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THE OKLAHOMA BAR Journal

Volume 92 — No. 3 — March 2021

Marijuana
and the Law

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Conscious Legal Minds



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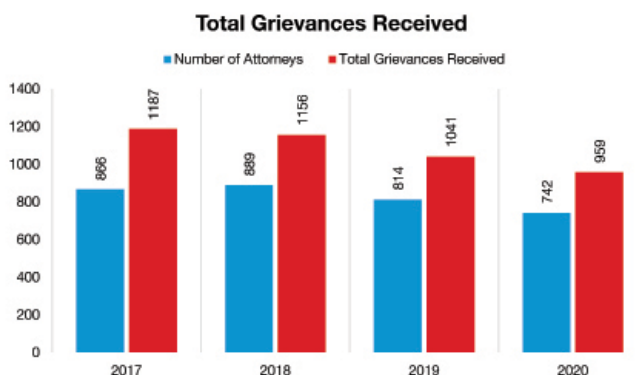
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Civility: A Cornerstone of Our Civilization

By Mike Mordy

HARRY WOODS, A PAST PRESIDENT of the Oklahoma Bar Association and longtime Crowe & Dunlevy attorney, passed away in January. He served as OBA president in 2004, which was the first year I served on the OBA Board of Governors. I had not previously been involved with the Oklahoma Bar Association in any way, and I remember my wife and I first attending an OBA social event where I met Harry Woods. I was immediately struck by how polite, courteous and attentive he was and how he was very much a gentleman. He was the epitome of civility. I never had a case with him but remember he and I both being at a motion docket where I noted his same civility in that professional setting.

Civility is an important attribute of mankind and is a cornerstone of our civilization. Civility is especially important in our profession. Justice Sandra Day O'Connor said, "Unfortunately civility is hard to codify or legislate, but you know it when you see it. It's possible to disagree without being disagreeable."



A handwritten signature in dark ink, appearing to read "Mike Mordy".

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There has been, and still is, much discord in our country. Some members of the media, including reporters, appear to have lost their civility, as evidenced by their manner in interrupting, patronizing and failing to respect those who are in governmental authority when interviewing them. The use of emails has in some way, and in some cases, caused deterioration in the civility of our communications with each other. Sending a letter was our previous means of communicating, which required some forethought in dictating or drafting the correspondence, having it typed, proofing it, maybe retyping it and then signing and sending. Now we typically

communicate through email, which can be prepared and sent without much forethought and sometimes sent with passive aggression – or more.

I mention all of this because we are currently surrounded by hostility in the news media and social media, but we as

... we are currently surrounded by hostility in the news media and social media, but we as attorneys must maintain our civility in dealing with the public and especially in dealing with each other.

attorneys must maintain our civility in dealing with the public and especially in dealing with each other. We need to be reminded that "civility is not a sign of weakness," as stated by John F. Kennedy, nor is it a quaint notion, but rather is a matter of being courteous and polite.

I hope that we can continue to be courteous, polite and civil towards each other, and the public, and not fall into some of the current strife and discord.

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Does the Federal Criminal Code Allow Landlords to Evict Residential Tenants for Possession of Marijuana?

A Look into HUD Regulations and Federal Preemption

By Orion A. Strand

FOLLOWING THE ENACTMENT OF MEDICINAL CANNABIS and marijuana decriminalization laws across the country, one question residential landlords have repeatedly asked is: Can I evict my tenant for using or possessing medicinal cannabis on the basis that such activity remains a violation of federal criminal law? The answer to this question is relatively simple in states with no protections for marijuana use because such use would invariably violate the state's criminal drug code. However, where states have afforded protections for medical marijuana users, the answer is a bit more nuanced.

Prior to the passage of the Oklahoma Medical Marijuana and Patient Protection Act (OMMPPA), simple possession of any kind of marijuana product on leased property would constitute grounds for eviction under the Oklahoma Landlord Tenant Act as a violation of the tenant's duty to "not engage in any drug-related criminal activity on or near the premises."¹ This basis for filing a forcible entry and detainer action is separate from the kind of criminal activity that "threatens the health, safety or right of peaceful enjoyment of the premises by other tenants ... or is a danger to the premises."² Not every kind of criminal act warrants an eviction judgment, but the Legislature intended to make

clear that any kind of drug-related criminal activity should qualify. Following the legalization of medicinal cannabis in Oklahoma, landlords have questioned whether they can continue to evict tenants on the same basis.

The OMMPPA actually contains very few protections for medical marijuana license holders facing adverse residential leasing actions. Unlike the prohibition of discrimination in employment practices, nothing prohibits landlords from refusing to enter into lease agreements with medical marijuana patients solely on the basis of their status as a medical marijuana licensee. Landlords may lawfully refuse to lease to medical marijuana licensees and

may further "prohibit ... the consumption of medical marijuana or medical marijuana product by smoke or vaporization on the premises, within the structures of premises or within ten (10) feet of the entryway to the premises."³ Landlords thus face very few barriers in heavily restricting the growing, smoking and vaporizing of marijuana by tenants on residential property because these activities pose the greatest threat of either physical harm to the property itself or constituting a nuisance to neighboring tenants. Two activities landlords may not prohibit under the act include simple possession and consumption of cannabis by means other than smoking or vaporization.⁴

This raises the question of whether the federal Controlled Substances Act (CSA)⁵ preempts a state's legalization or decriminalization of marijuana for purposes of enforcing a landlord's right to prohibit drug-related criminal activity on leased housing. The problem is especially apparent in properties that participate in one of the Department of Housing and Urban Development's (HUD) subsidized housing programs because the Quality Housing and Work Responsibility Act of 1998 (QHWRA)⁶ requires such properties to establish lease provisions prohibiting all drugs scheduled under the federal Controlled Substances Act. In a 2014 memorandum, following several states' enactment of marijuana legalization and decriminalization laws, HUD clarified that, "Because the CSA prohibits all forms of marijuana use, the use of 'medical marijuana' is illegal under federal law even if it is permitted under state law ... Owners of federal assisted housing are required by QHWRA to deny admission to any household with a member who the owner determines is, at the time of application for admission, illegally using a controlled substance as that term is defined by the CSA." However, HUD and the local public housing agencies do not enforce the prohibition of controlled substances on publicly subsidized housing but leave the matter to the discretion of the owner as to whether to evict the tenant for cause on that basis.⁷

The underlying issue here is whether the discretion afforded to such landlords under federal law creates an independent basis for eviction due to drug-related criminal activity, which would appear to preempt a state's protection of medicinal cannabis use on residentially leased property. Most

courts considering this question have answered in the negative. In one case reported out of Maryland, a landlord of a federally subsidized home filed an eviction for violation of a lease prohibiting simple possession of a small amount of marijuana on the premises.⁸ The lower court granted summary judgment to the landlord on the basis that, even though possession of fewer than 10 grams was not a violation of the state criminal code, marijuana is still a Schedule I substance under the CSA, and a landlord retains federally mandated (unreviewable) discretion on how to enforce its drug-free property policy.⁹ The Court of Special Appeals of Maryland reversed, finding a lack of any express preemption; that is, even if the federal criminal code preempts a state's decriminalization or legalization of marijuana (and it does), neither Congress nor HUD have issued mandates that preempt a state's ability to equitably enforce its landlord tenant laws.¹⁰

In the absence of federal preemption requiring states to enforce federal prohibitions of marijuana on leased premises, the matter would come down to a state court's interpretation and enforcement of its own landlord tenant law. This line of reasoning pits two separate Oklahoma statutes against each other: 41 O.S. §132(D) (creating a right of eviction for "any drug-related criminal activity") and 63 O.S. §427.8 (C) ("a medical marijuana patient shall not be denied the right to consume or use other marijuana products which are otherwise legal and do not involve ... smoking or vaporization").

The phrase "any drug-related criminal activity" could be construed to encompass activity prohibited under either the state or federal criminal codes. However, this would come into conflict with the state's protection of marijuana

use and possession under the OMMPPA. A commonly applied rule of statutory construction is that where there is an irreconcilable conflict between two statutory provisions, the Legislature is deemed to have been informed of the earlier provision when it enacted the later one.¹¹ Thus, the statute enacted later in time controls, and it is highly likely the state of Oklahoma would uphold the state's protections afforded to medical marijuana license holders over the civil enforcement of the federal criminal code.

ABOUT THE AUTHOR



Orion Strand practices at the Oklahoma City firm of Holden Litigation, focusing primarily on the areas of civil defense and tort claims. He has served as special features editor for the *American Indian Law Review* and is currently an OBF High School Mock Trial program committee member. He received his J.D. from the OU College of Law in 2017.

ENDNOTES

1. 41 O.S. §127(8).
2. 41 O.S. §132(D).
3. 63 O.S. §427.8(C).
4. *Id.*
5. 21 U.S.C. Section 801 *et seq.*
6. 42 U.S.C. 13662.
7. QHWRA section 577.
8. *Hosford v. Shateau Foghorn, LP*, 229 Md.App. 499, 145 A.3d 616 (Md. App. 2016).
9. *Id.* at 145 A.3d 620.
10. *Id.* at 229 Md.App. 523-524.
11. See, e.g., *Upton v. State ex rel. Dept. of Corrections*, 2000 OK 46; *K.M.C. v. State*, 221 P.3d 735, 2009 OK CR 29.

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Phil Fraim, President, Oklahoma Attorneys Mutual Insurance Company (OAMIC)
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- 12:30 p.m.** **Professionalism in the Practice of Law**
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- 1:10 p.m.** **Break**
- 1:20 p.m.** **Trust Accounting and Legal Ethics**
Gina Hendryx, OBA General Counsel
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- 4 p.m.** **Adjourn**

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Marijuana and Family Law

By Aaron Bundy

THE FEDERAL CONTROLLED SUBSTANCES ACT created categories of drugs called “schedules.”¹ “Schedule I Drugs,” according to the United States Drug Enforcement Agency, have the following characteristics:

- The drug or other substance has a high potential for abuse.
- The drug or other substance has no currently accepted medical treatment use in the U.S.
- It has a lack of accepted safety for use under medical supervision.²

No prescriptions may be written for schedule I drugs. Marijuana is categorized by the federal government as a schedule I drug, alongside drugs such as heroin, LSD and ecstasy. For decades, in child custody cases, possession or use by a parent of any schedule I drug, including marijuana, has been treated as grounds for emergency custody orders removing the minor child or children from that parent’s care. Recent changes in societal attitudes and in Oklahoma law have significantly changed how marijuana is viewed by family law courts.

ATTITUDES TOWARD MARIJUANA HAVE CHANGED OVER TIME

As a nation, our cultural views of marijuana have shifted over the past several decades. One study about why this shift occurred attributes much of the change to media framing. It found a correlation between news media discussing marijuana’s potential medical uses and increased support for legalization.³ As attitudes toward marijuana changed, states began

exploring their options. In 2013, Oklahoma commissioned a poll to gauge support for an overhaul of marijuana policies. The poll showed lawmakers that medical marijuana had significant support, with support for decriminalization also greater than 50%.⁴

In 2018, Oklahoma voters approved State Question 788, which created a new section of law called the “Oklahoma Medical Marijuana and Patient Protection Act.” The act permits issuance of medical marijuana licenses to qualified Oklahoma residents and permits the possession of limited amounts of marijuana by license holders.⁵ The new law in many ways conflicts with the federal Controlled Substances Act, including making a controversial distinction between a “recommendation” and a “prescription” by a physician for a medical marijuana patient license to protect physicians from the loss of their licenses or from federal prosecution.⁶

OKLAHOMA’S MEDICAL MARIJUANA LAW PROTECTS LICENSED PARENTS

The law also attempted to provide certain protections for license holders, including the following:

No medical marijuana license holder may be denied custody of or visitation or parenting time with a minor, and there is no presumption of neglect or child endangerment for conduct allowed under this law, unless the behavior of the person creates an unreasonable danger to the safety of the minor.⁷

The law disrupted how marijuana use may be viewed and treated by family court judges overseeing child custody cases. Absent a finding of “an unreasonable danger to the safety of the minor,” possession or use of marijuana by a license holder is no longer a ground for an emergency custody order. The law leaves judges, attorneys and parents with many unaddressed questions concerning the implications



of marijuana possession and use by a parent, including:

- What are the consequences for possession or use of marijuana by a parent who does not have a medical marijuana license?
- What constitutes “an unreasonable danger” to the safety of a minor by a medical marijuana license holder?

SUBSTANCES AND BEST INTERESTS

Family law judges enjoy a broad range of discretion when making best interests decisions for and concerning minor children. When considering a parent’s behavior and a child’s best interests, “the

determinative factor is always the effect of the parent’s behavior on the child.”⁸ Put another way, when a parent’s behavior is legally or morally questioned, there must be a “nexus” present such that the “effect of that parent’s behavior is detrimental to the best interests of the child.”⁹ In other words, a parent may be involved in certain types of illegal or immoral behavior without consequence to their parental rights, provided there is no negative impact on their minor children.

In that light, there are at least two statutory provisions outside of Oklahoma’s medical marijuana laws for judges, attorneys and parents to consider when marijuana possession or use is an issue. Oklahoma law provides for

a rebuttable presumption that a parent is affirmatively unfit if the parent is “an alcohol or a drug-dependent person as established by clear and convincing evidence and who can be expected in the near future to inflict or to attempt to inflict serious bodily harm to himself or herself or another person as a result of such dependency.”¹⁰ Oklahoma law requires emergency custody motions to demonstrate “that the child is in surroundings which endanger the safety of the child and that if such conditions continue, the child would likely be subject to irreparable harm.”¹¹ These two statutes impose a nexus requirement with specific, heightened burdens – one requires clear and convincing evidence, as

Although mere possession or use of marijuana may be a nonissue in some cases, if the presence or use of marijuana creates a danger for a minor child, family law judges may intervene.

opposed to the typical preponderance of the evidence standard, of harm to someone in the near future, and the other requires dangerous surroundings which, without intervention, would likely lead to irreparable harm.

Possession or use of marijuana by the parent may be analogous in some ways to other substances, such as alcohol or steroids. Consumption of alcohol by an adult is not illegal, but a minor child would be endangered if the child is being transported by a parent who is under the influence. Steroid use is illegal, but a request for a custody change by the other parent or by a third party would likely have to show a nexus between the use of steroids and a detriment to the best interests of the child. Regardless of the license status of a parent, marijuana possession or use is likely no longer a ground for a change in custody absent a nexus, or connection, between the use and a detriment to the minor child's best interests.

A medical marijuana license holder driving after legally using marijuana is still exposed to a potential charge of illegally driving under the influence of an intoxicating substance.¹² If a minor child is in the car, the driver could

also be charged with felony child endangerment.¹³ Even without an arrest or a criminal charge, the transportation of a minor after the recent use of marijuana could constitute "dangerous surroundings" and an "unreasonable danger" to any minor child who is present. Traveling with a minor child with any amount of marijuana across state lines or to a state that does not permit marijuana possession could expose the parent to arrest and again constitute dangerous surroundings or unreasonable danger due to the potential for the minor child to be alone and unsupervised after an arrest. Medical care providers are still required to report to DHS when an infant tests positive for alcohol or a controlled dangerous substance, including marijuana.¹⁴

CONCLUSION

The hypotheticals serve as examples for the proposition that the presence or absence of a medical marijuana license by a parent does not by itself end the inquiry in family court. Although mere possession or use of marijuana may be a nonissue in some cases, if the presence or use of marijuana creates a danger for a minor child, family law judges may intervene. The

impact of marijuana possession and use on the minor children involved must be assessed on a case-by-case basis before taking legal action.

