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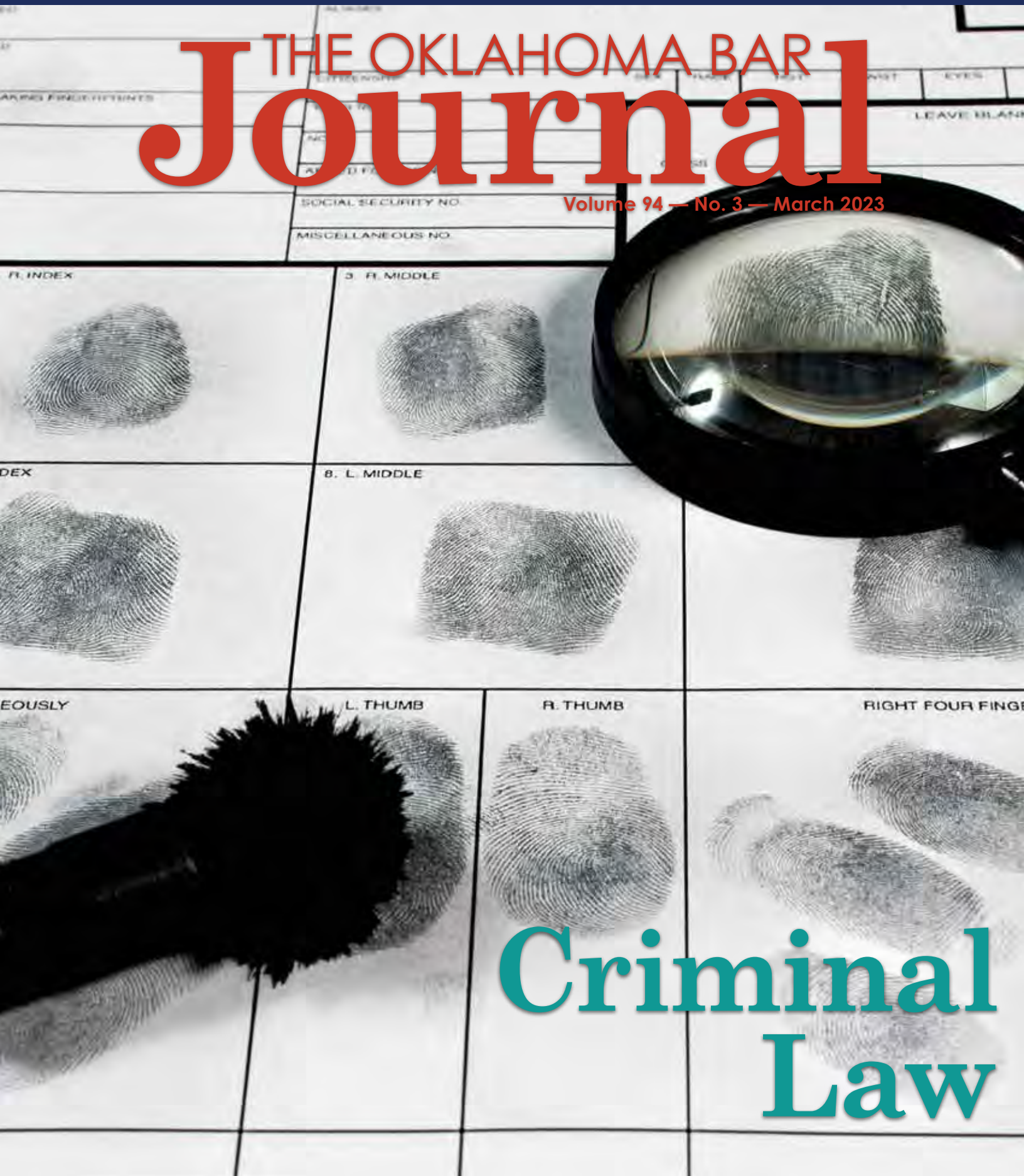

THE OKLAHOMA BAR Journal

Volume 94 — No. 3 — March 2023

Criminal Law

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continuing legal education

THURSDAY,
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A.I. IN HEALTHCARE:

Revolutionary or Risky?

Cosponsored by the OBA Health Law Section

FEATURED SPEAKER:
Graham Billingham, *MD, FACEP, FAAEM, Chief Medical Officer, Princeton Insurance Co.*

At the conclusion of this program, participants should be able to:

- **Describe the drivers and barriers to using artificial intelligence (AI) in healthcare.**
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About Out Speaker:
Graham Billingham, MD, FACEP, FAAEM is the Chief Medical Officer for Princeton Insurance Company and its parent organization, MedPro Group. He is responsible for providing leadership and support in the areas of clinical risk, claims, underwriting and sales efforts, and for leading the organizations' Healthcare Advisory Boards.

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THE OKLAHOMA BAR Journal

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Raise Your Hand

By Brian Hermanson

IT MAY NOT BE SURPRISING to most people that the months leading up to becoming the new OBA president were filled with my asking people to volunteer on committees and projects. I am amazed at the number of people needed to ensure the work of the bar moves forward and the goals are met. Every past president I have talked to remembers the struggle to fill those volunteer positions.

While the struggle is real, the reality is, most of the time, the members of the bar say yes when asked to help. I know many times I have asked attorneys to volunteer their services for the bar, they are quick to thank me for giving them the opportunity to help.

As we come out of the COVID years, it seems to some of us that many members of our profession are slow to get back into a crowded room. I can certainly understand that feeling. I still wear a mask to help protect family members. But we are blessed with the ability to be an active member of a committee and never leave the confines of our home or office. What an amazing advantage that has become.

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Last year the Solo & Small Firm Conference was one of the best-attended conferences in a long time. People are tired of not seeing people face-to-face. One has to wonder, will the in-person meeting make a comeback? One can only hope.

Most people I talk to at the end of their service on a committee tell me that they got much more out of the committee work than they put into the service. These lawyers have been able to meet many other lawyers with whom they remain friends. They also found many great opportunities arise out of their work on a committee. These are things that are almost certain to happen.

Visit www.okbar.org/committees/committee-sign-up to raise your hand and join a commttee!

There are many people I am friends with whom I met when I volunteered for the Young Lawyers Division. We reminisce about those days and laugh at the things we did so long ago. I count those memories as some of the best I have from the practice of law.

I remember going to my first OBA committee meetings after passing the bar, not knowing a soul in the room and then, months later, considering those same people my friends and mentors.

So, I ask you, what will you do when asked to volunteer for committee work? What will you do when you see an opportunity to get involved in a bar project? Will you look at the floor or avoid the phone call or email, or will you step forward and raise your hand? Be someone who takes the step that will mean so much to you in the future – raise your hand!

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We the People
insure domestic Tranquility, provide for the common defence, promote the
and our Posterity, do ordain and establish this Constitution for the
Article I

The New Second Amendment Frontier: Litigating the Constitutionality of Firearm Offenses Under *Bruen*'s Text-and-History Standard

By John D. Russell, Andrew J. Hofland and Justin A. Lollman

LAST YEAR, IN *NEW YORK STATE RIFLE & PISTOL ASS'N, INC. V. BRUEN*,[1] the Supreme Court, for the first time, announced a standard for deciding the constitutionality of firearm regulations under the Second Amendment. The test is unlike anything you learned in law school. It doesn't ask how important or compelling the state's interest is in a challenged regulation, whether the means of regulation used are substantially related or narrowly tailored to that interest or the degree to which the challenged regulation burdens the right invoked.

Instead, *Bruen* announced an entirely new two-step test "rooted in the Second Amendment's text, as informed by history."[2] At step one, *Bruen* requires lower courts, when examining a firearm regulation, to ask whether "the Second Amendment's plain text covers an individual's conduct."[3] If it does, "The Constitution presumptively protects that conduct." At that point, the court must turn to the second step, where the burden falls on the government to "justify its regulation by demonstrating that [the challenged regulation] is consistent with the Nation's historical tradition of firearm regulation" – that is, the tradition in existence "when the Bill of Rights was adopted in 1791."[4] If the government fails to carry this burden, the challenged regulation is unconstitutional.[5]

For criminal practitioners, the implications of *Bruen* are extensive. No other constitutional right is subject to more criminal regulation than the Second Amendment, with many of those regulations being of mid-to-late 20th-century vintage – too late to be considered part of "the Nation's historical tradition of firearm regulation" under *Bruen*. *Bruen*'s implications are only now beginning to play out in the lower courts, with some of the most commonly prosecuted firearm offenses facing new challenges in light of *Bruen*'s rigorous text-and-history standard. Attorneys prosecuting and defending these cases – in particular, defending – should be on the lookout for these issues and prepared to argue them. This article provides a roadmap for doing just that, describing *Bruen*'s holding, its significance and potential future implications.

THE LAY OF THE LAND BEFORE *BRUEN*

The Second Amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[6] In the years leading up to *Bruen*, the Supreme Court held, in *District of Columbia v. Heller*, that the Second Amendment "protects an individual right to possess

firearms"[7] and, in *McDonald v. City of Chicago*, that this right ranks "fundamental" and thus applicable against the states under the 14th Amendment.[8] Yet, aside from these narrow holdings, neither *Heller* nor *McDonald* provided a test or standard for deciding the constitutionality of firearm regulations under the amendment.[9]

In the years following these decisions, lower courts across the country, including the 10th Circuit, coalesced around a deferential two-part "means-end" balancing test.[10] That test required courts to first determine whether the challenged law regulates activity falling outside the scope of the Second Amendment right as originally understood.[11] If so, the activity is unprotected, and the analysis is over.[12] If not, the analysis would proceed to the second step, where the court was to analyze how closely the law comes to the core of the Second Amendment's right and the severity of the law's burden on that right.[13] Laws burdening a "core" Second Amendment right were subject to strict scrutiny.[14] All others were subject to intermediate scrutiny.[15]

THE *BRUEN* DECISION

Bruen involved a Second Amendment challenge to New York's discretionary "may issue" gun licensing statute. That statute criminalized gun possession, whether inside or outside the home, without a license.[16] For those wishing to carry a firearm outside the home, the applicant was required to convince a licensing officer, usually a judge or law enforcement officer, that they had "proper cause" for doing so.[17] While not defined by statute, New York courts had interpreted this "proper cause" standard as requiring license applicants to "demonstrate a special need for self-protection distinguishable from that of the general community."[18] Application of this "special need" requirement by licensing officers was demanding, discretionary and subject to highly deferential judicial review.[19]

The petitioners in *Bruen*, Brandon Koch and Robert Nash, were two law-abiding New York residents, both of who had applied for and been denied a license to carry a firearm outside the home for self-defense.[20] After their applications were denied, Mr. Koch and Mr. Nash filed suit in federal district court against the state officials responsible for overseeing and processing license applications, arguing the New York licensing statute was unconstitutional under the Second Amendment.[21] The district court dismissed the case, and the 2nd Circuit affirmed.[22]

In a 6-3 decision, the Supreme Court reversed.[23] In doing so, the court, for the first time, announced a test for deciding constitutional challenges under the Second Amendment, expressly disavowing the "means-end" balancing test adopted by every circuit court to address the issue.[24] As described above, *Bruen* established a two-part text-and-history test – a standard devoid of any judicial "interest balancing," like the "tiers of scrutiny" (rational basis, intermediate scrutiny, strict scrutiny) commonly applied under other constitutional amendments.[25] But the court did not stop there. It then went on to describe and apply this new standard, doing so in thorough, didactic detail over the course of its 63-page opinion. As explained below, the court's analysis and application yield several important lessons.

Bruen *Step One: Does the Second Amendment's Plain Text Cover the Regulated Conduct?*

At step one of the *Bruen* analysis, the court asks whether "the Second Amendment's plain text covers the [regulated] conduct."[26] This step requires "a 'textual analysis' focused on the 'normal and ordinary' meaning of the Second Amendment's language"[27] – in particular, the normal and ordinary meaning at the time the Second Amendment was adopted in 1791.[28] "The reason [for this reading] is obvious: the text was adopted by the people in its obvious and general sense."[29] "[T]he Constitution was written to be understood by the

voters."[30] "[T]he enlightened patriots who framed our constitution, and the people who adopted it," thus "must be understood to have employed words in their natural sense, and to have intended what they have said."[31]

The Second Amendment consists of three elements, guaranteeing the right 1) "of the people," 2) "to keep and bear" and 3) "arms."[32] These terms have well-established meanings.

"The people." "The first salient feature of the [Second Amendment's] operative clause is that it codifies a 'right of the people.'"[33] "The unamended Constitution and the Bill of Rights use the phrase 'right of the people' two other times": once "in the First Amendment's Assembly-and-Petition Clause" and again "in the Fourth Amendment's Search-and-Seizure Clause."[34] The court has interpreted the term "the people" as having a consistent meaning across all three provisions, "refer[ring] to a class of persons who are part of the national community or who have otherwise developed sufficient connections with this country to be considered part of that community."[35] This broad interpretation reflects the plain meaning of the word the "people" at the time the Bill of Rights was adopted, defined as "*every* person" or "the *whole Body* of Persons" comprising a community or nation.[36]

"Keep and bear." The Second Amendment protects the right to "keep and bear" arms. The word "keep" means "[t]o have in custody" or "retain in one's power of possession."[37] The word "bear" means "to 'carry.'"[38] Both verbs, the court has held, protect the "right *to possess* firearms"[39] – conduct often criminalized for certain individuals under modern firearm regulations.[40]

"Arms." Finally, the term "arms" refers to "[w]eapons of offense, or armour of defense."[41] The court has construed the term as "extend[ing] … to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding"[42] and has specifically held that the term protects the right to possess "handguns."[43]

Bruen *Step Two: Is the Challenged Regulation Consistent With the Nation's Historical Tradition of Firearm Regulation?*

If the Second Amendment's plain text covers an individual's conduct, "the Constitution presumptively protects that conduct," thus rendering the regulation presumptively unconstitutional. If the first step is met, the *Bruen* analysis turns to step two, where the burden falls on the government to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[44] The *Bruen* analysis at step two involves an "analogical inquiry," requiring "the government [to] identify a well-established and representative historical *analogue*" for the challenged regulation.[45] *Bruen*'s discussion and application of this requirement yields several important lessons. Four stand out in particular.

Burden. First, the burden at step two rests *entirely* with the government.[46] Courts "are not obliged to sift the historical materials for evidence to sustain the [challenged] statute"[47] but, consistent with ordinary "principle[s] of party presentation," may "decide a case based on the historical record compiled by the parties."[48] If that record yields "uncertainties" or is open to "multiple plausible interpretations," courts should rely on *Bruen*'s "default rules" – the presumption of unconstitutionality at step one and the government's burden at step two – "to resolve [those] uncertainties" in favor of the view "more consistent with the Second Amendment's command."[49]

Similarity. Second, in identifying a relevant "historical analogue," not every past practice that "remotely resembles" the challenged regulation will suffice.[50] Rather, to carry its burden, the government must identify a historical regulation that is "relevantly similar" to the one in question, both in terms of "how and why the regulations burden [one's] right to armed self-defense."[51] This does not require that the regulations be *identical* but that they impose "comparable burdens" and be "comparably justified."[52]

In some cases, this "inquiry will be fairly straightforward."[53] For example, "When a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing the problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[54] "Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional."[55]

Thus, the "means" by which a regulation is enforced is a crucial factor when comparing "how" two regulations "burden [one's] right to armed self-defense."[56] Historical firearm regulations enforced via a "small fine," "bond," "forfeiture" or other nonpunitive measures are poor analogues for modern firearm regulations carrying "significant criminal penalties."[57]

This same reasoning applies when considering a regulation's scope. Historical practices imposing conditions or restrictions on one's right to keep and bear arms provide no precedent for a "flat ban" on that right.[58]

Prevalence. Third, the government's burden at step two of the *Bruen* analysis does not stop at identifying a relevant historical

analogue. Rather, the government must show that the challenged regulation "is consistent with the Nation's historical tradition of firearm regulation."[59] This requires more than one or two isolated examples. A tradition of regulation requires a historical practice so "well-established" and "widespread" that a court can say with confidence that the regulated conduct falls outside of "the pre-existing right codified in the Second Amendment."[60] Although *Bruen* did not establish any clear threshold for determining when a historical practice rises to the level of a tradition, it did hold that "a single law in a single State" is not enough and even expressed "doubt that *three* colonial regulations could suffice."[61]

Time frame. Finally, in weighing historical evidence, courts must take careful account of the relevant time frame. As *Bruen* notes, "When it comes to interpreting the Constitution, not all history is created equal."[62] "Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*," which in the case of the Second Amendment was in 1791.[63] As a general rule, the longer a historical regulation predates or postdates this period, the less relevance it carries.[64] For historical analogues long predating the Second Amendment, courts "must be careful" to consider whether "linguistic or legal conventions changed in the intervening period."[65] While a medieval practice "that prevailed up to the period immediately before and after the framing of the Constitution" may bear on the meaning of the Second Amendment, the same cannot be said for "an ancient practice that had become obsolete in England at the time of the Constitution and never was acted upon or accepted in the colonies."[66]

This same caution applies with even greater force to *post*-enactment history. While historical practices "from the early days of the Republic" may be relevant, particularly if "open, widespread, and unchallenged," the relevance of such practices quickly fades and ultimately vanishes as one approaches the mid-to-late 19th century.[67] Simply put, "The belated innovations of the mid- to late-19th century … come too late to provide insight into the meaning of the Constitution in [1791]."[68] At most, practices from this period can provide "secondary" evidence to bolster or provide "confirmation" of a historical tradition that "had already been established."[69] Finally, by the time one gets to the 20th century, the relevance of any historical analogues is all but nonexistent, so much so that the court in *Bruen* declined to "address any of the 20th century historical evidence brought to bear by [the government] or their *amici*."[70]

Bruen's text-and-history analysis for evaluating the constitutionality of firearms regulations wiped away years of circuit court authority.

THE POTENTIAL IMPLICATIONS OF *BRUEN*

Bruen's text-and-history analysis for evaluating the constitutionality of firearms regulations wiped away years of circuit court authority. The resulting ripple effects will be far-reaching. So far, the most direct challenges have sought to apply *Bruen* to criminal statutes prohibiting the possession of firearms under certain circumstances. In the early aftermath of *Bruen*, federal district courts declared certain subsections of 18 U.S.C. §922 unconstitutional: possession of a firearm with an obliterated serial number under 18 U.S.C. §922(k),[71] possession of a firearm while subject to a domestic violence restraining order under 18 U.S.C. §922(g)(8),[72] possession of a firearm by a marijuana user[73] and receipt of a firearm while under felony indictment under 18 U.S.C. §922(n).[74] As additional challenges proliferate around the country, other subsections of §922 not tied to preventing violent felons from possessing firearms will likely be the targets of similar Second Amendment litigation, including, for example, 18 U.S.C. §922(g)(5) (prohibiting firearm possession by illegal aliens), 18 U.S.C. §922(q) (prohibiting firearm possession up to 1,000 feet from a school zone) and even 18 U.S.C. §922(g)(1) (prohibiting the possession of firearms by those with prior felony convictions). Indeed, as a sign of future litigation to come, earlier this year, the 3rd Circuit granted *en banc* review in an appeal challenging §922(g)(1) under *Bruen*'s text-and-history standard.[75]

But *Bruen* also has implications for the criminally accused wherever firearms are a factor within the criminal justice process. Practitioners should analyze current sentencing guidelines related to an offender's possession of firearms – whether enhancing a base offense

level because of the possession of a high-capacity magazine as with U.S. Sentencing Guideline §2K2.1 or overrepresenting a criminal history for a previous firearms offense affected by *Bruen* – as the possible source for objections, motions for departure or motions for variance considering they stem from conduct arguably protected by the Second Amendment. Onerous bond conditions or pretrial detention based on the existence of a prior firearm possession offense may be susceptible to challenge. *Bruen* could even have applicability in the Fourth Amendment context. Since *Bruen* holds that people generally have a constitutional right to carry guns in public, law enforcement may have difficulty basing reasonable suspicion or probable cause on the fact that they see a person simply possessing a handgun.

Bruen leaves open a myriad of challenges to firearm regulation. Every statute, regulation and sentencing enhancement is subject to challenge. If your client is charged with a firearm offense, you should analyze the burden of the regulation through *Bruen's* new test. It's a new day for firearm offenses.

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ENDNOTES

1. No. 20-843, slip op. (2022).
2. *Id.* at 10.
3. *Id.* at 15.
4. *Id.* at 15, 29.
5. *Id.* at 15, 30.
6. U.S. Const. amend. II.
7. *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008).
8. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).
9. *Id.*; *Heller*, 554 U.S. at 628-29, 634-35.
10. *Bruen*, slip op. at 8, 10 & n.4.
11. *Id.* at 9.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 10.
16. *Id.* at 2.
17. *Id.* at 3.
18. *Id.*
19. *Id.* at 4.
20. *Id.* at 6-7.
21. *Id.* at 7.
22. *Id.* at 7.
23. *Id.* at 1-2, 62-63.
24. *Id.* at 8.
25. *Id.* at 8-15.
26. *Id.* at 15.
27. *Id.* at 10-11 (quoting *Heller*, 554 U.S. at 576-77, 578).
28. *Id.* at 25.
29. 1 Joseph Story, *Commentaries on the Constitution of the United States* 407 (1833).
30. *Heller*, 554 U.S. at 576.
31. *Gibbons v. Ogden*, 22 U.S. 1, 71 (1824) (Marshall, C.J.); *see* Antonin Scalia and Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 69-77 (2012).
32. U.S. Const. amend. II.
33. *Heller*, 554 U.S. at 579.
34. *Id.*
35. *Id.* at 580 (quoting *United States v. Verdugo-Urquidez,* 494 U.S. 259, 265 (1990)); *see United States v. Meza-Rodriguez*, 798 F.3d 664, 669-70 (7th Cir. 2015) ("[T]he term 'the people' in the Second Amendment has the same meaning as it carries in other parts of the Bill of Rights.").
36. Thomas Dyche and William Pardon, *A New General English Dictionary* (14th ed. 1771) (defining "people" as signifying "every person, or the whole collection of inhabitants in a nation or kingdom"); 2 Noah Webster, *An American Dictionary of the English Language* (1828) defining "people" as the "body of persons who compose a community, town, city or nation," a "word … comprehend[ing] all classes of inhabitants"); *see also* Nathan Bailey, *A Universal Etymological English Dictionary* (1790) (defining "people" as signifying "the whole Body of Persons who live in a Country, or make up a Nation"); 2 Samuel Johnson, *A Dictionary of the English Language* (1766) (defining "people" as "[a] nation; those who compose a community"); 2 John Ash, *The New and Complete Dictionary of the English Language* (2d ed. 1795) (defining "people" as "[a] nation, the individuals composing a community; the commonalty, the bulk of a nation"); Gordon Wood, *The Creation of the American Republic* 607 (1998) ("[T]he word 'people' in America had taken on a different meaning from what it had in Europe. In America it meant the whole community and comprehended every human creature in society.").
37. *Heller*, 554 U.S. at 582.
38. *Id.* at 584.
39. *Id.* at 576.
40. *See, e.g.*, 18 U.S.C. §922(g).
41. *Heller*, 554 U.S. at 581.
42. *Id.* at 582.
43. *Id.* at 629.
44. *Bruen*, slip op. at 15.
45. *Id.* at 20-21.
46. *Id.* at 15, 50 n.25.
47. *Id.* at 52.
48. *Id.* at 17 n.6.
49. *Id.* at 17 n.6, 35-36 n.11.
50. *Id.* at 21.
51. *Id.*
52. *Id.* at 20-21.
53. *Id.* at 17.
54. *Id.*
55. *Id.* at 17-18.
56. *Id.* at 17, 20.
57. *Id.* at 49 (quoting *Heller*, 554 U.S. at 633-34).
58. *See id.* at 18, 49.
59. *Id.* at 15.
60. *Id.* at 21, 25-27.
61. *Id.* at 37, 57.
62. *Id.* at 25.
63. *Id.*
64. *Id.* at 25-28.
65. *Id.* at 26.
66. *Id.*
67. *Id.* at 27-38.
68. *Id.*
69. *Id.*
70. *Id.* at 58 n.28.
71. *United States v. Price*, No. 2:22-CR-00097, 2022 WL 6968457, at *6 (S.D.W. Va. Oct. 12, 2022).
72. *United States v. Rahimi*, No. 21-11011, 2023 WL 1459240, at *10 (5th Cir. Feb. 2, 2023). *United States v. Perez-Gallan*, No. PE:22-CR-00427-DC, 2022 WL 16858516, at *15 (W.D. Tex. Nov. 10, 2022).
73. *United States v. Harrison*, No. 5:22-CR-00328-PRW, 2023 WL 1771138, at *24 (W.D. Okla. Feb. 3, 2023).
74. *United States v. Stambaugh*, No. CR-22-00218-PRW-2, 2022 WL 16936043, at *6 (W.D. Okla. Nov. 14, 2022); *United States v. Quiroz*, No. PE:22-CR-00104-DC, 2022 WL 4352482, at *13 (W.D. Tex. Sept. 19, 2022).
75. *Range v. Attorney Gen. United States of Am.*, 56 F.4th 992 (3rd Cir. 2023).

