,283	Wi-Fi router, iPad and accessories
Cotton County	\$13,784.66	Skype CART and accessories
Craig County	\$6,005	Smartboard and accessories
Delaware County	\$12,732.62	Smartboard and accessories
Dewey County	\$8,748.75	Skype CART and accessories
Johnston County	\$21,450	Two digital recorders and large courtroom sound system
Major County	\$8,748.75	Skype CART and accessories
Marshall County	\$2,912	Three digital recorders and one lectern
McIntosh County	\$7,649.75	Skype CART and accessories
Muskogee County	\$1,607	Lectern with wireless mic and speaker
Osage County	\$11,070	Smartboard and accessories
Ottawa County	\$7,862	Smartboard and accessories
Pontotoc County	\$7,228.36	Smartboard and accessories
Tulsa County	\$6,700.50	Smartboard and accessories
Woodward County	\$8,748.75	Skype CART and accessories
\$139,279.89		

The OBF is committed to improving the administration of justice in every county court in Oklahoma. To date, the OBF has made grants to 67 of the 77 Oklahoma counties for important courtroom technology updates.

Ms. Pace is the OBF director of development and communications.

2021 YLD Leadership

Voting Opens Oct. 1, Ends Oct. 23

By Brandi Nowakowski

IT'S THAT TIME OF YEAR

Again – election season! Once again, we have the opportunity to select our young lawyer representatives. These individuals will sit on the Young Lawyers Division Board of Directors and lead our division of the Oklahoma Bar Association.

Oklahoma City attorney April Moaning will become the division chair for 2021, and many YLD members have stepped forward to run for office and serve our great organization. If you have been in practice for 10 years or less, you are a YLD member. As such, you can and should vote! The offices up for election are:

- Executive Offices: chair-elect, treasurer and secretary
- District 1: One seat; Craig, Grant, Kay, Nowata, Osage, Ottawa, Pawnee, Rogers and Washington counties
- District 3: One seat; Oklahoma County
- District 5: One seat; Carter, Cleveland, Garvin, Grady, Jefferson, Love, McClain, Murray and Stephens counties
- District 6: Two seats; Tulsa County
- District 7: One Seat; Adair, Cherokee, Creek, Delaware, Mayes, Muskogee, Okmulgee and Wagoner counties

- At-Large: Two seats; all counties
- At-Large Rural: One seat; all counties except Oklahoma and Tulsa counties

If you haven't already, you may soon be seeing social media posts asking for your vote. Please take a moment to read the candidate information and vote. It's quick and easy to vote; it just takes a minute. Voting for YLD elections is conducted by electronic ballot, which will be emailed to you on Oct. 1. You may cast your vote any time between Oct. 1 – 23. It couldn't be any more convenient to get involved with your bar association!

In order to ensure you receive a ballot, verify the OBA roster contains your current email address. You may do so by logging into MyOKBar or by calling the OBA Membership Department at 405-416-7080.

Once again, ballots must be cast no later than midnight, Friday, Oct. 23. If you do not receive a ballot, email brandi@stuartclover.com so one can be sent to you. Uncontested offices will be deemed elected by acclamation. Election results will be announced at the YLD November meeting to be held in conjunction with the OBA Annual Meeting.

2021 LEADERSHIP

2021 Chair



April Moaning

April J. Moaning received a Bachelor of Arts in economics from OSU and earned her

J.D. at the TU College of Law. While pursuing her law degree, she served as vice president of the TU Law Black Law Students Association and maintained active involvement in community service organizations. She also received numerous honors and awards, including the CALI Excellence for the Future Award in torts and the Rocky Mountain Black Law Students Association Best Oral Advocate Award.

Ms. Moaning began her legal career practicing family and criminal defense law. She later served as staff counsel at Liberty Mutual Insurance Co. where she gained experience in the areas of insurance defense and civil litigation matters involving personal injury and property damage. Currently, she represents clients in family, personal injury and civil matters. She also continues to focus on her commitment to community outreach by serving on the OBA

Diversity Committee and OBA YLD Board of Directors. She has served on the Board of Directors since January 2015 and has received multiple awards for her involvement and dedication to the division.