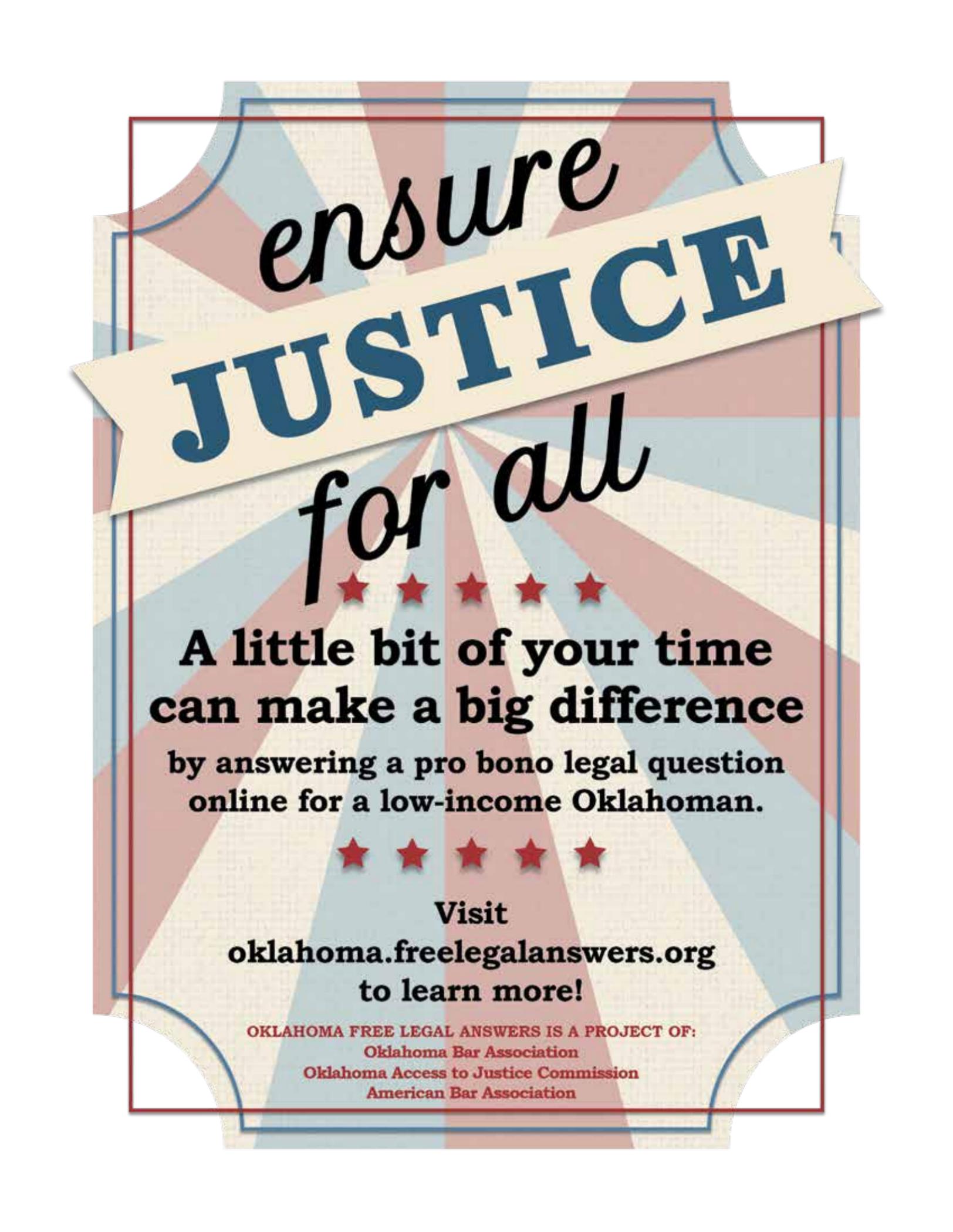
ABOUT THE AUTHOR



Aaron Bundy is a practicing attorney with offices in Tulsa and Sapulpa. His law practice is focused primarily on family law, including trial and appeal. He is a fellow of the American Academy of Matrimonial Lawyers.

ENDNOTES

1. 21 U.S.C. 801 *et seq.*
2. 21 U.S.C. 812.
3. Felson, J., Adamczyk, A. & Thomas, C. (2019). How and why have attitudes about cannabis legalization changed so much? [Abstract]. *Social Science Research*. Doi: <https://doi.org/10.1016/j.ssresearch.2018.12.011>.
4. Shapard, B. S. (2013, Sept. 23). *Poll: Oklahomans Views of Marijuana Are Changing*. *Soonerpoll.com*. <https://soonerpoll.com/poll-oklahomans-views-of-marijuana-are-changing>.
5. Okla. Stat. tit. 63 §420 *et seq.*
6. Codutti, A. C. (2019, Oct. 14), "10 things that are still illegal under Oklahoma's medical marijuana laws," *Tulsaworld.com*, https://tulsaworld.com/news/local/marijuana/10-things-that-are-still-illegal-under-oklahomas-medical-marijuana-laws/collection_5ee7df76-b3c4-5eff-b894-6802200d8d4b.html#1.
7. Okla. Stat. tit. 63 §425(D).
8. *Fox v. Fox*, 1995 OK 87, ¶7, 904 P.2d 66, 69.
9. *Gorham v. Gorham*, 1984 OK 90, ¶14, 692 P.2d 1375, 1378.
10. Okla. Stat. tit. 43 §112.5(C)(3).
11. Okla. Stat. tit. 43 §107.4.
12. Okla. Stat. tit. 47 §11-902.
13. Okla. Stat. tit. 21 §852.1.
14. Okla. Stat. tit. 10A §1-2-101(B)(6).



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Marijuana and the Workplace: A Case Study

By Michael A. Furlong and Laura McConnell-Corbyn



“DRUG TESTING,” A 2006 EPISODE OF THE HIT TV SERIES *THE OFFICE*, opens with the intrepid corporate climber, Dwight Schrute, discovering marijuana on the premises of the fictional company, Dunder Mifflin.¹ Never one to overlook the slightest possibility of an infraction by a colleague, Dwight springs into action to identify the culprit, interrogating his fellow employees and doling out “random” drug tests. Dwight’s overreaction prompts his colleague, Jim Halpert, to reflect that the presence of drugs in the workplace may be riskier than drug use itself. His antics, while more amusing than successful, provide a useful case study for a number of issues surrounding marijuana and the workplace.

OKLAHOMA EMPLOYERS’ RIGHT (AND SOMETIMES DUTY) TO MAINTAIN A DRUG-FREE WORKPLACE

Dwight’s shocked reaction reflects the widely accepted consensus that drugs do not belong in the workplace. Oklahoma law supports the right of employers to keep their worksites free of drugs and alcohol.² While certain limited protections exist for employees recovering from addiction (discussed below), the Americans with Disabilities Act (ADA) expressly permits employers to prohibit the use or being under the influence of illegal drugs, including marijuana, in the workplace.³ Going further, employers with federal government contracts or grants and employers that operate in the commercial or public transportation sector are required by federal law to maintain a drug-free workplace.⁴ The same goes for federal government employers⁵ and the majority of state and local government employers.

Savvy employers will recognize the imperative of taking a proactive approach when it comes to drug and alcohol use by employees. Mishandling issues with impaired employees can result in significant liability for an unprepared employer.⁶ Indeed, Oklahoma law encourages employers to think through drug and alcohol issues in advance by conditioning the ability of employers to conduct drug testing (discussed in the following section) on having a written policy.⁷

Later in the episode, Dwight Schrute demands that temporary employee Ryan Howard allow his car to be searched after learning Ryan attended a party the night before. The right of private employers to conduct searches of employee property while on the employer’s premises, including searches for drugs, is not prohibited by federal or Oklahoma law.⁸ Private employer searches of employee vehicles have been expressly

permitted in Oklahoma since 2003 with the following limitation:

Employers of this state that conduct employee-owned vehicle searches of its [sic] employees shall conduct such search on the property of the employer only. Searches that are conducted on property not owned or rented by the employer shall require a search warrant issued according to law.⁹

In a June 2020 decision, the National Labor Relations Board upheld an employee vehicle search policy against a union challenge that the policy violated the National Labor Relations Act.¹⁰

EMPLOYEE DRUG TESTING: A MATTER OF POLICY

Dwight’s investigation next turns to a demand that his colleagues submit to drug testing. When questioned, human resources

representative Toby Flenderson confirms all employees agreed in writing to random drug testing when they applied for the job.

Oklahoma law permits most employers to engage in drug testing, including random drug testing, if they comply with the requirements of the Oklahoma Standards for Workplace Alcohol and Drug Testing Act (the act).¹¹ Understandably, the act exempts drug testing that is “required by and conducted pursuant to federal law or regulation[.]”¹²

The act permits employee drug testing only under the following circumstances:

- Applicant and transfer/assignment testing
- For-cause testing “any time [the employer] reasonably believes the employee may be under the influence of drugs or alcohol, including, but not limited to, the following circumstances: a. drugs or alcohol on or about the employee’s person or in the employee’s vicinity, b. conduct on the employee’s part that suggests impairment or influence of drugs or alcohol, c. a report of drug or alcohol use while at work or on duty, d. information that an employee has tampered with drug or alcohol testing at any time, e. negative performance patterns, or f. excessive or unexplained absenteeism or tardiness”
- Post-accident testing
- Random testing
- Scheduled, fitness-for-duty, return from leave and other periodic testing
- Post-rehabilitation testing¹³

With respect to random, scheduled, fitness-for-duty, return from leave and other periodic testing,

public employers may only conduct such testing on the following employees:

- Police or peace officers
- Employees with drug interdiction responsibilities
- Employees who are authorized to carry firearms
- Employees who are engaged in activities that directly affect the safety of others
- Employees who are working for a public hospital
- Employees who work in direct contact with inmates in the custody of the Department of Corrections or work in direct contact with juvenile delinquents or children in need of supervision in the custody of the Department of Human Services¹⁴

An employer who wishes to conduct drug testing in one or more of the above categories must “first adopt a written policy setting forth the specifics of its drug or alcohol testing program[.]”¹⁵ The policy may include such topics as a statement of the employer’s policy respecting drug or alcohol use by employees; which applicants and employees are subject to testing; circumstances under which testing may be requested or required; substances that may be tested (stating “drugs and alcohol” is sufficient); testing methods and collection procedures (which are addressed in great detail in the act and usually, but not always, are written into the methodologies of reputable labs); consequences of refusing to undergo testing; potential adverse personnel action which may be taken as a result of a positive test result; the ability of an applicant and employee to explain, in confidence, the test results; the ability of an applicant and employee to obtain copies

of all information and records related to that individual’s testing; confidentiality requirements; and appeal procedures if any.¹⁶

Employees must be provided at least 10 days’ notice of a new policy or a change to an existing policy, and a copy must be provided to all applicants upon accepting employment with the employer.¹⁷ Employers who violate the act may be held liable for twice an employee’s lost wages, costs and attorney’s fees.¹⁸

Prior to 2011, the act required Oklahoma employers to include an employee assistance program (EAP) in order to have a valid drug and alcohol testing program.¹⁹ That requirement has been repealed by the Legislature. While employers may still provide EAPs on a voluntary basis, the presence of an EAP in a private employer’s policy is frequently a sign the policy has not been revised in several years and should be reviewed and updated as needed. State employees may avail themselves of the Oklahoma Employee Assistance Program administered by the Oklahoma Department of Mental Health and Substance Abuse Services.²⁰

Certain limited protections exist for employees identified as having used illegal drugs. The ADA prohibits discrimination on the basis of disability by employers with more than 15 employees. Its definition of an “individual with a disability” excludes any “employee or applicant who is currently engaging in the illegal use of drugs,” including marijuana. But the statute provides a “safe harbor” for any employee who:

- 1) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

Oklahoma law permits most employers to engage in drug testing, including random drug testing, if they comply with the requirements of the Oklahoma Standards for Workplace Alcohol and Drug Testing Act (the act).

- 2) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or
- 3) Is erroneously regarded as engaging in such use, but is not engaging in such use except that it shall not be a violation of [the ADA] for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph 1) or 2) is no longer engaging in the illegal use of drugs[.]²¹

Notwithstanding the foregoing, the ADA provides an employer “may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds for other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee[.]”²²

The implementing regulations of the Family and Medical Leave Act (FMLA), which applies to certain employers with 50 or more employees, permits employees who are absent from work for substance abuse treatment for themselves or family members to avail themselves

of FMLA leave but not employees who are absent because of substance abuse itself.²³ The regulations contain the following caveat:

Treatment for substance abuse does not prevent an employer from taking employment action against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave.²⁴

Once again, the existence of a well-drafted drug and alcohol policy is paramount for employers to establish compliance with state and federal law.

MEDICAL MARIJUANA: A NEW FRONTIER

As he wraps up his investigation, Dwight Schrute asks his colleagues a number of intrusive questions about prescription medications they are taking. Dwight’s inappropriate

questions²⁵ highlight a new area confronting Oklahoma employers. In June 2018, 57% of Oklahoma voters approved State Question 788, which legalized medical marijuana. Initially, the law provided broad protections for employees using medical marijuana:

Unless a failure to do so would cause an employer the potential to lose a monetary or licensing-related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either:

- 1) The status of the person as a medical marijuana license holder; or
- 2) Employers may take action against a holder of a medical marijuana license if the holder uses or possesses marijuana while in his or her place of employment or during the hours of employment. Employers may not take action against the holder of a medical marijuana license solely based upon the status of an employee as a medical marijuana license holder or the result of a drug test showing

positive for marijuana or its components.²⁶

Although the above provision remains in force, the Legislature's 2019 Unity Bill clarified the law and provided additional protections for employers as follows:

Unless otherwise required by federal law or required to obtain federal funding:

- 1) No employer may refuse to hire, discipline, discharge or otherwise penalize an applicant or employee solely on the basis of such applicant's or employee's status as a medical marijuana licensee; and
- 2) No employer may refuse to hire, discipline, discharge or otherwise penalize an applicant or employee solely on the basis of a positive test for marijuana components or metabolites (defined as "a result that is at or above the cutoff concentration level established by the United States Department of Transportation or Oklahoma law regarding being under the influence, whichever is lower")²⁷ unless:

- a) the applicant or employee is not in possession of a valid medical marijuana license,
- b) the licensee possesses, consumes, or is under the influence of medical marijuana or medical marijuana product while at the place of employment or during the fulfillment of employment obligations, or
- c) the position is one involving safety-sensitive job duties[.]²⁸

A "safety-sensitive" job is broadly defined as "any job that includes tasks or duties that the employer reasonably believes could affect the safety and health of the employee performing the task or others[.]"²⁹ It includes, without limitation:

- the handling, packaging, processing, storage, disposal or transport of hazardous materials,
- the operation of a motor vehicle, other vehicle, equipment, machinery or power tools,

- repairing, maintaining or monitoring the performance or operation of any equipment, machinery or manufacturing process, the malfunction or disruption of which could result in injury or property damage,
- performing firefighting duties,
- the operation, maintenance or oversight of critical services and infrastructure including, but not limited to, electric, gas, and water utilities, power generation or distribution,
- the extraction, compression, processing, manufacturing, handling, packaging, storage, disposal, treatment or transport of potentially volatile, flammable, combustible materials, elements, chemicals or any other highly regulated component,
- dispensing pharmaceuticals,
- carrying a firearm or
- direct patient care or direct childcare.³⁰

It is highly advisable that Oklahoma employers designate positions as safety sensitive upfront and notify employees in those positions that they are prohibited from medical marijuana use as a result. Employers should review position designations periodically and update them as needed, similar to a periodic review of whether positions are exempt or non-exempt for purposes of the federal Fair Labor Standards Act.

An employer who violates any employee protections in Oklahoma's medical marijuana laws may be held liable for twice an employee's lost wages, costs and attorney's fees.³¹ Nonetheless, the Unity Bill provides that nothing in Oklahoma's medical marijuana laws shall:



- 1) Require an employer to permit or accommodate the use of medical marijuana on the property or premises of any place of employment or during hours of employment;
- 2) Require an employer, a government medical assistance program, private health insurer, worker's compensation carrier or self-insured employer providing worker's compensation benefits to reimburse a person for costs associated with the use of medical marijuana; or
- 3) Prevent an employer from having written policies regarding drug testing and impairment in accordance with the Oklahoma Standards for Workplace Drug and Alcohol Testing Act.³²

The Unity Bill provided some protection and clarification for Oklahoma employers, but questions remain. For example, while employers may not discriminate against employees solely on the basis of possession of a medical marijuana card, does an employee's possession of a card give an employer grounds to conduct "for-cause" testing under Oklahoma's drug testing statute? Is the meaning of "under the influence" the same as having a positive test, or must additional factors exist?³³ What protections, if any, are afforded to employees using medical marijuana under the Oklahoma Anti-Discrimination Act (OADA)?³⁴ In the absence of future clarifying legislation, litigation will no doubt be necessary to provide definitive answers to these and other questions.

In spite of his valiant attempts (spoiler alert), Dwight Schrute never does figure out which of his colleagues dropped the joint in the

parking lot. Like many Oklahoma employers, however, his investigatory efforts are (mostly) supported by Dunder Mifflin's drug policy and applicable law. Ultimately, the most important step Oklahoma employers can take to navigate issues of employee marijuana use while remaining on the right side of the law is to have a detailed substance abuse policy that is clearly written, promulgated to all employees and consistently enforced.

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ENDNOTES

1. Season two, episode 20, "Drug Testing" (April 27, 2006).
2. 40 O.S. §555(A)(1) (permitting a written "statement of the employer's policy respecting drug or alcohol use by employees," including marijuana), 63 O.S. §427.8(I)(3) (same), 63 O.S. §427.8(H)(2) & (I)(1) (permitting an employer to prohibit an employee's use, possession, consumption or being under the influence of marijuana on the employer's premises or during work hours).
3. 42 U.S.C. §12114(c).
4. 41 U.S.C. §§8101 ff. (contractors), *see also* 48 C.F.R. §§223.5 ff. (U.S. Department of Defense contractors); 49 U.S.C. §31306 (transportation).
5. Exec. Order No. 12564, 51 Fed. Reg. 32,889 (Sept. 15, 1986).
6. *See, e.g., Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983) (holding that an employer who sent an intoxicated employee home unsupervised could be liable for a fatal accident involving the employee).
7. *See* Note 2, *infra*.

8. *But see* Charles W. Adams, "The Right of Privacy of Employees with Respect to Employer-Owned Computers and E-Mails," 75 *OBJ* 2567, 2567-68 (Oct. 2, 2004) (discussing an intermediate appellate Texas case, which concluded searching an employee's personal effects could give rise to liability under the tort of invasion of privacy (citing *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632 (Tex. App. 1984))).

9. 40 O.S. §200.

10. In re *Verizon Wireless et al.*, 369 NLRB No. 108 (Jun. 24, 2020) (approving "a rule notifying employees that their employer may search their personal property on its premises").