Defending Juveniles in Federal Court

An Overview of the Juvenile Justice and Delinquency Prevention Act

By Chance Cammack

THE IMPACT OF *MCGIRT V. OKLAHOMA* IS FAR-REACHING. One of the many consequences of the Gorsuch decision is that Indian children who commit crimes in the Northern and Eastern districts of Oklahoma are facing the harsh reality of being prosecuted in federal court. Since the *McGirt* decision, 29 cases have been filed against juveniles in the Northern and Eastern districts of Oklahoma. Prior to *McGirt*, federal juvenile cases were practically unheard of in Oklahoma. The federal system and the juvenile delinquency act were not designed to handle a high number of juveniles' cases. This article provides an overview of the Federal Juvenile Delinquency Act and a guide for practitioners who seek to represent juveniles in federal court.

THE FEDERAL JUVENILE DELINQUENCY ACT AND JUVENILE PROCEEDINGS

The federal juvenile delinquency statutes are codified in Title 18 of the United States Code sections 5031 to 5043. An attorney who takes on a federal juvenile case should carefully read the juvenile act. The purpose of the Federal Juvenile Delinquency Act "is to remove juveniles from the ordinary criminal process in order to avoid the stigma of a prior criminal conviction and to encourage treatment and rehabilitation."[1] The "legal and practical benefits of being tried as a juvenile … include pretrial detention in a foster home or community-based facility near the juvenile's home instead of an adult prison; and the sealing of the records and the withholding of the juvenile's name and picture from the media."[2] Juvenile proceedings are viewed as civil rather than criminal proceedings.[3]

All juvenile proceedings begin with the filing of an information by the United States attorney.[4] A grand jury indictment is not required. All pleadings and filings should be made under seal. The statute forbids the disclosure of the records in the case except for limited and specific circumstances.[5] "Section 5038 … requires the sealing of the entire file and record of [the juvenile] proceeding and prohibits later release, other than to meet an enumerated exception."[6] The courtroom should be cleared and sealed, and all parties should be announced prior to beginning any proceedings. Typically, before an information can be brought in district court, the U.S. attorney must certify the district court is the proper venue.[7] However, because *McGirt* held that most of eastern Oklahoma is Indian Territory, Indian children who commit acts of delinquency in those areas of Oklahoma are subject to federal jurisdiction.

Once an information has been filed, the government has 30 days to adjudicate the juvenile as delinquent.[8] The first step is an appearance before a United States magistrate judge. The juvenile has a right to be represented by counsel "before proceeding with

the critical stages of the proceedings."[9] The magistrate judge will conduct a detention hearing on the day the juvenile is arraigned. The act favors the release of a juvenile unless the magistrate judge determines detention is necessary to secure the juvenile's appearance in court or to ensure the juvenile's safety or the safety of the community.[10] If the juvenile is detained, the act requires that the juvenile be provided with education and medical care, including necessary psychiatric and psychological care.[11] Counsel should coordinate with the U.S. marshal to ensure their client is being confined in a facility separate from the adults and that their educational and medical needs are being met.[12] The court may appoint a guardian *ad litem* to represent the juvenile's best interests. A guardian *ad litem* can be beneficial when a parent is absent or not involved or there is a potential conflict of interest, for example, when a sibling is a codefendant. While the guardian *ad litem* is an officer of the court, they do not have the protection of attorney-client privilege with the juvenile. The guardian *ad litem* should not discuss the nature and circumstances of the case without the juvenile's attorney present.

ADJUDICATION AND DISPOSITION HEARINGS

At the adjudication hearing, the juvenile may admit or deny responsibility for the alleged offense. If the juvenile denies responsibility, they may have a bench trial where the judge must find guilt beyond a reasonable doubt.[13] A juvenile does not have a constitutional right to a trial by jury.[14] Additionally, juvenile proceedings are "analogous to preliminary examinations in criminal cases" and, therefore, the federal rules of evidence do not apply.[15] If the juvenile is found to be delinquent, the court must hold a disposition hearing within 20 days.[16] The disposition hearing should be treated like a sentencing hearing as the court will consider the policy statements promulgated by 28 U.S.C. §994, which includes the sentencing factors under 18 U.S.C. 3553(a). "The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment."[17] Prior to the disposition hearing, counsel should file a disposition memorandum to educate the court of the juvenile's history and other factors the court should consider when formulating the sentence. It may be advantageous to waive the speedy trial requirements in 18 U.S.C. §5036 to obtain evaluations and the necessary background information to advocate for the juvenile to remain in the community. Records may be obtained by subpoenas *duces tecum* pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure. The Northern and Eastern districts of Oklahoma have general orders outlining the procedures for obtaining subpoenas.[18] Additionally, parents or guardians *ad litem* can assist in gathering school and medical records.

At the disposition hearing, the court may order the juvenile to a term of probation or may sentence the juvenile to official detention.[19] If the juvenile is less than 18 years of age at the time of the disposition, the term may not extend beyond the lesser of the date the juvenile becomes 21 or the maximum term that would have been authorized by 18 U.S.C. §3561(c) had the juvenile been tried and convicted as an adult.[20] If the juvenile is between 18 and 21 years of age, the term may not extend beyond the lesser of three years or the maximum term that would have been authorized by 18 U.S.C. §3561(c) had the juvenile been tried and convicted as an adult.[21] If a person commits an act of juvenile delinquency but charges are not brought until after the person turns 21, the juvenile act is not applicable, and the person must be tried as an adult.[22] Allowing the juvenile to remain in the community and serve a term of probation best serves the goal of rehabilitation. If the juvenile is allowed to remain in the community, the probation office will formulate a treatment plan and work with providers in the community to best meet the needs of the juvenile. The court may not sentence an adjudicated juvenile to supervised release in addition to a term of official detention.[23]

If the court elects to sentence the juvenile to a term of detention, 18 U.S.C. §5037(c) provides the statutory time limits for which official detention may be ordered. If the juvenile is less than 18 years old at the time of sentencing, the court shall impose the lesser of either the date when the juvenile turns 21, the maximum of the guideline range of a similarly situated adult defendant or the maximum term that would be authorized had the juvenile been an adult.[24] Regardless of the crime, no term of detention may continue beyond the juvenile's 26th birthday.[25] There are only three juvenile detention centers used by the Federal Bureau of Prisons to detain juveniles in the entire country. If the juvenile violates a condition of their supervision, the court may revoke their supervision and sentence the juvenile to a term of detention.[26]

Most of the litigation around juvenile proceedings involves the transfer of the juvenile to criminal jurisdiction. The presumption is that a child should remain a juvenile.[27] All courts in the United States allow for

adult prosecutions of juveniles by some transfer method.[28] In some instances, transfer is mandatory. If the juvenile is 16 or older and is charged with a felony offense involving the use or potential use of physical force or an enumerated drug offense and the juvenile has a previous adjudication from the same list of offenses, the juvenile shall be transferred to district court for criminal prosecution.[29] When the government files a motion to transfer, the juvenile's speedy trial rights are tolled.[30] Unless, after advice from counsel, the juvenile elects to stipulate to the transfer, counsel should file an objection to the government's motion to transfer. A juvenile may choose to waive their rights under the act and can proceed with adult prosecution. This may be an effective strategy for a juvenile who will likely be transferred for adult prosecution, where the government offers a favorable plea agreement.

IS TRANSFER IN THE INTEREST OF JUSTICE?

The government bears the burden of proof by a preponderance of the evidence that transfer to adult status is warranted.[31] Juvenile adjudication is preferred under the act. "Juvenile adjudication is presumed appropriate unless the government establishes that prosecution as an adult is warranted in the interest of justice."[32] The district court must consider the six factors set forth in §5032 and make findings on the record. When deciding whether to transfer a juvenile for adult prosecution, 18 U.S.C. §5032 sets forth the following factors the court must consider: 1) the age and social background of the juvenile, 2) the nature of the alleged offense, 3) the extent and nature of the juvenile's prior delinquency record, 4) the juvenile's present intellectual development and psychological maturity, 5) the nature of the past treatment efforts and the juvenile's response to such efforts and 6) the availability of programs designed to treat the juvenile's behavioral problems.[33] The question the district court must decide is whether "transfer would be in the interest of justice."[34] "It is incumbent upon the court to deny a motion to transfer where, all things considered, a juvenile has a realistic chance of rehabilitative potential in available treatment facilities during the period of minority."[35]

The objection to the motion to transfer should address the six factors the court is required to consider. Counsel should request records that would be beneficial for the court to see the whole picture of the juvenile's circumstances, such as DHS, school and medical records. Additionally, it is often helpful to have a psychological evaluation performed. The government often requests that the court order the juvenile to participate in their own psychological evaluation. Counsel should object to the government's request as it is unnecessary and duplicative and often leads to a "battle of the experts" instead of the needs of the juvenile and whether they are amenable to treatment. Statements made by the juvenile during these evaluations are not admissible in subsequent criminal prosecutions.[36] The district court must consider and make findings regarding each factor. The district court can weigh each factor as it so chooses and may balance them as it finds appropriate.[37] The court does not have to state if one factor favors or disfavors transfer.[38] Often, the nature of the offense will carry the most weight and be the deciding factor.

The district court's decision of whether to transfer or not transfer the juvenile to adult criminal prosecution is immediately appealable through an interlocutory appeal.[39] The 10th Circuit reviews transfer

decisions for abuse of discretion, and the appellant bears "a heavy burden" when seeking to overturn the district court's decision.[40] Once the juvenile is transferred, federal prosecution proceeds as it would in any criminal case.

CONCLUSION

Currently, the United States Attorney's Office is only bringing the most serious juvenile cases to federal court. Cases involving murder and sexual assault have made up the majority of juvenile cases filed in the Northern and Eastern districts. However, as the courts and probation offices become more comfortable with handling juvenile adjudications, it is likely that juvenile cases filed in federal court will continue to increase. The more prepared and knowledgeable defense counsel can be when handling these cases, the better likelihood the juvenile will remain a juvenile and not be transferred for adult prosecution.

Author's Note: Assistant federal defender Alexis Gardner and interim federal defender for the Eastern District of Oklahoma Scott Graham also contributed to the writing of this article.

ABOUT THE AUTHOR

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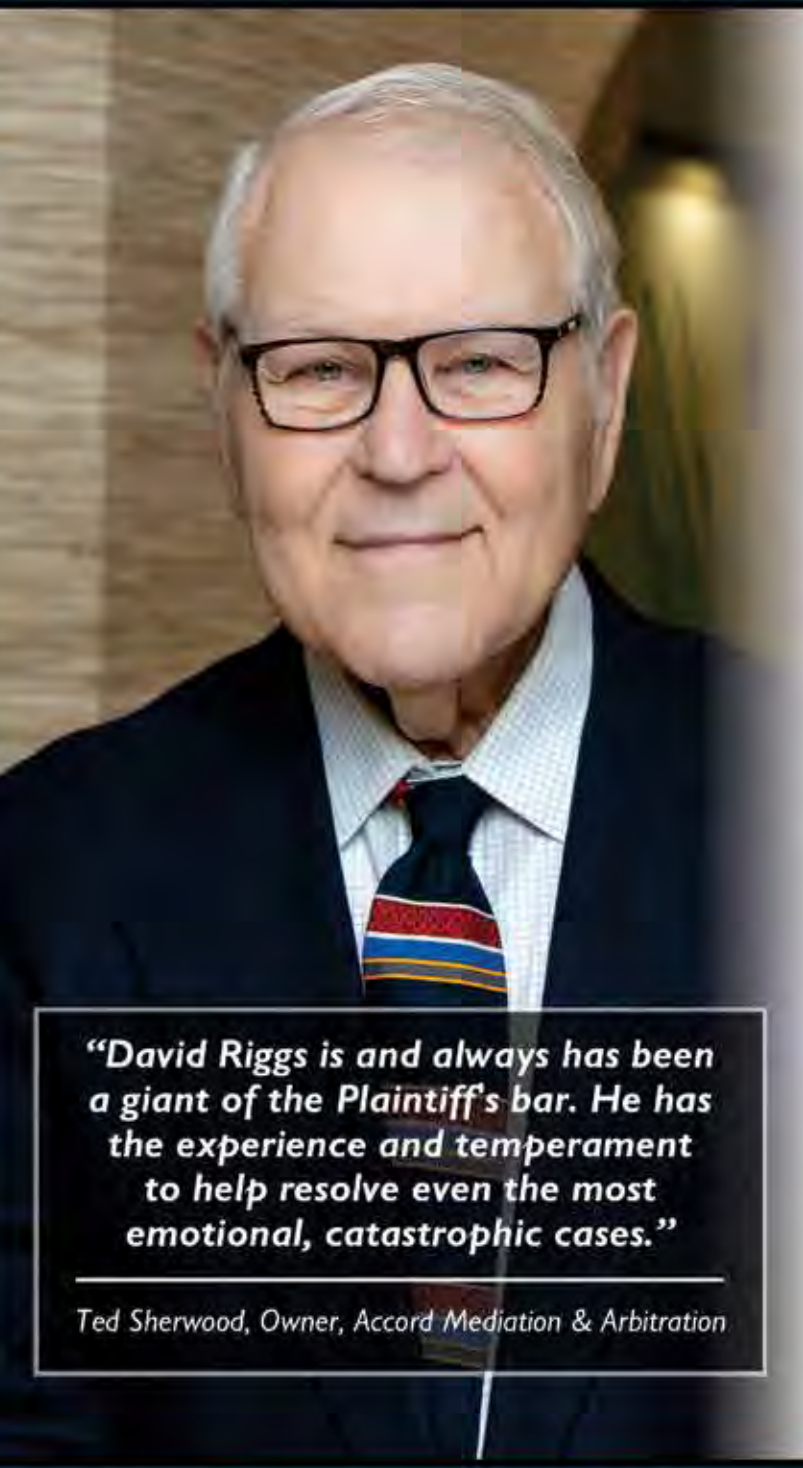
ENDNOTES

1. *United States v. Brian N.,* 900 F.2d 218, 220 (10th Cir.1990).
2. *United States v. David A*., 436 F.3d 1201, 1205 (10th Cir. 2006).
3. *United States v. Duboise*, 604 F.2d 648, 649-50 (10th Cir. 1979) (The object of the proceeding under the Juvenile Delinquency Act is to determine the youth's status as a delinquent. It is a civil rather than a criminal prosecution.).
4. 18 U.S.C. §5032.
5. 18 U.S.C. §5038.
6. *United States v. Bates*, 617 F.2d 585, 586-87 (10th Cir. 1980).
7. *United States v. Juv. Male*, 404 F. App'x 805, 806 (4th Cir. 2010).
8. 18 U.S.C. §5036*; United States v. David A*., 436 F.3d 1201, 1206 (10th Cir. 2006).
9. 18 U.S.C. §5034.
10. *Id.*
11. 18 U.S.C. §5035.
12. 18 U.S.C. §5035 requires, "Every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including necessary psychiatric, psychological, or other care and treatment."
13. *In re Winship*, 397 U.S. 358, 368, 90 S. Ct. 1068, 1075, 25 L. Ed. 2d 368 (1970) "In sum, the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in Gault – notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination."
14. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 91 S. Ct. 1976, 1986, 29 L. Ed. 2d 647 (1971).
15. *United States v. SLW*, 406 F.3d 991, 995 (8th Cir. 2005).
16. 18 U.S.C. §5037.
17. *Kent v. United States*, 383 U.S. 541, 554 (1966).
18. *See* Northern District of Oklahoma General Order 21-34; Eastern District of Oklahoma General Order 21-13.
19. 18 U.S.C. §5037.
20. 18 U.S.C. §5037(b)(1).
21. 18 U.S.C. §5037(b)(2).
22. *See United States v. Hoo*, 825 F.2d 667, 669-70 (2d Cir. 1987), cert. denied 484 U.S. 1035 (1988).
23. *United States v. Doe*, 53 F3d. 1081, 1083-84.
24. 18 U.S.C. §5037(c)(1)(A-C).
25. *Id*. at §5037(b)(2)(B).
26. *Id*. at §5037(d)(5).
27. *United States v. Lopez*, 860 F .3d 201, 210 (4th Cir. 2017) ("Rather, the JDA [Juvenile Delinquency Act] is intended to ensure that at the time they are brought into the criminal justice process, juveniles will have the benefit of a system that is tailored to their special receptivity to rehabilitation."); *United States v. Juvenile*, 347 F.3d 778, 786-87 (9th Cir. 2003) ("Moreover, if the primary goal of the federal juvenile justice system is no longer rehabilitation, as the government asserts, then the lessened due process protections afforded under the system would become extremely problematic.").
28. Peterson Tavil, "Mandatory Transfer of Juveniles to Adult Court: A Deviation from the Purpose of the Juvenile Justice System and A Violation of Their Eight Amendment Rights," 52 *Rev. Jur. U.I.P.R.* 377, 399 (2018).
29. 18 U.S.C. §5032; Major Richard L. Palmatier Jr., "Criminal Offenses by Juveniles on the Federal Installation: A Primer on 18 U.S.C. § 5032," *Army Law*., January 1994, at 3, 6.
30. *United States v. David A*., 436 F.3d 1201, 1207 (10th Cir. 2006).
31. *United States v. Leon D.M.*, 132 F.3d 583, 589 (10th Cir. 1997).
32. *United States v. McQuade Q*., 403 F.3d 717, 719 (10th Cir. 2005).
33. 18 U.S.C. §5032.
34. *Id*.
35. *United States v. One Juv. Male*, 51 F. Supp. 2d 1094 (D. Or. 1999).
36. 18 U.S.C. 5032; *United States v. J.D., 517 F. Supp. 69, 73-74* (S.D.N.Y. 1981) ("It is all but inevitable that in the course of any psychiatric evaluations of these defendants, the psychiatrists will inquire into the defendants' social backgrounds, previous delinquency, criminal experience, and other matters. Such inquiry is not prohibited by this opinion. What is prohibited is use of the defendants' statements about those subjects, in this or any subsequent proceeding, as proof of their content, rather than as verbal acts of diagnostic significance in the psychiatrists' evaluations of the defendants' psychological maturity, intellectual development, and possible mental defects.").
37. *United States v. McQuade Q.,* 403 F.3d 717, 719–20 (10th Cir. 2005).
38. *Id*.
39. "We noted that every circuit that has addressed the question had concluded that an order transferring a juvenile to adult status is immediately appealable under the collateral order doctrine." And, "Because the Double Jeopardy Clause prohibits a second prosecution for the same offense, *United States v. Hawley*, 93 F.3d 682, 687 (10th Cir. 1996), the government will forever lose the opportunity to try a particular defendant as an adult if it cannot immediately appeal the denial of a motion to transfer." *United States v. Leon D.M.*, 132 F.3d 583, 587 (10th Cir. 1997).
40. *Id*. at 590.



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To Be 'Lesser Related' or Not To Be, That is the Question – An Exploration of the 'Lesser Related' Crimes Doctrine

By Caleb A. Harlin

JURY TRIALS ARE THE PINNACLE OF THE PRACTICE OF LAW – a time-honored tradition with present-day relevance. A forum for presenting differing points of view. A check against government overreach. A stage for storytelling. A constitutional touchstone.

In the criminal defense context, a jury trial is also the lens for evaluating every case that comes through the door of a law office. Every witness, statement and shred of evidence must be viewed in light of how it could be used – or defended against – at a jury trial. For some clients, the jury trial is a moment of vindication. For others, it is their last moment of freedom.

One of a criminal defense attorney's first jobs is to evaluate the risk of conviction for each charge against a client. What is the most likely outcome at a jury trial? If the client is convicted, how can the attorney obtain the best outcome at sentencing? What is the likelihood the jury will empathize with the client enough to choose a lesser offense instead of a greater one? Should the attorney talk to the jury about a lesser offense at all? This article explores the issue of "lesser related" crimes. If you practice long enough in the area of criminal law – whether you are a judge, a prosecutor or a defense attorney – you will eventually encounter this doctrine. Since the topic of "lesser related" crimes originates from the doctrine of lesser included offenses, this discussion will begin there.

DUE PROCESS

The doctrine of lesser included offenses is rooted in the due process concept of notice. "Simply put, due process requires that a defendant have notice of the crime with which he is charged."[1] "It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him."[2]

In Oklahoma, this doctrine is codified at 22 O.S. §916: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." For decades, Oklahoma courts primarily applied the "elements" test to interpret this statute.[3] This meant, "[A]n offense is a lesser included one only where the greater offense cannot be committed without necessarily committing the lesser."[4] This paralleled the U.S. Supreme Court's application of the doctrine.[5] But the elements test is not the only test found in Oklahoma case law.