2021 Immediate Past Chair



Jordan Haygood

Jordan Haygood is the current chair of the Young Lawyers Division and has been a member of the

board for six years, previously holding each Executive Board position. He also serves on the OBA Board of Governors and serves as a member of its Budget Committee and Audit Committee. Additionally, he serves on the Awards Committee and the Solo & Small Firm Conference Planning Committee.

Mr. Haygood is the regional director of managed care for SSM Health – Oklahoma, where he leads all contract negotiations, drafting, management and strategy with insurance payors for SSM Health St. Anthony Hospital – Oklahoma City, Shawnee and its operating entities. He previously held the role of senior legal counsel before moving into his director position.

He was recently named to the *Journal Record* Achievers Under 40

2020 Class, which recognizes young leaders across Oklahoma. Mr. Haygood also serves as the Governance Committee Chair for Rebuilding Together OKC, where he has been on the board since 2019. He graduated from the OCU School of Law in 2013, where he received the 2013 Dean's Service Award from Dean Valerie K. Couch. He is also a 2005 graduate of Texas Christian University, where he received his B.S. in news-editorial journalism from the Bob Schieffer College of Communication. Mr. Haygood resides in Oklahoma City with his fiancé, Marty Coltrane, and their pug, Carlos.

CONTESTED ELECTIONS

The following persons have been nominated and are running contested for the following positions. Results will be announced at the YLD November meeting.

District 3



Kellie Laughlin

Kellie Laughlin serves as a staff attorney to Judge Kenneth L. Buettner of the Oklahoma Court of Civil

Appeals. She attended the OU College of Law, where she graduated

with honors and was inducted into The Order of Barristers. She was a recipient of the William T. and James T. Comfort Scholarship and was a member of the Dean's Leadership Fellows. Ms. Laughlin served as an editor on the *Oklahoma Law Review* and participated in moot court, receiving top awards in regional and national competitions. She received a Bachelor of Arts in international studies, *summa cum laud*, and a Bachelor of Arts in letters with distinction from OU. She is a member of Phi Beta Kappa.

Ms. Laughlin is a native of Woodward and enjoys contributing to her home-state community. She serves as co-chair for the OBA Women in Law Committee Social Committee and is a member of the OU Law International Business & Human Rights Young Alumni Advisory & Pro Bono Council. She also volunteers as a member of ZOOTroop, a young professionals' organization supporting the OKC Zoo, and sings as a member of the Canterbury Voices choir. During her spare time, she enjoys traveling, camping and spending time with her husband and their "family zoo" of two cats and two dogs.



Eleanor Burg

Eleanor Burg is a transactional associate at McAfee & Taft whose practice encompasses a broad range of corpo-

rate and business matters, including business entity formation and organization, mergers and acquisitions, asset and stock acquisitions and divestitures, transaction financing, contract negotiations and the development and sale of real estate.

She graduated with honors from the OU College of Law in 2018, where she served as managing editor of the *Oklahoma Law Review*, director on the Board of Advocates, member of the ABA National Appellate Advocacy Team and was named to The Order of Barristers. She was also the recipient of the OBA's Outstanding Senior Student Award and the Joel Jankowsky Award, which recognizes the graduating student who exemplifies the highest standard of excellence in leadership, scholarship and selfless service to others.

In her free time, Ms. Burg serves as the captain of her ultimate frisbee team and recently established and currently leads the first Diversity Committee for the Oklahoma City Ultimate Association. From 2018 to 2019, she served as a team leader with The Mine, advising a team of local young professionals in forming a national expansion plan for an Oklahoma City nonprofit organization.

While an undergraduate, she completed a summer internship in the congressional office of U.S. Rep. Dan Boren as part of the Ewing Fellowship Program at OU. After graduating *cum laude* with a bachelor's degree in political science from OU and prior to

entering law school, she worked as a legal assistant for a law firm in San Antonio, Texas.

District 7



Margaret Cook

Margaret Cook attended the TU College of Law after working for several years with Help-In-Crisis, a domes-

tic and sexual violence service agency. After graduating with her J.D. in 2012, she returned to Help-In-Crisis to serve as its executive director. During her years as executive director, Ms. Cook established a legal program to assist survivors of domestic violence and sexual assault. She received recognition for her service in 2016 with the Dianne Barker Harold Award.