11. 40 O.S. §§551 ff.

12. *Id.* at §553(C), *see also* Note 3, *infra*.

13. 40 O.S. §554.

14. *Id.*

15. *Id.* at §555(A).

16. *Id.*

17. *Id.* at §555(B).

18. *Id.* at §563.

19. *Id.* at §561 (repealed by 2011 HB 2033).

20. *See* ok.gov/odmhsas/Additional_Information/Employee_Assistance_Program/index.html.

21. *Id.* at §12114(b), *see Mauerhan v. Wagner Corp.*, 649 F.3d 1180, 1186-87 (10th Cir. 2011) (construing the safe harbor as not protecting an employee who had been drug free for only one month because "the drug use was sufficiently recent to justify the employer's reasonable belief that the drug abuse remained an ongoing problem").

22. *Id.* at §12114(c)(4).

23. 26 C.F.R. §825.119 (a).

24. *Id.* at §825.119(b).

25. *See* www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-disability-related-inquiries-and-medical (last accessed Oct. 15, 2020) (prohibiting employers from asking employees what prescription drugs they are taking, except "[i]n limited circumstances ... employers may be able to ask employees in positions affecting public safety about their use of medications that may affect their ability to perform essential functions and thereby result in a direct threat").

26. 63 O.S. §425(B).

27. *Id.* at §427.8(K), *see also* 49 C.F.R. §40.87 (setting the U.S. Department of Transportation initial test cutoff at 50 ng/mL for initial testing and 15 ng/mL for confirmatory testing), 47 O.S. §11-902(A) (prohibiting "any amount" of marijuana).

28. *Id.* at §427.8(H).

29. *Id.* at §427.8(K).

30. *Id.*

31. *Id.* at §427.8(J).

32. *Id.* at §427.8(I).

33. *See Rose v. Berry Plastics Corp.*, 2019 OK CIV APP 55, 451 P.3d 195 (concluding, in a workers' compensation case, that a claimant overcame by clear and convincing evidence the presumption of intoxication based on a positive post-accident test for marijuana in spite of the fact the claimant had smoked marijuana approximately 10 hours earlier), *see also Whitnire v. Wal-Mart Stores, Inc.*, 359 F.Supp.3d 761, 788-92 (D. Ariz. 2019) (granting *sua sponte* summary judgment to an employee who consumed marijuana 12 hours before a work shift at which she was involved in an accident and had a positive post-accident test because the employer had no evidence she was impaired at the time of the accident).

34. *See* Robert M. Kline, "Courts are Siding with Employees who Use Medical Marijuana," *Nat'l L. Rev.*, Vol. X, No. 289 (June 19, 2019), available at www.natlawreview.com/article/courts-are-siding-employees-who-use-medical-marijuana.

Waste Not, Want Not

By Rachel O. Klubeck

THE RAPID GROWTH OF OKLAHOMA'S *medical marijuana industry has created serious waste management challenges for lawmakers and licensed businesses.*

When State Question 788 passed in June 2018 with 56.86% voter approval, Oklahoma became the 30th state to allow for the sale of medical marijuana to state-registered patients.¹ By February 2021, there were 2,550 licensed caregivers, 367,053 licensed patients and 9,987 total active licensed medical marijuana businesses in the state.² Among the licensed businesses, there are 6,546 growers, 1,262 processors, 2,057 dispensaries, 69 transporters and 23 laboratories.³ However, there were only *nine* active waste disposal businesses in operation in the state of Oklahoma.⁴ The difficulty of procuring waste disposal licenses and continued limited number of waste disposal licensees has proven problematic for the 9,978 other presently licensed Oklahoma medical marijuana businesses and puts them at an increased risk of noncompliance and potential revocation of their commercial license.

In 2019, the Oklahoma Legislature passed the Oklahoma Medical Marijuana Waste Management Act (act).⁵ The act required commercial cannabis businesses to dispose of medical marijuana waste through a state-licensed waste facility and imposed a number of other requirements for medical marijuana waste

disposal,⁶ including a limit of 10 waste disposal licenses in the first year after the act's passage. Since the act went into effect in late 2019, there have been no new waste disposal licenses issued, and the significant gap between the number of licensed businesses and waste disposal licensees continues to be a problem. The act does not include a cap on medical marijuana commercial licensing or any provisions that address the environmental implications of cannabis-related waste experienced in previously legalized states.²

RELEVANT AUTHORITIES & DEFINITIONS

The Oklahoma Medical Marijuana Authority (OMMA) was established under the Oklahoma Department of Health (OSDH) and oversees Oklahoma's medical marijuana program.⁷ Under the act, "medical marijuana waste" is defined as the "unused, surplus, returned or out-of-date marijuana and debris from the plants of the genus *Cannabis*, including dead plants and all unused plant parts, except the term shall not include roots, stems, stalks and fan leaves."⁸ Thus, cannabis businesses in the state of Oklahoma may only dispose of roots, stems, stalks and fan leaves through a state-licensed

waste disposal facility.⁹ Pursuant to the act's definitions, "disposal" means "the final disposition of medical marijuana waste by either a process which renders the waste unusable through physical destruction or a recycling process."¹⁰ However, there are no definitions or guidelines for which parts may be recycled or the requirements for an authorized recycling process.

Before the act was passed in 2019, regulations from the OMMA included an expanded definition of "medical marijuana waste" to include *any wastewater generated during growing and processing*.¹¹ This language proved problematic because it required licensed growers and processors to dispose of their medical marijuana wastewater through a state-licensed waste disposal facility. Yet, there were no licensed facilities for wastewater disposal. The OMMA amended the regulatory definition of "medical marijuana waste" after the act was passed in 2019 to remove wastewater from the definition and the statutory and regulatory definitions are now the same.

WASTE DISPOSAL LICENSING & PERMITTING

To obtain a medical marijuana waste disposal license in the state of Oklahoma, OMMA requires an



applicant to first obtain a permit or license from the Oklahoma Department of Environmental Quality (DEQ). Initially, communication between DEQ and OMMA appeared to be nonexistent, as the OMMA provided for waste disposal licenses long before the DEQ even knew what permits or licenses were to be issued from their own agency.

The DEQ has several internal divisions relevant to waste disposal – air, land and water quality. Depending on the type of disposal, the DEQ requires certifications, allowances and other necessary documentation required by the Environmental Protection Agency (EPA), the federal agency responsible for creating standards and laws promoting the health of individuals and the environment, in order to issue a DEQ permit or license.¹² The cost of obtaining an EPA and/or DEQ permit or license varies and is by no means cheap. Once a DEQ permit or license (and other necessary documentation) is secured, the OMMA application can be submitted for approval. The cost for the application is \$5,000 and is not refundable, even if the application is not approved.

There are four types of waste disposal licensing available under OMMA regulations: 1) Compost, 2) Landfill/Solid Waste, 3) Incinerator and 4) Other. Under the act, unless restricted by local ordinance, waste disposal licensees

are authorized to destroy medical marijuana waste by open burning, incineration, burying, mulching, composting or any other technique approved by the DEQ.¹³ If or when an OMMA application is approved, OMMA has the full authority to audit and oversee compliance of all cannabis companies operating in the state. Additionally, as with the approval of any other commercial OMMA license, a transportation license is provided to the waste disposal licensee so they may legally transport medical marijuana. All persons who transport medical marijuana on behalf of the disposal company must register as a transport agent under the company's OMMA license or risk noncompliance and legal ramifications.

It is important to note the difference between waste disposal facility *licenses* and waste disposal facility *permits*.¹⁴ In order to obtain an OMMA waste disposal permit (\$500), one must first obtain an OMMA waste disposal license (\$5,000). The permit only becomes necessary once the waste disposal licensee chooses to expand into additional locations – an option solely available to waste disposal licensee – and is required for each additional, approved facility of a waste disposal facility licensee.¹⁵

DISPOSAL PROCESSES

Every cannabis business operating in Oklahoma needs or will have a need for waste disposal during operations. For example, growers and processors who have samples that fail product testing requirements (that cannot be legally remediated) must dispose of the remaining batch or lot of product through a waste disposal licensee.¹⁶ After testing product samples, OMMA laboratories must dispose of tested samples through a waste disposal licensee.¹⁷ Dispensaries with broken or contaminated products must

either return such product to the company that sold the product or dispose of the faulty product itself through a waste disposal licensee.¹⁸ In any situation, the transfer of waste to a waste disposal licensee must be documented in the manifest of each medical marijuana business licensee.¹⁹



Disposal processes will differ depending on the type of waste and waste disposal company. Incineration disposal is a much different disposal process than composting. A waste disposal company may first choose to perform a site evaluation for their client in order to form a waste management plan, as plans may differ for growers, processors, laboratories and dispensaries. Waste disposal companies often provide clients with storage containers to allow for easier accumulation and pick-up of client waste (typically trash cans that can be locked), but waste disposal companies are not required to provide storage containers to clients. Once ready for removal and disposal, the waste will be either picked up by the waste disposal company and transported back to their facility, or a client may transport and

drop off their waste at the waste disposal facility themselves. The OMMA requires that all transportation and changing hands of products be recorded in each licensee's manifests, which are to be reported to OMMA by the 15th of each month.²⁰ Typically, waste disposal companies either charge

clients by the pound (or similar units of weight) or by the number of storage containers.

CANNABIS WASTE DISPOSAL ISSUES

One issue with Oklahoma's implementation of the requirement of waste disposal through licensees is *practicality*. With only nine present waste licensees and nearly 10,000 active commercial licenses, rural cannabis businesses may not have a viable option for proper waste disposal. Further, the additional costs associated with waste disposal may act as a deterrent for small or failing businesses to remain compliant with waste disposal requirements.

Another concern with waste disposal compliance is *proper record keeping*. Commercial licensees, medical marijuana research facilities and medical marijuana

education facilities that dispose of medical marijuana waste are required to document their waste on a form provided by the OMMA.²¹ The information to be recorded includes precise weights or counts of medical marijuana waste and the manner in which the medical marijuana waste is disposed.²² Documentation must also include a sworn affidavit under penalty of perjury attesting to the lawful disposal of the medical marijuana waste.²³ All disposal records have to be maintained by commercial licensees for five years and are subject to inspection and auditing by the OMMA.²⁴

ENVIRONMENTAL CONCERNS

There are environmental concerns stemming from cannabis waste that have been identified in previously legalized states that Oklahoma's Legislature and agencies have not yet adequately addressed in the state's medical marijuana laws and regulations. Among these issues are the environmental impact of the high volume of plant and packaging waste on landfills and lack of laws and regulations that encourage recycling or repurposing of cannabis waste. For example, when a patient purchases a vapor cartridge containing medical marijuana concentrate, the cartridge is typically packaged in a plastic, opaque, child-resistant container that meets the state's strict packaging guidelines. Once the cartridge has been consumed, the patient is left with an empty, metal and plastic cartridge "skeleton," which ends up being trashed. Because there are not currently any programs in place to encourage or require recycling or repurposing, the packaging ends up in landfills.

One solution to the potentially environmentally toxic abundance of cannabis plant waste may be in cannabis itself, or rather, hemp.

Hemp is cannabis that tests at or under 0.3% delta-9 THC.²⁵ In other words, if one were to smoke hemp as is, they would not get "high." Hemp was legalized at the federal level with the passage of the Farm Bill in December 2018.²⁶ More packaging companies are utilizing hemp biomass to create environmentally friendly cannabis packaging, which allows for quicker deterioration than plastic-based packaging, and hemp cellulose can be extracted and used to make cellophane, rayon, celluloid and a range of plastics.²⁷ Further, hemp can be used to create a variety of products for an array of industries, including rope, textiles, clothing, food, paper, bioplastics, insulation and biofuel.²⁸ The cost associated with hemp packaging is, on average, higher than its plastic-based competitors, which may not be cost-effective for small companies, but hemp packaging costs are becoming more and more competitive with plastic-derived materials.²⁹ Oklahoma's medical marijuana laws and regulations should be developed to encourage Oklahoma waste disposal licensees to repurpose any usable biomass and waste into hemp-like materials for packaging or other industrial and commercial uses. In addition to alleviating the cannabis industry's environmental impact by decreasing pollution, recycling and reusing waste when possible could eventually increase profits for licensed businesses.

CONCLUSION

Medical marijuana waste disposal rules and regulations remain unclear, if not unknown, to most. Even medical marijuana business owners who have sought advice from legal counsel or have done their own legitimate research on waste are at risk of noncompliance. Clear and consistent laws and regulations, as well as improved

coordination between agencies, are needed to address the conflicting standards, increase the number of licensed waste disposal facilities and account for the environmental implications of waste generated by the cannabis industry.

ABOUT THE AUTHOR



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ENDNOTES

1. Ballotpedia, [ballotpedia.org/Oklahoma_State_Question_788,_Medical_Marijuana_Legalization_Initiative_\(June_2018\)#cite_note-3](https://ballotpedia.org/Oklahoma_State_Question_788,_Medical_Marijuana_Legalization_Initiative_(June_2018)#cite_note-3) (last visited Jan. 14, 2021).
2. Okla. Medical Marijuana Authority, www.omma.ok.gov (last visited Feb. 3, 2021).
3. *Id.*
4. *Id.*
5. SB 882 was passed by the Senate on May 2, 2019, and was signed by Gov. Kevin Stitt on May 19, 2019.
6. 63 O.S. §§427a – 430 (2019).
7. Okla. Admin. Code § 310:681-1-2.
8. *Id.*
9. *Id.*
10. 63 O.S. §428.
11. Okla. Admin. Code §310:681-1-4 (2018).
12. Environmental Protection Agency, www.epa.gov (last visited Jan. 13, 2021).
13. 63 O.S. §§427a - 430 (2019).
14. Okla. Admin. Code §310:681-1-1-4 (2020).
15. *Id.*
16. Okla. Admin. Code §310:681-8-1.
17. Okla. Admin. Code §310:681-8-3.
18. Okla. Admin. Code §310:681-5-10.
19. Okla. Admin. Code §310: 681-4-5.
20. Okla. Admin. Code §310:681-5-6.
21. *Id.*
22. 63 O.S. §429(C) (2019).
23. *Id.*
24. *Id.*
25. 2 O.S. §3-402 (2019).
26. Agriculture Improvement Act of 2018, H.R. 2, 115th Cong. (2018).
27. Sensi Seeds, *Hemp Plastic: What Is It & How Is It Made?*, sensiseeds.com/en/blog/hemp-plastic-what-is-it-and-how-is-it-made (last visited Jan. 12, 2021).
28. Nicole M. Keller, *The Legalization of Industrial Hemp and What it Could Mean for Indiana's Biofuel Industry* (2019), mckinneylaw.iu.edu/iiclr/pdf/vol23p555.pdf (last visited Jan. 14, 2021).
29. Laura Drotleff, "Cannabis-based packaging and paper could reduce waste, promote sustainability," *Marijuana Business Daily* (2020), mjbizdaily.com/green-packaging/ (last visited Jan. 14, 2021).

Specific Use Permits and Municipal Regulation of the Medical Marijuana Industry

By David Weatherford

IN 2018, MEDICAL MARIJUANA WAS LEGALIZED in Oklahoma, creating a frenzy of discussion about the ability of local governments to regulate the industry. From zoning and area restrictions to complete bans, some public officials explored every available option, resulting in lawsuits and challenges that attempted to reconcile the public will of legalization with the local desire to regulate land use.

One simple and pre-existing solution was already available in the Oklahoma Statutes. In 2003, the Oklahoma Legislature added three statutes to the Oklahoma Municipal Code at Title 11 that may be one of the single greatest delegations of power the Legislature has ever given to municipalities. The three sections are simple but powerful in that they create the ability for local control of numerous land use issues that may arise in cities and towns through specific use permits (SUPs).

WHY USE THE SUP PROCESS

Several reasons exist for using the SUP process, and they begin with understanding the clear language the Legislature provided. The statutes authorizing SUPs are found first at 11 O.S. §43-113. Section 113 creates the authority for municipalities to allow specific use permits and states the municipality by ordinance may “enumerate a list of uses which it has determined

more intensely dominate the area in which they are to be located or their effects on the general public are broader in scope than other types of uses which are permitted in a zoning district.”¹ Further, inclusion of the proposed use on the list included within a municipal ordinance shall not “constitute an authorization” that approval will be granted, but instead, approval shall be based on the “probable effect on the adjacent properties and community welfare.”² The statute also authorizes “conditions related to the use of the land” that may be imposed, stating a long list of possible “conditions” that may be considered or imposed in approving the proposed use.³ The statute requires at least one public hearing and requires the ordinance to specify the public body that will be conducting the hearing.⁴

Section 43-114 outlines the “reasonable conditions” that may be imposed in considering a specific use permit and directly

authorizes the consideration of the use on “the natural environment, the health, safety, and welfare of the residents and landowners immediately adjacent to the proposed land use or activity, and the community as a whole.”⁵ Section 43-115 provides details about the “site plan” that may be required and makes it clear the municipality may require detailed disclosure as a part of the application process.

The purpose of the SUP statute was to allow local control of “intensive land uses,” thus allowing each municipality to establish its own list of “intense uses.” This power alone should be good reason to use the SUP process as it gives legislative control when it may not otherwise exist in regard to some of the worst possible uses that may be proposed to a municipality. For each of those intense uses, if the SUP process is not used, an appeal from the Board of Adjustment denial, with *de novo* review, becomes possible.