Three other approaches have appeared at various times: the pleadings test,[6] the evidence test[7] and a hybrid of the pleadings and evidence tests.[8] The "pleadings" test considers "not only ... the strict elements of the offenses, but look[s] to the facts alleged in the indictment/information to determine if a lesser included offense of the greater charged offense existed."[9] The "evidence" test "considers not only the elements [of the charged crime], but [also] looks to the crimes the trial

evidence tends to prove."[10] Finally, the "hybrid pleadings/evidence" test allows the court to review "all materials made available to a defendant through discovery and at the preliminary hearing, not just the Information."[11] Of these different approaches, the elements test appears to have been followed more than the others.[12]

NEW PROCESS

In 1999, Oklahoma law finally settled on the evidence test for the doctrine of lesser included offenses.[13] The case that formally made the announcement was *Shrum v. State*. The *Shrum* court noted that recent decisions of the "Court continue[d] to be inconsistent in [their] approach to lesser included offenses."[14] In one case, the court had applied "the strict statutory elements approach,"[15] while another case "utilized the hybrid pleading/evidence test."[16] The *Shrum* court reiterated the due process roots of the doctrine of lesser included offenses: "The principal impediment to administering instructions on related, but not necessarily included, offenses is the defendant's due process right to

notice of the charges against which he must defend."[17] Ultimately, the *Shrum* court took "this opportunity to formally adopt ... the evidence test to determine what constitutes a lesser included offense of any charged crime."[18]

According to the evidence test, there is a two-step analysis. The first step "requires courts to make a legal determination about whether a crime constitutes a lesser included offense of the charged crime or whether it is legally possible for the charged crime to include a lesser included offense."[19] The lesser-offense jury instruction is appropriate in situations "where the lesser and the greater offense are in the same class of offenses and are closely or inherently related, but the elements do not satisfy the strict statutory elements test."[20] *Shrum* did not define how close the offenses need to be or how inherently related. The court in *Shrum* was presented with two different theories of homicide offenses. It concluded that all homicides are inherently related, and a jury instruction as to any lesser form is appropriate.[21]

The second step is "whether the trial evidence warrants instruction."[22] In other words, the court "looks to the crimes the trial evidence tends to prove" to see if the lesser charge was supported by some of the evidence at trial.[23] If the elements of the two crimes are related and the evidence tends to establish the lesser crime, the evidence test is satisfied, and the jury instruction may be given – even over the defendant's objection.[24]

Shrum involved a defendant who shot and killed his stepfather after a heated argument.[25] The defendant was charged with first-degree malice murder,[26] but he was ultimately convicted of first-degree heat of passion manslaughter.[27] The state requested the jury instruction on the lesser offense, and the defendant did not object.[28] A central issue was whether the defendant acted with malice in a heat of passion or out of self-defense.[29] Applying the evidence test, the *Shrum* court concluded that all lesser forms of homicide were "necessarily included," and the court could instruct the jury on them if they were supported by the evidence.[30] The *Shrum* court then walked through three scenarios of how to apply this test.

THREE VIGNETTES

The first scenario given was if the trial court *sua sponte* proposes to instruct the jury on a lesser offense that was supported by the evidence.[31] If the defendant objects, that preference must be respected, and the "defendant shall have the right to affirmatively waive any lesser included offense instruction that the evidence supports and proceed on an 'all or nothing approach.'"[32] In other words, a defendant can choose to submit the case to the jury on the greater offense only and not allow the jury to consider any lesser offenses. If the jury concludes that the state did not quite prove its case as to the greater offense, the defendant would have to be acquitted. A criminal defense attorney is well advised to discuss the pros and cons of this decision with each client before it ever comes up at a jury trial.

The second scenario given was if the prosecution requested a lesser offense instruction, and the defendant objects.[33] In that situation, "[T]he trial court should review the Information together with all material that was made available to the defendant at preliminary hearing and through discovery to determine whether the defendant received adequate notice that the State's case raised lesser related offenses that should be deemed included."[34] It appears in this second scenario that the defendant does not have a veto power on a requested jury instruction as long as they had sufficient notice of a lesser related offense before the beginning of the jury trial.

The third scenario given was if either the trial court or the prosecution offers a jury instruction on a lesser offense and the defendant does *not* object.[35] In this scenario, the defendant might actually want the jury instruction on the lesser crime but not quite enough to ask for it themselves. In such a case, the court is allowed to "presume the defendant desired the lesser included offense instruction as a benefit."[36] Let the defendant beware: If you do not object immediately, you generally lose the ability to object later.

The moral of the story for defense attorneys was to object to any substantive jury instructions that you do not request, and carefully discuss the pros and cons of jury instructions for lesser related crimes with your clients before the jury trial ever starts. The moral of the story for prosecutors was that you should ask many questions at the preliminary hearing (in felony cases) and make sure you provide everything in your file relating to lesser crimes to the defense – just in case the court evaluates whether the defendant had notice of the lesser related crime or not. The moral of the story for judges was to avoid any jury instructions that the defendant objected to, unless the prosecutor asked for the instruction specifically *and* there was enough evidence to show the defendant had notice that they might be on trial for a lesser related crime.

The moral of the story for defense attorneys was to object to any substantive jury instructions that you do not request, and carefully discuss the pros and cons of jury instructions for lesser related crimes with your clients before the jury trial ever starts.

PREDICTION

Judge Lumpkin wrote a concurring opinion in *Shrum* to "separately ... address the issue of lesser included offenses."[37] It appears he foresaw problems with the "evidence" test because he warned, "Imprecise writing in appellate opinions can later be the basis to disregard the plain language of a statutory rule and expand a legal concept beyond its legislative intent."[38] He noted, "The law must provide a steady plumb line if the rule of law is to prevail."[39] He observed that, "[T]he discomfort of ... legal challenge[s] should not be allowed to be the catalyst to discard objective legal standards."[40] Then he reviewed the history of 22 O.S. §916 and noted, "[P]rior case law ... has remained largely (albeit not entirely) consistent through the years."[41] He explained, "Regardless of the shortcuts or difference in writing styles in prior opinions, the cases are all based on the underlying premise that the alternate charge must be a lesser included offense of the primary charge and that determination is not based upon the particular facts of each separate case."[42] He went on to say, "The offenses that comprise lesser included offenses do not change from case to case [and that] [t]he only change is whether the evidence in each particular case is sufficient to warrant a jury instruction."[43] He concluded by saying, "It is for these reasons I must object to the Court's embarking on an adoption of a policy regarding lesser included offenses that I believe disregards the doctrine of stare decisis and the plain language of [22 O.S.] Section 916."[44]

PANDEMONIUM

The concept of "lesser related" crimes blossomed after *Shrum*. In one first-degree murder case, the defendant was entitled to a second-degree felony murder jury instruction because, "A trial court is required to instruct on all lesser included *or lesser related offenses* warranted by the evidence."[45] In another first-degree murder case, *Glossip v. State*, the court held that being an accessory after the fact was a lesser related offense to first-degree murder because relevant evidence had been presented at trial and because it was the defense's theory of the case.[46] But in yet another first-degree murder case, *Miller v. State*, the court upheld a trial court's decision to decline an accessory-after-the-fact jury instruction when the defense's theory was total innocence, and the evidence on the issue was conflicting.[47]

In *McHam v. State*, the defendant's right to choose an all-or-nothing strategy was taken away, and courts were then allowed to instruct *sua sponte* on any lesser related crimes shown by the evidence.[48] A few years later, in *Barnett v. State*, giving a lesser related instruction was no longer merely an option for the court, it became a duty: "The district court has a duty to instruct on lesser included *or lesser related offenses* which are supported by the evidence."[49]

Then, in *State v. Tubby*, the court was presented with a situation where it was "unable to determine whether Accessory to First Degree Felony Murder was a legally recognized lesser included offense" due to an insufficient

appellate record.[50] Since the "State did not designate those portions of the trial transcript containing the evidence at trial" and "[b]ecause the determination [of] whether an offense is a legally recognized lesser included offense is based upon the crimes the trial evidence tends to prove[,] we find that the State has failed to ensure a sufficient record to determine the question raised on appeal."[51]

Fast forward to 2018. Judge Lumpkin authored two separate opinions that dealt with lesser related offense issues. In *Bench v. State*, the court considered whether second-degree depraved-heart murder was a lesser offense to the crime of first-degree murder.[52] Judge Lumpkin noted the historical tradition of the elements test: "This Court had traditionally looked to the statutory elements of the charged crime and any lesser degree of crime to determine the existence of any lesser included offenses."[53] Then he referenced *Shrum's* adoption of the evidence test that included "situations where the lesser and greater offense are in the same class of offenses and are closely or inherently related, but the elements do not satisfy the strict statutory elements test."[54] But notable throughout his discussion is that he avoided the phrase "lesser related" and instead used the phrases "lesser included" and "necessarily included" to describe whether second-degree murder was a lesser offense of first-degree murder.[55] This language is more akin to the elements test, not the evidence test. Then he went through the two-step analysis and concluded that a second-degree murder charge was historically a lesser included offense to first-degree murder, but he ultimately found that the jury instruction in question was not supportable by the evidence that had been presented at trial.[56]

In the second case from 2018, *Bivens v. State,* Judge Lumpkin was presented with the question of whether possession of an illegal substance with intent to distribute was a lesser related crime of the offense of drug trafficking.[57] In that case, the trial court had failed to give such a jury instruction *sua sponte*, and the defendant appealed.[58] Judge Lumpkin again cited *Shrum* and its progeny to establish the two-part test, but he stopped the analysis as soon as he determined that the requested jury instruction was not a lesser included offense: "Appellant fails to meet the first step of the analysis as the crime of Possession with Intent to Distribute is not a legally recognized lesser included or lesser related offense to the crime of Trafficking."[59] Again, this is the language of the previous "elements" test, not the current "evidence" test.

SUMMARY

It appears that we now have a two-step hybrid elements/pleadings/evidence test. First, the court should determine whether the proposed jury instruction is for a lesser included offense[60] or a lesser related offense.[61] Second, the court should evaluate whether *prima facie* evidence was presented at trial to support the lesser offense[62] while being careful to account for whether the defense's theory of the case lines up with it.[63] If the defense's theory matches the instruction, the instruction may be given.[64] If it does not, the instruction should be refused.[65]

Notable in this new formulation is the court's return to an elements-based analysis for the first step of the test. Under *Bivens* and *Bench*, courts may compare the elements of the greater offense against the elements of the lesser offense before looking to see if the evidence in the case matches the lesser offense. If there is insufficient congruence between the elements of the two crimes, the analysis may stop there, and the jury instruction would not be appropriate.[66] Judge Hudson noted this in his concurrence in *Bivens*: The "[m]ajority utilizes a two-step approach that begins with

the 'elements' test" instead of the "evidence" test.[67] Judge Kuehn also noticed this shift in her concurrence in *Bivens* by pointing out that the majority had relied on a strict elements test case in reaching its conclusion that possession with intent is not a lesser included offense of the crime of drug trafficking.[68] Both Judge Hudson and Judge Kuehn also made similar points in their separate concurring opinions in *Bench*.[69]

The law surrounding lesser related crimes can be beneficial to the prosecution at times and beneficial to the defendant at other times. On the one hand, a defendant can force the jury to hear instructions about other lesser crimes more easily than before *Shrum*. A defendant is not necessarily restricted to the exact elements of the charged crime. Counsel should be alert throughout the trial to the possibility that a lesser crime could fit the facts better. If such facts come out, counsel should consider requesting the lesser related offense jury instruction(s). This could result in better outcomes for some defendants and lower sentences for lesser offenses, especially in cases where there are strong mitigating facts.

On the other hand, *Shrum* and its progeny authorize the government to put instructions in front of the jury for a wider array of crimes, including those based on any facts alleged in the pleadings, on testimony from the preliminary hearing and on the evidence that comes out at trial. With more crimes for a jury to consider, there can be a greater likelihood that a defendant will get convicted of something at a jury trial.

Cases like *Bench* and *Bivens* may signal a revival of the "elements" test in the first step of the *Shrum* analysis. Or perhaps they are examples of how every case must be considered on its own unique facts. Or maybe they represent a "Step Zero" in the *Shrum* analysis, requiring courts to make an initial determination on whether case law has already categorically placed a particular lesser offense inside or outside the scope of the doctrine of lesser related crimes.[70]

No doubt, future cases will continue to reveal the precise contours of the doctrine of lesser related crimes. In the meantime, forewarned is forearmed.

"Your Honor, the defense is ready."

ABOUT THE AUTHOR

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ENDNOTES

1. *Parker v. State*, 1996 OK CR 19, ¶18, 917 P.2d 980, 985.
2. *Schmuck v. United States*, 489 U.S. 705, 718 (1989).
3. *Shrum v. State*, 1999 OK CR 41, ¶7, 991 P.2d 1032, 1035; *Willingham v. State*, 1997 OK CR 62, ¶¶19, 27, 947 P.2d 1074, 1080.
4. *State v. Uriarite*, 1991 OK CR 80, ¶8, 815 P.2d 193, 195.
5. *Schmuck*, 489 U.S. at 716 ("We now adopt the elements approach.").
6. *Shrum*, at ¶8, 991 P.2d at 1035-36.
7. *See e.g.*, *Darks v. State*, 1998 OK CR 15, ¶31, 954 P.2d 152, 161; *see also Shrum,* 1999 OK CR 41, ¶9 n7, 991 P.2d at 1036, n7.
8. *See infra* note 11.
9. *Shrum*, at ¶8, 991 P.2d at 1035-36.
10. *Id*. at ¶9, *and* ¶9, n7, 991 P.2d at 1036 *and* 1036, n7.
11. *Riley v. State*, 1997 OK CR 51, ¶4, 947 P.2d 530.
12. *Cf.*, *e.g.*, *Willingham v. State*, 1997 OK CR 62, ¶27, 947 P.2d 1074, 1081 (elements test), *Floyd v. State*, 1992 OK CR 22, ¶10, 829 P.2d 981, 984 (elements test); *State v. Uriarite*, 1991 OK CR 80, ¶8, 815 P.2d 193, 195 (elements test); *Hale v. State*, 1988 OK CR 24, ¶18, 750 P.2d 130, 136, cert. denied, 488 U.S. 878, 109 S.Ct. 195, 102 L.Ed.2d 164 (1988) (elements test); *Trevino v. State*, 1987 OK CR 89, ¶5, 737 P.2d 575, 577 (elements test); *Harris v. State*, 1955 OK CR 133, ¶8, 291 P.2d 372, 374 (elements test); *Thoreson v. State*, 69 Okl.Cr. 128, 100 P.2d 896, 902 (1940) (elements test); *and Cochran v. State*, 4 Okl.Cr. 379, 111 P. 974, 975 (1910) (elements test); *with Riley v. State*, 1997 OK CR 51, ¶¶14-15, 947 P.2d 530, 533-34 (hybrid pleadings/evidence test); *Morris v. State*, 1979 OK CR 136, ¶18, 603 P.2d 1157, 1161 (pleadings test: "[A]n insufficient information can support conviction for any lesser offense properly alleged even if it cannot support conviction for the crime charged."); *Parker v. State*, 1996 OK CR 19, ¶24, 917 P.2d 980, 986 (hybrid pleadings/evidence test)("This Court will look to the 'four corners' of the Information together with all material that was made available to a defendant at preliminary hearing or through discovery to determine whether the defendant received notice to satisfy due process requirements."); *Smith v. State*, 1946 OK CR 115, 83 Okl.Cr. 209, 244, 175 P.2d 348, 367 (pleadings test: information charging defendant with murder alleged sufficient facts to justify manslaughter instruction); *Kelly v. State*, 1916 OK CR 3, 12 Okl.Cr. 208, 219, 153 P. 1094, 1097 (pleadings test: "Where criminal acts of widely different characteristics are arranged together under a statute as degrees of an offense of the same name, a conviction cannot be had of a crime as included in the offense specifically charged, unless the information in charging a higher degree contains all the essential allegations of the lower degree.").
13. *Shrum v. State*, 1999 OK CR 41, ¶10, 991 P.2d 1032.
14. *Id*., at ¶10, 991 P.2d at 1036.
15. *Willingham v. State*, 1997 OK CR 62, ¶¶19, 27, 947 P.2d 1074, 1080.
16. *Riley v. State*, 1997 OK CR 51, ¶15, 947 P.2d 530, 533-34.
17. *Shrum*, at ¶6, 991 P.2d at 1033.
18. *Id*., at ¶10, 991 P.2d at 1036.
19. *Id*. at ¶7, 991 P.2d at 1035 (citation, internal quotations marks and internal brackets omitted).
20. *Id*., at ¶8, 991 P.2d at 1035.
21. *Id*., at ¶10, 991 P.2d at 1036.
22. *Id*., at ¶7, 991 P.2d at 1035.
23. *Id*., at ¶9, 991 P.2d at 1036.
24. *Id*., at ¶12, 991 P.2d at 1037.
25. *Id*., at ¶2, 991 P.2d at 1033.
26. *Id*., at ¶3, 991 P.2d at 1033.
27. *Id*., at ¶1, 991 P.2d at 1033.
28. *Id*., at ¶3, 991 P.2d at 1033.
29. *Id*., at ¶2, 991 P.2d at 1033.
30. *Id*., at ¶10, 991 P.2d at 1036.
31. *Id*., at ¶11, 991 P.2d at 1036.
32. *Id*., at ¶11, 991 P.2d at 1036-37; *citing O'Bryan v. State*, 1994 OK CR 28, ¶11, 876 P.2d 688, 689-90 ("Now after your discussion with me [defense counsel] and your own independent decision, do you want to go murder one or nothing? Defendant O'Bryan: Yes. Defense Counsel: Okay. The Court: All right. The record is clear that Appellant made a knowing and intelligent waiver of her right to a lesser included offense instruction and chose instead to rely on an all or nothing approach.").
33. *Id*., at ¶11, 991 P.2d at 1037 (citation omitted).
34. *Id*.
35. *Id*., at ¶11, 991 P.2d at 1037.
36. *Id*.
37. *Id*., at ¶1, 991 P.2d at 1038 (Lumpkin, V.P.J., concurring in result).
38. *Id*., ¶3, 991 P.2d at 1038 (Lumpkin, V.P.J., concurring in result). He wrote, "In this case, we review the issue only for plain error as [the defendant] failed to raise any objections to the heat of passion manslaughter instructions and waived his right to do so now. Finding no plain error, the remainder of the Court's discussion is

only dicta." *Id.* at ¶1, 991 P.2d at 1038 (Lumpkin, V.P.J., concurring in result).

39. *Id.*, at ¶2, 991 P.2d 1038 (Lumpkin, V.P.J., concurring in result).

40. *Id.*, at ¶8, 991 P.2d at 1039 (Lumpkin, V.P.J., concurring in result).

41. *Id.*, at ¶4, 991 P.2d at 1038 (Lumpkin, V.P.J., concurring in result).

42. *Id.*, at ¶6, 991 P.2d at 1038-39 (Lumpkin, V.P.J., concurring in result).

43. *Id.*

44. *Id.*, at ¶8, 991 P.2d at 1039 (Lumpkin, V.P.J., concurring in result).

45. *Childress v. State*, 2000 OK CR 10, ¶14, 1 P.3d 1006, 1011 (emphasis added).

46. *Glossip v. State*, 2001 OK CR 21, ¶29, 29 P.3d 597, 604.

47. *Miller v. State*, 2013 OK CR 11, ¶¶138-40, 313 P.3d 934, 980-81.

48. *McHam v. State*, 2005 OK CR 28, ¶20, 126 P.3d 662, 670.

49. *Barnett*, 2012 OK CR 2, ¶¶4, 18-22, 271 P.3d 80, 82, 86-87 (emphasis added) (trial court was correct to give second-degree felony murder jury instruction and deny first-degree manslaughter jury instruction in a first-degree malice aforethought murder case when there was no evidence of the lesser manslaughter offense).

50. *State v. Tubby*, 2016 OK CR 17, ¶10, 387 P.3d 918, 921.

51. *Id.*

52. *Bench v. State*, 2018 OK CR 31, ¶68, 431 P.3d 929, 953.

53. *Id.* at ¶72, 431 P.3d at 954.

54. *Id.* (internal quotation marks omitted).

55. *Id.* at ¶¶73-74, 431 P.3d at 954.

56. *Id.* at ¶¶74-82, 431 P.3d at 954-56.

57. *Bivens v. State*, 2018 OK CR 33, ¶¶23-24, 431 P.3d 985, 994-95.

58. *Id.* at ¶23, 431 P.3d at 994.

59. *Id.* at ¶24, 431 P.3d at 994.

60. *See*, *e.g.*, *Bench*, at ¶¶74-82, 431 P.3d at 954-56, *and Bivens*, ¶¶23-24, 431 P.3d at 994-95.

61. *Shrum*, *supra*, *and Barnett*, *supra*.

62. *See*, *e.g.*, *Bench*, at ¶¶74-82, 431 P.3d at 954-56, *and Bivens*, ¶¶23-24, 431 P.3d at 994-95.

63. *See*, *e.g.*, *Glossip*, at ¶29, 29 P.3d at 604, *and Miller*, at ¶¶138-40, 313 P.3d at 980-81.

64. *Glossip*, at ¶29, 29 P.3d at 604.

65. *Miller*, at ¶¶138-40, 313 P.3d at 980-81.

66. *Bivens*, at ¶24, 431 P.3d at 995-96.

67. *Bivens*, at ¶1, 431 P.3d at 996-97 (Hudson, J., concurring in results).

68. *Id.* at ¶1, n1, 431 P.3d at 997, n1 (Kuehn, J., concurring in results) ("The Majority relies on *Dufries v. State*, 2006 OK CR 13, ¶20, 133 P.3d 887, 891. However, *Dufries* itself is in conflict with *Shrum*. Although *Dufries* was decided well after *Shrum*, it relies on *Ott v. State*, 1998 OK CR 51, ¶13, 967 P.2d 472, 477. *Ott* was decided before *Shrum* and thus used the strict elements test in effect at that time, which was explicitly rejected in *Shrum*.").

69. *Bench*, at ¶2, 431 P.3d at 985 (Hudson, J., concurring in result) ("The majority's statement that second degree murder has historically been considered a lesser included offense of first degree malice murder is superfluous ... the legal determination is already made, and the trial court need only look to the evidence to determine whether instructions on lesser forms of homicide are supported.") (internal quotation marks, citation omitted); *Bench*, at ¶2, 431 P.3d at 983 (Kuehn, J., concurring in result) ("We have rejected the strict 'elements' approach to deciding whether it is appropriate to instruct on lesser offenses. Instead, we consider (1) whether a reasonable view of the evidence meets all elements of the lesser option, and if so, (2) whether a rational juror could have acquitted Appellant of the greater option and convicted him of the lesser – in other words, whether a rational juror could have disregarded any evidence or element that distinguishes the greater from the lesser.") (citation omitted).

70. If there is such authority holding that a particular offense is not a lesser offense, that ends the analysis before it begins, and the proposed jury instruction is not proper. *Bivens*, at ¶24, 431 P.3d at 994-95. Alternatively, if there is no authority on that particular lesser offense, then the court proceeds with the *Shrum* two-step analysis as usual. Finally, if there is authority that a particular offense is a lesser offense, then courts may proceed directly to the second step of the *Shrum* analysis. *Bench*, at ¶74, 431 P.3d at 954.

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When in Doubt, File a Claim: Administrative vs. Judicial Federal Forfeitures

By Spencer T. Habluetzel

IF IT HAS NOT ALREADY HAPPENED, you may someday have a client who asks you for return of property seized by the federal government. The client might be an innocent owner who let someone borrow their property or an innocent lienholder who did not know the property was at risk of being seized. You could seek return of the property in the administrative forfeiture proceeding, but for the U.S. Department of Justice (DOJ) agency forfeitures, you should almost always pursue a judicial forfeiture proceeding by filing a claim.

Federal forfeitures are complicated. Generally, there are three ways to forfeit property: administrative (non-judicial, *in rem*), civil (judicial, non-conviction, *in rem*) and criminal (judicial, post-conviction, *in personam*).[1] "No single law authorizes federal criminal forfeiture."[2] Instead, there are multiple federal statutes, regulations and procedures applicable to forfeitures.[3] The DOJ *Asset Forfeiture Policy Manual* states, "The administrative forfeiture process promotes the efficient allocation of Department resources and discourages undue burdens on the federal judicial system while affording interested parties a prompt resolution through the remission process."[4] Usually, federal forfeitures begin as an administrative proceeding.

