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# THE OKLAHOMA BAR Journal

Volume 94 — No. 7 — September 2023

## Corporate Law



THURSDAY,  
OCTOBER 26, 2023

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Stuart I. Teicher, Esq. is a professional legal educator who focuses on ethics law and writing in-struction. A practicing lawyer for 30 years, Stuart's career is now dedicated to helping fellow lawyers survive the practice of law and thrive in the profession. Mr. Teicher teaches seminars, provides in-house training to law firms and legal departments, provides CLE instruction at law firm client events, and also gives keynote speeches at conventions and association meetings.

Stuart helps lawyers get better at what they do (and enjoy the process) through his entertaining and educational CLE "performances". He speaks, teaches, and writes — Thomson Reuters published his book entitled, *Navigating the Legal Ethics of Social Media and Technology*.

Mr. Teicher is a Supreme Court appointee to the New Jersey District Ethics Committee where he investigates and prosecutes grievances filed against attorneys. Mr. Teicher also served on the New Jersey Office of Attorney Ethics Fee Arbitration Committee. Mr. Teicher is an adjunct professor of law at Georgetown Law where he teaches Professional Responsibility, and he is an adjunct professor at Rutgers University in New Brunswick where he teaches undergraduate writing courses. He also taught legal writing at St. John's University School of Law in New York City.

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# contents

September 2023 • Vol. 94 • No. 7

## THEME: CORPORATE LAW

Editor: Jason Hartwig

*On the cover: A view of downtown Tulsa. Photography by Tulsa lawyer Lynn R. Anderson.*

## FEATURES

- 6 | A CYBER PRIMER: 6 PRACTICAL LOOKOUTS FOR  
ADVISING COMPANIES IN THE 21ST CENTURY  
*By COLLIN R. WALKER*
- 14 | PRESERVING THE INTEGRITY OF PROFESSIONAL  
LIMITED LIABILITY COMPANY LAW FIRMS:  
ANNUAL BEST PRACTICES FOR CORPORATE  
GOVERNANCE IN OKLAHOMA  
*By NATALIE K. LEONE*
- 20 | GENERAL CORPORATE DUE DILIGENCE IN  
MERGERS AND ACQUISITIONS TRANSACTIONS  
*By TIAN TIAN CHEN*
- 28 | SEXUAL HARASSMENT AND RESPECT IN THE  
LEGAL WORKPLACE  
*By KATHERINE MAZAHARI AND DANIEL ZONAS*

## DEPARTMENTS

- 4 | FROM THE PRESIDENT
- 64 | FROM THE EXECUTIVE DIRECTOR
- 66 | LAW PRACTICE TIPS
- 70 | BOARD OF GOVERNORS ACTIONS
- 74 | OKLAHOMA BAR FOUNDATION NEWS
- 76 | YOUNG LAWYERS DIVISION
- 77 | FOR YOUR INFORMATION
- 78 | BENCH & BAR BRIEFS
- 80 | IN MEMORIAM
- 81 | EDITORIAL CALENDAR
- 88 | THE BACK PAGE

## PLUS

- 34 | PATHS TO THE SUPREME COURT: A BRIEF  
DISCUSSION OF THE VARIOUS WAYS TO OBTAIN  
REVIEW OF A DISTRICT COURT ORDER  
*By MELANIE WILSON RUGHANI*
- 40 | RESIDENTIAL RESTRICTIVE COVENANTS:  
THE AMENDMENT PROCESS UNDER 11 O.S.  
SECTION 42-106.1  
*By KRAETTLI Q. EPPERSON*
- 48 | ANNUAL MEETING
- 58 | WOMEN IN LAW CONFERENCE
- 60 | NEW ANIMAL LAW SECTION
- 61 | ACCESS TO JUSTICE
- 62 | COMMITTEE SIGN UP
- 63 | YOUR OBA MEMBER BENEFITS



PAGE 34 – Paths to the Supreme Court



PAGE 40 – Residential Restrictive Covenants

# Welcome Home!

By Brian Hermanson

**WHAT?! IT IS ALREADY SEPTEMBER!** How can that be? As shocking as it is when time quickly flies by, we know that if we are not careful, we may not accomplish all our intended goals during the year.