Additionally, and just as importantly, the SUP should be used because it creates a standard of review that is much more advantageous to the city. The SUP process was specifically upheld in *Sand Springs Materials, LLC v. City of Sand Springs*.⁶ In *Sand Springs Materials*, the city had denied a proposed rock quarry within city limits. The Oklahoma Court of Civil Appeals, in upholding the denial, stated the standard of review as follows:

The proper standard of review for the district court in this case is whether errors of law were committed by the [City], and whether the [City's] findings are supported by the clear weight of the evidence." *City of Muskogee v. Grayson*, 1991 OK 101, ¶ 8, 818 P.2d 491, 493. The

district court exercises original jurisdiction in reviewing such cases to determine whether zoning ordinances or the application thereof is arbitrary, capricious, or unreasonable. *City of Sand Springs v. Collier*, 1967 OK 194, ¶ 16, 434 P.2d 186, 190, overruled in part by *O'Rourke v. City of Tulsa*, 1969 OK 112, 457 P.2d 782. That determination in the district court and in this Court depends on whether the decision of the municipality is "fairly debatable."

In reviewing the judgment of the district court, [the appellate court] must look beyond the district court's conclusions and consider the basic, physical facts appearing in the record so as to ascertain whether the zoning decision is "fairly

debatable." The district court's independent conclusion as to whether there is a "fairly debatable" basis for the challenged zoning ordinance will be sustained unless it is against the clear weight of the evidence.

Mid-Continent Life Ins. Co. v. City of Oklahoma City, 1985 OK 41, ¶ 10, 701 P.2d 412, 414 (footnotes omitted). If zoning decisions of a municipality have a substantial relation to the public health, safety, morals or general welfare, and do not constitute an unreasonable, arbitrary exercise of police power, the municipality's judgment will not be overridden by the district court. *Id.* at ¶ 9, 701 P.2d at 413.

The court in *Sand Springs Materials* concludes: "The quarry proposed

by SSM would be in operation for 20-25 years. It would permanently and substantially change the landscape of the area. The City determined that this use would have a substantial adverse impact on adjacent property, community welfare



and public facilities. The district court concluded that the City's decision was supported by substantial and competent evidence. Conducting our independent review of the record, we conclude that the decision of the City to deny SSM's application for a special use permit is fairly debatable."

Again, allowing the municipality to weigh the impact of a proposed use on the impact to adjacent property, community welfare as a whole and public facilities allows a great deal of discretion while also forcing a focus on tangible factors that can be properly considered by our planning commission members and elected officials.

USES TO WHICH THE SUP PROCESS CAN BE APPLIED

The statutory guidance provides the uses that may be included in the permit process

are "those types of uses which, because of the size of the land they require or the specialized nature of the use, may more intensely dominate the area," thus the list is subject to the discretion of the local municipality. The types

of uses typically included are the intense uses that need additional regulation because of their domination and, by definition, would usually include those uses in which more local control is desired. Among the common uses would be the obvious, such as prisons, homeless shelters, landfills, mining uses, transmitting towers and treatment centers. Other difficult uses that can "dominate an area," such as adult entertainment, medical marijuana facilities and apartment complexes above a certain number of units have been included.

The use list should be created by the governing body, with input from the planning commission, and should be reviewed on a regular basis for any necessary updates. Probably the best approach is for the municipality to simply ask which uses will create a public uproar if proposed. If the proposed

use would likely cause such a public reaction, it likely is because of a fear it will dominate an area. Additionally, the creation of the uses is the ultimate legislative decision and should only be subject to challenge if it is arbitrary.

THE PROCESS AND FACTORS TO CONSIDER

The statute quoted above, and as affirmed in *Sand Springs Materials*, sets forth the factors that should be considered in weighing a SUP, including specifically the impact the proposed use will have on adjoining property, the community welfare as a whole and the impact on public facilities. The first step in the process is an application that should require the applicant to outline as much detail as possible about the proposed use and its impact. Second, the planning commission conducts an initial review in which it determines the extent of notice that should be provided, outlines any information they may need from the city staff or the applicant in order to review the request and establishes a hearing process. For "routine" SUPs (to the extent there can be one), the notice and process are similar to a zoning change. If the proposed use is controversial, the city staff should ensure they actively pursue whatever information may be needed to fully evaluate the proposal.

Each SUP application is viewed on individual findings as to the probable effect on adjacent properties and the community as a whole – and if approved, approved with conditions or denied based on those findings. A municipality may impose specific, individual conditions on land and/or buildings on each SUP if those conditions facilitate additional protections to adjoining properties and the overall welfare of the community.

The planning commission is required to hold at least one public hearing on the SUP application and “shall” transmit its findings of approval, approval with conditions or disapproval to the governing body. Upon receipt of the planning commission’s findings, the governing body may approve, approve with conditions or disapprove the SUP on its own accord.

I have found that providing the planning commission a “findings of fact and conclusions of law” form is helpful, and by use of the form, the commission votes on each of the factors within the statute. For example, the commission should make a specific finding concerning whether the use will have a minimal or substantial impact on adjoining property. Likewise, the commission should vote to determine whether the use will or will not adversely affect the community as a whole and should determine if the use will have an adverse impact on public facilities. After each of the findings, the commission should vote to determine whether any safeguards are needed and lastly should vote to recommend approval or denial of the permit.

Any reasonable conditions on a proposed SUP shall meet the following requirements:

- 1) Be designed to take into consideration the natural environment; health, safety and welfare of the residents and landowners immediately adjacent to the proposed land use or activity; and the community as a whole.
- 2) Be related to the valid exercise of a municipality’s police power and the proposed use or activity.
- 3) Be necessary to meet the intent and purpose of the zoning requirements.

- 4) Be related to the standards established in the municipality’s zoning ordinance for the land use or activity under consideration.
- 5) Be necessary to ensure compliance with those standards.

The conditions agreed to or imposed may alleviate concerns that exist about a proposed use and may assist the planning commission and governing body in the approval process.

Lastly, by resolution, the process in the city of Sand Springs allows for a review on the record by the city council, rather than a completely new hearing. As stated in the statute, a public hearing is required and can be held before the planning commission. By allowing a review on the record at the elected official level, the process is enhanced by 1) empowering the planning commission and 2) allowing the elected officials to take an appellate approach with controversial issues.

APPLICATION OF THE SUP PROCESS TO THE MARIJUANA USES

The state of Oklahoma’s approach to the regulation of the medical marijuana industry has been unique, causing many to request additional local control.⁸ The addition of the marijuana uses to the list of uses requiring a specific use permit allows for application of a known process to the new uses.

If the process outlined above is followed, each marijuana use proposed will be determined on its own merits and subject to appeal and review based on the specifics of each proposal, rather than “an act which entirely prevents retail marijuana establishments from operating within municipal boundaries.”⁹

Just as with the other SUP uses, the proposed marijuana use would

be evaluated with the identical factors applied to other listed uses, including the impact to adjacent property, community welfare as a whole and public facilities. Commission members and elected officials should be careful not to substitute any personal beliefs that all marijuana uses should be banned to make the community better when applying the “community welfare” factor, as such an approach is directly contrary to the vote approving medical marijuana and subsequent statutes passed by the Legislature. Instead, the community welfare factor should be approached from a land use approach, just as it would for any of the other listed uses.

ABOUT THE AUTHOR



David L. Weatherford is a Tulsa attorney with more than 30 years of municipal attorney experience. He is a graduate of OSU and the TU College of Law. He has served as city attorney for Sand Springs since 2002 and for Mannford since 1998, representing the municipalities in a wide range of legal matters.

ENDNOTES

1. 11 O.S. §43-113(A) and 11 O.S. §43-113(B).
2. 11 O.S. §43-113(C).
3. 11 O.S. §43-113(D).
4. 11 O.S. §43-113(E),(F).
5. 11 O.S. §43-114(B)(1).
6. 2010 OK CIV APP 128, 243 P.3d 768.
7. *Id.* at ¶18.
8. See, www.politico.com/news/magazine/2020/11/27/toke-lahoma-cannabis-market-oklahoma-red-state-weed-legalization-437782 (last visited Jan. 26, 2021).
9. See, 63 O.S. §425(F)(2).

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THE OKLAHOMA BAR

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Harvey B. Hunt Jr., *Tulsa*



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Thomas Martin Wakely, *Norman*

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In 1951, the 22nd Amendment was ratified, a gallon of gas cost 19 cents and television continued to grow in popularity with the premiere of *I Love Lucy* and the first tests for Color Television Pictures broadcast from the Empire State Building.



In 1961, President Kennedy established the Peace Corps, the German Democratic Republic built the Berlin Wall, we were introduced to Fritos and the electric toothbrush and Commander Alan Shepard Jr. became the first American in space on Mercury 3.



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In 1971, Walt Disney World opened its gates for the first time, cigarette advertising was banned on television and radio following the passing of the Public Health Cigarette Smoking Act, Satchel Paige was the first Black player to be elected to the Baseball Hall of Fame and the NASDAQ was established in New York City.

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SOLO & SMALL FIRM CONFERENCE



The OBA and Solo & Small Firm Conference Planning Committee are working on making decisions to confirm the format, date and location of this year's conference. Originally set for June 18-20 at Choctaw Casino Resort in Durant, the conference will return to that location in 2022. Details on the 2021 event are coming soon!

Find the most current information at www.okbar.org/solo.

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Oklahoma Bar Association
Lawyers Helping Lawyers
Assistance Committee

Early Forecast for the Session Ahead

By Miles Pringle

THE FIRST REGULAR

session of the 58th Legislature is underway, and in many ways, it is unprecedented. Just over 3,040 bills and joint resolutions were prefiled, the most in more than 20 years. There also appears to be a substantial number of “shell bills” (a bill with little or no substantive language introduced for the purposes of later being amended to include actual legislative proposals), for example approximately 30% of the bills prefiled in the House were shell bills. The volume of shell bills will make it more difficult for those tracking legislation to keep on top of the issues.

Will more prefiled bills lead to more legislation passing? Perhaps. One indicator is that due to a COVID-19 shortened session in 2020, fewer bills (less than 200) made their way through the Legislature to the governor’s desk. That is in contrast to the more than 500 signed in 2019 and the average in Gov. Mary Fallin’s tenure of more than 400 per year. So maybe there is a backlog of bills that will be pushed through this session.

On Feb. 1, Gov. Stitt set out his priorities in the annual State of the State. He outlined three main goals for this year’s session: “Number

one, make Oklahoma a top 10 state for business, number two, deliver taxpayers more for their money and number three, invest in our fellow Oklahomans.” Regarding efficiency, Gov. Stitt proposed amending the manner school districts count the number of students in their districts, stating the current formula accounts for more than 55,000 students being double counted.

DAY AT THE CAPITOL

The OBA’s Annual Day at the Capitol event will be held virtually this year on March 23. We hope you are able to join us and check out the Legislative Monitoring Committee’s page at www.okbar.org/dayatthecapitol for more information. While we will not be able to go over to the Capitol together this year, we will still learn a lot about what is going on with this year’s session.

I would like to recognize our members who serve in the Legislature:

Senate

- Sen. Mary Boren – District 16
Hometown: Norman
- Sen. Michael Brooks – District 44
Hometown: Oklahoma City
- Sen. Julie Daniels – District 29
Hometown: Bartlesville
- Sen. Kay Floyd – District 46
Hometown: Ada
- Sen. Brent Howard – District 38
Hometown: Altus



Photo credit: Legislative Service Bureau Photography



Photo credit: Legislative Service Bureau Photography

House of Representatives

- Rep. Jose Cruz – District 89*
County: Oklahoma
- Rep. Jon Echols – District 90
Counties: Cleveland, Oklahoma
- Rep. Chris Kannady – District 91
County: Cleveland
- Rep. Jason Lowe – District 97
County: Oklahoma
- Rep. Anthony Moore – District 57*
Counties: Beckham, Blaine, Caddo, Canadian, Custer
- Rep. Terry O'Donnell – District 23
Counties: Rogers, Tulsa, Wagoner
- Rep. Mike Osburn – District 81
County: Oklahoma
- Rep. Emily Virgin – District 44
County: Cleveland
- Rep. Collin Walke - District 87
County: Oklahoma

*newly elected

The number of lawyer legislators stays the same as the previous session at 15 – that's only 10% of

the total elected legislators who serve. Many people think that percentage is much higher.

LEGISLATIVE KICKOFF

In case you missed the OBA's Legislative Kickoff, you can access the program as part of the OBA's online CLE at tinyurl.com/oba-kickoff2021. We had a wonderful program, and I want to again thank the speakers and OBA staff who made the event possible. The program included:

- "How a Bill Becomes Law in Oklahoma" by OBA Legislative Liaison Clay Taylor
- "COVID-19 Update" by Tony G. Puckett, McAfee & Taft
- "Native American Law Update" by Conor Cleary, Senior Indian Law Attorney, U.S. Department of the Interior

- "50 Bills in 50 Minutes" by Kim Hays, Kimberly K. Hays PLLC; Richard Mildren, The Mildren Group; Rep. Chris Kannady; Felina Rivera, Bussett Legal Group; and Kim Andres, Citi Bank

We also had a fantastic legislative panel with lawyer legislators Sen. Brent Howard, Sen. Kay Floyd, Rep. Chris Kannady and Rep. Emily Virgin. I highly encourage those who missed the program to sign up for it online!



Mr. Pringle is general counsel for The Bankers Bank in Oklahoma City and serves as the Legislative Monitoring Committee chairperson. Contact him through the committee's Communities page online in MyOKBar.

Professional Responsibility Commission Annual Report

As Compiled by the Office of the General Counsel
of the Oklahoma Bar Association

Jan. 1, 2020 – Dec. 31, 2020 | SCBD 6890

INTRODUCTION

Pursuant to the provisions of Rule 14.1, Rules Governing Disciplinary Proceedings (RGDP), 5 O.S. 2011, ch. 1, app. 1-A, the following is the Annual Report of grievances and complaints received and processed for 2020 by the Professional Responsibility Commission and the Office of the General Counsel of the Oklahoma Bar Association.

THE PROFESSIONAL RESPONSIBILITY COMMISSION

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

Attorney members serving on the Commission during 2020 were Chairperson Sidney K. Swinson, Tulsa; Vice-Chairperson Heather Burrage, Durant; R. Richard Sitzman, Oklahoma City; Karen A. Henson, Shawnee; and Jimmy D. Oliver, Stillwater. The Non-Lawyer members were John Thompson, Oklahoma City and James W. Chappel, Norman. Commission members serve without compensation but are reimbursed for actual travel expenses.

RESPONSIBILITIES

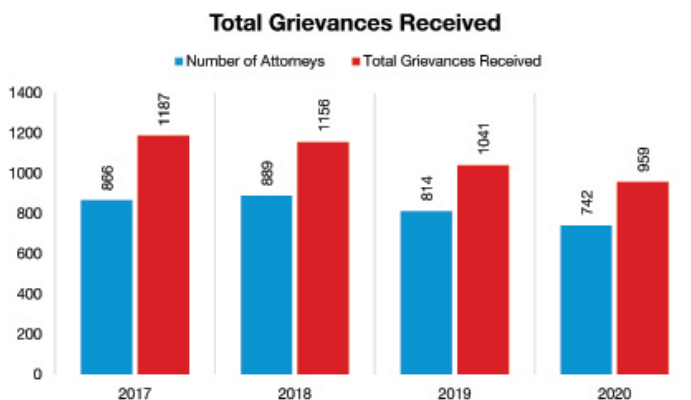
The Professional Responsibility Commission considers and investigates any alleged ground for discipline, or alleged incapacity, of any lawyer called to its attention, or upon its own motion, and takes such action as deemed appropriate to effectuate the purposes of the Rules Governing Disciplinary Proceedings.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

VOLUME OF GRIEVANCES

During 2020, the Office of the General Counsel received 228 formal grievances involving 176 attorneys and 731 informal grievances involving 566 attorneys. In total, 959 grievances were received against 742 attorneys. The total number of attorneys differs because some attorneys received both formal and informal grievances. In addition, the Office processed 194 items of general correspondence, which is mail not considered to be a grievance against an attorney.¹

On Jan. 1, 2020, 180 formal grievances were carried over from the previous year. During 2020, 228 new formal grievances were opened for investigation. The carryover accounted for a total caseload of 408 formal investigations pending throughout 2020. Of those grievances, 142 investigations were completed by the Office of the General Counsel and presented for review to the Professional Responsibility Commission. Therefore, 266 investigations were pending on Dec. 31, 2020.