ADMINISTRATIVE FORFEITURES

The vast majority of all federal forfeitures begin and end as an administrative proceeding because they are uncontested.[5] In an administrative forfeiture, an individual may submit a "Petition for Remission or Mitigation" or file a "Claim."[6] A petition offers an expedited administrative procedure to informally seek return of property without judicial action.[7] A petition does not contest the forfeiture, while a claim initiates the judicial process to decide whether the property should be forfeited.[8]

The problem with administrative federal forfeitures arises because for some federal agencies, there is no right after denial to proceed in court or appeal. Petitions do not contest the forfeiture, but they are like pardons in that they are discretionary.[9] "Congress granted complete discretion to the Attorney General to remit or mitigate forfeitures as an 'act of grace,' and no judicial review of remission decisions is available."[10] Courts "may only determine whether the agency followed the applicable procedural requirements prior to forfeiting the property."[11] As a result, if the reviewing forfeiture officer denies the petition for an arbitrary or incorrect reason, there is little the claimant can do to contest the denial other than for improper notice.[12] Whether the discretionary treatment of administrative petitions is a problem depends on the seizing agency's regulations. Under DOJ and its sub-agency[13] regulations, there is no right to proceed in court after a petition denial and no right to appeal like you can do in court. Conversely, U.S. Customs and Border Protection (CBP) regulations do allow the claimant to proceed in court after petition denial.[14]

COMPARING DOJ AND CBP ADMINISTRATIVE FORFEITURE PROCEDURES

In both cases, after a seizure, DOJ and CBP will send a seizure notice that details the possible

actions a claimant may take and that cites relevant statutes and regulations. DOJ seizures rely on 28 C.F.R. Parts 8 and 9. CBP seizures rely on 19 C.F.R. Parts 161 and 171.

The DOJ's seizure letter explains that a claimant may 1) "request a pardon of the property" by filing a petition for remission or mitigation, 2) "contest the forfeiture" by filing a claim or 3) request a hardship release of property.[15] In support, the FBI seizure letter cites 18 U.S.C. §§983, 1001, 1621; 19 U.S.C. §§1602-1619; 28 U.S.C. §1746; 28 C.F.R. Parts 8 and 9. The Drug Enforcement Administration seizure letters additionally cite 21 U.S.C. §881.[16] It is *important* to notice in the two pages of single-spaced, small text, the letter states, "If you do not file a claim, *you will waive your right to contest the forfeiture of the asset.* Additionally, if no other claims are filed, *you may not be able to contest the forfeiture of this asset in any other proceeding, criminal or civil*."[17] Although the DOJ's letter does not explicitly say a claimant has no right to appeal a petition denial, it does say the claimant cannot contest the forfeiture if the claimant does not file a claim. The deadline to file a petition is 30 days from receipt of the seizure letter while to file a claim is 35 days from the date of the seizure letter.[18] Under DOJ regulations, filing a claim requires the agency to stop the administrative forfeiture proceeding and either return the property or transmit the claim to the U.S. Attorney's Office for judicial proceedings.[19] Because the deadlines to file a petition or claim end about the same time, it is not possible under DOJ regulations to wait for a decision on the petition before filing a claim to force judicial proceedings. This means the claimant must file a claim in order to protect their rights to judicial review and avoid a discretionary denial of the request to return property.

In contrast to DOJ procedures, CBP seizure letters use a different form than DOJ letters but explain a similar procedure.[20] CBP letters also provide for filing a petition or claim but also suggest a compromise offer, abandonment or taking no action at all.[21] In support, CBP letters cite 18 U.S.C. §983; 19 U.S.C. §§1614, 1617, 1618; 19 C.F.R. Parts 161 and 171.[22] The deadline to file a petition with CBP is 30 days from the date of the seizure letter.[23] However, the CBP letter states the claimant can file a claim requesting referral to the U.S. attorney within 60 days after a petition denial.[24] The CBP regulations do not actually

Thus, while filing a claim may be necessary to protect the right of judicial review, resolution and return of property will likely take longer in a judicial forfeiture proceeding than an administrative proceeding.

provide a claim deadline expiring after petition denial, but 18 U.S.C. §983(a)(2)(B) provides that the claim deadline is the date set forth in the seizure letter.[25] Therefore, a claimant of property seized by the CBP does not have to immediately file a claim in order to preserve the right to judicial review of the forfeiture and related appeal.

JUDICIAL FORFEITURES

A claim forces the seizing agency to refer the matter for civil or criminal judicial forfeiture proceedings, and failure to do so after a certain time requires releasing the property.[26] Specifically, 18 U.S.C. §983(a)(3) provides that the government must release the property unless it files a civil complaint, obtains a criminal indictment containing forfeiture allegations or otherwise takes appropriate steps to preserve its right to maintain custody of the property per the applicable criminal forfeiture statute.[27] Civil judicial forfeiture proceeds according to the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions and the Federal Rules of Civil Procedure.[28] Criminal judicial forfeiture proceeds under 21 U.S.C. §853 and Federal Rule of Criminal Procedure 32.2, and third parties may assert interests under §853(n).[29] In a criminal forfeiture, the forfeiture determination is not made until after the verdict or plea of guilty, and the determination of third-party interests are deferred until even later.[30] Thus, while filing a claim may be necessary to protect the right of judicial review, resolution and return of property will likely take longer in a judicial forfeiture proceeding than an administrative proceeding.

CONCLUSION

In certain situations, such as for innocent lienholders, the government does not usually deny administrative petitions for remission. But because there is no right to review petition denial or for subsequent judicial proceedings in DOJ forfeitures, claimants should always file claims after DOJ seizures. It is just good business (and a way to avoid a potential malpractice claim). The claim forces the forfeiture into court, giving the claimant the opportunity for judicial review by law instead of discretionary administrative review.

The contents of a petition and a claim are sufficiently similar that they can be drafted in tandem. The DOJ may still consider remission or settlement concurrently with a judicial proceeding, so it is still worth filing both a petition and a claim.[31] The additional time to prepare both documents is relatively short as the claimant can utilize similar answers in both documents. However, with CBP, there is no need to file a claim unless the petition is denied because the CBP letter currently allows for filing a claim after denial of the petition.

While the government's desire to avoid unnecessarily burdening the courts or wasting resources is admirable, claimants must be aware that the DOJ's rules make administrative forfeitures a potentially risky proposition. Failing to pursue judicial forfeiture means the claimant is ultimately trusting an unknown agency employee to exercise discretion in the claimant's favor.[32] Additionally, sometimes pursuing judicial forfeiture can make the government view the proceeding as more trouble than it is worth. For example, in one instance after a lienholder filed a claim, the DOJ withdrew its interest in the property even though there was substantial positive equity available to the DOJ after satisfying the lien. If the DOJ really does desire to save time and avoid judicial forfeiture proceedings, then all the DOJ has to do is change the seizure notice letter

form to provide a claim deadline after petition denial similar to the CBP's seizure notice letter.[33] Until then, when in doubt, file a claim.

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ENDNOTES

1. Stefan D. Cassella, *Asset Forfeiture Law in the United States* §1-4, at 9 (2016); "Types of Federal Forfeiture," justice.gov, available at www.justice.gov/afms/types-federal-forfeiture.
2. Heather J. Garretson, "Federal Criminal Forfeiture: A Royal Pain in the Assets," 18 *S. Cal. Rev. L. & Soc. Just.* 45, 48 (2008).
3. An in-depth discussion of all the various laws relating to federal forfeitures and distinctions between them is beyond the scope of this article. However, a great resource is Cassella's *Asset Forfeiture Law in the United States*, *supra*.
4. *Asset Forfeiture Policy Manual* at 68 (2021).
5. Cassella, *supra* §1-4, at 10.
6. 37 C.J.S. Forfeitures §35.
7. *United States v. Von Neumann*, 474 U.S. 242, 250 (1986); 37 C.J.S. Forfeitures §35.
8. 18 U.S.C. §983(a)(3); *Cassella*, *supra* §4-6, at 144. Criminal forfeitures are handled in 21 U.S.C. §853(n); 37 C.J.S. Forfeitures §35.
9. 37 C.J.S. Forfeitures §35.
10. *Asset Forfeiture Policy Manual* at 155 (2021).
11. *United States v. Shigemura*, 664 F.3d 310, 312 (10th Cir. 2011).
12. *Cassella*, *supra* §5-2, at 179-183; 18 U.S.C. §983(e)(5).
13. For example, DOJ subagencies include the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA) and Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE). *See* www.justice.gov/agencies/chart.
14. The CBP is a sub-agency of the Department of Homeland Security. *See* https://bit.ly/40TcDAM.
15. An example of an FBI seizure notice is available here: https://bit.ly/3jPDCMW.
16. An example of a DEA seizure notice is available here: https://bit.ly/3jMZZmd.
17. *Id. at 2 ¶II.*
18. *Id. at 1 ¶I. B., 2 ¶II. B.;* 28 C.F.R. §8.10(a); 18 U.S.C. §983(a)(2)(B).
19. *Id. at 2 ¶II. G*; 28 C.F.R. §8.10(e); 18 U.S.C. §983(a)(3).
20. An example of a CBP seizure notice is available here: https://bit.ly/3YqDe6l.
21. *Id. at 1-3*.
22. *Id. at 1-5*.
23. *Id. at 1*.
24. *Id. at 2, 5*; 19 C.F.R. §162.94(b); 18 U.S.C. §983(a)(2)(B).
25. 19 C.F.R. §162.94(b); 18 U.S.C. §983(a)(2)(B).
26. 18 U.S.C. §983(a)(3); *Cassella*, *supra* §4-6, at 144. Criminal forfeitures are handled in 21 U.S.C. §853(n).
27. 18 U.S.C. §983(a)(3).
28. *Id.*; Fed. R. Civ. P. tit. XIII, R. A.
29. 21 U.S.C. §853; Fed. R. Crim. P. 32.2.
30. Fed. R. Crim. P. 32.2(b).
31. *Supra, note 16 at 2 ¶II. G.*; 28 C.F.R. §9.4.
32. *See* 28 C.F.R. §9.1(b) (describing who has authority to grant remission and mitigation).
33. 18 U.S.C. §983(a)(2)(B) (stating the claim deadline is based on the deadline in the personal notice letter); 28 C.F.R. §8.10(a).

NOTICE OF INVITATION TO SUBMIT OFFERS TO CONTRACT

THE *OKLAHOMA INDIGENT DEFENSE SYSTEM* BOARD OF DIRECTORS gives notice that it will entertain sealed Offers to Contract ("Offers") to provide non-capital trial level defense representation during **Fiscal Year 2024** pursuant to 22 O.S. 2001, '1355.8. The Board invites Offers from attorneys interested in providing such legal services to indigent persons during Fiscal Year 2024 (July 1, 2023 through June 30, 2024) in the following counties: **100% of the Oklahoma Indigent Defense System caseloads in THE FOLLOWING COUNTIES:**

ATOKA / BRYAN / CANADIAN / COAL / COTTON / CRAIG / JEFFERSON / GRADY / HUGHES / KAY / LINCOLN / NOBLE / NOWATA / OTTAWA / PONTOTOC / POTTAWATOMIE / ROGERS / SEMINOLE / WAGONER / WASHINGTON

Offer-to-Contract packets will contain the forms and instructions for submitting Offers for the Board's consideration. Contracts awarded will cover the defense representation in the OIDS non-capital felony, juvenile, misdemeanor, traffic, youthful offender and wildlife cases in the above counties during FY-2024 (July 1, 2023 through June 30, 2024). Offers may be submitted for complete coverage (100%) of the open caseload in any one or more of the above counties. Sealed Offers will be accepted at the OIDS offices Monday through Friday, between 8:00 a.m. and 5:00 p.m.

The deadline for submitting sealed Offers is 5:00 PM, Thursday, March 16, 2023.

Each Offer must be submitted separately in a sealed envelope or box containing one (1) complete original Offer and two (2) complete copies. The sealed envelope or box must be clearly marked as follows:

FY-2024 OFFER TO CONTRACT **TIME RECEIVED:**
_____ COUNTY / COUNTIES **DATE RECEIVED:**

The Offeror shall clearly indicate the county or counties covered by the sealed Offer; however, the Offeror shall leave the areas for noting the time and date received blank. Sealed Offers may be delivered by hand, by mail or by courier. Offers sent via facsimile or in unmarked or unsealed envelopes will be rejected. Sealed Offers may be placed in a protective cover envelope (or box) and, if mailed, addressed to OIDS, FY-2024 OFFER TO CONTRACT, P.O. Box 926, Norman, OK 73070-0926. Sealed Offers delivered by hand or courier may likewise be placed in a protective cover envelope (or box) and delivered during the above-stated hours to OIDS, at 111 North Peters, Suite 500, Norman, OK 73069. **Please note that the Peters Avenue address is NOT a mailing address; it is a parcel delivery address only.** Protective cover envelopes (or boxes) are recommended for sealed Offers that are mailed to avoid damage to the sealed Offer envelope. **ALL OFFERS, INCLUDING THOSE SENT BY MAIL, MUST BE PHYSICALLY RECEIVED BY OIDS NO LATER THAN 5:00 PM, THURSDAY, March 16, 2023 TO BE CONSIDERED TIMELY SUBMITTED.**

Sealed Offers will be opened at the OIDS Norman Offices on Friday, March 17, 2023, beginning at 9:30 AM, and reviewed by the Executive Director or his designee for conformity with the instructions and statutory qualifications set forth in this notice. Non-conforming Offers will be rejected on Friday, March 17, 2023, with notification forwarded to the Offeror. Each rejected Offer shall be maintained by OIDS with a copy of the rejection statement.

NOTICE OF INVITATION TO SUBMIT OFFERS TO CONTRACT

Copies of qualified Offers will be presented for the Board's consideration at its meeting on **Friday, March 24th, 2023**, at ***a place to be announced***.

With each Offer, the attorney must include a résumé and affirm under oath his or her compliance with the following statutory qualifications: presently a member in good standing of the Oklahoma Bar Association; the existence of, or eligibility for, professional liability insurance during the term of the contract; and affirmation of the accuracy of the information provided regarding other factors to be considered by the Board. These factors, as addressed in the provided forms, will include an agreement to maintain or obtain professional liability insurance coverage; level of prior representation experience, including experience in criminal and juvenile delinquency proceedings; location of offices; staff size; number of independent and affiliated attorneys involved in the Offer; professional affiliations; familiarity with substantive and procedural law; willingness to pursue continuing legal education focused on criminal defense representation, including any training required by OIDS or state statute; willingness to place such restrictions on one's law practice outside the contract as are reasonable and necessary to perform the required contract services, and other relevant information provided by attorney in the Offer.

The Board may accept or reject any or all Offers submitted, make counter-offers, and/or provide for representation in any manner permitted by the Indigent Defense Act to meet the State's obligation to indigent criminal defendants entitled to the appointment of competent counsel.

FY-2024 Offer-to-Contract packets may be requested by facsimile, by mail, or in person, using the form below. Offer-to-Contract packets will include a copy of this Notice, required forms, a checklist, sample contract, and OIDS appointment statistics for FY-2019, FY-2020, FY-2021, FY-2022 and FY-2023 together with a 5-year contract history for each county listed above. The request form below may be mailed to **OIDS OFFER-TO-CONTRACT PACKET REQUEST, P.O. Box 926, Norman, OK 73070-0926, or hand delivered to OIDS at 111 North Peters, Suite 500, Norman, OK 73069 or submitted by facsimile to OIDS at (405) 801-2655**.

REQUEST FOR OIDS FY-2024 OFFER-TO-CONTRACT PACKET

Name _____ OBA # _____

Street Address _____ Phone _____

City, State, Zip _____ Fax _____

County / Counties of Interest _____

_____

Examining Mental Health Professionals: Analysis of Work Product and Impeachment Methods

By Dr. Shawn Roberson

ATTORNEYS ENCOUNTER mental health professionals across varied legal settings. It can be challenging to understand and dispute the work of a professional without possessing their expertise. This article is intended to help legal professionals understand some common shortcomings in mental health professionals' work product and avenues for cross-examination. It also aims to assist in assessing the quality of work product for your expert and potential issues that need to be addressed during direct examination.

Mental health professionals do not possess the same areas of expertise or qualifications, nor are they equally equipped to serve as expert witnesses. The most common experts you will encounter include:

Psychologists: These professionals hold a doctoral-level degree (*e.g.*, Ph.D., Psy.D. or Ed.D.) and are licensed by the Oklahoma State Board of Examiners of Psychologists. They have extensive training in psychological testing and conducting therapy. Although they are usually familiar with prescription medications to treat mental illnesses, they are not licensed to prescribe medications. When they assess someone for a legal context, it will typically include both a clinical interview and objective psychological testing. According to state regulations, this is the only license that allows professionals to refer to themselves as psychologists and their work product by the term psychological (or any derivative thereof).

Psychiatrists: These professionals hold a doctoral-level degree (*e.g.*, M.D. or D.O.). They are licensed by either the Oklahoma Board of Medical Licensure and Supervision (M.D.) or the Oklahoma State Board of Osteopathic Examiners (D.O.). They are trained to prescribe medications to treat mental illnesses and conduct therapy. Although they may be familiar with some psychological testing, they are not typically trained to administer and interpret such tests. When they assess someone for a legal context, they usually rely on a clinical interview and their observations of the examinee without the benefit of objective testing.

Master's degree-level clinicians: These professionals (in Oklahoma) hold various types of master's degrees, allowing them to be licensed at that level (*e.g.*, licensed professional counselor (LPC), licensed behavioral practitioners (LBP), licensed marital and family therapist (LMFT), licensed clinical social worker (LCSW), etc.). They are licensed by their respective boards (*e.g.*, the Oklahoma State Board of Behavioral Health for the first three listed and the Oklahoma State Board of Licensed Social Workers for the latter listing). Depending upon which profession we are discussing, some are trained in therapy, some are trained in objective testing, and some are trained in both. According to state regulations, these professionals are not allowed to refer to their work product by the term psychological (or any derivative thereof), which is why you often see them title their reports as a "mental health assessment" and not a "psychological evaluation."

I strongly recommend that if you are dealing with a proffered "expert," you obtain details as to licensure (if any), degrees (*i.e.*, accreditation) and the extent of their knowledge and authority to render opinions specifically on mental illness, objective testing and other clinical issues. Licensure is an important issue, especially when it comes to qualifying an expert in *voir dire* or during a *Daubert* challenge. I recommend that attorneys possess a copy of the ethical and professional guidelines for each type of licensed professional they are likely to encounter, along with

knowledge of how to access their state board's website to check for licensure, sanction history, etc. In addition, these sites typically provide the rules for various professionals, outlining their areas of expertise and limitations. A note of caution: In some instances, master's degree-level clinicians sometimes also possess doctoral-level degrees, including the term "psychology" in the degree, but they are often obtained from programs that do not allow them to become licensed at the doctoral level (*e.g.*, online degrees, degrees from programs not sufficiently accredited, etc.). Nonetheless, their respective boards do allow such professionals to use the title of "Dr.," further confusing legal professionals as to their level of expertise. I would recommend that legal professionals focus not just on degree or title but on the highest level of licensure the person possesses. The person can, at times, be identified by a string of abbreviated certifications after their name. The legal professional should also be aware of "vanity diplomates" or other supposed credentials a proffered expert may tout, as many of them involve little more than paying to take an open-book test and receive a certification to present to the judiciary or clients. Legitimate board certification represents an additional, higher-level demonstration of credentialing, often including both written and oral examinations. However, like licensure, board certification does not ensure the quality of services. The quality of services is determined by examining methodology, reasoning and other factors within a particular case.

The current article will attempt to inform the reader of the most common missteps of mental health professionals, how they can be identified and how an attorney can effectively bring such errors to light for the trier of fact.

EXAMINE THE ORIGINAL SOURCE DOCUMENTS

Oftentimes, lawyers receive only the end work product in the form of a report with opinions. This report may or may not accurately reflect the underlying data. Some experts don't even provide a "methods" section outlining the data upon which they relied, which should be a red flag. Unfortunately, mental health professionals are also not immune from misrepresentation and bias. Research shows that experts are prone to providing more favorable opinions

to the attorneys retaining their services. This is not, in my opinion, usually an intentional slanting of opinions but our natural human inherent trait of providing what is requested. Although well-trained experts employ strategies to avoid bias, it is only upon questioning and closely examining the methodologies employed to arrive at an opinion if these strategies were implemented. An attorney's ability to review and demonstrate in open court how a professional misrepresented data can be crucial in cross-examination. This could include a review of clinical notes, assistant's notes, computer-generated reports and even the raw data from psychological testing.

There are specific processes for obtaining test materials (*e.g.*, test responses, computer-generated reports, etc.) because they are considered trademark secrets by the companies that issue them. Under most circumstances, experts are barred from releasing such materials directly to attorneys due to both ethical tenants and ownership agreements with the testing companies. Experts are allowed to forward test materials to other appropriately trained and licensed professionals, which will require you to hire such an expert if you have not already. It should be noted that this typically does not include some of the aforementioned professionals (*i.e.*, psychiatrists, social workers, etc.) who do not have the appropriate educational background and training to receive such materials. The only other way to obtain test data is by court order.

Many psychological "tests" are composed of self-report checklists with no measure of validity. All measures are not equally valid and reliable. In some cases, these checklists are presented as "tests" but are easily defeated by an examinee and do not hold up under cross-examination. Several years ago, I encountered an expert who claimed that a defendant charged with a violent sex offense did not have deviant sexual interests based upon his completion of a checklist with questions like, "Even when women claim they don't want to be sexually touched, they really enjoy it." Unless the examinee is of extremely low intelligence, they know how to answer this question to present themselves as less deviant. If the attorney was not armed with details about this "test," the cross-examination might have gone very differently. Moreover, had the attorney who retained this expert been aware of the nature of this "test," the attorney might have prepared differently. There are resource materials that can serve as useful aids in determining the quality of a test.[1] Tests are also frequently updated, so you should ensure a practitioner is using the current version.

Once you have access to the underlying test data, you may be surprised by what can be revealed. It is not uncommon, in my experience, to find that psychologists made errors in simple addition, changing the scores and sometimes the interpretation. More egregious errors are also sometimes discovered. Not long ago, I was involved in a murder case where the opposing expert clearly stated in their report that a specific psychological test showed no evidence of aggression or a personality disorder. That expert, and the retaining attorney, curiously agreed to hand over all the data except for the computer printout from that one test. After it was obtained by court order, the test printout possessed by that expert revealed the expert's claim was blatantly false, with the document specifically noting high scores related to aggression and a possible personality disorder. In another case from several years ago, it was discovered that a prominent psychologist had created a second false protocol without anyone's knowledge.

USE OF ASSISTANTS

Mental health professionals often choose to use lesser-qualified assistants who are not licensed professionals (*e.g.*, "psychological

Many psychological "tests" are composed of self-report checklists with no measure of validity. All measures are not equally valid and reliable.

technicians," students, etc.). However, they do not always reveal this in their reports. The limitations of using assistants can be many, including cases where the assistant actually spends more time with the examinee than the licensed professional, misadministration or improper scoring of tests, poor or biased note-taking, overstepping their legally allowed role (*i.e.*, clinical decision-making, etc.) or having limited experience. It may require the testimony of such an assistant in court to bring these issues to light when they are not readily apparent in the expert's report.