How many of your colleagues have been missing from your life over the last few years of the pandemic? When was the last time you saw the buddies you made in the trenches they call law school? When was the last time you had a class reunion or a time when you sat down with a bunch of good attorney friends and had a visit?

Well, here is your chance. We are rapidly approaching the Oklahoma Bar Association Annual Meeting. This year's meeting will be a time when we can all get together, share stories of our lives and break bread with those many lost friends from across the state.

I'm excited that we are holding this year's meeting at the beautiful, historic Skirvin Hilton Hotel in downtown

Oklahoma City. We have reserved two floors of the hotel for our meeting spaces, and we have ensured there will be plenty of opportunities to sit down in small or large spaces and just relax with friends. Of course, there will be plenty of CLE offered with cutting-edge seminars and great opportunities to try out the latest in technology.

Wednesday will be your opportunity to have lunch with your fellow law school alumni and visit with many of your classmates and professors. There will also be meetings throughout the day that will help you energize both you and your practice.

During the Annual Meeting, we will hear from outstanding speakers and educators, and everyone who

registers for the Annual Meeting is invited to the Welcome Reception on Wednesday night. There will be refreshments, food, music and everything you could hope for at the reception. The judiciary will be invited, and

there will be quiet spaces available for visiting and conversation as well as alcohol-free areas to ensure everyone feels welcome and comfortable. We also hope to have many OBA past presidents in attendance.

At our Thursday Annual Luncheon, we will enjoy fellowship as we recognize and honor the 2023 OBA Award winners.

Other Thursday events will offer additional CLE opportunities as well as various OBA section and committee

meetings. During the day on Thursday, you'll have the opportunity to take part in OBA section and committee work. The OBA Diversity Committee will hold its annual Diversity Awards Dinner on Thursday evening.

On Friday, we will again have an outstanding speaker at the annual Delegates Breakfast, followed by the OBA General Assembly and the House of Delegates, where the important business of the association will be conducted.

If you have never been to an OBA Annual Meeting before, this will be the perfect time to see what you have been missing. If you have attended in the past, you know the fun and camaraderie that accompanies spending a few days with outstanding jurists and attorneys.

And guess what? The time to register will come and go before you know it. What better time than now to sign up and become a part of this incredible event.

See you there!



Register now at  
[www.okbar.org/annualmeeting](http://www.okbar.org/annualmeeting)



A handwritten signature in blue ink, appearing to read "B. Hermanson".

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# A Cyber Primer: 6 Practical Lookouts for Advising Companies in the 21st Century

By Collin R. Walke

**T**HE FUTURE OF COMMERCE IS NO LONGER COMING; it has arrived. Every single industry is driven by the internet and data, even industries like pipeline<sup>1</sup> and railroad<sup>2</sup> operations. In common parlance, “Data is the new oil.” As a result, attorneys and companies no longer have a choice in adopting and adapting to new technologies. They either do, or they go extinct. Technology, however, is something many people, including industry leaders and attorneys, loathe. Has anyone ever purchased a printer and been able to get it to work without troubleshooting it first? I doubt it.

But the practical frustrations that stem from technological implementation shy in comparison to the legal liabilities. Given that virtually every single business touches data, attorneys counseling companies on ... well, really anything, need to appreciate that there is a labyrinthine set of regulations and laws governing the cyber realm. The aim of this article is to provide six practical lookouts that corporate attorneys need to consider when advising their clients from the inception of a business to a data breach. Obviously, an entire volume of books can be written about these topics, but this primer provides, in general, the common issues attorneys come across in 21st-century

commerce. Hopefully, each lookout will at least provide a general direction from which attorneys can begin their own research.

## LOOKOUT NO. 1: TRADITIONAL THEORIES OF LIABILITY STILL EXIST

Even though cyber issues may be “unique” in some aspects, at the end of the day, many legal claims are simply new spins on already existing theories of recovery. For example, in Oklahoma, simple negligence may be sufficient to state a viable claim for damages resulting from a data breach.