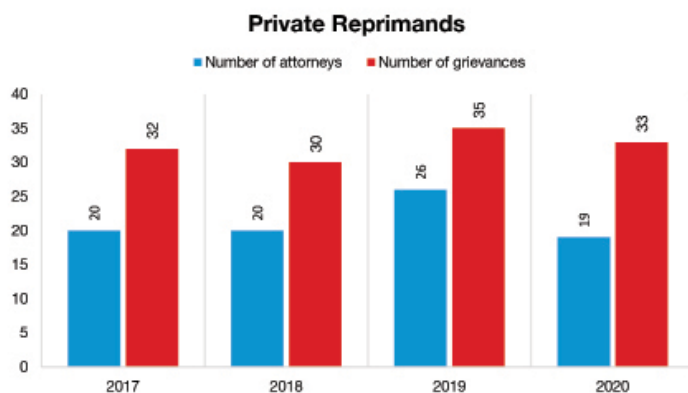
The time required for investigating and concluding each grievance varies depending on the seriousness and complexity of the allegations and the availability of witnesses and documents. The Commission requires the Office of the General Counsel to report monthly on all informal and formal grievances received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



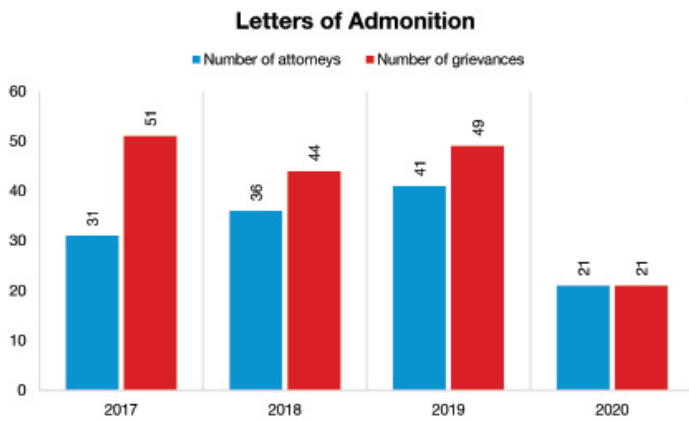
DISCIPLINE IMPOSED BY THE PROFESSIONAL RESPONSIBILITY COMMISSION

Formal Charges. During 2020, the Professional Responsibility Commission voted the filing of formal disciplinary charges against nine lawyers involving 20 grievances. In addition, the Commission also oversaw the investigation of 11 Rule 7, RGDP matters filed with the Chief Justice of the Oklahoma Supreme Court.

Private Reprimands. Pursuant to Rule 5.3(c), RGDP, the Professional Responsibility Commission has the authority to impose private reprimands, with the consent of the attorney, in matters of less serious misconduct or if mitigating factors reduce the sanction to be imposed. During 2020, the Commission issued private reprimands to 19 attorneys involving 33 grievances.



Letters of Admonition. During 2020, the Professional Responsibility Commission issued letters of admonition to 21 attorneys involving 21 grievances, cautioning that the conduct of the attorney was dangerously close to a violation of a disciplinary rule which the Commission believed warranted a warning rather than discipline.



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

Diversion Program. The Professional Responsibility Commission may also refer respondent attorneys to the Discipline Diversion Program, where remedial measures are taken to ensure that any deficiency in the representation of a client does not occur in the future. During 2020, the Commission referred 24 attorneys to be admitted into the Diversion Program for conduct involving 39 grievances.

The Discipline Diversion Program is tailored to the individual circumstances of the participating attorney and the misconduct alleged. Oversight of the program is by the OBA Ethics Counsel with the OBA Management Assistance Program Direction involved in programming. Program options include Trust Account School, Professional Responsibility/Ethics School, Law Office Management Training, Communication and Client Relationship Skills and Professionalism in the Practice of Law class. In 2020, instructional courses were taught by OBA General Counsel Gina Hendryx, OBA First Assistant General Counsel Loraine Farabow, OBA Assistant General Counsel Katherine Ogden, OBA Ethics Counsel Richard D. Stevens, OBA Management Assistance Program Director Jim Calloway and OBA Practice Management Advisor Julie Bays.

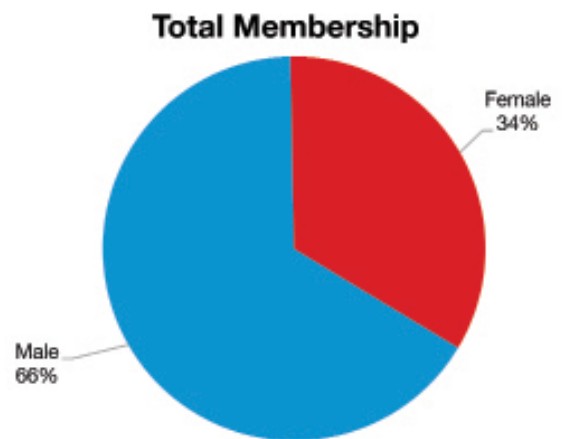
As a result of the Trust Account Overdraft Reporting Notifications, the Office of the General Counsel is now able to monitor when attorneys encounter difficulty with management of their IOLTA accounts. Upon recommendation of the Office of the General Counsel, the Commission may place those individuals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

2020 Diversion Program Curriculum	Number of Lawyers
Law Office Management Training	12
Communication and Client Relationship Skills	14
Professionalism in the Practice of Law	2
Professional Responsibility / Ethics School	9
Client Trust Account School	9
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SURVEY OF GRIEVANCES

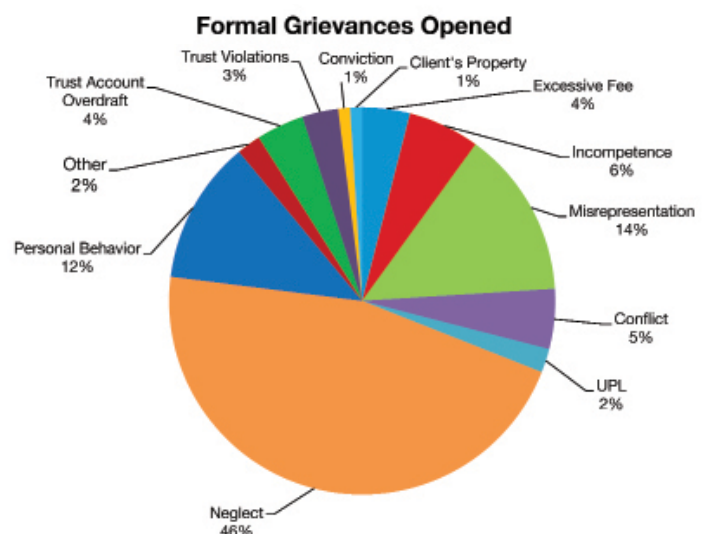
In order to better inform the Oklahoma Supreme Court, the bar and the public of the nature of the grievances received, the numbers of attorneys complained against and the areas of attorney misconduct involved, the following information is presented.

Total membership of the Oklahoma Bar Association as of Dec. 31, 2020, was 18,330 attorneys. The total number of members includes 12,053 males and 6,277 females.

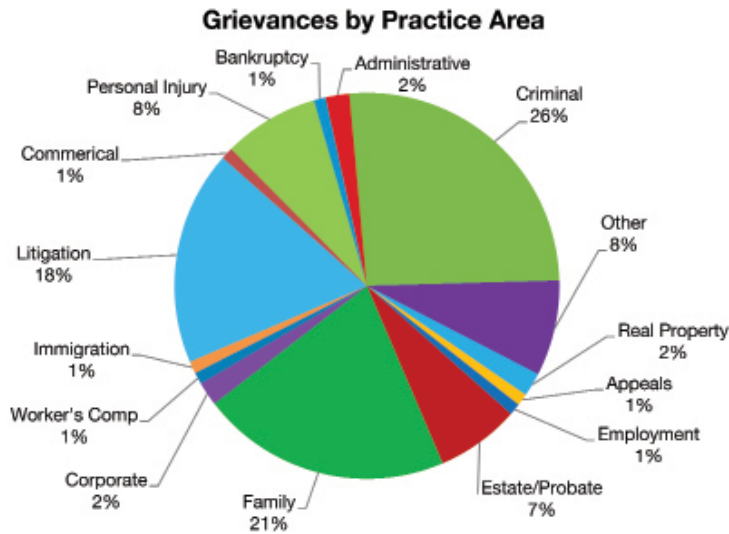


Formal and informal grievances were received against 742 attorneys. Therefore, less than six percent of the attorneys licensed to practice law in Oklahoma received a grievance in 2020.

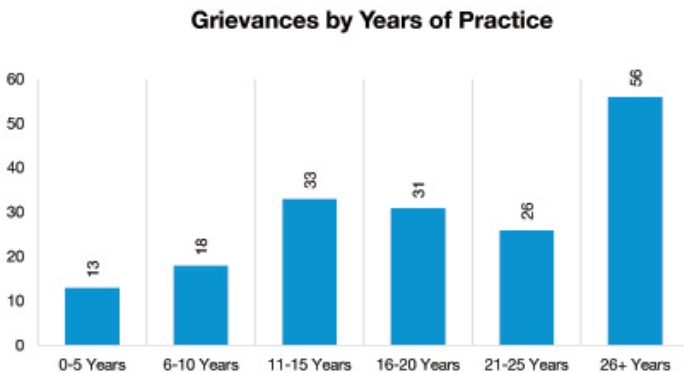
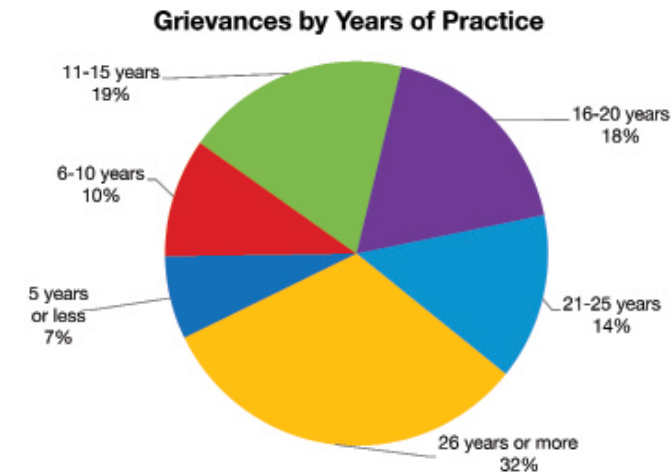
A breakdown of the type of attorney misconduct alleged in the 228 formal grievances opened by the Office of the General Counsel in 2020 is as follows:



Of the 228 formal grievances, the area of practice is as follows:



The number of years in practice of the 176 attorneys receiving formal grievances is as follows:



The largest number of grievances received were against attorneys who have been in practice for 26 years or more. The age of attorneys with disciplinary cases filed before the Oklahoma Supreme Court in 2020 is depicted below.

Type of Complaint Filed	Rule 6, RGDP	Rule 7, RGDP	Rule 10, RGDP	Rule 8, RGDP
Number of Attorneys Involved	7	12	1	2
Age of Attorney				
21-29 years old	0	0	0	0
30-49 years old	1	7	1	1
50-74 years old	6	5	0	1
75 or more years old	0	0	0	0

Type of Discipline Imposed	Dismissals	Confidential Suspension	Disciplinary Suspension	Resignation Pending Disciplinary Proceedings	Disbarment
Number of Attorneys Involved	6	1	9	3	3
Age of Attorney					
21-29 years old	0	0	0	0	0
30-49 years old	2		5	2	0
50-74 years old	4	1	4	1	3
75 or more years old	0	0	0	0	0

DISCIPLINE IMPOSED BY THE OKLAHOMA SUPREME COURT

In 2020, discipline was imposed by the Oklahoma Supreme Court in 22 disciplinary cases. The sanctions are as follow:

Disbarment

Respondent	Order Date
Miller, Laurie Jean	1/14/20
Siegrist, Kent LeRoy	3/24/20
Janzen, Carolyn Sue	12/8/20

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

Respondent	Order Date
Willand, George William, III	2/24/20
Mayes, Brent Earl	6/30/20
Khuu, Tuan Anh	10/5/20

Disciplinary Suspensions

Respondent	Length	Order Date
Harroz, Keegan Kelley	Interim	2/10/20
Green, John Thomas	90 days	4/28/20
Haskell, Doak Willis	Interim	6/8/20
Ezell, Julia Marie	1 year	6/16/20
Gierhart, Douglas Mark	2 years + 1 day	9/15/20
Faulk, Robert R.	Interim	9/28/20
Levisay, Shelley Lynne	1 year	10/6/20
Pistotnik, Bradley Alan	2 years + 1 day	11/24/20
Robinson, Eugene	Interim	12/7/20

Dismissals

Respondent	Order Date
Card, Daniel James (Misdemeanor Conviction; Rule 7, RGDP)	1/27/20
Corley, Ky Dowdy (Misdemeanor Conviction; Rule 7, RGDP)	4/13/20
Ellis, Vernon Dale, Jr. (Misdemeanor Conviction; Rule 7, RGDP)	5/26/20
Steen, Jeffry Conner (Rules 1.1, 1.3, 3.1, 8.4, RGDP)	9/21/20
Jameson, Robert Earl (Misdemeanor Conviction; Rule 7, RGDP)	9/21/20
Carlton, James W., Jr. (Misdemeanor Conviction; Rule 7, RGDP)	10/5/20

Private Reprimand

Respondent	Order Date
Filed Under Seal	1/14/20

There were 18 discipline cases filed with the Oklahoma Supreme Court as of Jan. 1, 2020. During 2020, 22 new formal complaints were filed for a total of 40 cases pending with the Oklahoma Supreme Court during 2020. On Dec. 31, 2020, 20 cases remain filed and pending before the Oklahoma Supreme Court.²

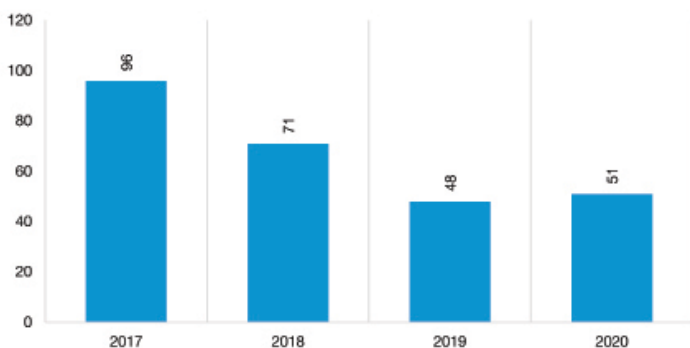
REINSTATEMENTS

There were two Petitions for Reinstatement pending before the Professional Responsibility Tribunal and two Petitions for Reinstatement pending with the Oklahoma Supreme Court as of Jan. 1, 2020. There were seven new Petitions for Reinstatement filed in 2020. In 2020, the Oklahoma Supreme Court granted five reinstatements and denied one reinstatement. On Dec. 31, 2020, there were four Petitions for Reinstatement pending before the Professional Responsibility Tribunal and one Petition for Reinstatement pending before the Oklahoma Supreme Court.

TRUST ACCOUNT OVERDRAFT REPORTING

The Office of the General Counsel, under the supervision of the Professional Responsibility Commission, has implemented the Trust Account Overdraft Reporting requirements of Rule 1.15(j), Oklahoma Rules of Professional Conduct, 5 O.S. 2011, ch. 1, app. 3-A (ORPC). Trust Account Overdraft Reporting Agreements are submitted by depository institutions. In 2020, 51 notices of overdraft of a client trust account were received by the Office of the General Counsel. Notification triggers a general inquiry to the attorney requesting an explanation and supporting bank documents for the deficient account. Based upon the response, an investigation may be commenced. Repeated overdrafts due to negligent accounting practices may result in referral to the Discipline Diversion Program for instruction in proper trust accounting procedures.

Trust Account Overdrafts



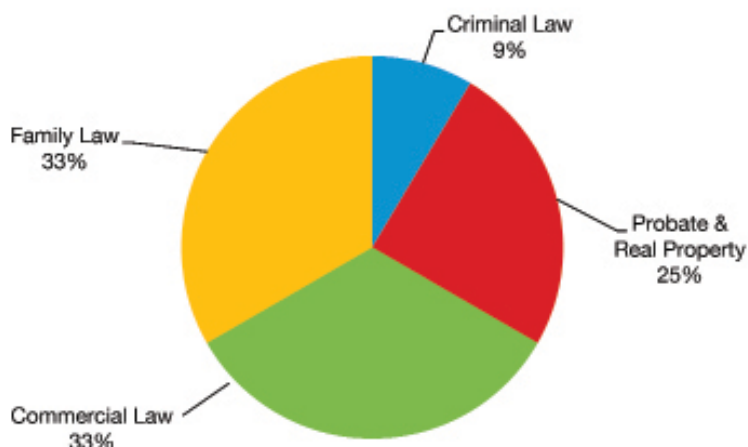
UNAUTHORIZED PRACTICE OF LAW

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

Requests for Investigation. In 2020, the Office of the General Counsel received 13 complaints for investigation of the unauthorized practice of law. The Office of the General Counsel fielded many additional inquiries regarding the unauthorized practice of law that are not reflected in this summary.

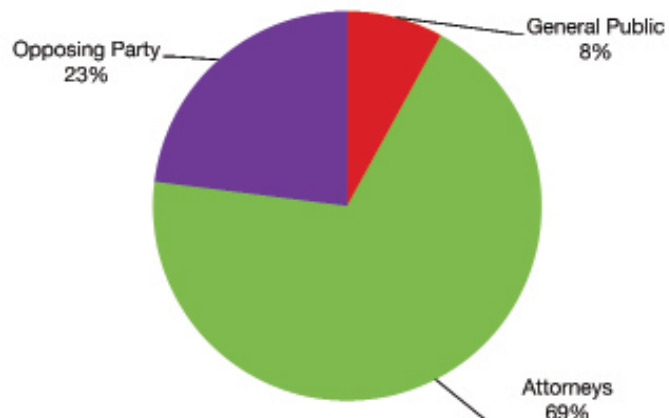
Practice Areas. Allegations of the unauthorized practice of law encompass various areas of law. In previous years, most unauthorized practice of law complaints involved non-lawyers or paralegals handling divorce matters, but that trend has declined over the last few years. However, in 2020, a significant number of UPL complaints involved commercial and family law matters.