In 2017, she went on to open her own practice in Tahlequah and considers herself, not just an attorney, but a legal advocate. She has a passion for assisting victims of violence and strives to help them get back on their feet. She has an exceptional skill for listening to client's needs and developing a legal plan that is specifically developed for each individual. She strives to make each and every client feel valued.

She is a member of the American Bar Association, OBA Family Law Section and OBA Estate Planning, Probate and Trust Section. She has also served as YLD representative for District 7 from 2018 – 2020.



Chase McBride

Chase McBride is a partner at the Ritchie, Rock, McBride & Atwood Law Firm working primarily out

of the Pryor office. He is currently serving as a YLD board member and president of the Mayes County Bar Association.

He attended TU where he received his degree in finance and a minor in economics. He attended graduate school at OU, where he received both his J.D. and Master of Business Administration. He also received a certificate in law and entrepreneurship from the OU College of Law. His areas of practice are diverse but largely include business/corporate and contract litigation, family law, criminal defense and the protection of civil and property rights.

Mr. McBride has litigated federal business actions, organized multi-million-dollar business transactions and transfers, represented high asset divorce estates and successfully defended a first-degree murder charge from district court all the way to the Oklahoma Court of Criminal Appeals. He has also represented three separate Oklahoma police chiefs in wrongful termination issues and employment disputes.

Outside the courtroom, he tries to promote comradery among lawyers and further legal education in conjunction with the bar association. He has been published in the *Oklahoma Bar Journal* regarding court-ordered, grandparental rights and interlocutory appeals and presented CLEs on the two issues. Outside of the legal world, he is married to his wife, Rachel, and has two young daughters. He enjoys fly fishing when he can find time.

UNCONTESTED ELECTIONS

The following persons have been nominated. They are running uncontested and will be declared elected at the OBA YLD meeting in November.

Chair-Elect



Dylan Erwin

Dylan Erwin joined Holladay & Chilton in 2018. Prior to entering private practice, Mr. Erwin was

an assistant district attorney for Comanche and Cotton counties. During his time in the DAs office, he was able to hone his skills as a trial attorney while serving the people in his hometown of Lawton. After leaving the DAs office, he brought his trial experience with him into the private sector with Andrews Davis, where he worked primarily in their criminal law and civil litigation practice areas. As a criminal defense attorney, he has represented clients in matters ranging from speeding tickets and misdemeanor DUIs to felony drug charges and multi-defendant racketeering prosecutions.

As a civil litigator, he has handled cases ranging from small claims disputes to large scale construction litigation, complex business litigation and employment and labor claims on behalf of both the employer and the employee. A fifth generation Oklahoman, Mr. Erwin graduated *magna cum laude* from OU in 2011 with a Bachelor of Arts degree in English and a minor in classical cultures. He received his J.D. from the OU College of Law in 2014. While in law school, he served as president of the Student Bar Association and vice justice of the Harlan Chapter of Phi Alpha Delta law fraternity. He received the Student Bar Association Prize for

his service to the student body, the Public Service Award for his pro bono work in both civil and criminal legal clinics, a Top Ten Speaker Award in moot court and was included on the dean's list for his academic achievements. In his free time, he enjoys reading all the books he didn't have time to read while in law school, writing short fiction, traveling and attempting to live out his high school dream of being the frontman of a garage band.

Treasurer



Caroline Shaffer Siex

Caroline Shaffer Siex is a December 2016 graduate from the TU College of Law. She currently works

at the Tulsa firm Gibbs Armstrong Borochoff PC handling civil litigation, nursing home defense and family law. She is a co-chair for the OBA Women in Law Committee's networking subcommittee and a member of the Tulsa County Bar Association and Hudson Hall Wheaton Chapter of the American Inns of Court.