CHERRY-PICKING DATA

Mark Twain famously quipped, "There are three kinds of lies: lies, damned lies, and statistics." This is a wonderful summation of how experts (in any field) sometimes manipulate facts by cherry-picking data. That is, they choose the data that fit their conclusions and omit (or minimize) the ones that do not. This can include both clinical data (*e.g.*, observations, the examinee's statements, the information contained in records, etc.) and test data. In some cases, scores on tests can have multiple, but very different, interpretations. The clinician then chooses which interpretation matches their opinion (*i.e.*, confirmation bias), sometimes never informing the reader that the score might have other interpretations. Oftentimes, there may be competing hypotheses or diagnoses to explain behavior, but the expert focuses on just one to the exclusion of others. In other instances, experts reference uncorroborated data in support of their opinions, without informing the reader that the evidence is wholly questionable.

EXAMINEE RESPONSE STYLE

Because of the subjectivity of psychological diagnosis, the response style of the examinee can play a pivotal role. Examinees will lie and misrepresent their functioning to experts for various reasons. Sometimes, it is to look more pathological (*i.e.*, malingering) in an attempt to improve the outcome of a criminal case or win a civil lawsuit. In other instances, examinees try to appear more psychologically healthy than is the case, referred to as "faking good" (*i.e.*, custody disputes, pre-employment exams, sex offender evaluations, etc.). The assessment of response style could comprise an entire article in itself and will not be extensively discussed here. Simply put, an expert should be prepared to explain how they considered the issue. In situations where the examinee would obviously be motivated to be less than honest, the examiner needs to seriously consider the need for an objective assessment of response style. There is absolutely no research to suggest that mental health professionals are effective "lie detectors" or can discern when malingering or "faking good" is taking place. Otherwise, there would have been little need to invent objective tests to measure it.

FACT VERSUS FICTION

One of the most common pitfalls for mental health experts lies in the failure to differentiate what is alleged versus what has been demonstrated as true. While reliance on third parties for collateral information can be important, treating it as factual can be a fatal flaw in a case. When citing uncorroborated data, it should be so noted. For example, if told by a relative that an examinee suffered a traumatic brain injury, effective report writers cite it as a "reported" injury until confirmed. Even with the examinee themself, the expert should use this type of language. If an examinee indicated they began suffering from auditory hallucinations in college, it is "reported" and not written as factual. This helps the reader understand the strength of the data and avoids the risk of the expert being shown to be in error if later data is contradictory.

LACK OF COLLATERAL INFORMATION

One of the common complaints I encounter from attorneys is a lack of the examiner doing anything other than meeting with an examinee. This concern is well-raised for some types of evaluations. Depending upon the purpose of the evaluation, the failure to order prior treatment records may significantly hinder an expert from reaching supportable conclusions. When examining an expert's work product, consider whether prior treatment records, evaluation reports, school records, legal records, substance abuse testing or interviews of third parties would have led the examiner to different conclusions.

It is advisable to use an expert who is thorough (as the case requires) if you expect their opinions to withstand scrutiny. At times, attorneys may seek to use an expert who is less thorough because it lowers the financial cost or who is superficial and does not uncover the potential negatives about the client. I recently had a colleague in another state receive an attorney request for a "less invasive" examination, which that colleague declined. Just recently, I was contacted by a corporation requesting a fitness-for-duty evaluation of an employee they were concerned might pose a threat. However, upon providing a fee agreement, their legal department altered the contract, eliminating the interview of third parties or seeking outside

records. Some professionals might proceed with such an examination, but it is ill-advised in assessing dangerousness in the workplace and many other issues addressed by psychological evaluations.

DIAGNOSIS CAN BE FLAWED

The social sciences are considered a "soft science" because they often rely upon subjective decision making. Symptoms are reported by examinees, and if they are not accurate, it can compromise diagnostic accuracy. Moreover, clinicians are not human lie detectors; in fact, research suggests they can be fooled by deceptive clients.[2] If no objective form of testing is utilized, it becomes even more difficult (at times) to arrive at accurate results. This is why the findings in many correctional centers, psychiatric hospitals and other settings can be questionable. The Rosenhan study (1973) demonstrated the problems with diagnosis decades ago. The study used confederates, none of whom actually had a mental illness, who presented themselves at psychiatric hospitals. They reported that they had experienced what sounded like an auditory hallucination but aside from this claim, presented without other symptoms of mental illness. After admission, they denied hallucinations and acted completely normal. Nonetheless, they were hospitalized for weeks, the medical staff did not discern that the study participants were not actually mentally ill, and the participants were assigned serious diagnoses (*i.e.*, schizophrenia, bipolar disorder, etc.).

Of course, if you have much experience with the mental health system, you have probably already encountered the fact that the same person may be assigned an array of subjective diagnoses depending upon who examines them.

"Diagnostic momentum" occurs when a poor assessment and diagnosis is continued in subsequent reports and opinions with no critical analysis of how it was reached. These diagnoses often begin with a brief intake assessment, utilizing only a clinical interview. Once diagnosed, it can be very difficult to change perceptions, even if the initial diagnosis was inaccurate or the person's symptoms changed over time. Skepticism should also be applied in considering the diagnoses obtained through Social Security disability income exams. Despite the evidence that research indicates malingering occurs in up to 50% of such evaluations, the U.S. Department of Health and Human Services (HHS oversees state Social Security programs) forbids the use of malingering tests and can severely limit the time and methods used to reach a diagnosis for their agency. In summary, not all evaluations are equal.

ADVERSARIAL ALLEGIANCE

Last but certainly not least, attorneys are, no doubt, aware that experts are sometimes biased toward the side retaining them. This phenomenon has been captured and replicated in scientific studies. One of the first of these brilliant studies included over 100 forensic psychologists and psychiatrists who reviewed the same set of offender data to offer an opinion on dangerousness but believed they were being hired by either the defense or the prosecution.[3] Care to take a guess as to the results? It showed that those working for the prosecution tended to score the offender as higher risk, while those working for the defense scored the offender as lower risk. Obviously, this study does not demonstrate that all experts (or any one expert) are biased, but it points to an inherent problem of the adversarial system.

HIRED GUNS

Although less common, some opinions are clearly for sale, as long ago asserted by the book *Whores of the Court: The Fraud of Psychiatric Testimony and the Rape of American Justice*. In such cases, it often requires hiring your own expert to comb through the data and ascertain where the bias lies. It can also be useful for an attorney to research the expert's background (*i.e.*, prior court rulings,

how often an expert works for one side of the adversarial system, etc.). In one case I participated in, the attorney found that a high-profile national expert's work was admonished by another state's court system. I would add that this expert was "board certified" and had been recognized with some of the most prestigious awards a national association has to offer. Given the expert's impressive background, without discovering this information, the attorney might have had a difficult time demonstrating bias.

CONCLUSIONS

While the field can be of great assistance in reaching legal conclusions, it is equally ripe for bias and a lack of objectivity. In my experience, the gatekeepers of accountability for mental health professionals' work product fall to legal professionals, as the individual experts and their respective licensure boards will not necessarily ensure compliance with professional standards.

ABOUT THE AUTHOR

Dr. Shawn Roberson is a licensed psychologist in private practice. He has conducted thousands of criminal and civil forensic examinations throughout Oklahoma and other states. Dr. Roberson previously served as the chairperson for the Oklahoma State Board of Examiners of Psychologists in addition to teaching at numerous universities.

ENDNOTES

1. Carlson, J.F., Geisinger, K.F. and Jonson, J. (2021). *Mental Measurements Yearbook*, Twenty-First Edition.

2. Melton, G.B., Petrila, J., Poythress, N.G. and Slobogin, C. (2007). *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, Third Edition. The Guilford Press: New York.

3. Murrie, D.C., Boccaccini, M.T., Guarnera, L.A. and Rufino, K. A. "Are Forensic Experts Biased by the Side That Retained Them?" *Psychological Science* (2013).

Seeking Courtroom Interpreter Candidates

By Debra Charles

DO YOU KNOW SOMEONE who might have the skills to be a courtroom interpreter? The 2023 training program for the Oklahoma Supreme Court's Language Access Program is now enrolling! These intensive three-day programs will be held in Oklahoma City on April 5-7 and in Woodward on April 12-14.

Qualified interpreters play an essential role in ensuring equal access to justice and helping court proceedings function efficiently and effectively. To further this important goal, the Oklahoma Supreme Court has implemented a credentialing program for interpreters in the Oklahoma courts.[1] As the Language Access Program continues to grow, credentialed interpreters have excellent potential to be busy and successful in serving Oklahoma courts.

> *Many persons who come before the courts are partially or completely excluded from full participation in the proceedings due to limited English proficiency or a speech or hearing impairment. It is essential that the resulting communication barrier be removed, as far as possible, so that these persons are placed in the same position as similarly situated persons for whom there is no such barrier. …*[2]

The Oklahoma program utilizes nationally recognized standards for training and examination.[3] Successful candidates are individuals who possess an educated, native-like mastery of both English and another language and display wide general knowledge – characteristic of what a minimum of two years of general education at a college or university would provide. Our training program helps individuals develop the skills to perform the three major types of court interpreting: sight translation, consecutive interpreting and simultaneous interpreting.

Courtroom interpreters are freelance professionals who are retained by local courts on a case-by-case basis. This offers an excellent opportunity for growing a rewarding business while maintaining a work-life balance and flexible scheduling.

Candidates with *strong* language skills are needed – for both spoken language and sign language interpreting. Please share this information with anyone you know who might be a good fit for this exciting area. The flyer for the spring program is on the next page, and more information is available at www.OSCN.net > Programs > Certified Courtroom Interpreters.

Debra Charles serves as general counsel for the Administrative Office of the Courts.

ENDNOTES

1. The Supreme Court has approved detailed rules related to courtroom interpreting in Oklahoma courts. The Code of Professional Responsibility for Courtroom Interpreters in the Oklahoma Courts is set forth in Title 20, Chap 23, App I. The interpreter credentialing and continuing education process is set forth in the Rules of the State Board of Examiners of Certified Courtroom Interpreters. Title 20, Chap 23, App II. Rules governing disciplinary proceedings are set forth in Title 20, Chap 23, App III.

The State Board of Examiners of Certified Courtroom Interpreters provides oversight of the interpreter credentialing and disciplinary program, with subject matter expertise, exam proctoring and program administration provided by the Administrative Office of the Courts professional staff. The board is created by statute, and its actions are supervised by the Supreme Court and subject to approval by the court. *See* 20 O.S. §1701, et seq.

2. Preamble to the Code of Professional Responsibility for Interpreters, Rule 1, Title 20, Chap 23, App I.

3. The court interpreter credentialing process developed by the National Center for State Courts (the "NCSC") is widely recognized as the industry standard for certification of courtroom interpreters. Like most states, Oklahoma uses these nationally recognized standards and the NCSC examinations for its courtroom interpreter credentialing.

COURTROOM INTERPRETER TRAINING

Ensuring equal access to justice for all individuals regardless of their ability to communicate in the spoken English language.

Spring 2023

Class Now Enrolling!

Oklahoma Courtroom Interpreter training class and testing will be held on the following dates:

OKLAHOMA CITY APRIL 5 & 6, 2023
PRELIMINARY EXAM ON APRIL 7, 2023

WOODWARD APRIL 12 & 13, 2023
PRELIMINARY EXAM ON APRIL 14, 2023

The classes are specifically for bilingual individuals who are interested in becoming a **Registered Courtroom Interpreter**. The training will be conducted primarily in the English language, with many language-specific examples and terms explained and used. In this highly focused, 2-day training program, participants will learn:

- Structure of the Oklahoma judicial system;
- Legal terminology;
- Oklahoma's *Code of Professional Responsibility for Interpreters in the Oklahoma Courts*;
- Role of the interpreter in various legal and court proceedings; and Modes of interpretation including consecutive, simultaneous, and sight.

Following the training program, examinations will be administered to participants who desire to become Registered Courtroom Interpreters.

Scan the QR code for additional information and registration materials or visit www.oscn.net/programs/interpreters.asp.

SPACE IS LIMITED. *REGISTER TODAY!*

Provided by the Oklahoma Supreme Court Administrative Office of the Courts
2100 N. Lincoln Blvd., Suite 3, Oklahoma City, Oklahoma 73105
405-556-9300

SOLO & SMALL FIRM CONFERENCE

JUNE 22-24, 2023 | OSAGE CASINO HOTEL | TULSA

It's that time of the year again! Mark your calendars now for June 22-24 when the OBA Solo & Small Firm Conference comes to the Osage Casino Hotel in Tulsa. Get all your MCLE (including 2 hours of ethics) for the year during this three-day event in a fun, relaxed and informal setting.

This year's CLE offerings will include something for all solo and small firm practitioners, including more selections for younger lawyers. Plus, celebrate the summer! Satisfy your appetite at one of the restaurants, test your luck at the casino and relax by the pool, all without having to leave the comfort of the hotel.

Registration is now open. Visit the conference website at www.okbar.org/solo for the complete schedule plus online conference and hotel registration. Be sure to register using the OBA hotel room block to receive the discounted room rate, which is available through May 21.

You won't want to miss out on this year's great programs and events, so register today! The early-bird registration deadline ends June 5.

OKLAHOMA BAR ASSOCIATION
2023 SOLO
& SMALL FIRM CONFERENCE | YLD MIDYEAR MEETING
JUNE 22-24 | OSAGE CASINO HOTEL | TULSA

A wide range of substantive law and law practice management CLE sessions are featured, with a focus on tools for and frequent challenges encountered by small firm lawyers. The conference provides social events with plenty of time to meet and network with lawyers from across the state who can provide you with advice, friendship and possible referrals. Held in conjunction with the Young Lawyers Division Midyear Meeting.

ONLINE REGISTRATION
www.okbar.org/solo

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

FAX FORM
405-416-7092

REGISTRANT INFORMATION

Full Name: _____ OBA #: _____

Address: _____

City/State/Zip: _____

Phone: _____ Fax: _____

Email: _____

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

_____

GUEST INFORMATION

Guest name: _____

Guest name: _____

Guest name: _____

Guest name: _____

Guest name: _____

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

STANDARD RATES FOR OBA MEMBERS

admitted before Jan. 1, 2021

	NUMBER OF GUESTS	CIRCLE ONE
Early Attorney Only Registration **(on or before June 5)**		**$300**
Late Attorney Only Registration **(on or after June 6)**		**$350**
Guest Registration **(on or before June 5)**	_____	**$200** *each*
Late Guest Registration **(on or after June 6)**	_____	**$250** *each*
Guest Registration *(for children 12 and under)*	_____	**$125** *each*

SPECIAL RATES FOR OBA MEMBERS OF TWO YEARS OR LESS

admitted on or after Jan. 1, 2021

	NUMBER OF GUESTS	CIRCLE ONE
Early Attorney Only Registration **(on or before June 5)**		**$200**
Late Attorney Only Registration **(on or after June 6)**		**$225**
Guest Registration **(on or before June 5)**	_____	**$200** *each*
Late Guest Registration **(on or after June 6)**	_____	**$225** *each*
Guest Registration *(for children 12 and under)*	_____	**$125** *each*

PAYMENT INFORMATION

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

For payment using: ☐ Visa ☐ MasterCard ☐ Discover ☐ American Express

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

Expiration Date: _____ Authorized Signature: _____

REGISTRATION AND POLICIES

CANCELLATION POLICY

Cancellations will be accepted at any time on or before June 6 for a full refund; a $50 fee will be charged for cancellations made on or after June 6. **No refunds after June 12.**

REGISTRATION, ETC.

Registration fee includes 12 hours of CLE credit, including up to two hours of ethics. Includes all meals: dinner Thursday and Friday, breakfast Friday and Saturday and lunch Friday and Saturday.

HOTEL RESERVATIONS

Call 877-246-8777 or visit www.osagecasino.com, select the Tulsa location, then click on Group Sign In and use booking ID OBA23 to get the group rate. The group rate is available through May 21.

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Contact Mark Schneidewent at marks@okbar.org for more information.

FOR MORE INFORMATION AND TO REGISTER ONLINE, VISIT WWW.OKBAR.ORG/SOLO.

Legislative Update

By Shanda McKenney

AS OF THIS WRITING, it is two weeks into the First Regular Session of the 59th Legislature, and your Legislative Monitoring Committee is hard at work keeping an eye on legislation that may be of interest to Oklahoma's attorneys. If you were unable to attend the 2023 Legislative Kickoff in person, you haven't missed out completely! An online video replay of the program is available at https://bit.ly/3Esi4gr, and viewing it can earn you some CLE credit, too!

During the event, Clay Taylor and Angela Ailles Bahm presented the basics of how legislation winds through the system and how the public can keep track of its process. After that, several substantive bills were presented by OBA members. One of the highlights of this program, "60 Bills in 60 Minutes," was provided by the following speakers:

- Stacy Acord, McDaniel Acord (Family Law)
- Paul Cason, Goodwin/Lewis (Civil Procedure/Courts)
- Amber Peckio Garrett, Amber Law Group (Cannabis Law)
- Teena Gunter, Oklahoma Department of Agriculture, Food and Forestry (Government)
- Seth Paxton, Paycom Government Affairs (Native American Law)
- Taylor Venus, Venus Law Firm (Environment/ Natural Resources)

Legislative Monitoring Committee Chair Shanda McKenney introduces OBA Legislative Liaison Clay Taylor during the Legislative Kickoff event in January.

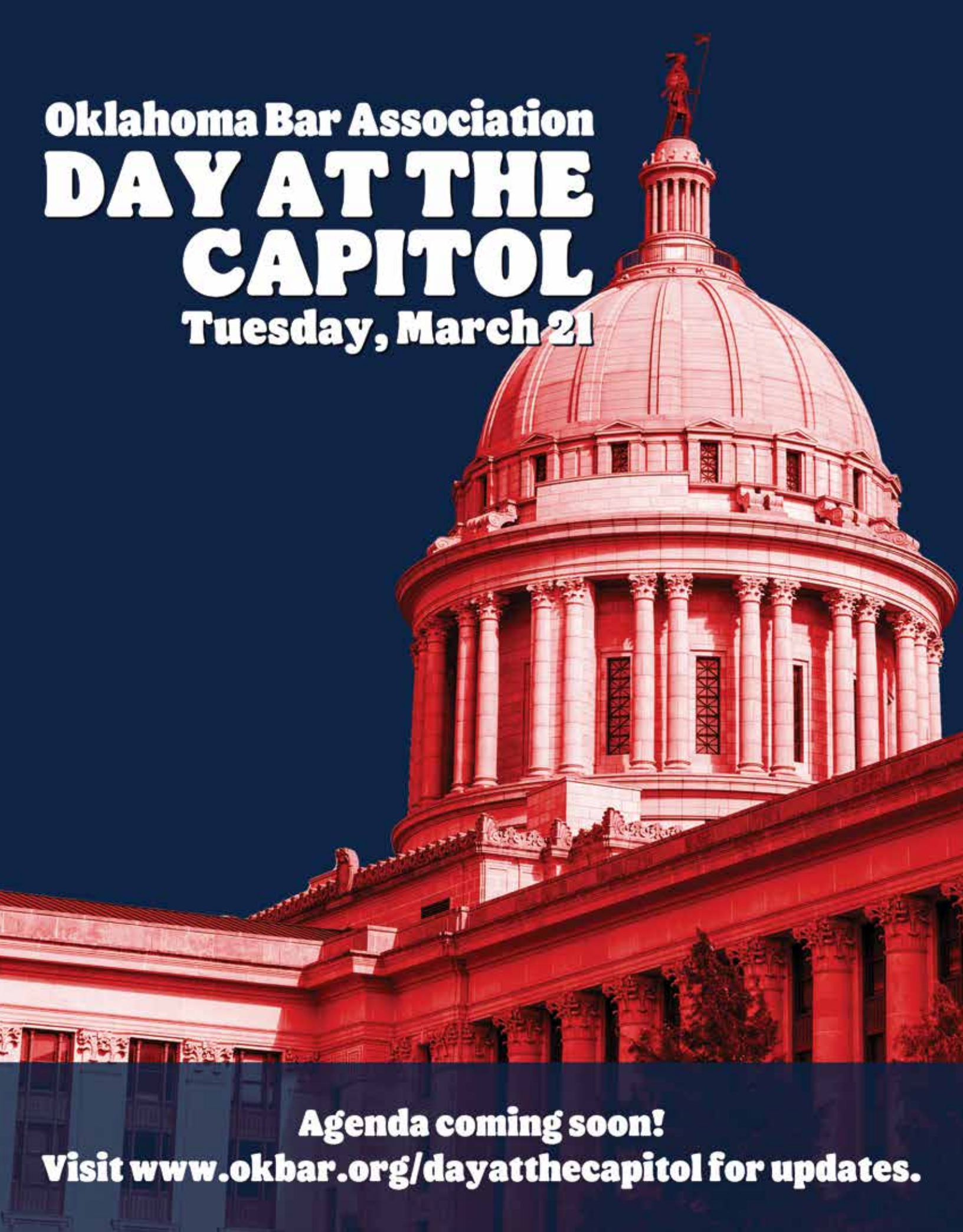
Following the presentation of highlighted bills by topic, Jari Askins moderated a legislative panel, which included OBA members Sen. Brent Howard, Sen. Kay Floyd, Rep. Chris Kannady and Rep. Jason Lowe.

The next major event for this committee is OBA Day At the Capitol, which is scheduled for Tuesday, March 21, beginning at the Oklahoma Bar Center in Oklahoma City. We will hear from several speakers regarding the progress of the session. Following a networking lunch, we will walk across the street to the Capitol building to meet with legislators and introduce ourselves as resources in specific subject matter areas.

If you have an interest in the work this committee does, please visit http://bit.ly/3wwswQA. If you are particularly interested in any specific legislation, please keep the following remaining deadlines in mind:

- March 2 – deadline for bills to come out of committee
- March 23 – deadline for bills to be voted on the floor in the house of origin
- April 27 – deadline for bills to be voted on the floor in the opposite house
- May 26 – s*ine die* adjournment of the Legislature

As always, you can check the legislative calendars yourself, track specific bills, get contact information for legislators and so much more by visiting www.oklegislature.gov.


Oklahoma Bar Association
DAY AT THE CAPITOL
Tuesday, March 21
Agenda coming soon!
Visit www.okbar.org/dayatthecapitol for updates.

Professional Responsibility Commission Annual Report

As Compiled by the Office of the General Counsel of the Oklahoma Bar Association
Jan. 1, 2022 – Dec. 31, 2022 | SCBD 7401

INTRODUCTION

Pursuant to the provisions of Rule 14.1, Rules Governing Disciplinary Proceedings (RGDP), 5 O.S. 2021, ch. 1, app. 1-A, the following is the Annual Report of grievances and complaints received and processed for 2022 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 lawyer members are nominated by the president of the Oklahoma Bar 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. Members serve for a term of three years, with a maximum of two terms. Terms expire Dec. 31 at the conclusion of the three-year term.