Areas of Practice



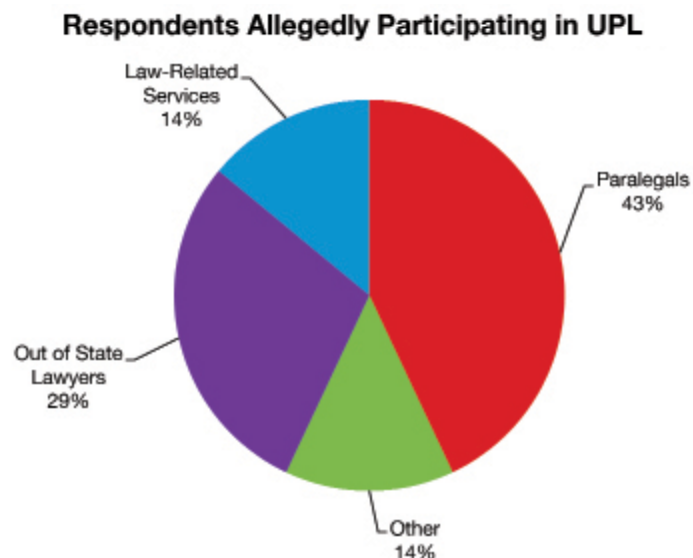
Referral Sources. Requests for investigations of the unauthorized practice of law stem from multiple sources. In 2020, the Office of the General Counsel received the most complaints from attorneys.

Requests to Investigate: Referral Sources



Respondents. For 2020, most requests for investigation into allegations of the unauthorized practice of law related to paralegals.

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

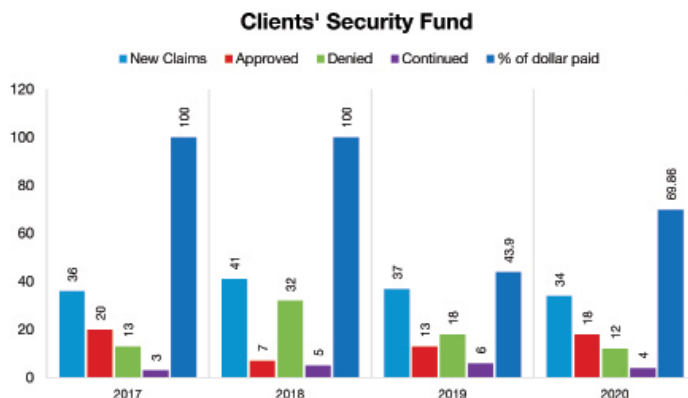


Enforcement. In 2020, of the 13 matters received, the Office of the General Counsel took formal action in one matter. Formal action includes issuing cease and desist letters, initiating formal investigations through the attorney discipline process, referring a case to an appropriate state and/or federal enforcement agency or filing the appropriate district court action. Six matters were closed after corrective action was taken. The remainder of the matters are under investigation.

CLIENTS' SECURITY FUND

The Clients' Security Fund was established in 1965 by Court Rules of the Oklahoma Supreme Court. The Fund is administered by the Clients' Security Fund Committee, which is comprised of 17 members, 14 lawyer members and 3 non-lawyers, who are appointed in staggered three-year terms by the OBA President with approval from the Board of Governors. In 2020, the Committee was chaired by lawyer member Micheal Salem, Norman. Chairman Salem has served as Chair for the Clients' Security Fund Committee since 2006. The Fund furnishes a means of reimbursement to clients for financial losses occasioned by dishonest acts of lawyers. It is also intended to protect the reputation of lawyers in general from the consequences of dishonest acts of a very few. The Board of Governors budgets and appropriates \$175,000.00 each year to the Clients' Security Fund for payment of approved claims.

In years when the approved amount exceeds the amount available, the amount approved for each claimant will be reduced in proportion on a pro rata basis until the total amount paid for all claims in that year is \$175,000.00. The Office of the General Counsel reviews, investigates and presents the claims to the committee. In 2020, the Office of the General Counsel presented 34 new claims to the Committee. The Committee approved 18 claims, denied 12 claims and continued four claims into the following year for further investigation. In 2020, the Clients' Security Fund paid a total of \$177,712.50 on 18 approved claims.



CIVIL ACTIONS (NON-DISCIPLINE) INVOLVING THE OBA

The Office of the General Counsel represented the Oklahoma Bar Association in several civil (non-discipline) matters during 2020. One case carried forward into 2021. The following is a summary of all 2020 civil actions against or involving the Oklahoma Bar Association:

Rickey White v. Oklahoma Bar Association, Oklahoma County Case No. CV-2020-55. Plaintiff filed a Petition for Writ of Mandamus on Jan. 8, 2020. The Oklahoma Bar Association was not served. This Petition was related to White's prior matter, Court of Criminal Appeals of Oklahoma Case No. MA-2019-825, wherein he petitioned the court for an order directing the Oklahoma Bar Association to re-open and investigate a grievance he filed against an attorney. On April 17, 2020, the District Court denied the Petition for Writ of Mandamus.

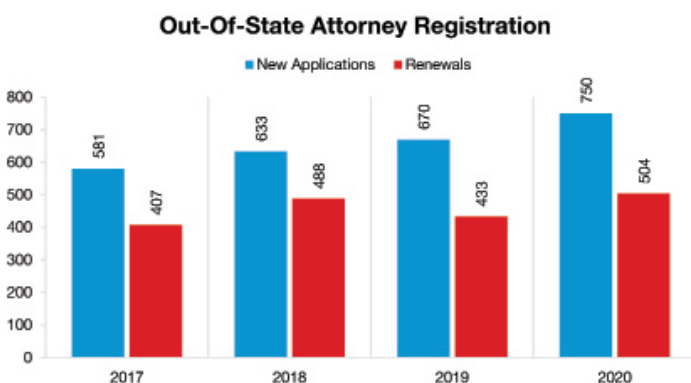
Johnson & Johnson ex rel., Stephen P. Wallace v. State of Oklahoma, et al., United States District Court for the District of New Jersey, Case No. CIV-19-14189. Mr. Johnson filed suit against multiple Oklahoma defendants alleging RICO and other violations. The facts underlying the suit are not easily discernable from Mr. Wallace's filings. Johnson & Johnson notified the court that they were not (despite Mr. Wallace's filings) associated with this case in any way. The Oklahoma Bar Association and the Oklahoma Attorney General

joined together with local counsel to file a Motion to Dismiss on Sept. 26, 2019. Plaintiff filed various “Emergency” and “Supplemental Emergency” Motions. The Oklahoma Bar Association and the Oklahoma Attorney General was dismissed with prejudice on April 23, 2020. Mr. Wallace continues to file documents in this closed case.

McCormick et al., v. Barr et al., United States District Court for the Northern District Court of Oklahoma, Case No. CIV-20-24-JED-JFJ, filed Jan. 21, 2020. The Plaintiffs assert various claims against 21 defendants. There are no claims asserted against the Oklahoma Bar Association, even though it was named as a defendant. The Oklahoma Bar Association filed its Motion to Dismiss on Feb. 12, 2020. This matter is pending.

ATTORNEY SUPPORT SERVICES

Out-of-State Attorney Registration. In 2020, the Office of the General Counsel processed 750 new applications and 504 renewal applications submitted by out-of-state attorneys registering to participate in a proceeding before an Oklahoma Court or Tribunal. Out-of-State attorneys appearing pro bono to represent criminal indigent defendants, or on behalf of persons who otherwise would qualify for representation under the guidelines of the Legal Services Corporation due to their incomes, may request a waiver of the application fee from the Oklahoma Bar Association. Certificates of Compliance are issued after confirmation of the application information, the applicant’s good standing in his/her licensing jurisdiction and payment of applicable fees. All obtained and verified information is submitted to the Oklahoma Court or Tribunal as an exhibit to a “Motion to Admit.”



Certificates of Good Standing. In 2020, the Office of the General Counsel prepared 1,120 Certificates of Good Standing/Disciplinary History at the request of Oklahoma Bar Association members.



ETHICS AND EDUCATION

During 2020, attorneys in the General Counsel’s office presented more than 50 hours of continuing legal education programs to county bar association meetings, attorney practice groups, OBA programs, all three state law schools and various legal organizations. In these sessions, disciplinary and investigative procedures, case law and ethical standards within the profession were discussed. Due to pandemic restrictions, the majority of these programs were presented via video conference. These efforts direct lawyers to a better understanding of their ethical requirements and the disciplinary process and informs the public of the efforts of the Oklahoma Bar Association to regulate the conduct of its members. In addition, the General Counsel participated in a presentation to the Arkansas Supreme Court and the Arkansas Bar Association on the implementation of an Ethics Counsel office to assist Arkansas attorneys.

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

RESPECTFULLY SUBMITTED this 4th day of February, 2021, on behalf of the Professional Responsibility Commission and the Office of the General Counsel of the Oklahoma Bar Association.

Gina Hendryx, General Counsel
Oklahoma Bar Association

ENDNOTES

1. The initial submission of a trust account overdraft notification is classified as general correspondence. The classification may change to a formal grievance after investigation.
2. Four cases were stayed by the Court and are still considered pending by the Office of the General Counsel: SCBD 6318, Rule 7, RGDP; SCBD 6354, Rule 7, RGDP; SCBD 6512, Rule 7, RGDP; SCBD 6723, Rule 6, RGDP.



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Past *Brave New World* Status

By John Morris Williams

AS WE CONTINUE FORWARD, it has become clear the world has changed forever. How we meet, where we meet and when we meet will continue to be discussed and studied for the foreseeable future. We are past *Brave New World* status. We are now in planning for a world that seems to want to accommodate everyone, everywhere. Maybe that's a really good thing.

Currently, the OBA utilizes Zoom, BlueJeans and Teams meeting platforms. Each of us has our individual preferences based on needs and experiences. As we moved into the virtual world, it became apparent that our BlueJeans platform was not sufficient for meetings with over 100 participants. We knew that utilizing Zoom had some risks of security and

third-party mischief. Thankfully, none of those occurred, and Zoom became very proactive in meeting security issues. Microsoft Teams is also a platform that is growing in popularity. Where we ultimately end up in choosing a primary platform is months away, if ever.

It is likely online CLE will dominate the attendance model forever. Prior to the pandemic, this trend was already being experienced. The OBA has done a great deal of work and study to accommodate sections and committees in offering CLE in their regular meetings. While some manual systems were developed for the short term, the best solutions were found to be working through the OBA CLE Department. OBA CLE has the systems to produce online

programs and automatically track CLE attendance. Committees and sections are highly encouraged to cosponsor their CLE programs with OBA CLE.

An additional tool I have not seen utilized globally is the recording of meetings. Most of the online platforms do allow for recording. Of course, not every meeting should be recorded. Meetings where important business is discussed that might be voted on later might be the kind of meeting that lends itself to recording. That way members who missed the meeting could still make informed votes when the matter comes up at a later meeting.

Most of the video platforms have multiple features that seldom get used. For example, Zoom has a breakout room feature. Agendas, exhibits and graphics are also easy to add and display. Users who learn to use the features obviously have more informative and engaging meetings. There are many online trainings to teach users to master all the features. One of the seldom-used features is voting. Using the voting feature can save time in a meeting and create an exact record of the vote.

All the folks who make guesses for a living are now saying in the future we will see most meetings being in person and virtual. They call these hybrid meetings. There is nothing really new about this concept. What is new is the thought that meetings that were exclusively



All the folks who make guesses for a living are now saying in the future we will see most meetings being in person and virtual.

in-person meetings will add a virtual audience. The downside of this is locations will have to be scrutinized to ensure they can support the necessary technology for the virtual production.

OBA UPGRADING VIRTUAL MEETING EXPERIENCE

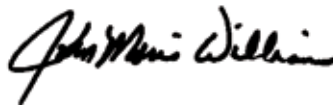
During this time of transition, the OBA is continuing to study and upgrade its systems, so we are ready when it is safe to meet in person again. Although the cost of some of the technology has gone down, it is still expensive when the systems need to accommodate multiple users in multiple locations. This is especially true if there is a large, in-person component to the meeting, so cameras and sound systems need to track and amplify speakers' voices in a large room.

The OBA has acquired some new, medium-sized room technology that will accommodate meetings occurring at the OBA and up to 1,000 remote attendees for section and committee meetings. Meeting leaders will be able to utilize all the features on whatever platform they wish to use. Those needing staff


assistance are requested to let staff know prior to the meeting. We will be more than glad to help make your in-person or virtual meetings as interactive as they can be.

Please feel free to share with us your virtual meeting experiences and let us know how we can improve.

Be safe and well.



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



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The Rise of Two-Factor Authentication and the Authenticators

By Jim Calloway

RECENTLY, MANY MEDIA outlets covered the plight of Stefan Thomas, the man who, as of January 2021, had \$250 million worth of bitcoin trapped in his Bitcoin wallet. He secured the keys to the wallet on an IronKey flash drive. I recall in one 60 tips presentation years ago noting the *Mission Impossible* feature of the IronKey that provides extra security by terminally encrypting the contents of the drive after 10 incorrect password entry attempts. Yes, the data does self-destruct. Mr. Thomas lost the paper with his password written on it and, after a few wrong guesses, now has two password attempts left. In his defense, when he received the 7,002 Bitcoin in 2011 as payment for making an animated video, the value of bitcoin was much less.

His IronKey now is in a secure location, and Mr. Thomas hopes some future cryptographers will one day crack it. I'm not sure you could outline a more severe case of pain resulting from forgetting a password.

There are ways to better secure your accounts without running the risk of locking them up "forever."

As I've noted previously, I believe lawyers should be using a password manager to organize

and use appropriate, complex and unique passwords for every login. I still believe that, but now there is more to consider.

PASSWORDS ALONE DO NOT PROVIDE ADEQUATE SECURITY

You read that correctly. Passwords alone are no longer sufficient protection for the most important accounts you log in to.

Originally, it was believed that it sufficed for a user to memorize two different items, the username and password, and log in using those. But now, most websites (and people) use their email addresses for their username. This has the advantage of being something the user won't forget and the disadvantage of being easily discoverable in most situations.

So, the password is the only remaining "secure" information in the login process.

According to some online security services, 90% of passwords can be cracked in less than six hours. That number sounds high to me, but I have little doubt about the significant risk. Today, there are powerful hacker tools that can test millions of passwords every second. Longer passwords containing characters and numbers

are more time consuming to crack. And those who do not use a password manager tend to use the same password for many sites, which means when one account is cracked, the criminals may have the password for many.

So, you need another secure bit of data, another factor.

THE NEED FOR TWO-FACTOR AUTHENTICATION

Most readers are familiar with two-factor authentication (2FA). Hopefully, you are already using this with your bank account and other financial accounts. The more accurate term is multifactor authentication, but I am going to use 2FA in this article just because it is more readable than MFA.

A common shorthand way to describe the additional factor used for 2FA is something you know, something you have or something you are (biometrics). Something we have with us almost all the time is our mobile phone. The most common method of 2FA is by SMS text messaging. When you enter your username and password into a site, the site responds by sending you a code via text message that must be entered to complete the login process. Sometimes this can be done by email, which is also not secure.



This basic form of 2FA means that even if a hacker got into the online service and pilfered all the usernames and passwords, they would still not be able to access your account because they wouldn't have your mobile phone to receive the required code via text message.

You should already use 2FA for any financial accounts, any online shopping service you have allowed to remember your credit card number, medical portals and confidential client information. If you have social media accounts, using this method will likely mean you will never have to post, "Please do not accept any invitations from me. I've been hacked."

A critical account to secure with 2FA is your Microsoft 365 account. If a hacker steals your password, it grants them the ability to send out emails pretending to be you, view and change your calendar and access all documents you have stored in OneDrive. In

many ways, this is the "keys to the kingdom" hack.

But sadly, using SMS text messaging for 2FA, this simple and most common method, is no longer the best practice.

Although I cannot stress strongly enough how much more secure SMS text messaging is than not using any method of 2FA.

SMS TEXT MESSAGE AUTHENTICATION IS MUCH MORE SECURE THAN SKIPPING 2FA ENTIRELY, BUT SMS TEXTS ARE NO LONGER THE BEST 2FA METHOD

Unlike end-to-end encrypted messaging, such as WhatsApp or Signal, SMS is built on an infrastructure with known security weaknesses. Apple's iMessage is encrypted, but that only applies when transmissions are iMessage to iMessage. So, normally the code is sent via SMS and therefore not encrypted.

The risks of using SMS text messages for authentication are somewhat technical. One risk is your cell phone carrier can be scammed into giving someone else access to your codes. It is easier to "steal" a cell phone number, transferring the account to a new device than one would hope, especially if the bad actors have the number and other personally identifiable information, such as the last four digits of your social security number. A data breach at any employer could easily provide that information. Malware can be unknowingly installed on users' phones that scans for these SMS passcodes and sends them to a wrongdoer. Interception of SMS messages is another additional insecurity, even if it is uncommon.