Ms. Siex has been serving the OBA as a YLD Board of Directors member since 2017. She served as the Hospitality Chair for the division from 2018 to 2019. In 2020, she has been serving as the board's secretary while also serving as the YLD District Representative for District 24 (Oklahoma and Arkansas) of the ABA. During her time on the board, she has shown her willingness and effort to help other young lawyers, especially those just emerging into practice, from passing out bar exam survival kits, hosting a swearing-in happy hour for newly admitted Tulsa area lawyers and attending the TU bar preparation class

to provide information about the Oklahoma bar and advice to law students.

She has also contributed to the *Tulsa Lawyer* magazine advocating for firms to expend time and effort into helping their young lawyers grow in their careers. She wants to continue to serve on this board to bring more networking opportunities to the young lawyers in Tulsa and to ease the daunting transition from law school into the legal field for newly admitted lawyers.

Secretary



Laura Talbert

Laura Talbert is a shareholder at Stockton Talbert PLLC in Oklahoma City. Her practice primarily

focuses on complex civil litigation and employment law. She graduated from the OU College of Law in 2012. After graduating, she worked as a prosecutor. Prior to starting her own firm, Ms. Talbert also worked for the Oklahoma Department of Corrections General Counsel's Office. In her free time, she enjoys playing volleyball, watching the Thunder and cheering on the Sooners. She has been on the YLD board for three years and looks forward to continuing her service in a leadership role.

District Six

Caroline Shaffer Siex

See bio above.

ABOUT THE AUTHOR

Ms. Nowakowski is YLD immediate past chairperson and chairs the division's Nominating Committee. She practices in Shawnee and also serves as OBA vice president. Keep up with the YLD at www.facebook.com/obayld.

FOR YOUR INFORMATION



VOLUNTEERS NEEDED FOR EARLY SETTLEMENT MEDIATION PROGRAM

Thank you to OBA members who have already signed up for our Let's Talk Housing program, announced in August, to address the eviction surge following the end of the CARES Act moratorium in July.

In partnership with the Oklahoma Supreme Court Early Settlement Program and the Access to Justice Commission, the **OBA is offering free mediation training, including 6.5 hours of MCLE credit**, to

equip more attorneys to be involved in the state's Early Settlement Mediation program.

The OBA's Let's Talk Housing program is a collaboration that has allowed nonprofit organizations focusing on the housing crisis, the OBA and Oklahoma Supreme Court Access to Justice Commission and Early Settlement Program to respond to the ongoing economic consequences of the pandemic that are now reaching the courts.

"I appreciate the leadership by the president, the Board of Directors and the executive director of the Oklahoma Bar Association in coordinating with lawyers all over the state to assist the public in dealing with the very serious issue of evictions," said Oklahoma Supreme Court Chief Justice Noma Gurich. "Our district judges are adaptable, resilient and resourceful. In times of strife, people often turn to the courts to find answers. Together, with the assistance from Oklahoma lawyers, the judicial system will remain strong and accessible so that the best interests of the public are served."

As the federal moratorium that stalled evictions expired, President Susan Shields asks Oklahoma attorneys to volunteer to assist in the Early Settlement Program in an effort to find solutions short of evictions and civil trials by getting the necessary training to serve as mediators.

President Shields explains, "Our goal is for Oklahoma attorneys across our state to get training in the Early Settlement Mediation program so we can apply our expertise to help in this emergency. Mediation has proven to be an effective and lower cost tool to help settle disputes between landlords who rely on rental income and tenants who might face homelessness in this unprecedented time that finds many unemployed and unable to take care of basic expenses."

"Lawyers are looking for opportunities to help in this time of crisis, and the Let's Talk Housing program is an important way to give back to people in our communities that are hurting and to help relieve the stress on the court system," said President Shields who plans to be among the first OBA members to take the course.

For additional information on becoming a volunteer mediator for the Early Settlement Program, email marissa.fairbanks@oscn.net.