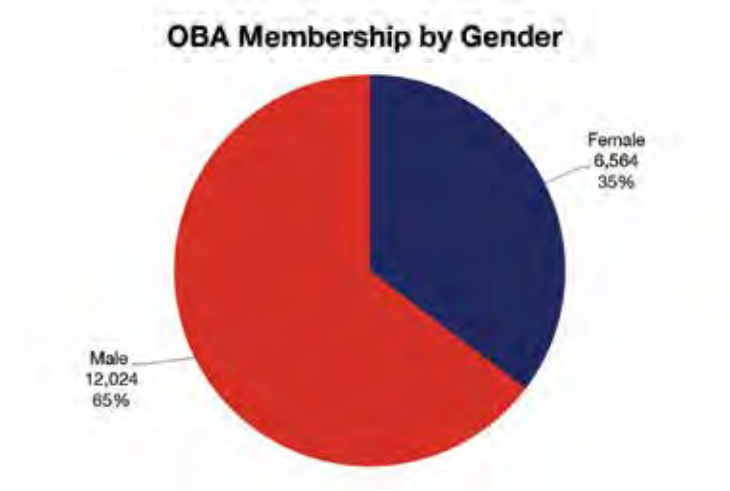
Lawyer members serving on the Commission all or part of 2022 were Chairperson Sidney K. Swinson, Tulsa; Vice Chairperson Heather Burrage, Durant; Karen A. Henson, Shawnee; Matthew Beese, Muskogee; Jimmy D. Oliver, Stillwater; and Alissa Preble Hutter, Norman. The non-lawyer members were John Thompson, 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 a lawyer. The Office of the General Counsel prosecutes all proceedings under the Rules Governing Disciplinary Proceedings, supervises the investigative process and represents the Oklahoma Bar Association in all reinstatement proceedings.

OBA MEMBERSHIP STATISTICS

The membership of the Oklahoma Bar Association as of Dec. 31, 2022, was 18,588 lawyers. The total number of members included 12,024 males and 6,564 females.

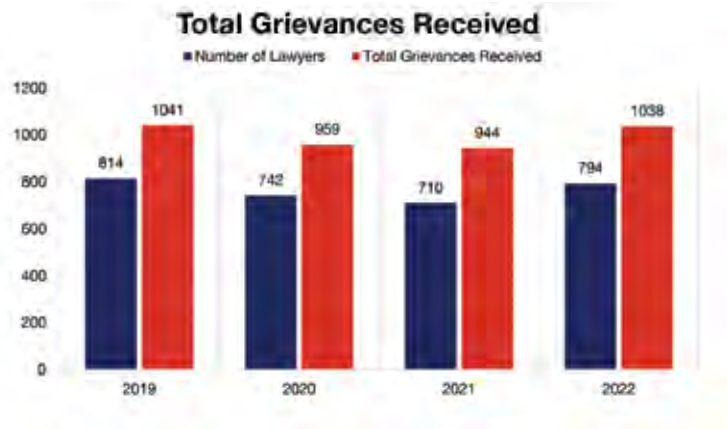


VOLUME OF GRIEVANCES

During 2022, the Office of the General Counsel received 198 formal grievances involving 151 lawyers and 840 informal grievances involving 643 lawyers. In total, 1,038 grievances were received against 794 lawyers. The total number of grievances and lawyers receiving the same differs because some lawyers received multiple grievances. In addition, the Office of the General Counsel processed 133 items of general correspondence, which is mail not considered to be a grievance against a lawyer.[1]

On Jan. 1, 2022, 160 formal grievances were carried over from the previous year. The carryover accounted for a total caseload of 358 formal investigations pending throughout 2022. Of those grievances, 192 investigations were completed by the Office of the General Counsel and presented for review to the Professional Responsibility Commission. Therefore, 166 formal grievances remained pending as of Dec. 31, 2022.

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.

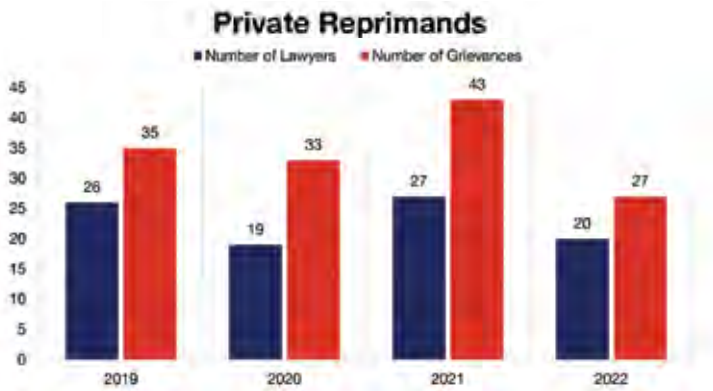


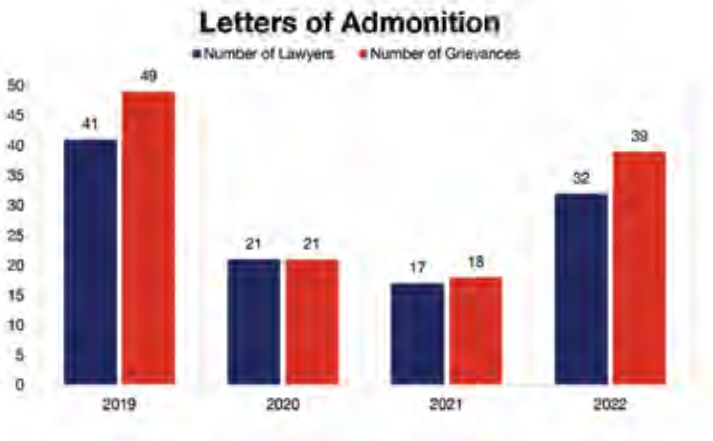
DISCIPLINE IMPOSED BY THE PROFESSIONAL RESPONSIBILITY COMMISSION

Formal Charges. During 2022, the Professional Responsibility Commission voted on the filing of formal disciplinary charges against eight lawyers involving 30 formal grievances. In addition, the Commission also oversaw the investigation of 12 Rule 7, RGDP formal disciplinary charges 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 lawyer, in matters of less serious misconduct or if mitigating factors reduce the sanction to be imposed. During 2022, the Commission voted to administer private reprimands to 20 lawyers involving 27 formal grievances.

Letters of Admonition. During 2022, the Professional Responsibility Commission voted to issue letters of admonition to 32 lawyers involving 39 formal grievances cautioning that the conduct of the lawyer was dangerously close to a violation of a disciplinary rule.





Dismissals. The Professional Responsibility Commission dismissed 12 grievances that had been received but not concluded due to the resignation of the lawyer pending disciplinary proceedings, a continuing lengthy suspension of the respondent lawyer or disbarment of the respondent lawyer. The remainder were dismissed where the investigation could not substantiate the allegations by clear and convincing evidence.

Diversion Program. The Professional Responsibility Commission may also refer respondent lawyers 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 2022, the Commission referred 32 lawyers to the Discipline Diversion Program for conduct involving 40 grievances.

The Discipline Diversion Program is tailored to the individual circumstances of the participating lawyer and the misconduct alleged. Oversight of the program is by the OBA Ethics Counsel, with the OBA Management Assistance Program staff 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. In 2022, instructional courses were taught by OBA General Counsel Gina Hendryx, OBA Assistant General Counsels Katherine Ogden and Tracy Pierce Nester, 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 able to monitor when lawyers 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 general membership as a continuing legal education course.

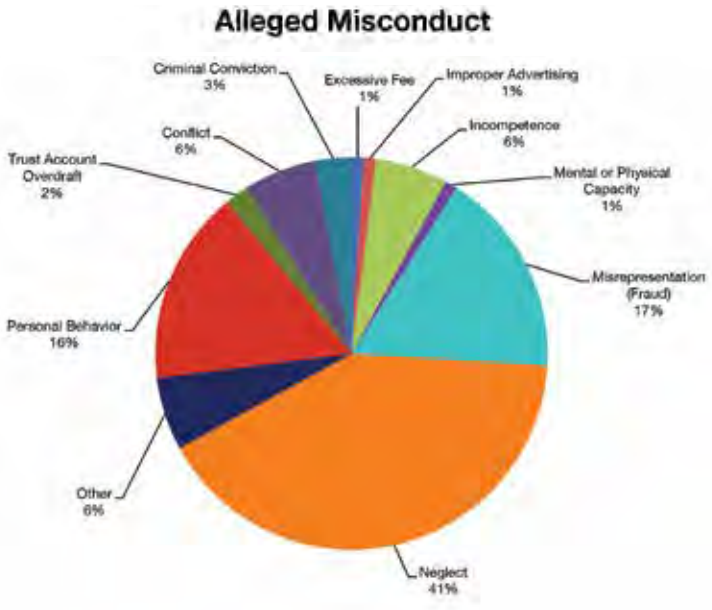
2022 Diversion Program Curriculum	Number of Lawyers
Communication and Client Relationship Skills	13
Professionalism in the Practice of Law	12
Professional Responsibility/Ethics School	12
Client Trust Account School	5
Law Office Consultations	5

SURVEY OF GRIEVANCES

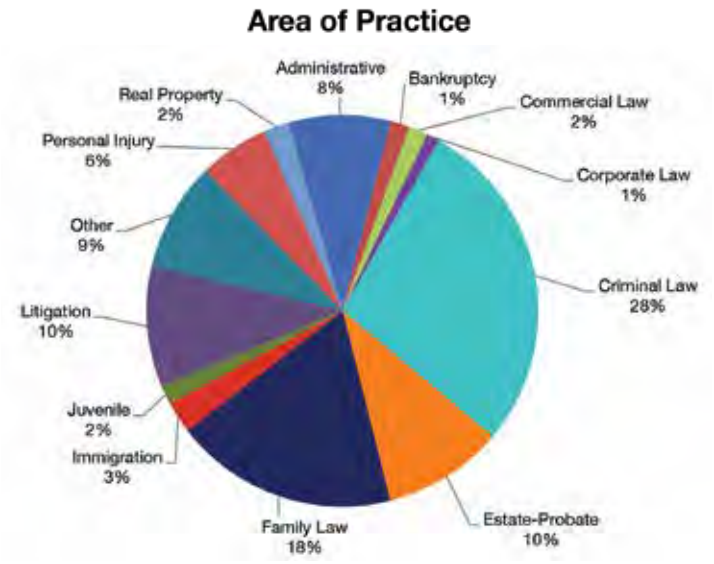
To better inform the Oklahoma Supreme Court, the bar and the public of the nature of the grievances received, the number of lawyers receiving grievances and the practice areas of misconduct involved, the following information is presented.

Formal and informal grievances were received against 794 lawyers. Therefore, fewer than 5% of the lawyers licensed to practice law in Oklahoma received a grievance in 2022.

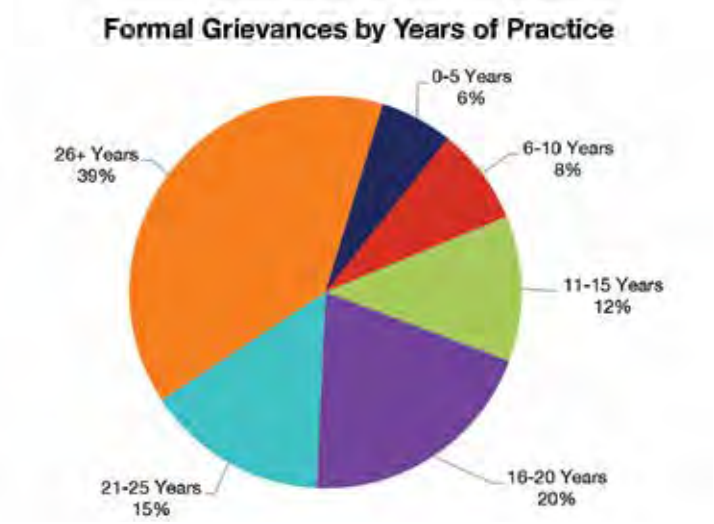
A breakdown of the types of misconduct alleged in the 198 formal grievances opened by the Office of the General Counsel in 2022 is as follows:



Of the 192 formal grievances, the area of practice is as follows:



The number of years in practice of the 151 lawyers receiving formal grievances is as follows:



The largest number of grievances received were against lawyers who have been in practice for 26 years or more. The age of lawyers with disciplinary cases filed before the Oklahoma Supreme Court in 2022 is depicted below.

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

DISCIPLINE IMPOSED BY THE OKLAHOMA SUPREME COURT

In 2022, discipline was imposed by the Oklahoma Supreme Court in 20 disciplinary cases. The discipline imposed was:

Disbarment

Respondent	Order Date
Robert Carlyle Scott	1/11/22
Haskell Doak Willis	2/8/22
Sean Downes	6/21/22
Ronald Kaufman	6/28/22
Jay Silvernail	6/28/22

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

Respondent	Order Date
Michelle Rolfer	1/10/22
Robin Stead	3/21/22
Daniel Girald	11/23/22
David Bower	12/20/22

Disciplinary Suspensions

Respondent	Length	Order Date
Lance Lance	Interim	1/10/22
Robin Stead	Interim	1/18/22
Sanford Kutner	18 months	2/28/22
Phillip Shyers	Interim	3/21/22
David Littlefield	Interim	6/6/22
Jack Shears	Interim	6/20/22
David Woodward	75 days	9/3/22
Ryan Wiehl	Interim	11/14/22

Confidential Suspensions

Respondent	Length	Order Date
Confidential	Indefinite (R10 RGDP)	2/22/22
Confidential	Indefinite (R10 RGDP)	5/3/22

Dismissals

Respondent	Order Date
Benjamin Lepak	1/31/22
Brecken Wagner	2/1/22
Steve George	4/12/22
Robert Martin	4/18/22
Kimberly Mouledoux	5/23/22
William Eakin	6/27/22
Jack Shears	7/11/22

There were 22 discipline cases filed with the Oklahoma Supreme Court as of Jan. 1, 2022. During 2022, 21 new formal complaints were filed for a total of 43 cases before the Oklahoma Supreme Court during 2022. On Dec. 31, 2022, 23 cases remained open before the Oklahoma Supreme Court.

Type of Discipline Imposed	Disbarment	RPDP	Disciplinary Suspension	Confidential Suspension	Dismissals
Number of Lawyers Involved	5	4	8	2	7
Age of Lawyer					
21-29 years old	0	0	0	0	0
30-49 years old	1	1	2	1	4
50-59 years old	3	1	1	1	0
60-74 years old	1	2	3	0	2
75 or more years old	0	0	2	0	1

REINSTATEMENTS

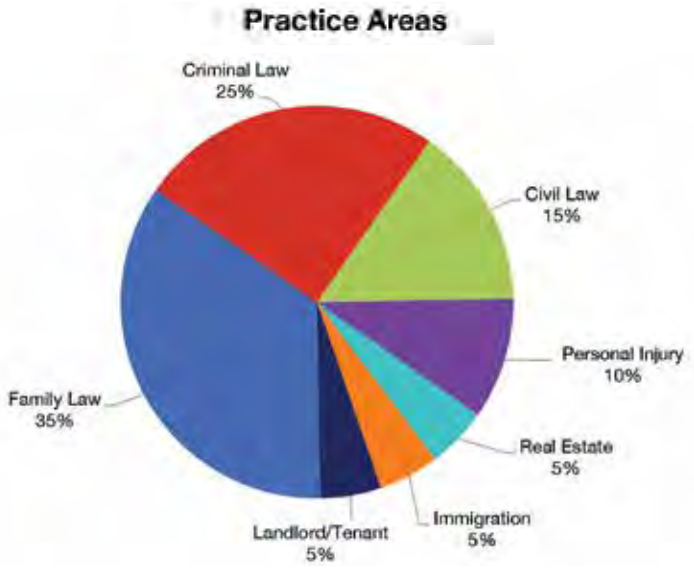
On Jan. 1, 2022, there were two petitions for reinstatement pending before the Professional Responsibility Tribunal and three petitions for reinstatement pending before the Oklahoma Supreme Court. There were six new petitions for reinstatement filed in 2022. In 2022, the Oklahoma Supreme Court granted four reinstatements and denied one. On Dec. 31, 2022, there were three petitions for reinstatement pending before the Professional Responsibility Tribunal and two petitions for reinstatement pending before the Oklahoma Supreme Court.

UNAUTHORIZED PRACTICE OF LAW

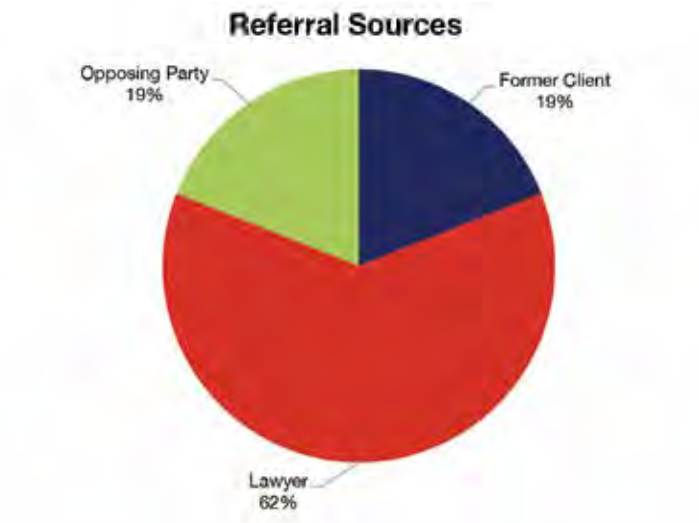
Rule 5.1(b), RGDP, authorizes the Office of the General Counsel to investigate allegations of the unauthorized practice of law (UPL) by non-lawyers, suspended lawyers and disbarred lawyers. Rule 5.5, ORPC, regulates the unauthorized practice of law by lawyers and prohibits lawyers from assisting others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

Requests for Investigation. In 2022, the Office of the General Counsel received 21 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.

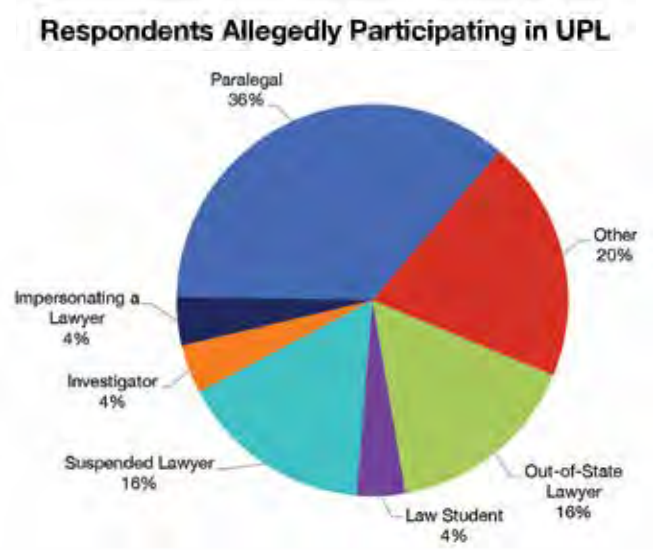
Practice Areas. Allegations of the unauthorized practice of law encompass various areas of law. In previous years, most unauthorized practice of law complaints involved non-lawyers or paralegals handling family matters, and that trend continues in 2022, with one-third of the UPL complaints involving family law matters.



Referral Sources. Requests for investigations of the unauthorized practice of law come from multiple sources. In 2022, the Office of the General Counsel received the majority of UPL complaints from lawyers.



Respondents. In 2022, 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 2022, the Office of the General Counsel took formal action in seven matters. Formal action included issuing cease and desist letters, initiating formal investigations through the lawyer discipline process, referring a case to an appropriate state and/or federal enforcement agency or filing the appropriate district court action. Nine matters were closed after corrective action was taken, and the remainder of the matters remain 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 three non-lawyers, who are appointed in staggered three-year terms by the OBA president with approval from the Board of Governors. In 2022, the committee was chaired by lawyer member Micheal Salem, Norman. Chairman Salem has served as chair of 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 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. The Office of the General Counsel reviews, investigates and presents the claims to the committee. In 2022, the Office of the General Counsel presented 45 claims to the committee. The committee approved 31 claims, denied 13 claims and continued one claim into the following year for further investigation. In 2022, the Clients' Security Fund paid a total of $115,899.58 on 31 approved claims.

CIVIL ACTIONS (NON-DISCIPLINE) INVOLVING THE OBA

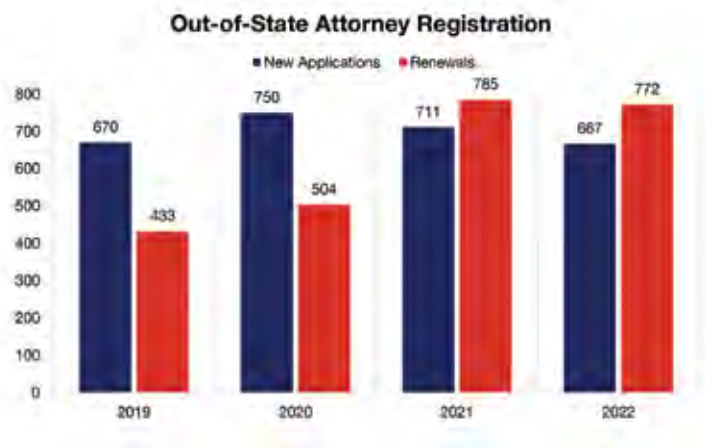
The Office of the General Counsel represented the Oklahoma Bar Association in several civil (non-discipline) matters during 2022. The following is a summary of the civil actions against or involving the Oklahoma Bar Association:

- *McCormick et al., v. Barr et al.,* United States District Court for the Northern District 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. The Oklahoma Bar Association filed its motion to dismiss on Feb. 12, 2020. On Dec. 8, 2021, the court dismissed the matter without prejudice and imposed filing restrictions on the plaintiffs. Plaintiffs filed an objection on Jan. 6, 2022.
- *Bednar v. McGuire, et al.,* Oklahoma County District Court Case No. CJ-2020-5931. Bednar filed a petition for damages on Dec. 14, 2020. Bednar named 26 defendants. Bednar alleged his dissatisfaction with the disciplinary process. Several defendants were dismissed on May 10, 2022. To date, the Oklahoma Bar Association has not been served.
- *Alberta Rose Jones v. Eric Bayat, et al.*, Lincoln County District Court No. CJ-2021-21. Rose filed a Complaint on March 5, 2021. Rose named 10 defendants and "Does 1-25," including the Oklahoma Bar Association and an assistant general counsel. Jones alleged that the Oklahoma Bar Association failed to achieve her son's legal goals. To date, the Oklahoma Bar Association has not been served. This matter was transferred to Kay County District Judge Turner.