Phishing exploits can also trick people into compromising their SMS.¹ *Forbes* contributor Zak Doffman profiled an Iranian SMS 2FA attack named Rampant Kitten.



Check Point warned of an SMS 2FA attack just last month, “an Android backdoor that extracts two-factor authentication codes from SMS messages, records the phone’s voice surroundings and more.” The “Rampant Kitten” operation, attributed to Iranian hackers, intercepted 2FA codes for otherwise secure Google and Telegram accounts. The attack was brutally simple, Check Point told me, an app pushed out to users via social engineering that asked for permission to read SMS messages.²

For more in-depth technical information, refer to National Institute of Standards and Technology Special Publication 800-63B, Digital Identity Guidelines, Authentication and Lifecycle Management.³ Section 5.1.3.3, Authentication using the Public Switched Telephone Network, provides, “Verifiers SHOULD consider risk indicators such as device swap, SIM change, number porting, or other abnormal behavior before using the PSTN to deliver an out-of-band authentication secret.”

PSTN is essentially the telephone network, wired and wireless.⁴

One should secure all financial accounts properly not only to avoid today’s risks but to prepare for tomorrow’s increased risks.

Executive Summary

Using 2FA is very important. The SMS texting method is simple, even if not totally secure, although compromises of SMS seem relatively rare right now. If you have a bank or retirement account you access online, that is a vulnerability. A single compromise could cause some life-altering pain. A 2FA system that doesn’t use SMS is superior, but it is far better to use SMS 2FA than none at all.

WHAT ARE MORE SECURE AUTHENTICATION METHODS?

Some well-known services provide their own 2FA method. Some already provide a method that does not involve SMS text messaging.

If you have a Facebook account, that is a good opportunity to work through setting up 2FA. Facebook has made it very simple. See the Facebook page “Login Alerts and Two-Factor Authentication.”⁵

Facebook also provides a code generator that can avoid SMS entirely. See Facebook’s “What is Code Generator and how does it work?”⁶ Facebook will only require the code when you log in from a new, different device, so it won’t impact your use in most cases.

Two methods that provide a high level of security with 2FA are authenticator apps and physical tokens.

AUTHENTICATORS

Authenticators generate codes on your phone or mobile device.

Even if an attacker tricked your cell phone company into moving your phone number to their phone, they would not be able to get your security codes. The data needed to generate those codes remains securely *on your phone*. It never travels through the SMS text messaging system.

The first thing to know about authenticators is many password managers also include an authenticator service as a part of the



subscription. LastPass, in particular, gets good reviews for its application.

Google authenticator is a popular, free and well-regarded authenticator. It is available for both Android and iPhone. It can be used with a broad number of services, including those provided by Microsoft.

Most reviewers recommend Authy.⁷ But I appreciate that most Android users will likely use Google authenticator. Similarly, firms committed to Microsoft 365 might decide to use the Microsoft authenticator.

There are certainly many options. See Gizmodo's "The Best Authenticator Apps for Protecting Your Accounts"⁸ and Android Authority's "10 best two-factor authenticator apps for Android"⁹

PHYSICAL SECURITY KEYS

I have not used physical security keys for authentication. These are currently used mainly by larger corporations. I do know you are never supposed to store the physical security key in your computer bag, and for most of us, the best option is to store it on our keyring. I also know there will be minor annoyances and major annoyances ("I left all my keys at the garage because my car is getting repaired") when these security tools are implemented. It's not a key you want to misplace.

You can find lots of online articles about the various physical keys and key "families." ZDnet's "Best Security Key in 2021" is a good starting point at www.zdnet.com/article/best-security-key. Your attention is also directed to "YubiKey, Google Titan, RSA SecureID, and More: Seven Authentication Token Families Compared" from the Plurilock Blog.¹⁰

At this point, I predict we will mainly see physical security keys

implemented by large law firms with IT departments to support them and tech-savvy solo practitioners or small firm lawyers who find managing this type of device to be the simplest solution for those who are not fortunate enough to have an IT department.

ONE SMS WORKAROUND

Some services may require SMS text messaging for 2FA. One way to bypass this insecurity would be to set up a Google Voice phone number and use that for your 2FA because you can secure your Google accounts with 2FA. Then you log in to Google Voice to see the code. That method is probably too inconvenient for many frequently accessed accounts but is certainly an option for financial accounts that are not frequently accessed, like retirement accounts.

CONCLUSION

It's time for two-factor authentication. In fact, it is past time. But 2FA will involve a few delays every day. It adds a bit more friction to your life – at least your online life. If all you want to do now is to implement SMS text messaging for your financial accounts, Microsoft 365 account and other accounts containing confidential client information, you will have made a significant improvement with your digital security.

Many will decide it is time to set up a more secure authenticator service or purchase physical security keys. The fact that many have implemented authenticators at this point should reassure you that implementation will not be overly challenging. Hopefully, this article and the sources cited in it will allow you to confidently move forward with your options for implementing 2FA more securely.

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 or find more tips at www.okbar.org/map. It's a free member benefit.

ENDNOTES

1. "Two-Factor Authentication Might Not Keep You Safe," *The New York Times*, Jan. 27, 2019, www.nytimes.com/2019/01/27/opinion/2fa-cyberattacks-security.html.
2. "Why You Should Stop Using SMS Security Codes – Even On Apple iMessage," *Forbes*, Oct. 11, 2020, www.forbes.com/sites/zakdoffman/2020/10/11/apple-iphone-imessage-and-android-messages-sms-passcode-security-update.
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4. en.wikipedia.org/wiki/Public_switched_telephone_network.
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Thank You, OBF Donors!

By Candice Pace

FIRST, WE MUST give a special shout out to our donors! Last year, our grantees needed extra support and resources due to the harmful effects of the pandemic on the ability of low-income Oklahomans to receive legal services. We asked our donors for additional funds to help, and we have been blown away by the response! Thanks to their generosity, we raised \$185,000 for legal services, an increase of \$20,000 over 2019 donations. This is by far our best fundraising year yet!

Since 2015, we have been focused on engaging the legal community in the bar foundation and showing why the work done is so important. Although we have funding sources like IOLTA, the need for legal services is overwhelming. Last year, the OBF awarded over \$730,000 to its Grantee Partners, but the requests were over \$1.1 million. We have also doubled the number of Grantee Partners receiving OBF funds annually. It is our mission to ensure justice is possible for all and filling the funding gap is the top priority of our fundraising efforts. Thank you, donors, for your ongoing support and dedication to our mission!

75 YEARS OF IMPACT FUNDRAISING GOAL

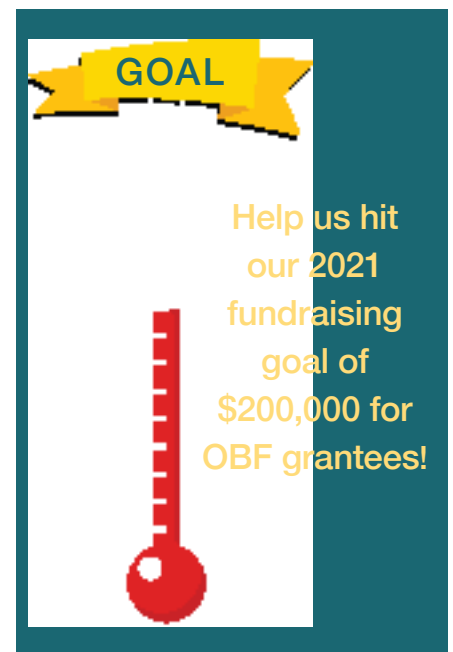
In honor of our 75th year, we have set a fundraising goal of \$200,000! We are asking the Oklahoma legal community to help us reach it, so we can impact more lives through the provision of legal services.

Here are three ways YOU can help us reach our 2021 fundraising goal:

- 1) Join our Partners Advancing Justice Program (formerly Fellows). This is an annual giving program with options to make monthly recurring donations. You can make a one-time donation or sign up for monthly giving online at okbarfoundation.org/donate.
- 2) Donate to our 75 for 75 Campaign that kicks off at the end of March. Donations will go toward ending family violence, which has increased during the pandemic.
- 3) Purchase tickets, sponsor and attend our 75th Impact Event on Friday, Oct. 1 (if it is safe to gather).

For more information about donations and sponsorships, please contact Candice Pace at candicej@okbar.org.

Ms. Pace is OBF director of development & communications.



Thank you ♥

**THANK YOU, OBF donors, for raising
\$185,000 for legal services in 2020!**

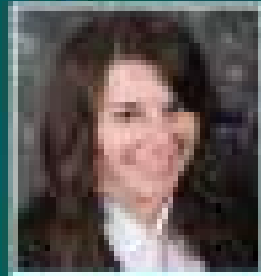
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2020-2021

Scholarship and Award Recipients



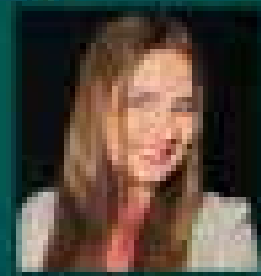
Kennedy Baker
OU School of Law
Dean's Scholarship



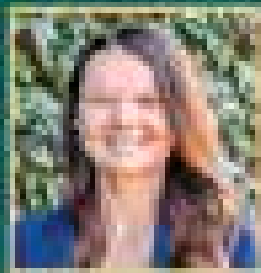
Brittany B. Boyer
OU College of Law
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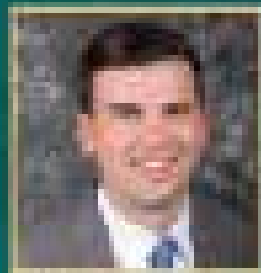
Madeline E. Bowers
OU College of Law
Dean's Scholarship



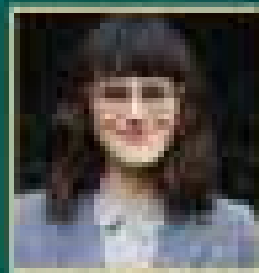
Taylor Whitcomb
OU College of Law
J.B. Clark Scholarship



Mary E. McCann
OU School of Law
Scholarship and Award Recipient



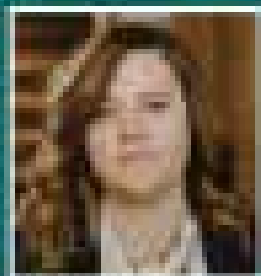
Daniel Weatherford
OU College of Law
Professor of Law's Scholarship



Elizabeth "Jenni" Blackford Beers
OU College of Law
Professor of Law's Scholarship



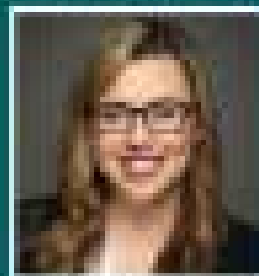
Dallas Harris
OU School of Law
J.B. Clark Scholarship



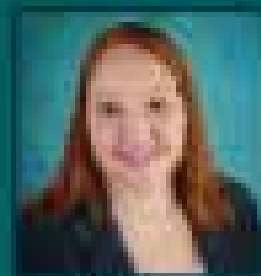
Amanda Fink
OU College of Law
Mary E. McCann Award



Jordan Fink
OU College of Law
Mary E. McCann Award



Jennie Meek
OU College of Law
Mary E. McCann Award



Rachel Miles
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Spring into Action with the YLD

By April Moaning

"SPRING IS NATURE'S WAY

of saying, 'Let's party!'" That is what the late Robin Williams believed, at least. I am inclined to share the same sentiment, as spring is my favorite season. Many of us are ready for lots of sunshine, natural vitamin D and more outdoor activities. The YLD is excited about the possibility of partaking in one of our favorite outdoor activities – the Kick It Forward Tournament. We have all come to terms with the fact that if the tournament occurs, it will be postponed to the fall. Nonetheless, we cannot help but daydream about the day when we can enjoy a bit of friendly competition, exercise, sunshine, food trucks and possibly bragging rights?

It is important to note that Kick It Forward is not just about having a good time and blowing off a little steam. Ultimately, it is a fundraising event designed to help fellow lawyers who have experienced financial difficulties and



YLD board members discuss their upcoming activities and conduct business virtually during a recent monthly meeting.

are unable to pay their annual bar dues. Many are in need of financial assistance as the economy slowly recovers from a very tumultuous year. So, please be sure to donate to the Kick It Forward program even if the kickball tournament does not come to fruition this year.

The YLD board members generally attend the American Bar Association (ABA) YLD Midyear Meeting right before the start of the spring season. This year, the midyear meeting was conducted virtually. While we missed the opportunity to fellowship with YLD members across the nation, we took full advantage of the digital platform and invited several OBA members to the YLD assembly.

I am ashamed to admit that I did not fully understand the benefits of participation in the ABA prior to my tenure on the YLD board. One of the most important benefits is the opportunity to vote on resolutions pertaining to lawyers across the nation. As representatives for young lawyers



in the state of Oklahoma, we were asked to vote on the following five resolutions:

- 1) Establishment of an annual "National Young Lawyers Week" to celebrate the innovation, diversity, leadership and overall contributions of young lawyers;
- 2) Implementation of a policy urging bar associations and law firms to bank with financial institutions that invest or fund fossil fuel pipelines;
- 3) Reformation of bar examination policies and implementation of remote, open book and/or more frequent bar exams;
- 4) Enactment of federal, state, local and tribal legislation banning no-knock warrants; and

- 5) Amendment of the YLD Bylaws to encompass nonattorney practitioners within the definition of "young lawyer."

As you can imagine, many of the above resolutions were polarizing, but delegates participated in a respectful, healthy debate. The ABA House of Delegates will next consider resolutions adopted by the ABA YLD.

Speaking of healthy debates, I wish to take this time to once again encourage you to participate in the virtual Day at the Capitol scheduled for March 23. You may find updates and details pertaining to the virtual event at www.okbar.org/dayatthecapitol. Since the YLD has opted to attend Day at the Capitol in lieu of our monthly board meeting, we will reconvene on April 22 at noon to

start planning for the Solo & Small Firm Conference and to commence our project to revise the Young Adult Guide. We would love for you to join us!

Ms. Moaning practices in Oklahoma City and serves as the YLD chairperson. She may be contacted at aprilmoaninglaw@gmail.com. Keep up with the YLD at www.facebook.com/obayld and www.okbar.org/yld.

Don't let distance keep you from getting involved



Attend section and committee meetings remotely via BlueJeans.

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



CONGRATULATIONS

to GableGotwals alum, **Dennis Cameron**,
in his new role as Executive Vice President
and General Counsel of Devon Energy!



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served this country and are unable to afford to hire an attorney.

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FOR YOUR INFORMATION

LAWYERS ARE ESSENTIAL

When considering your eligibility for the COVID-19 vaccine, recall that Gov. Stitt's executive order from March 2020 included attorneys and accompanying administrative and support services as essential. Oklahoma lawyers have provided the necessary legal work their clients critically need during these challenging times and are continuing to do so. To sign up for a vaccine, visit vaccinate.oklahoma.gov.

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.



LHL DISCUSSION GROUP HOSTS APRIL MEETING

"Dealing with Difficult Judges" will be the topic of the April 1 meeting of the Lawyers Helping Lawyers monthly discussion group. Each meeting, always the first Thursday of the month, is facilitated by committee members and a licensed mental health professional. The group meets from 6 to 7:30 p.m. remotely using BlueJeans. There is no cost to attend. Email debraj@okbar.org for login information.



MARK YOUR CALENDARS FOR DAY AT THE CAPITOL MARCH 23

Oklahoma lawyers, let your voices be heard! The OBA will host its annual Day at the Capitol Tuesday, March 23, virtually from 9:30 a.m. to noon. The agenda will feature speakers commenting on legislation affecting various practice areas, and there will also be remarks from the judiciary and bar leaders. Watch for more details soon at www.okbar.org/dayatthecapitol.

ON THE MOVE

Travis Harrison has joined the Norman law firm of Ward & Glass LLP. Previously, he practiced law at Phillips Murrah in Oklahoma City, focusing primarily on transactional law. Mr. Harrison received his J.D. from the OCU School of Law in 2018.

Justice Tom Colbert retired effective Feb. 1. Appointed to the Oklahoma Supreme Court by Gov. Brad Henry in 2004, he was the first Black jurist to serve on the court, as well as first to serve as chief justice. Justice Colbert received his J.D. from the OU College of Law in 1982 and previously served on the Oklahoma Court of Civil Appeals.

Amir Farzaneh and **Neelam Patel** have merged their law practices to form the Farzaneh and Patel Law Firm in Moore. The firm will focus on immigration law, estate planning, business and employment law and personal injury.

Alton Murray Jr. of Claremore, an OBA member for 52 years, announces he has retired from the practice of law.

Susan Damron has been selected by the Sac and Fox Nation to provide contractual services to evaluate and make recommendations to update tribal codes to establish

crime victim rights. The goal of the project is to provide a safety net of advocate services for the members of the Sac and Fox Nation, Native Americans in the Sac and Fox jurisdiction and people on tribal land with the Sac and Fox Nation who are victims of crime.

John M. Wylie has joined the Lubbock, Texas, office of Tombs Maxwell LLP as of counsel. Tombs Maxwell has a multi-state practice primarily in the areas of structured tort settlements, financial transactions, estate planning and probate. Mr. Wylie received his J.D. from the OU College of Law in 1997.