OBA MEMBER REINSTATEMENT

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

Michelle J. Millben, OBA 30403
801 N. Pitt Street #309
Alexandria, VA 22314

OBA MEMBER RESIGNATIONS

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

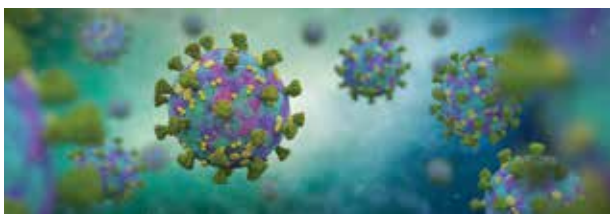
Alvin Daryl Webster, OBA No. 16071
Pt. Lena Loop Rd.
Juneau, AK 99801

Jonathon Cory Sanchez
OBA No. 33606
17503 25th Ave NE, K207
Marysville, WA 98271



KICK IT FORWARD TOURNAMENT TO BE MOVED TO SPRING 2021

The Young Lawyers Division has decided to postpone the annual Kick It Forward Kickball Tournament. The tournament will now take place in April. More details can be found on the Kick It Forward Kickball Tournament webpage at www.okbar.org/kif.



OBA COVID-19 RESOURCES

The OBA has compiled a list of resources from the state of Oklahoma, the federal Centers for Disease

Control and Prevention, Federal Emergency Management Agency and the Oklahoma district courts in order to help Oklahoma lawyers during the COVID-19 pandemic. The list is updated frequently as more resources and information becomes available. A few notable resources include:

- **CARES Act Resources for Property Owners and Renters:** The OBA Access to Justice Committee wants all Oklahoma lawyers to be aware of the basic provisions important to both property owners and renters under the CARES Act. They have created a guide designed to inform about CARES Act provisions that impact both plaintiffs and defendants.
- **Oklahoma Court Resources:** Information about the impact COVID-19 is having on court proceedings, including guidelines for Oklahoma trial judges who may have attorneys wishing to conduct depositions by videoconference.
- **Law Practice Tips:** OBA Management Assistance Program Director Jim Calloway posts daily tips to help lawyers as the COVID-19 crisis continues to create unique challenges. Find some of Mr. Calloway's top tips featured on page 44.

For the full list of the latest OBA pandemic resources updates, visit www.okbar.org/covid19.

WOMEN IN LAW CONFERENCE POSTPONED, SPOTLIGHT WINNERS TO BE HONORED

In consideration of keeping people safe during this pandemic, the Women in Law Committee has decided to cancel its annual conference for this year. The event, originally scheduled for Oct. 16 in Oklahoma City, will be moved to 2021. An important conference tradition is to present five women with Mona Salyer Lambird Spotlight Awards, honoring recipients who have distinguished themselves in the legal profession and who have lighted the way for other women. The awards will be bestowed this year, and a plan to honor them virtually is being developed now. Watch for more details to come!

ASPIRING WRITERS TAKE NOTE

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

ON THE MOVE

Madison Cataudella has joined the Tulsa office of Charney Brown LLC. She will focus on corporate representation at the Oklahoma Corporation Commission, with additional emphases in the firm's estate planning and probate branches. Ms. Cataudella received her J.D. and LLM from the TU College of Law in 2019.

Kelli Hilgenfeld has joined the Oklahoma City office of Evans & Davis as an associate attorney. She received her J.D. from the OU College of Law in 2010. Ms. Hilgenfeld will practice primarily in the areas of estate planning, business planning, trust administration and probate law.

Caroline G. Lindemuth has joined the Tulsa office of Crowe & Dunlevy as an associate attorney. She received her J.D. from the TU College of Law in 2019. Ms. Lindemuth will be a member of the firm's Labor and Employment and Litigation and Trial Practice Groups.

Daniel J. Talbot has established Talbot Law Group PLLC, located at 2000 N. Classen Blvd., Ste. A200, in Oklahoma City. He received his J.D. from the OCU School of Law in 1998. **C. Magan Graham** has joined the firm as an associate attorney. She received her J.D. from the OU College of Law in 2005.

Maria T. Kolar will join the OCU School of Law as a faculty member this fall. She received her J.D. from Yale Law School in 1995. After graduating, Ms. Kolar served as a law clerk on the U.S. Court of Appeals for the 7th Circuit in Chicago. She then served as a law clerk on the Oklahoma Court of Criminal Appeals for nearly 13 years and as a law clerk on the U.S. District Court for the Western District of Oklahoma for two years, focused solely on capital habeas corpus cases. She previously served as a visiting assistant professor at the OU College of Law, where she taught legal research and writing. Most recently, she worked in the Homicide Direct Appeals Division of the Oklahoma Indigent Defense System.