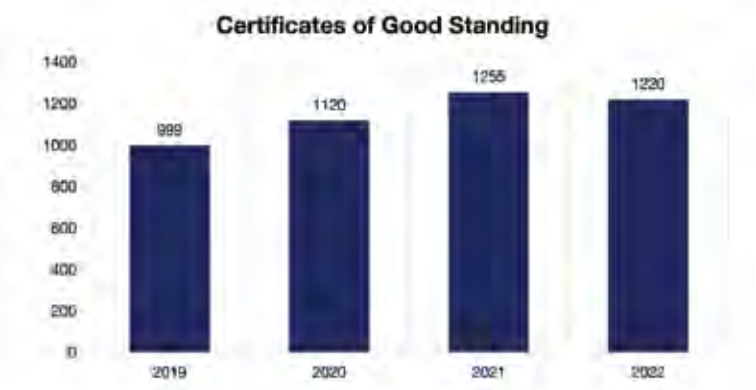
- *Alberta Rose Jones v. Eric Bayat, et al.,* Lincoln County District Court No. CJ-2022-27. Rose filed a petition on Feb. 25, 2022, against 11 named defendants and 10 "Doe" defendants. The petition alleged the Oklahoma Bar Association ignored Open Records Act requests and her dissatisfaction at the resolution of bar grievances. The Oklahoma Bar Association filed a motion to dismiss on March 23, 2022. On April 11, 2022, this matter was transferred to Payne County District Judge Corley. This matter is still pending.
- *Brewer v. Oklahoma Bar Association,* United States Supreme Court Case No. 21-7199. On July 14, 2021, the United States Supreme Court docketed Brewer's petition for writ of certiorari, appealing the Oklahoma Supreme Court's denial of Brewer's application to assume original jurisdiction and writ of prohibition on June 21, 2021, in Oklahoma Supreme Court Case No. 119532. Brewer's petition alleged various claims and sought broad relief from various branches of government, including a general request for the Oklahoma Bar Association to stop its oppression of the people of Oklahoma. The Oklahoma Bar Association filed a waiver of right to respond. The matter was distributed for conference, and on April 4, 2022, the Supreme Court denied Brewer's petition.
- *Farley v. Williams, et al*., United States District Court for the Western District of Oklahoma, Case No. CIV-21-65. A complaint was filed on Jan. 29, 2021, naming Oklahoma Bar Association as a defendant. Farley was dissatisfied with the resolution of his bar grievance. The Oklahoma Bar Association was not served. Plaintiff has filed multiple documents in this matter. On April 6, 2021, the magistrate recommended that the case be dismissed. Plaintiff objected on April 14, 2021, and again on Sept. 24, 2021. On Sept. 26, 2022, this matter was dismissed without prejudice.
- *Rigsby v. Burkhulter, et al.,* United States District Court for the Eastern District of Oklahoma, Case No. CIV-22-287. Rigsby filed a complaint against multiple defendants, including the Oklahoma Bar Association, on Oct. 7, 2022. Although the facts are unclear, Rigsby appears to contend that the Oklahoma Bar Association failed to enjoin his public defenders from violating his "rights" and would not appoint counsel for him. The Oklahoma Bar Association has not been served. On Nov. 28, 2022, the court dismissed Rigsby's action without prejudice for the failure to pay the entire filing and administrative fees as directed by the court. Rigsby appealed.
- *Rigsby v. Burkhulter, et al.,* United States Court of Appeals for the 10th Circuit, Case No. 22-7058. On Nov. 7, 2022, Rigsby filed an interlocutory appeal of an order denying Rigsby leave to proceed *in forma pauperis* issued in United States District Court for the Eastern District of Oklahoma Case No. CIV-22-287. On Dec. 6, 2022, the court directed Rigsby to pay the district court's full filing fee by Dec. 27, 2022, or the appeal will be dismissed without further notice.
- *Rigsby v. Burkhulter, et al.,* United States Court of Appeals for the 10th Circuit, Case No. 22-7063. On Dec. 14, 2022, Rigsby filed a second appeal of an order denying his motion to "bring issue to the attention of the Court" and judgment dismissing the action without prejudice for failure to pay the entire filing and administrative fee, from United States District Court for the Eastern District of Oklahoma Case No. CIV-22-287. This matter is pending.

ATTORNEY SUPPORT SERVICES

Out-of-State Attorney Registration. In 2022, the Office of the General Counsel processed 667 new applications and 772 renewal applications submitted by out-of-state lawyers registering to participate in a proceeding before an Oklahoma Court or Tribunal. Out-of-state lawyers 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 their 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 2022, the Office of the General Counsel prepared 1,220 Certificates of Good Standing/Disciplinary History at the request of Oklahoma Bar Association members.

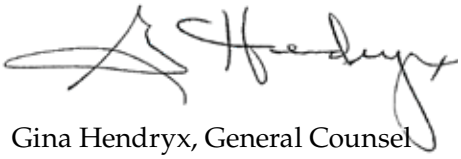


ETHICS AND EDUCATION

During 2022, lawyers in the General Counsel's office presented more than 40 hours of continuing legal education programs to county bar association meetings, lawyer practice groups, OBA programs, all three state law schools and various legal organizations. In these sessions, disciplinary and investigative procedures, case law and ethical standards within the profession were discussed. These efforts direct lawyers to a better understanding of their ethical requirements and the disciplinary process and inform the public of the efforts of the Oklahoma Bar Association to regulate the conduct of its members. The Office of the General Counsel worked with lawyer groups to assist with presentation of programming via in-person presentations and video-conferencing platforms.

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

RESPECTFULLY SUBMITTED Feb. 2, 2023, 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

ENDNOTE

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.

How To Know if You Are on the Right Track

By Janet Johnson

I BEGIN EACH DAY WITH A choice: whether I get up with my first alarm – also known as the "ambitious alarm" – which is set for the person I want to be, or whether I get up with the safety alarm, which is set for the person I know I really am. Then the real struggle begins. Do I press snooze once or not at all? It is a slippery slope and often occurs on Mondays. Once I have made the commitment to get up and start my day, another struggle hits me. Do I have time to stop for a coffee and breakfast, or do I make the more prudent choice of making a cup at home? When I consider that the day begins with decision-making, it is no wonder decision fatigue sets in early and often and can result in an overwhelming sense of disorganization.

With so many happenings in our daily lives, it is hard to find time for reflection and self-evaluation. However, the more I work to keep my promises to myself from February, where I discussed a Sunday-through-Friday view and setting clear priorities, I find that it might be easier and more innate than I think. When I stop to reflect, I realize end-of-the-week Janet is proud of first-of-the-week Janet.

It really is the simple things: action items handled, follow-ups complete, email inbox more manageable and calls returned. This is a satisfying feeling. It gives me a sense of accomplishment, and that is because I have accepted that it is okay to do one thing at a time. This acceptance is me realizing my limits and capabilities. As a result, it assures me that I am on the right track.

The right track is different for everyone. For me, it is recognizing when I am confident enough to stand firm and when I need to compromise. Additionally, it is relying on that circle of influence to assist and guide as needed. In the legal profession, it can often seem taboo to ask for help. I could go into several theories on why that is, but I will spare you my hypotheses. Instead, I will present a challenge: I challenge us all to reflect and ask for help and assistance when we feel it is needed. This realization is another sign that a person is on the right track.

I write this article in hopes that it furthers the accountability I was seeking in February. I am a work in progress – it is called the practice of law for a reason. Coming to terms with my time and abilities is true growth, and I am convinced that this is proof I am on the right path. Thus, my March mantra is *stay confident, stay the course, and you will find the right path.*

Janet

To contact Executive Director Johnson, email her at janetj@okbar.org.

OKLAHOMA FIND A LAWYER

DID YOU KNOW?

You can find lawyers by practice and geographical area through the OBA's website. To be included in the free, public directory, click the "Find A Lawyer Sign Up" link on your MyOKBar page.

CHECK IT OUT

www.oklahomafindalawyer.com

FIND MORE MEMBER BENEFITS AT WWW.OKBAR.ORG/MEMBERBENEFITS

Fun and Tips Abound at the 2023 OBA Solo & Small Firm Conference

By Jim Calloway

EVEN AS WE ENDURE THE chilly winds of March, it is time to look forward to this summer's Solo & Small Firm Conference, held June 22-24 at the Osage Casino Hotel in Tulsa.

SOMETHING FOR EVERYONE

From the conference kickoff with the ever-popular "60 Tips in 60 Minutes" to the closing session of "What's Hot and What's Not in Law Office Management & Technology," the Solo & Small Firm Conference combines fun social events with 12 hours of MCLE credit, including two hours of ethics. This means attendees can satisfy all the year's MCLE requirements at this event. Also, look forward to a poolside cookout Thursday evening, and make sure to join us Friday night for the primary social event. Did I mention there will be door prizes too?

The conference coincides with the Young Lawyers Division Midyear Meeting, so this year, we focused on offering more selections for young lawyers. There will be a young lawyer/new lawyer track offering each hour, including the session "How to Get the Most Out of Your Bar Association" with OBA President Brian Hermanson and OBA Executive Director Janet Johnson. Other sessions include "How I Manage My Small Firm Criminal Defense Practice" with Oklahoma City attorney Ed Blau and "Estate Planning – Help Your Clients Leave a Fortune and Not a Fight" with Tulsa attorney Mark Darrah. We expect to see many veteran lawyers in the young lawyer track; young lawyers may also find an educational opportunity in one of the other two sessions offered at the time.

GREAT SPEAKERS AND PROGRAMS

Stanley Tate, an entertaining and dynamic speaker who has previously presented at ABA TECHSHOW, will be our special featured guest this year. Mr. Tate will present "Carving Your Path: Developing a Successful Law Practice in a Niche Area of Law" (Friday) and "Everything You Need to Know About Student Loans in 2023" (Saturday). He will also join us for 60 Tips in 60 Minutes to open the conference. Check out his website, www.tateesq.com, for a look at a lawyer site focused on answering potential clients' questions.

Kansas City lawyer Stanley Tate will be the featured guest during this year's Solo & Small Firm Conference. He will dive into the topic of student loan law as well as discuss how lawyers can use video for marketing.

Kenton Brice will be joining us again this year, presenting "Microsoft Word Add-Ins for Law Practice" and "Document Automation to Build an Unbundled Legal Product." Mr. Brice is the director of technology innovation and the interim director of the Donald E. Pray Law Library at the OU College of Law.

OBA General Counsel Gina Hendryx will speak during a plenary session on "The Attorney/Client Relationship: Good, Bad & Questionable." The Office of the General Counsel will also present an ethics program titled "So, You Just Received Your First, Second or Tenth Grievance: What Happens Next?" on Saturday afternoon. Another ethics presentation involves something many practicing lawyers have already encountered: "Ethical Considerations of Using Cash Apps" with OBA Ethics Counsel Richard Stevens and OBA Practice Management Advisor Julie Bays. This program will discuss what happens the next time a client wants to Venmo you the retainer.

There are many more educational sessions offered during the conference. "Electronic Filing in Oklahoma State Courts" will be taught by Debra Charles, general counsel, Administrative Office of the Courts. "I Didn't Know PDFs Could Do That" will be presented by Darla Jackson, director of the TU College of Law Mabee Legal Information Center. Robert Spector, Glenn R. Watson chair and esteemed centennial professor of law emeritus at the OU College of Law, will also provide an update on "Recent Developments in Family Law."

DON'T MISS OUT!

Check out the conference website at www.okbar.org/solo for more information, registration and the schedule. You don't want to miss out on this year's great programs and events, so we encourage you to make an early decision and register before the June 5 early-bird deadline. We are going to have a lot of fun, and we hope to see you there!

Mr. Calloway is OBA Management Assistance Program director and staff liaison to the Solo and Small Firm Conference Planning Committee. Need a quick answer to a tech problem or help solving a management dilemma? Contact him at 405-416-7008, 800-522-8060 or jimc@okbar.org. It's a free member benefit.

2023 SSF CONFERENCE AT A GLANCE

- June 22-24, Osage Casino Hotel Tulsa
- Early-bird registration deadline is June 5.
- Hotel room block registration deadline is May 21.
- For more information, visit www.okbar.org/solo.

Meeting Summary

The Oklahoma Bar Association Board of Governors met Jan. 20, 2023.

REPORT OF THE PRESIDENT

President Brian Hermanson reported he attended the Jan. 19 orientation meeting for committee and section leadership, the Membership Engagement Committee meeting, the "has-beens" dinner for outgoing board members and the swearing-in ceremony for new OBA officers and members of the Board of Governors. He contributed two articles for the *Oklahoma Bar Journal*, worked on appointments, met with Executive Director Johnson and Administration Director Brumit about the OBA 2023 Annual Meeting and toured the Skirvin Hotel's meeting spaces. He discussed numerous bar business matters with Executive Director Johnson. Additionally, he attended a dinner for retiring district attorneys, the December and January District Attorneys Council board meetings, the District Attorneys Council Technology Committee meeting, the December and January Oklahoma District Attorneys Association board meetings and the district attorney swearing-in ceremony before Judge Rob Hudson, vice presiding judge of the Oklahoma Court of Criminal Appeals. He also gave an ethics presentation to the Garfield County Bar Association and spoke to the Ponca City Leadership group and Tonkawa Leadership group. He also attended the swearing-in ceremony for Chief Justice M. John Kane IV, as well as the Senate and House budget hearings for the District Attorneys Council.

REPORT OF THE VICE PRESIDENT

Vice President Williams reported he attended the swearing-in ceremony for 2023 officers and governors as well as the Jan. 19 orientation meeting for committee and section leadership.

REPORT OF THE PRESIDENT-ELECT

President-Elect Pringle reported he attended the swearing-in of the new chief justice and the Board of Governors has-beens party. He also helped coordinate the OBA Legislative Monitoring Committee's Legislative Kickoff, worked with OBF Executive Director Renee DeMoss regarding the IOLTA change and met with OBA staff and a third-party technology vendor regarding IT issues.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Johnson reported she attended the swearing-in ceremony for Chief Justice Kane, the Membership Engagement Committee meeting and presented during the Jan. 19 orientation meeting for committee and section leadership.

REPORT OF THE PAST PRESIDENT

Past President Hicks reported he attended the luncheon following the Board of Governors meeting, made plans to attend the ABA Midyear Meeting in New Orleans and worked with President Hermanson and President-Elect Pringle on a few administrative matters.

BOARD MEMBER REPORTS

Governor Ailles Bahm reported she attended the Board of Governors has-beens party, the OBA swearing-in ceremony and the luncheon reception that followed. She also attended the Legislative Monitoring Committee meeting, where Legislative Kickoff planning continued and new Co-Chair Shanda McKenney was introduced. **Governor Barbush** reported he attended various Bryan County Bar Association events, including the Christmas social, retirement events for Judge Sherrill and the swearing-in ceremony for the new associate and special judges. He has also been working on coordinating a southeastern Oklahoma attorney summit, to which all regional attorneys and county bar associations will be invited. The summit will include presentations from judges within the district, a presentation from Oklahoma Attorneys Mutual Insurance Company as well as a presentation from the Lawyers Helping Lawyers Assistance Program aimed at expanding reach in southeastern

Oklahoma. Additionally, he notified all the school districts about the Law Day contest and hand-delivered entries from local schools in advance of the contest deadline. He also co-wrote an article for the May issue of the *Oklahoma Bar Journal*. **Governor Bracken** reported he attended the Legislative Monitoring Committee meeting, the Supreme Court justice swearing-in ceremony, the Jan. 19 orientation meeting for committee and section leadership and the Board of Governors has-beens party. **Governor Conner** reported he attended the Garfield County Bar Association January meeting. **Governor Dow** reported she attended the Cleveland County Bar Association monthly meeting and the OBA Family Law Section meeting. **Governor Hilfiger** reported he attended two Muskogee County Bar Association meetings. **Governor Knott** reported she attended the Canadian County Bar Association Christmas social, Judge Jack McCurdy's retirement party and the swearing-in of Canadian County's new special judge. She is slated to present during the February meeting of the Canadian County Bar Association. She also served as editor of the February issue of the *Oklahoma Bar Journal* and attended the January meeting of the *Oklahoma Bar Journal* Board of Editors. **Governor Rogers** reported he attended the Board of Governors has-beens party and the OBA swearing-in ceremony. **Governor Thurman** reported he is currently serving as president of the Pontotoc County Bar Association and is currently planning the association's meetings, events and community outreach. **Governor Vanderburg** reported he attended the Cost Administration Implementation Committee and the International Municipal Lawyers Association's Municipal Fellows Committee meeting, which included work developing the next round of testing. He also reported the Oklahoma Association of Municipal Attorneys is working to recruit young lawyers to rural counties. **Governor White** reported he attended the Board of Governors has-beens party, the OBA swearing-in ceremony and luncheon. He also authored an article for the *Tulsa Lawyer* on professionalism.

Governor Barbush has also been working on coordinating a southeastern Oklahoma attorney summit, to which all regional attorneys and county bar associations will be invited.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Shaffer Siex reported the YLD is planning its upcoming service activities, including plans to present the Young Adult Guide to attendees of an upcoming children's behavioral health conference that is being facilitated by the Oklahoma Department of Mental Health and Substance Abuse Services. She also prepared her monthly column for the *Oklahoma Bar Journal*.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported from Dec. 1 to Dec. 31, the Office of the General Counsel received 25 formal grievances and 89 informal grievances. These numbers compare with 16 formal grievances and 44 informal grievances respectively for the same time period last year. As of Dec. 31, there were nine disciplinary cases awaiting decisions from the Oklahoma Supreme Court. Between Dec. 1 and Dec. 31, the

Supreme Court issued one order approving resignation pending disciplinary proceedings. In summary, as of Dec. 31, there were 169 grievances pending investigation by the Office of the General Counsel for future presentation to the Professional Responsibility Commission. In addition to the pending investigations, there is one grievance awaiting a private reprimand and nine grievances to be filed as formal charges with the Oklahoma Supreme Court. Furthermore, upon the successful completion of the Attorney Diversion Program, participating attorneys are to receive private reprimands involving 13 grievances and letters of admonition involving 17 grievances. A written report of PRC actions and OBA disciplinary matters for the month was submitted to the board for its review.

BOARD LIAISON REPORTS

Governor Dow said the **Civil Procedure and Evidence Code Committee** is organizing and will be meeting soon. Governor Smith said the **Member Services Committee** is scheduled to meet in February after a long hiatus. Governor Vanderburg said the **Rules of Professional Conduct Committee** is active by email and is circulating proposed changes to rules for committee commentary. Past President Hicks said the **Strategic Planning Committee** is gathering information and organizing an upcoming meeting. Governor Hilfiger said the **Law Day Committee** met Jan. 9 and has received more than 1,300 entries for its annual art and writing contests for school-aged children. Governor Barbush said the **Lawyers Helping Lawyers Assistance Program Committee** will participate in a regional summit to be held in southeast Oklahoma this year.

Vice President Williams said the **Legislative Monitoring Committee** will host the annual OBA Legislative Kickoff on Jan. 27. Governor Bracken said that he has taken on leadership of the **Military Assistance Committee** and is planning a meeting in February. Governor Shaffer Siex said the **Solo and Small Firm Conference Planning Committee** is meeting Jan. 24, and programming is being developed.

APPROVAL OF OBA MOBILE APP SURVEY

President-Elect Pringle explained his vision for a mobile or web-based app that would enhance member service and promote member engagement. He also explained the rationale for distributing a survey to solicit membership feedback. He presented to the board a draft survey that was recommended for approval by the Membership Engagement Committee. The board passed a motion to approve the survey for membership-wide distribution.

PRESIDENT HERMANSON'S APPOINTMENTS

The board passed a motion to approve the following appointments:

Professional Responsibility Commission – President Hermanson reappoints Alissa Dawn Preble Hutter to a first full term that expires Dec. 31, 2025.

Court on Judiciary/Appellate Division – President Hermanson reappoints D. Kenyon Williams Jr. to a two-year term that expires March 1, 2025.

Court on Judiciary/Trial Division – President Hermanson appoints Charles W. Chesnut to a first full term that expires March 1, 2025.

UPCOMING OBA AND COUNTY BAR EVENTS

President Hermanson reviewed upcoming bar-related events, including Legislative Kickoff, Jan. 27, Oklahoma Bar Center; Day at the Capitol, March 21, Oklahoma State Capitol; New Admittee Swearing-In Ceremony, April 25; and the OBA Solo & Small Firm Conference, June 22-24, Osage Casino, Tulsa.

NEXT BOARD MEETING

The Board of Governors met in February, and a summary of those actions will be published in the *Oklahoma Bar Journal* once the minutes are approved. The next board meeting will be held Monday, March 20, at the Oklahoma Bar Center in Oklahoma City.

OBF Announces 2023 Housing Protection and Community Redevelopment Grantees

THE OKLAHOMA BAR Foundation is proud to announce $207,500 in grants to six nonprofit organizations for fiscal year 2023 program funding. These Grantee Programs provide legal services to low-income Oklahomans in the areas of foreclosure and eviction, domestic violence, civil legal aid and commutation.

2023 HOUSING PROTECTION AND COMMUNITY REDEVELOPMENT GRANTEES

Grantee	Area of Service	Funding Amount
Community Action Agency (LASO)*	Canadian and Oklahoma counties	$23,000
Legal Aid Services of Oklahoma – Mortgage Foreclosure Defense	Comanche, Cotton, Pittsburg and Tillman counties	$29,000
OCU School of Law – Pro Bono Housing Eviction Legal Assistance Program	Oklahoma County	$50,000
Safe Center (LASO)*	Stephens and Jefferson counties	$48,000
Tulsa County Public Defender – Project Commutation	Tulsa County	$51,500
Tulsa County Bar Association	Tulsa County	$6,000
	Total	**$207,500**

**Indicates embedded attorney from Legal Aid Services of Oklahoma (LASO)*

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Partners Advancing Justice
Individual giving program – giving starts at $10/month or $100/year.

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Group annual giving program – giving starts at $1,000.

Legacy Partners for Justice
Leave a legacy by making a planned gift to the OBF. Joining as a Legacy Partner is one of the most powerful actions you can take to ensure justice is possible for all.

More Ways to Support the OBF

Cy Pres
Leftover monies from class action cases can be designated to the OBF's Court Grant Fund or General Fund.

Memorials & Tributes
Make a gift in honor of someone – OBF will send a handwritten card to the honoree or their family.

Unclaimed Trust Funds
Contact the OBF office if you have unclaimed trust funds in your IOLTA Account (405-416-7070 or foundation@okbar.org).

Give Now!

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Reflect on the Change of Plans in a Positive Light

By Caroline M. Shaffer Siex

ALREADY THREE MONTHS into this year, we look back on what has been accomplished and what has yet to be accomplished. The YLD has already hosted its first event and assembled the bar exam survival kits, and the Board of Directors attended the ABA Midyear Meeting in New Orleans. I had looked forward to attending our ABA conference. We meet on several issues with lawyers across the county. Likewise, various issues are brought before the ABA to discuss and determine any resolutions to take up in guiding American jurisprudence as a whole.

The trip, of course, was during the blistering ice storm that swept through Green Country Oklahoma, as well as other parts of the nation. The other officers and I, who were appearing to represent the OBA YLD community, found our plans changed. Our flights were canceled, rebooked and, for some of us, canceled again.

The OBA YLD Board of Directors attends the ABA YLD Midyear Meeting in New Orleans in February. From left Alexandra Gage, Caroline Shaffer Siex, Taylor Venus, Dylan Erwin and Laura Talbert.

The gauntlet of engaging in airline travel led me to reevaluate the entire trip. I found myself on an unexpected 10-hour drive to New Orleans. Of course, I felt frustration, annoyance and anger. This trip was carefully planned and prepared for months ahead of time – then I was trekking on something with little ability to plan. As I drove into Arkansas and headed south to Louisiana, I passed by the narrow and tall pines. I thought to myself, "Although it was not my original plan, it is not that bad." Later I drove over the bayous and large bridges into the Big Easy. It was a different experience than if I had flown, one I would not have been able to enjoy.