KUDOS

Robert D. Gifford, associate district court judge for the Seminole Nation, was honored with the Medal of Patriotism for his 23 years of military service as both an active-duty army judge advocate and in the reserves, as well as his contributions to service members and veterans in his private practice. He retired from the Army Reserves in 2019 as a colonel. Judge Gifford, who has served on the Seminole Nation's judiciary since 2018, also serves as a part-time judge for five other Native American tribes and as the chair of the OBA Military and Veterans Law Section.

Bradley J. Wilson was appointed by Gov. Kevin Stitt to serve as the commissioner representing the OBA at the Oklahoma Commission on Children and Youth. A former Ardmore municipal judge, Mr. Wilson currently works at the Ardmore law firm of Mordy, Mordy, Pfrehm & Wilson PC. He received his J.D. from the OCU School of Law in 2009.

Paul F. McTighe Jr. was awarded the North the Allegheny Foundation's 2021 Distinguished Alumni Award. The annual award recognizes graduates in 10 categories who have made significant contributions to society or outstanding professional accomplishments. Mr. McTighe has been a private practitioner since 1973. For most of his career, he has focused on the representation of claimants for social security disability, representing approximately 6,500 clients.

Guidelines for Bench & Bar Briefs submissions can be found at www.okbar.org/barjournal/submissions.

Submit news items for the May issue by April 1 to:

Lauren Rimmer
OBA Communications Dept.
405-416-7018
barbriefs@okbar.org

IN MEMORIAM

Melvin Combs Jr. of Oklahoma City died Dec. 26. He was born July 17, 1941. Mr. Combs received his J.D. from the OCU School of Law in 1972 and cofounded the first integrated law firm in Oklahoma in 1974. He used the firm's law library at night and on the weekends to tutor Black law students, helping over 100 students prepare for and pass the Oklahoma bar exam. He was the 2014 recipient of the OBA Trailblazer Award.

Steve Conatser of Bartlesville died Dec. 24. He was born July 11, 1948, and spent most of his childhood in Bartlesville. Mr. Conatser received his bachelor's degree from TU and his J.D. from the University of Arkansas School of Law in 1974. After earning his law degree, Mr. Conatser returned to Bartlesville to start his law practice. In 1981, he was appointed to serve as municipal judge for Bartlesville, a position he held until his death. He was a member of the Bartlesville Rotary Club, and he played drums for Distant Thunder, a local band. Memorial contributions may be made to the Bartlesville Community Foundation.

James Columbus Cox of Norman died Dec. 19. He was born Dec. 12, 1940, in Oklahoma City. **Mr. Cox served in the U.S. Navy.** After being honorably discharged, he returned to Midwest City, where he drove an ambulance and buses and served as a police officer. He received his J.D. from the OCU School of Law in 1983 and practiced law until his death.

James C. Daniel of Disney died Jan. 15. He was born Jan. 12, 1951, in Kansas City, Missouri. Mr. Daniel taught at Union Public Schools, Bixby Public Schools and Tulsa Junior College. He received his J.D. from the TU College of Law in 1980 and practiced law for the remainder of his career. Most recently, he worked for The Baker Law Firm PLLC.

Martin E. Dyer of Ardmore died Jan. 5. He was born Feb. 8, 1928, in Ardmore. **Mr. Dyer served in the U.S. Navy during the Korean War.** He received his J.D. from the OU College of Law in 1954 and served as the Ardmore City School District attorney for 65 years. He served on the Ardmore City Commission for 39 years, was the mayor of Ardmore for eight years and was an active member of the Ardmore Lions Club for 65 years. Mr. Dyer was also a board member for the Ardmore Little Theater and appeared in over 20 productions. Memorial contributions may be made to the Ardmore Main Street Authority for the construction of the new depot park or to the Ardmore Lions Club to support the eyeglasses program.

Charles O. Hanson III of Tulsa died Jan. 13. He was born Feb. 28, 1944, in Moline, Illinois. **Mr. Hanson served on active duty in the U.S. Air Force from 1967 to 1973 and retired as a lieutenant colonel from JAG Corps in 1996.** He received his J.D. from the TU College of Law in 1976. From 1980 until his retirement in 2017, he was a partner at Hanson & Holmes PLC. Mr. Hanson served

as treasurer of the Tulsa Title and Probate Lawyers Association for 29 years, as president of the Green Country MGT Register and was a founding member of the Heart of Route 66 Auto Museum. He was an active member of the Broken Arrow Evening Lions Club and a third-degree black belt. Memorial contributions may be made to the Heart of Route 66 Auto Museum, Wild Heart Ranch, St. Jude Children's Research Hospital, Happy Hands Education Center or Coffee Bunker.

Roy Johnsen of Tulsa died Jan. 2. He was born Aug. 17, 1941, in Oklahoma City. After graduating from OSU, where he was a member of the Sigma Phi Epsilon fraternity, he received his J.D. from the TU College of Law in 1967. Mr. Johnsen worked at the Tulsa Metropolitan Area Planning Commission, served as the principal author of the new Tulsa Zoning Code and co-founded the law firm of Epperson, Goodpaster and Johnsen in 1971. Early in his career, he played a pivotal role in the planning and formation of Woodland Hills Mall. Closing his career, he participated in the initial discussions and planning for the Gathering Place. Memorial contributions may be made to the Alzheimer's Association.

Julie Catherine Lacy of Oklahoma City died Dec. 16. She was born Dec. 4, 1968. Ms. Lacy received her J.D. from the OU College of Law in 2000.

Roy Powell of Oklahoma City died Sept. 22. He was born April 13, 1920, in Maysville. After attending OSU for a year, he joined the U.S. Army and was selected for the Army Air Corps. He transitioned to the U.S. Air Force in 1947 and served as a fighter pilot during the Korean War. He later taught Air Force

ROTC at OSU and Eastern Oklahoma State College. Mr. Powell retired from the Air Force as a lieutenant colonel in 1960. He received his J.D. from the OU College of Law in 1961. He was appointed an assistant district attorney for Pontotoc County in 1970 and later district attorney for Pontotoc, Seminole and Hughes

counties. After leaving office in 1979, he served as an adjunct professor of business law at Eastern New Mexico University. In 1981, Mr. Powell returned to prosecutorial law and served as an assistant district attorney in Okmulgee and Harper counties until retiring in 1986.



Retired Judge Thomas R. Brett

Oct. 2, 1931 – Feb. 5, 2021

OBA President 1970



Retired Judge Thomas R. Brett died Feb. 5. He is remembered for his kindness, humility, self-discipline, wit, wisdom and good humor. Judge Brett was born Oct. 2, 1931, in Oklahoma City. In fourth grade, he met Mary Jean James, who would later become his wife of 69 years and mother of his four children. In high school, he was the starting guard on the 1948 State Championship basketball team and was named Classen High School's Class of 1949's "Prince of Friendship." A proud Sooner, Judge Brett received his bachelor's degree from OU and his J.D. from the OU College of Law in 1957. He served on OU's Board of Regents from 1971 to 1977 and as board president from 1977 to 1978. While on the board, he was instrumental in the creation of the OU Medical Center in Oklahoma City, served on two presidential search committees and chaired the committee that hired Barry Switzer as the head football coach.

He began his legal career as an assistant district attorney in Tulsa and then continued in private practice as a trial lawyer. In 1979, he was appointed by President Carter to serve as a U.S. district judge for the Northern District of Oklahoma, where he served until 2003. Notably, he presided over the

complicated, 13-month federal prosecution of Colombian drug kingpin Jose Abello Silva. On the bench, Judge Brett was known for his commitment to ethics and to upholding the highest standards of the legal profession. He was elected as a Fellow of the American College of Trial Lawyers and received the American Inns of Court Professionalism Award, the OBA's Ethics and Judicial Excellence Awards and the Tulsa Bar Association's Golden Rule and Outstanding Senior Lawyer Awards.

Judge Brett was also devoted to helping his community through charitable activities. He served on the Board of Literacy & Evangelism International, as a trustee of the Mabey Foundation and on the Salvation Army Advisory Board. He was an elder at the Kirk of the Hills, where he co-taught the Senior High Sunday School Class with his wife for about 15 years. Judge Brett was also a retired colonel with the U.S. Army Reserve Judge Advocate General Corps. Memorial contributions may be made to The Salvation Army, Kirk of the Hills in Tulsa, St. Francis Hospice or the OU College of Law scholarships.



IN REMEMBRANCE

Patricia Ann Flanagan

Oct. 9, 1944 – Feb. 20, 2021

The OBA Board of Editors honors the life of its fellow editor, whose many contributions to the *Oklahoma Bar Journal*, Oklahoma Bar Association and to the practice of law will long be remembered.

25-Year Yukon, Oklahoma Practitioner

OBA Board of Editors Associate Editor

Business owner, Yukon Tag Agency

High school teacher in Walters, Norman and Mustang

Coached Mustang's First High School Mock Trial Team to the State Championship

Member of CASA

Active member of St. John Nepomuk Catholic Church

EDITORIAL CALENDAR

2021 ISSUES

APRIL

Law Day

Editor: Carol Manning

MAY

African American

Legal History

Editor: Melissa DeLacerda

melissde@aol.com

Deadline: Jan. 1, 2021

AUGUST

Personal Injury

Editor: Cassandra Coats

cassandracoats@leecoats.com

Deadline: May 1, 2021

SEPTEMBER

Bar Convention

Editor: Carol Manning

OCTOBER

Tax Law

Editor: Tony Morales

tony@stuartclover.com

Deadline: May 1, 2021

NOVEMBER

DUI

Editor: Aaron Bundy

aaron@bundyawoffice.com

Deadline: Aug. 1, 2021

DECEMBER

Elder Law

Editor: Luke Adams

ladams@tisdalohara.com

Deadline: Aug. 1, 2021

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



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POSITIONS AVAILABLE

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ASSISTANT DISTRICT ATTORNEY POSITION. Tim R. Webster District Attorney for District 19 is seeking an Assistant District Attorney for the Durant office. This is a four-attorney office, and the primary functions of this position will be juvenile cases and general criminal assignment. Salaried position with full state benefits. Please send resume, references, and cover letter to: Tim R. Webster, 117 North Third, Durant, Oklahoma 74701 or email to Timothy.Webster@dac.state.ok.us.

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IN-HOUSE COUNSEL FOR A REGIONAL FIRM, candidates that we are seeking must have litigation experience as well as business experience. This is an excellent opportunity for growth within a company. Send resume and salary history. Send replies to Box GH, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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

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TULSA AV RATED LAW FIRM SEEKING ASSOCIATE with excellent litigation, research, and writing skills, 3-5 years' experience for general insurance defense, long term care defense, professional negligence defense practices. Must have litigation experience for all phases of Pretrial discovery and trial experience with research and writing skills also preferred. Send replies to Box M, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

AV-RATED LAW FIRM IN NW OKC is seeking to fill a newly created associate attorney position. Areas of Practice will include real estate and commercial law, estate planning, and business transactions. Experience is preferred but not required. Required qualifications include the following: Candidate shall be licensed to practice law in the State of Oklahoma; Candidate possesses excellent interpersonal, communication, writing and analytical skills; Candidate must be organized, adaptable, and capable of multitasking in a fast-paced, deadline-driven environment. Email replies to advertising@okbar.org with the subject line "Position QR." Interested applicants should include a cover letter and writing sample with your reply. This is a full-time position; starting salary is \$55,000. All replies will be held in strict confidence.

ESTATE PLANNING LAW FIRM of Hallman & Associates, P.C. seeking senior attorney with 5-30 years' experience in Estate and Trust Administration and Probate. Tired of the big firm hours? We take a team approach to serving clients. Salary commensurate with experience, health insurance, paid vacation, personal days and a 401K matching program. Confidential resume submissions: dhallman@hallmanlawoffice.com.

BILINGUAL PARALEGAL/LEGAL ASSISTANT: Elias & Elias, a longtime Tulsa Plaintiff firm, is seeking a paralegal/legal assistant fluent in Spanish with 5 or more years of experience in Oklahoma Workers' Compensation and personal injury cases. Applicant should be proficient in Microsoft Office/365 and experience with AbacusLaw or other legal case management system is a plus. Salary commensurate with experience. Excellent benefits including health insurance and retirement. Email resumes to Herb Elias, Jr. at heliase@eliasandelias.com.

POSITIONS AVAILABLE

JUDGE ADVOCATE GENERAL'S (JAG) CORPS for Oklahoma Army National Guard is seeking qualified licensed attorneys to commission as Judge Advocates. Selected candidates will complete a six-week course at Fort Benning, Georgia followed by a tenand one-half week Military Law course at the Judge Advocate General's Legal Center on the beautiful campus of University of Virginia in Charlottesville, Virginia. This is not a full-time employment position.

Judge Advocates in the Oklahoma National Guard will ordinarily drill one weekend a month and complete a two-week Annual Training each year. Benefits include low cost health, dental, and life insurance, PX and commissary privileges, 401(k) type savings plan, free CLE, and more! **For additional information contact CPT Rebecca Pettit, email Rebecca.I.pettit.mil@mail.mil or call 405-228-5052.**

MIDWEST CITY IS HIRING A CITY ATTORNEY. Previous municipal experience and licensing by Oklahoma State Bar Association required; previous City Attorney experience preferred. Salary Range: \$85,808 - \$124,431 DOQ. For details visit www.midwestcityok.org/jobs. EOE.

NOTICE OF BANKRUPTCY JUDGE VACANCY EASTERN DISTRICT OF OKLAHOMA. The United States Court of Appeals for the Tenth Circuit seeks applications for a bankruptcy judgeship in the Eastern District of Oklahoma. Bankruptcy judges are appointed to 14-year terms pursuant to 28 U.S.C. §152. The position is located in Muskogee, Oklahoma and will be available September 1, 2021, pending successful completion of a background investigation. The current annual salary is \$201,112. The incumbent will be expected to assist other courts in the circuit as necessary, including the Northern and Western Districts of Oklahoma. This assistance may require travel. Go to www.ca10.uscourts.gov/hr/jobs to view the position requirements and download the application. The deadline for applications is Monday, April 19, 2021.

POSITIONS AVAILABLE

AV RATED INSURANCE DEFENSE/CIVIL LITIGATION FIRM seeks sharp, self-motivated associate attorneys with civil litigation experience. Openings in both Tulsa and Oklahoma City offices. Candidates should be organized, detail oriented and have strong research and writing skills. Excellent career opportunity for the right applicants. Send replies to Box DD, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

MCAFEE & TAFT IS EXPANDING OUR GROWING LITIGATION TEAM and seeking one to two associate or Of Counsel attorneys to join its Litigation practice group for the following positions: General Litigation Attorney with 2-15 years of experience in the areas of complex business disputes, products liability, personal injury, insurance defense, coverage and bad faith, and professional negligence. Ideal candidates will have experience in preparing trial documents, understanding medical and technical issues in a variety of contexts, and experience in cases involving torts. Prior business or financial experience a plus. All inquiries will be treated confidentially. Top academic performance, strong writing and analytical skills, interpersonal skills, and the ability to work in a team environment are required. Please submit resume and law school transcript to Craig Buchan at McAfee & Taft, A Professional Corporation, Williams Center Tower II, Two W. Second Street, Suite 1100, Tulsa, OK 73102, or via email to craig.buchan@mcafeetaft.com. No phone calls please.

Reflecting on a 60-Year Legal Career

By Philip S. Haney

I WAS LUCKY THAT MY FAMILY saw potential in me as a career professional, encouraged me to attend law school and were willing to pay for it. I had been commissioned a second lieutenant in the U.S. Army (through the OU ROTC program), and the other practical choice was a few years of active duty. I thought law school might make me a better soldier, give me a better job when I went on active duty and as a civilian. This was my main reason to select law to study. As it happens with many choices that are made for convenience, becoming a licensed attorney resulted in a lifelong career.

Law school convinced me I could make persuasive, forceful arguments and do so in different settings. Having majored in English and been raised in a journalism family, I also discovered my writing and reading skills were a bonus to solving client problems.

I thought expertise and formal training were distinctions a lawyer should pursue and that developing a resume this way would get clients and business. I obtained an LL.M. in taxation at New York University and never regretted that investment. Surprisingly, I soon found that parsing the Internal Revenue Code is a skill that translates to resolving many challenges of a business law practice. My

practice focus has been representing clients in the nonprofit sector, including foundations, public charities and schools throughout the U.S. and in other countries. This work continues to be rewarding.

The biggest difference I've noticed in the practice of law is the speed with which services are expected to be delivered. My career began before cell phones and computers. We had the *luxury* of overnight proofreading and U.S. mail service. Today, many of my clients require same-day services and access to me afterhours by phone or videoconference. This requires good organization and communication. It also increases the potential for error. Technology is a way of life, but it must be used wisely in a busy law practice.

As I think of my career, I am reminded that I have been my boss for all these years and that self-employment motivates a person, requires steady commitment and work discipline. I'm proud to be practicing law and find every year filled with complex legal issues



Author Philip Haney as a law student, OU College of Law class of 1971.

and clients needing my services to navigate through their problems. Working as a lawyer keeps my mind busy and requires me to be prepared for new laws, regulations and methods of doing business. The law and a commitment to it keep me confident and continue to give me a great sense of accomplishment.

Mr. Haney practices in Tulsa.



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