John Alberts and **Kirk Olson** have established Bison Law Firm, located at 1609 Professional Circle in Yukon. The firm will focus on cases involving catastrophic injury, wrongful death, semi-truck collisions, car and motorcycle crashes, oil field accidents, fall events and other incidents involving serious personal injury. Mr. Alberts, a former assistant district attorney for Kay County and a Yukon mayor, will serve as managing partner. The firm can be reached at 405-407-0111.

KUDOS

Retired Judge Timothy Colbert will be inducted into the Chickasaw Hall of Fame. He received his J.D. from the OCU School of Law in 1976. In 1979, he was elected to the Chickasaw Tribal Council District 5 and the new Chickasaw Tribal Legislature in 1983, where he was a member of the tribal health care and commerce committees. Judge Colbert served as associate district judge for Murray, Johnston, Marshall and Love counties. He retired in 2019 after 40 years as a Chickasaw legislator.

Judge Jerry Moore, a former district attorney and resident of Tahlequah, was sworn in as a Cherokee County special judge on June 30. The office of special judge covers Cherokee, Adair, Muskogee, Wagoner and Sequoyah counties. He received his J.D. from the OU College of Law in 1991. After practicing with Baker and Baker, he was appointed to assistant district attorney in 1995. In 2006, Judge Moore was elected district attorney for District 27 and then opened his own practice.

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:

Lauren Rimmer
Communications Dept.
Oklahoma Bar Association
405-416-7018
barbriefs@okbar.org

Articles for the November issue must be received by Oct. 1.



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

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

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

IN MEMORIAM

Judge Thomas H. Alford of Muskogee died Aug. 4. He was born Dec. 16, 1949, in Muskogee. Judge Alford, a graduate of Muskogee Central High School, received his J.D. from the OU College of Law in 1976. After working as an associate with Wilcoxon, Cate and Scherer, he became an assistant district attorney, and ultimately chief prosecutor for the Muskogee County district attorney's office. He was appointed a special judge in Muskogee County in 1985 and was selected to serve as an associate district judge later that year. In 1998, Judge Alford was elected a district judge for Oklahoma's 15th Judicial District and was re-elected four times before retiring in January 2019. Memorial contributions may be made to Grace Episcopal Church or CASA for Children Inc.

Steven L. Barghols of Oklahoma City died July 29. He was born May 13, 1951, in Cherokee, Iowa. Mr. Barghols graduated from OU with his bachelor's degree in 1972 and received his J.D. from the University of Texas School of Law in 1976. He began his career as an oil and gas lawyer but later found his calling in mediation and arbitration, practicing at the Oklahoma City firm of Hampton Barghols Pierce PLLC. Mr. Barghols served as president of the Oklahoma County Bar Association, Oklahoma County Bar Foundation, William J. Holloway Jr. American Inn of Court and the Edmond Public Schools Foundation. He was a recipient of the OBA's Neil E. Bogan Professionalism Award and the OCBA's Bobby G. Knapp Bar Leadership Award. Memorial contributions may be made to

the OCBA, Legal Aid Services of Oklahoma or the Regional Food Bank of Oklahoma.

John Michael Baum of Edmond died July 15. He was born May 30, 1944, in Ponca City. Mr. Baum received his bachelor's degree from OU in 1966 and his J.D. from the OU College of Law in 1970.

Katheryn K. Buhle of Boca Raton, Florida, died June 19. She was born Sept. 21, 1950. Ms. Buhle received her J.D. from the OCU School of Law in 1982.

Robbie Emery Burke of Tulsa died May 22. She was born Mar. 23, 1952, in Duncan. Ms. Burke graduated from OU with her bachelor's degree and received her J.D. from the TU College of Law in 1982. She worked at Sneed Lang before going into private practice. She practiced mainly in the areas of elder law, estate planning, guardianships and title law. Memorial contributions may be made to the First Presbyterian Church of Tulsa Children's Ministry or Tulsa Lawyers for Children.