Our law careers sometimes start with well-thought-out plans. Sometimes we set out on getting our law degree to practice in a certain area of law, then find out that we prefer civil versus criminal procedure. Some of us left litigation or joint litigation after swearing off one or the other. However, adjusting our plans can be part of learning as a young lawyer. Rather than consider it a disaster, realize it may be a good change.

A change of plan may not be something as drastic as switching your law area. You may just need to change how you prepare for depositions or how you will prepare for an argument before

a particular judge. Changing the plan of action can be positive. Young lawyers are rarely told to reflect on the changes in their careers to look for the positive. However, these changes are often your progress.

The progress young lawyers make is often not appreciated, and they do not find themselves celebrating it. Although this alone may not be what causes the disdain to practice law or the burnout, it certainly does not help.

For young lawyers, especially those who are just starting, know that you can and should plan. However, you can lose your plan. You change jobs, an area of law or a focus. The loss of that plan, or even a failure, should not keep you from refocusing and continuing in your career. Rather, use it to reflect and make a new plan. You may find the new plan can be just as great or better.

Ms. Shaffer Siex practices in Tulsa and serves as the YLD chair. She may be contacted at cshaffer@gablawyers.com.

For Your Information

OBA MEMBERS RECOGNIZED FOR PRO BONO SERVICE

The American Bar Association recognized four OBA members for their dedication to pro bono service through participation in ABA Free Legal Answers, a virtual legal clinic where income-eligible clients can post civil legal services questions. Timothy C. Dowd, Mary J. Rounds, Travis C. Smith and Paula D. Wood were recognized for answering 50 or more civil legal questions through the program in 2022. The OBA Access to Justice Committee thanks these attorneys for their service.

MOCK TRIAL TEAMS GEAR UP FOR FINALS

Eight teams from Ada, Jenks, Moore, Oklahoma City and Owasso have advanced to the 2023 Oklahoma High School Mock Trial semifinals. The semifinal rounds were set for Feb. 28 in Tulsa at the Page Belcher Federal Building and March 1 in Oklahoma City at the United States District Court for the Western District of Oklahoma. The top two teams from these rounds will compete during the finals scheduled for March 7 at the OU Law Center in Norman.

The Mock Trial Program is sponsored and funded by the Oklahoma Bar Foundation and the OBA Young Lawyers Division. Over 300 judges and attorneys volunteer their time to work with mock trial teams as coaches and to conduct the competitions. More information about the program is available at www.okbar.org/mocktrial.

MARK YOUR CALENDARS FOR DAY AT THE CAPITOL MARCH 21

Oklahoma lawyers, let your voices be heard! The OBA will host its annual Day at the Capitol Tuesday, March 21. Registration begins at 9:30 a.m. at the Oklahoma Bar Center, 1901 N. Lincoln Blvd., and the agenda will feature speakers commenting on legislation affecting various practice areas. There will also be remarks from the judiciary and bar leaders, and lunch will be provided before heading to the Capitol for the afternoon. Find more information at www.okbar.org/dayatthecapitol.

SOVEREIGNTY SYMPOSIUM 2023

The 2023 Sovereignty Symposium has been scheduled for June 13-14 at the Skirvin Hilton Hotel in Oklahoma City. The event, themed "Treaties," will feature keynote speaker Emma Nicholson, a life peer and member of the House of Lords in the United Kingdom. Watch for more details at www.sovereigntysymposium.com.

THE BACK PAGE: SHOW YOUR CREATIVE SIDE

We want to feature your work on "The Back Page"! Submit articles related to the practice of law, or send us something humorous, transforming or intriguing. Poetry, photography and artwork are options too. Email submissions of about 500 words or high-resolution images to OBA Communications Director Lori Rasmussen at lorir@okbar.org.

LHL DISCUSSION GROUP HOSTS APRIL MEETINGS

The Lawyers Helping Lawyers monthly discussion group will meet April 6 in Oklahoma City at the office of Tom Cummings, 701 NW 13th St. The group will also meet April 13 in Tulsa at the office of Scott Goode, 1437 S. Boulder Ave., Ste. 1200. Each meeting is facilitated by committee members and a licensed mental health professional. The small group discussions are intended to give group leaders and participants the opportunity to ask questions, provide support and share information with fellow bar members to improve their lives – professionally and personally. Visit www.okbar.org/lhl for more information.

CONNECT WITH THE OBA THROUGH SOCIAL MEDIA

Are you following the OBA on social media? Keep up to date on future CLE, upcoming events and the latest information about the Oklahoma legal community. Connect with us on LinkedIn, Twitter, Facebook and Instagram.

OBA CRIMINAL LAW SECTION
PROFESSIONAL ADVOCATE OF THE YEAR AWARDS

The Criminal Law Section is seeking nominations for its prestigious **"Professional Advocate of the Year"** awards. These awards will be presented to the Prosecutor and the Defense Attorney who best exemplify the criteria listed below. Nominations may be made by any member of the bar, even if you are not a member of the Criminal Law Section of the OBA. Prosecutors nominate Defense Attorneys and Defense Attorneys nominate Prosecutors.

Defense Attorney – Professional Advocate of the Year: The recipient must be an Oklahoma attorney who practices criminal defense (federal or state) in Oklahoma and is recognized as an ethical and professional advocate who defends and protects the constitutional rights of his/her individual client. The recipient should exhibit superior advocacy skills before the court either at the trial or appellate level and consistently shows professionalism, courtesy, and respect to opposing counsel in the spirit of the adversarial system.

Prosecutor – Professional Advocate of the Year: The recipient must be an Oklahoma attorney who represents the government in criminal prosecutions (federal or state) in Oklahoma and is recognized as an ethical and professional prosecutor who exercises prosecutorial discretion in an equitable manner towards the community as a whole. The recipient should exhibit superior advocacy skills before the court either at the trial or appellate level and consistently show professionalism, courtesy, and respect to opposing counsel in the spirit of the adversarial system.

Professional Judicial Award
Defense attorneys, prosecutors, and judges may also submit nominations for the **Honorable Donald L. Deason Judicial Award** to an Oklahoma or Tenth Circuit Judge who is known for character, dedication, and professional excellence.

Submission Guidelines:

- Defense attorneys nominating the **Prosecutor Professional Advocate of the Year Award** should send nominations to Mike Wilds, wilds@nsuok.edu.
- Prosecutors nominating the **Defense Professional Advocate of the Year Award** should send nominations to Trent Baggett, slamminsammy@cox.net.
- Prosecutors, defense attorneys and judges may send nominations for the **Honorable Donald L. Deason Judicial Award** to either Trent or Mike.

Be sure to support any nomination with a short letter that includes any anecdotes or individual achievements that serve to substantiate the nomination. **Submissions must be received by June 5th, 2023. Recipients will be recognized at the Annual Forensics Academy Seminar (tentatively scheduled for August 11th at UCO).**

ON THE MOVE

The Oklahoma City law firm of DeBee Clark PLLC has changed its name to DeBee, Clark & Weber PLLC. Partners include **H. Edward Debee**, **Michael Clark** and **Hope Weber**.

Christina Wolfram and **Michael D. Carter** have been named partners at the Oklahoma City office of Hall Booth Smith. Ms. Wolfram practices medical malpractice and other personal injury matters. She received her J.D. from the OU College of Law. Mr. Carter practices in the area of asbestos, talc and silica defense, labor and employment, products liability and workers' compensation. He received his J.D. from the OU College of Law.

Alex Sokolosky has returned to the Tulsa office of Crowe & Dunlevy as an associate attorney. He is a member of the firm's Banking & Financial Institutions, Bankruptcy & Creditor's Rights and Litigation & Trial practice groups. Mr. Sokolosky represents clients in a wide range of commercial disputes in both federal and state courts, with a focus on bankruptcy, breach of contract, collection and foreclosure matters. Additionally, he serves on the Board of Directors of First Bank of Owasso.

Kari A. Deckard has joined the Tulsa office of Doerner, Saunders, Daniel & Anderson as a partner. She practices in the area of employment law, including defense of claims of discrimination and harassment, wrongful and retaliatory discharge, breach of contract, enforcement of employment, noncompetition and confidentiality agreements and wage and hour disputes. Additionally, she dedicates a substantial portion of her employment practice to educating, training and counseling clients on litigation avoidance strategies and compliance with state and federal laws and regulations affecting the workplace. Ms. Deckard received her J.D. with honors from the TU College of Law.

T. Michael Blake, Justin Jackson and **Nathan L. Whatley** have been appointed new practice group leaders at McAfee & Taft by the Board of Directors. Mr. Blake, who focuses on tax and transaction planning and implementation, has been renamed leader of the firm's Tax and Family Wealth Group. Mr. Jackson, the long-time leader of the Securities Group, has been named co-leader of the firm's Business Transactions and Finance Group. He primarily works on mergers and acquisitions, divestitures, securities and corporate governance and compliance. Mr. Whatley returns as the leader of the firm's Labor and Employment Group. He represents management in all phases of litigation before both state and federal courts, regulatory and administrative agencies and arbitration panels.

Dana L. Murphy has been named of counsel at the Oklahoma City law firm of Goodwin/Lewis. She was elected three times as the Oklahoma Corporation commissioner, serving 14 years in the position. Ms. Murphy has over 30 years of experience in oil and gas title, transactional and regulatory work including 14 years of experience in energy law including the regulation of utilities, petroleum storage tanks and regional transmission.

Judge Khristan Strubhar has been sworn in as Canadian County's first female district judge. After graduating from law school, she worked as an Oklahoma County assistant district attorney. She became a managing attorney for the Garfield County office, eventually opening her own office in the same building where her father, Richard Strubhar, practiced before her. Judge Strubhar was appointed as a Canadian County special judge and served for four years before being elected as a district judge in 2022. In 1984, her mother, Reta Strubhar, became Canadian County's first female associate judge.

Sam Roberts has joined the Oklahoma City office of McAfee & Taft as a member of the Business Transactions and Finance and Securities practice groups. Mr. Roberts practices in the areas of business transactions and financing, corporate and securities law, and corporate governance and compliance matters. He received his J.D. with honors from the University of Texas School of Law. During law school, he served as staff editor of the *Texas Journal of Oil, Gas, and Energy Law.* After graduation, he worked as a corporate associate in the Houston office of Kirkland & Ellis LLP.

KUDOS

Judge Mark Barcus received a Director's Award at the January ceremony for the Executive Office for Immigration Review (EOIR) for his work on the Pro Bono Committee. The committee completed a nationwide assessment of access to justice resources in immigration courts and drafted comprehensive recommendations for improving operations for pro se respondents and pro bono legal services. This was his second Director's Award, the first being the year prior for his work on the agency's COVID Reporting and Response Team. Judge Barcus serves as assistant chief immigration judge, overseeing the Dallas Immigration Court and Fort Worth Immigration Adjudication Center.

Glen D. Johnson Jr. has been inducted into the Order of the Owl by the OU College of Law. He is a director in Crowe & Dunlevy's Oklahoma City office. Mr. Johnson received his J.D. from the OU College of Law and an honorary Doctor of Humane Letters from OCU. He served as chancellor of the Oklahoma State System of Higher Education, leading the state system of 25 state colleges and 10 constituent agencies from 2007 to 2021, when he was named chancellor emeritus. Mr. Johnson has been inducted into the Oklahoma Hall of Fame, the Oklahoma Higher Education Hall of Fame and the Oklahoma Association of Community Colleges Hall of Fame. He has been named a Life Fellow of the ABA and has received the Leadership Oklahoma Lifetime Achievement Award.

HOW TO PLACE AN ANNOUNCEMENT:

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

Submit news items to:

Hailey Boyd
Communications Dept.
Oklahoma Bar Association
405-416-7018
barbriefs@okbar.org

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

In Memoriam

Paul Wilson Austin of Norman died Jan. 16. He was born June 25, 1960, in Topeka, Kansas. Mr. Austin volunteered as a guardian *ad litem* for parties who could not afford one, a judge for the OU College of Law's moot court and skills competitions and an auctioneer for the Organization for the Advancement of Women in the Law's annual fundraiser. He served as the president of the Cleveland County Bar Association and a peer-elected delegate to the House of Delegates at the OBA Annual Meeting.

David Allen Box of Claremore died Jan. 1. He was born April 30, 1945, in Muskogee. He received his J.D. from the TU College of Law. **Mr. Box served in the U.S. Army for two years**. Upon his return, he practiced law in Muskogee before serving as a special judge in the 12th District Court of Oklahoma in Claremore for 21 years. While serving as a judge, he created a community service program and drug court to help drug offenders get rehabilitation help. He was a member of the Blue Starr Church of Christ.

Richard O. Burst of New Braunfels, Texas, died Oct. 20. He was born May 6, 1941, in Guthrie. **In June 1960, he enlisted in the U.S. Air Force. Mr. Burst served as a site crypto maintenance operator until he was medically discharged in 1968.** He received his J.D. from the TU College of Law in 1973 and moved back to Guthrie, where he became the prosecuting attorney and eventually the city attorney. His family then moved to Port Isabel, Texas, where Mr. Burst worked as assistant district attorney for Cameron County until becoming an attorney for the Cameron County Commissioner.

Guy Palmer Clark of Ponca City died Jan. 23. He was born May 27, 1940, in Oklahoma City. After receiving his J.D. from the OU College of Law in 1965, he attended Officer Candidate School and the Naval Justice School. **He served his country from 1966 to 1970 as captain of the U.S. Marine Corps at the Marine Corps Air Station at Kaneohe Bay in Hawaii as a judge advocate.** Upon his return, he opened his own law practice in 1972 and eventually merged with Northcutt Law Firm in 1977. He served on the OBA Board of Governors for two years and the Oklahoma Bar Foundation Board of Trustees for five years. Memorial contributions may be made to the Guy Clark Memorial Fund or Grace Episcopal Church.

William Joseph Doyle III of Tulsa died Jan. 6. He was born Jan. 28, 1938, in Tulsa. He received his J.D. from the TU College of Law in 1963 and passed the bar in both Oklahoma and Michigan. **He served in the U.S. Army and was honorably discharged at the rank of captain in 1966**. He practiced law for over 50 years as a partner of the Jones, Givens, Gotcher, Brett, Doyle & Bogan law firm and later joined Doyle & Salisbury. Among other awards, he received the OBA's Award for Outstanding Pro Bono Service in 2013.

Dan W. Ernst of Tulsa died Feb. 12. He was born May 25, 1955. Mr. Ernst grew up in Middleburg Heights, Ohio, a suburb of Cleveland. He received his J.D. from the TU College of Law in 1980 and practiced in the area of insurance defense law. Memorial contributions may be made to the Tulsa Chapter of the Alliance of Therapy Dogs.

Rex Duane Friend of Oklahoma City died Jan. 7. He was born Oct. 13, 1954, in Coldwater, Kansas. He received his J.D. from the OU College of Law in 1983. Mr. Friend lived in the Oklahoma City area for more than 45 years, working as an immigration attorney for many of them. Additionally, he served as a board member of the Oklahoma Coalition to Abolish the Death Penalty for more than 20 years.

William R. Geyer of Norman died June 10, 2022. He was born Dec. 6, 1948. Mr. Geyer received his J.D. from the TU College of Law in 1975.

Gretchen A. Grover Harris of Norman died Jan. 7. She was born April 27, 1947, and grew up in Guthrie. She received her J.D. with distinction from the OU College of Law in 1981. During law school, she was recognized by the OBA as an Outstanding Senior Law School Student and received the Paul K. Frost Memorial Award for academic and leadership achievement. Over the years, she was active in various OBA committees, earning the Women in Law Mona Salyer Lambird Spotlight Award. Memorial contributions may be made to St. Vincent de Paul at St. Mark the Evangelist, the Linda Scoggins Scholarship Fund at the OU Foundation or a local animal rescue organization.

Dale Lynn Jackson of Collinsville died Feb. 1. He was born June 15, 1957, in Seminole. Mr. Jackson received his J.D. from the OU College of Law in 1985. He practiced both accounting and law for more than 35 years in Oologah. Memorial contributions may be made to his granddaughter through a member of his family.

Ross N. Johnson of Oklahoma City died Jan. 21. He was born April 14, 1949, in Dallas. Mr. Johnson received his J.D. from the OCU School of Law in 1974. He served as chairman of OCU's Kappa Alpha housing and spent several years in private practice before retiring.

Clifford A. Jones of Austin, Texas, died Oct. 13. He was born Aug. 14, 1953. Mr. Jones received his J.D. from the OU College of Law in 1977. He practiced in the areas of corporate financing and corporation and bankruptcy law.

Larry Bailey Lipe of Tulsa died Feb. 7. He was born July 11, 1951. Mr. Lipe received his J.D. from the Southern Methodist University Dedman School of Law in 1976.

Robert Dennis Long of Palm Springs, California, died Nov. 29. He was born Nov. 12, 1952, in Ardmore. Mr. Long received his J.D. from the OU College of Law. Memorial contributions may be made to your local animal and homeless shelters.

Warren K. Miller of Woodland Hills, California, died July 23, 2022. He was born Dec. 23, 1944. Mr. Miller received his J.D. from the OU College of Law in 1972.

John E. Montazzoli of Edmond died Jan. 4. He was born May 5, 1947, in Rahway, New Jersey. Mr. Montazzoli received his bachelor's degree in political science from the University of Charleston and began his career as a journalist, covering the legislature and politics for years. He went on to receive his J.D. from the OCU School of Law. Memorial contributions may be made to the First Tee of Metropolitan Oklahoma City.

Connie Kay Moore of Tulsa died Oct. 31. She was born May 20, 1948. Ms. Moore received her J.D. from the TU College of Law.

Lynda Brown Nichols of Grove died June 12, 2022. She was born Nov. 10, 1949, in Miami. She received her J.D from the TU College of Law in 1987. Ms. Nichols was a proud member of the Cherokee Nation.

Richard A. Resetaritz of Edmond died Jan. 2. He was born April 5, 1954. Mr. Resetaritz received his J.D. from the OU College of Law in 1979. He was a member of the OBA Government and Administrative Law Practice Section and the Labor and Employment Law Section.

Ted M. Riseling Jr. of Tulsa died Dec. 20. He was born Oct. 25, 1942, in Oklahoma City. **Mr. Riseling served in the Army National Guard of Oklahoma until he was honorably discharged in 1969.** He received his J.D. from the TU College of Law in 1969. For the first four years of his legal career, he worked as a trial attorney in the IRS Office of Chief Counsel until switching to private practice, eventually opening his own law firm in 1978. He served as the director of the Tulsa Estate Planning Forum and lectured extensively before the OBA and Tulsa County Bar Association on taxation and estate planning matters.

William Jarboe Ross of Oklahoma City died Nov. 17. He was born May 9, 1930. Mr. Ross received his J.D. from the OU College of Law in 1954 and began working at the Oklahoma City Municipal Counselor's Office before joining the law firm of Rainey, Flynn, Green & Anderson as an associate. He became a partner five years later and a senior partner 10 years after that. He was passionate about the nonprofit community, serving in various leadership positions. He chaired the Federal Judicial Nominating Committee for the U.S. District Court for the Western District of Oklahoma and served as a member of the Admissions and Grievances Committee. He received multiple honors for his service and leadership, such as an honorary degree in humane letters from OU and induction into the Oklahoma Hall of Fame.

Michael Francis Shepard of Round Rock, Texas, died Dec. 20, 2021. He was born April 24, 1946, in Northampton, Massachusetts. **Mr. Shepard attended Columbia University before enlisting in the U.S. Navy during the Vietnam War. He served aboard the USS Hermitage LSD-34 for two years before his second posting brought him to London.** Upon return, he completed his undergraduate degree and received his J.D. from the TU College of Law in 1979. He worked as an oil and gas attorney for more than 30 years.

Kenneth Lee Spears of Oklahoma City died Jan. 12. He was born Dec. 6, 1941, in Pawhuska. Mr. Spears received his J.D. from the OU College of Law in 1971. His career included 47 years of bankruptcy practice and more than 30 years as a municipal judge in Midwest City.

Virgil R. Tipton of Norman died Dec. 27. He was born Nov. 30, 1940, in Ada. **Mr. Tipton served in the U.S. Navy in the Office of Naval Intelligence.** He received his J.D. from the OU College of Law in 1973 and worked as a city attorney before being appointed to the bench to serve as a special judge for Garvin and McClain counties. He was a deacon of the First Presbyterian Church.

Richard H. Vallejo of Oklahoma City died Jan. 12. He was born Aug. 1, 1941. **Mr. Vallejo served in the U.S. Army as a specialist, stationed from 1967 to 1969.** Upon discharge, he received a Commendation Medal. He received his J.D. from the OCU School of Law in 1971 and worked predominantly as a private practice lawyer in Oklahoma City. Additionally, he served on the Human Rights Commission and as a judge for the Sac and Fox Nation.

Loyde Hugh Warren of Edmond died Jan. 1. He was born April 18, 1939. Mr. Warren received his J.D. from the OU College of Law in 1969.

Jack R. Winn of Tulsa died Sept. 8. He was born May 19, 1929. Mr. Winn received his J.D. from the TU College of Law in 1963.

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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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Solo & Small Firm Conference Flashbacks

Left: *OBA members and their families enjoy the 2003 Solo & Small Firm Conference Circus Night at Tanglewood Resort on Lake Texoma.*

Middle left: *From left Ross Kodner, OBA Management Assistance Program Director Jim Calloway and 2007 OBA President Stephen Beam show off their best Doc Brown impersonations at the 2005 Back to the Future-themed conference.*

Middle: *The winning team of the Friday golf scramble at the 2007 Solo & Small Firm Conference.*

Middle right: *Former OU football head coach Barry Switzer meets with attendees during the 2011 conference.*

Left: *YLD members experience the first poolside reception in 2011 at the Downstream Resort in Quapaw. From left Breea Clark, Sarah Stewart, Kaleb Hennigh, Robert Faulk, Lane Neal, Roy Tucker and Timothy Rogers*

Right: *During the 2018 Midyear Meeting, YLD members attend a social event at the FlyingTee in Tulsa.*

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THE CINDERELLA CONUNDRUM:

The Evil Step-Parent and Worthless Stepchildren in Estate Planning and Settlement

PROGRAM PLANNER: Mark S. Darrah, *Attorney, Tulsa*

Problems between stepchildren and stepparents are as old as the ages. That's why so many fairy tales feature an evil stepmother or stepfather and why it is not uncommon for stepparents to consider their stepchildren worthless. These situations in estate planning and settlement are a conundrum because no two are alike and there are rarely perfect solutions to avoid the tensions and conflicts that can arise.

The program will include these topics:

1. **Assisting Widows and Widowers in recognizing bad actors**
2. **What are the signs of a gold digger**
3. **Common concerns and sources of mistrust between stepparents and stepchildren and steps to avoid inflaming an already challenging relationship.**
4. **Ante-nuptial agreements**
5. **Estate planning for a remarried widow or widower**
6. **Unique settlement issues that arise when one spouse from the second marriage dies**
7. **Ethical, class, race and gender issues relative to difficulties these marriages can pose**

This program will draw on the wisdom folk and fairy tales teach while addressing applicable legal principals, statutes, and cases in practice.

About Out Speaker:
Mark S. Darrah maintains a general civil practice in mid-town Tulsa. A substantial portion of his legal work involves estate planning, probate, estate administration, trusts, and trust litigation.
Mark is a graduate of the University of Southern California and the University of Oklahoma College of Law. He has practiced in Tulsa since 1982 and is a member of all relevant bar associations.

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