Ronald Deane Fulkerson of Oklahoma City died July 10. He was born Dec. 11, 1932, in Oklahoma City. **After graduating from high school, he enlisted in the U.S. Army and served in the Korean War.** Mr. Fulkerson received his J.D. from the OCU School of Law in 1967. The founding attorney of Fulkerson & Fulkerson PC, he tried more than 100 cases over his 53-year career. Memorial contributions may be made to The Toby Keith Foundation's OK Kids Korral.

Douglas R. Haughey of Tulsa died May 2. He was born Aug. 23, 1956, in Champaign, Illinois. He graduated from Illinois State University and received his J.D. from the TU College of Law in 1981. Following graduation, Mr. Haughey joined the firm of Doyle, Harris, Davis & Haughey, where he practiced until his death. Memorial contributions may be made to the First Presbyterian Church of Champaign, Illinois.

Marilyn K. Hughes of Oklahoma City died June 24. She was born April 14, 1949, in Duncan. After graduating with her bachelor's degree from OSU, Ms. Hughes taught English and French at Tulsa's Union High School. She received her J.D. from the TU College of Law in 1975. Ms. Hughes was general counsel for Sonic Corp. before becoming executive director of the Oklahoma Ethics Commission, a position she held for 25 years. Memorial contributions may be made to Bethlehem Primitive Baptist Church or Harmony Plains Singing School.

J. C. Joyce of Tulsa died July 11. He was born Jan. 23, 1940, in Huntington, Arkansas. Mr. Joyce graduated from Tulsa Central High School in 1958. While attending law school, he was editor in chief of the Tulsa Law Journal and was chosen as the top law student by the OBA and Tulsa County Bar Association. He received his J.D. from the TU College of Law in 1966 and joined the firm of LeRoy Blackstock, where he later became partner. He spent most of his 54-year legal career defending the constitutional religious rights and freedoms of churches and clergy throughout the U.S.

Judge Neal E. Merriott of Palm Harbor, Florida, died July 8. He received his bachelor's degree from OSU and his J.D. from the OU College of Law in 1964. Judge Merriott served as a McCurtain County district judge from 1972 to 1979 and practiced law in Atoka County for 25 years. He was appointed an associate district judge in the 25th Judicial District in Atoka County in 2003.

Evelyn B.L. Phyffer of Las Vegas died July 11. She received her J.D. from the OU College of Law in 1981.

Robert Unruh II of Tulsa died May 29, 2017. He was born Nov. 16, 1929, in Tulsa. Mr. Unruh attended Will Rogers High School, where he played on the golf team. He captained the TU golf team for three years while earning his bachelor's degree. He received his J.D. from the TU College of Law. **After graduating, he was in the U.S. Army with the 10th Mountain Division for two years and was stationed in Germany.** Following his service, he returned to Oklahoma to coach TU's golf team. Mr. Unruh was later inducted into TU's Athletic Hall of Fame for his achievements in golf, which included winning 152 golf championships. He also worked for the Tulsa Metropolitan Utility Authority for over 45 years as legal counsel.

Charles D. Williams III of Anthony, Kansas, died July 1. He was born April 11, 1960, in Anthony. Mr. Williams received his J.D. from the TU College of Law in 1994. He served as past master and past district deputy grand master of the Anthony Masonic Lodge #200. He was a member of the Anthony Kiwanis Club, serving as past president, past lieutenant governor and president of the Kansas Kiwanis Foundation. Memorial contributions may be made to the Anthony Masonic Lodge #200, Anthony Kiwanis or First Baptist Church of Anthony.

J•Douglas Williams of Woodward died Aug. 7. He received his J.D. from the OU College of Law in the late 1960s and was in the first class of legal interns to be licensed by the Oklahoma Supreme Court. Mr. Williams was a special agent with the FBI for four years, working at offices in Washington D.C., Birmingham, Alabama and Los Angeles. He was the voice of Woodward's K-101 Morning Show and received a Marconi Award for Radio Personality of the Year. He served as president and CEO of Omni Communications Inc. for 40 years and the president and general manager of Omni Media Group. Mr. Williams was a member and former president of the Oklahoma Association of Broadcasters. Memorial contributions may be made to the Classic Bowl Foundation.

David L. Wilson of Stigler died June 14. He was born Sept. 3, 1949, in Roff. Mr. Wilson received his J.D. from the OU College of Law in 1985.

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NOVEMBER

Alternative Dispute Resolution

Editor: Aaron Bundy
aaron@bundylawoffice.com
Deadline: Aug. 1, 2020

DECEMBER

Wellness

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

2021 ISSUES

JANUARY

Meet Your Bar Association

Editor: Carol Manning

FEBRUARY

Marijuana and the Law

Editor: Virginia Henson
virginia@phmlaw.net
Deadline: Oct. 1, 2020

MARCH

Probate

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

APRIL

Law Day

Editor: Carol Manning

MAY

Personal Injury

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

AUGUST

Tax Law

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

SEPTEMBER

Bar Convention

Editor: Carol Manning

OCTOBER

DUI

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

NOVEMBER

Elder Law

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

DECEMBER

Labor & Employment

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



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Maggie Martin joins Crowe & Dunlevy's Oklahoma City office expanding the firm's Healthcare Practice Group capabilities.

Having served for more than a decade as in-house legal counsel for INTEGRIS Health, Inc., **Maggie** provides healthcare industry clients—including healthcare institutions, hospitals and physicians—with invaluable counsel regarding transactional, operational and regulatory compliance matters. Her extensive experience with health law issues enhances our solutions for your legal challenges.

We welcome **Maggie** to the firm.



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Dancing Alone

By Travis Pickens

THE CANADIAN COMEDY series *Schitt's Creek* tells the story of the Roses, a monied family that loses its fortune. They are forced to relocate to a small town the father had bought his son as a joke. Isolated from most people, even themselves, by their former wealth and extravagant lifestyle, the family slowly learns the importance of authentic connections with each other, friends and even the off-beat, otherwise ordinary folks that play big roles in their lives. One season ends in a barn dance, where the Roses, at last, drop their designer luggage of judgments, bitterness and regrets and join in. They are grateful for their acceptance by the town and now see everyone and everything through new, wiser eyes.

We are all emotionally isolated now by a pandemic. It has caused us to lose connections almost

instantly to our friends, to some extent our families and to our larger menagerie of colleagues and characters. Finding those magical “barn dance” moments and finding gratitude within the pandemic bubble is difficult. For most, a blind proclamation that “There is a reason for everything,” does not work. After all, so many have lost their lives or perhaps a close friend or family member. No obvious “reason” in that. We are left in a strange and sometimes terrifying time, waiting for a vaccine.

Like Glinda the Good Witch told Dorothy that she herself had the power to go back to Kansas, we have the power within ourselves to find gratitude. In these often-solitary days, we can be glad to still practice and make a living, able to work for ourselves, sometimes with just a smartphone and computer. Many of us work

in companies, agencies, firms and courts that have operated more like a family, complete with occasional dysfunction, but overall, with real care and mutual concern.

Even alone, we can be grateful for the significance of our profession. As lawyers, we have always been in the middle of making civilizations and managing them, and that, despite the virus, hasn't changed. The world is now evolving in some dramatic ways, and lawyers will again be at the center of things, representing the oppressed and privileged, the ordinary and extraordinary, the old ideas and the new. Almost nothing important happens without our involvement somewhere or somehow.

And again, alone we can be thankful that like the characters of *Schitt's Creek*, we will one day come together again with fresh perspectives and, at least momentarily, drop our insecurities and pains because they will not seem so significant then. There will be barn dances aplenty, careless and easy, intimate and fun – the kind with human touch and close conversations, with drinks and smiles, great music and every form of love. Gratitude will come easy.

That day has not yet come but will. For now, we must learn to dance alone, with gratitude, and if there is indeed a reason for the pandemic, maybe that is it.



Mr. Pickens practices in Oklahoma City.

WEDNESDAY,
SEPTEMBER 30, 2020
NOON - 1 P.M.



MCLE 1/0



FEATURED PRESENTER:
Amy Wood, Psy.D.

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