In *Cook v. McGraw Davisson Stewart*,<sup>3</sup> a real estate client sued his former real estate broker for negligence. Allegedly, a hacker

accessed the broker’s email and used it to cause the client to send a fraudulent wire transfer to the hacker, thinking the client was sending it to the broker for closing. The client claimed the broker “failed to maintain proper security” on their email. The broker in *Cook* got lucky because the client did not present evidence sufficient to demonstrate a question of fact on his negligence claim because “he could not present evidence that [the broker’s] email had been hacked, as opposed to his own.”<sup>4</sup>

Similarly, in *In re McDonald’s Corporation Stockholder Derivative Litigation*,<sup>5</sup> the Delaware Court of Chancery extended the duty of oversight found in *In re Caremark International, Inc., Derivative Litigation*<sup>6</sup>

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to officers of companies. The extension of the *Caremark* duty to officers now means that officers, such as chief privacy officers, chief information security officers or others, may be held liable if they fail to oversee proper implementation and operation of cyber-security protocols.<sup>7</sup>

Both *Cook* and *McDonald's* show that simply because data is involved does not mean the rules of general liability have changed. As a result, just as an attorney would make sure that their client has adequate general liability insurance, attorneys advising corporate clients need to ensure that adequate cyber insurance is in place as well.

## LOOKOUT NO. 2: CYBER INSURANCE IS NO LONGER OPTIONAL

Generally speaking, general liability policies do not cover damages arising from cyber incidents.<sup>8</sup> Nor do errors and omissions or directors and officers coverage.<sup>9</sup> That is why cyber coverage is a must-have. For example, while the figures vary, the average cost of a ransom for a ransomware attack can easily reach hundreds of thousands of dollars, and that does not account for ancillary damages, such as business interruption, reputational damage or costs of remedies. Could your client afford a six-figure hit today?<sup>10</sup>

Cyber applications and coverages vary widely. Some cyber insurance applications ask for very minimal information from the applicant, choosing instead to simply determine – as a potential hacker would – how many external vulnerabilities are publicly detectable and approximating risk off that. Other applications are fairly detailed and may require governance and/or technical controls.

For example, some applications require specific company positions, such as data privacy officers or chief information security officers. Others require certain internal policies and procedures, including business interruption plans, cyber incident response plans, data privacy notices, etc. Almost all applications require at least annual training on cyber incident response plans and data privacy policies. Some even require penetration testing (pen-testing), where private companies are hired to attempt to hack into the client's system.

Common examples of technical controls required by insurance applications are backup systems,<sup>11</sup> firewalls,<sup>12</sup> multi-factor authentication<sup>13</sup> and endpoint detection and response.<sup>14</sup> Knowing a good technical team that can help implement these and other technical controls is extremely important.

Another common lookout where technical controls and governance play a crucial role is the use of personal devices for work. If a company permits employees to use personal devices for work, then that company should absolutely have a bring-your-own-device (BYOD) policy. A good BYOD policy ensures that employees know what they can and cannot do with their own devices while utilizing them for work and how to use them in such a way that limits exposure to potential threats (*i.e.*, limiting what apps can be downloaded). Companies utilizing a BYOD policy should also ensure they have technical controls in place for the management of mobile devices.<sup>15</sup> A solid BYOD policy and mobile management program can help shield an employer from liability from a litany of angles ranging from employment to negligence claims.

## LOOKOUT NO. 3: WHAT IS ADEQUATE COVERAGE FOR CYBER POLICIES?

Again, the estimates vary, but according to IBM, the average cost of a data breach worldwide is \$4 million.<sup>16</sup> Even if one assumes that those numbers are artificially inflated as an average, the costs to a small business for a data breach can still easily exceed \$100,000, especially if lawsuits follow, as they often do. And that is setting aside the very plausible six-figure cost of a ransomware ransom. At this point, one should easily see the importance of adequate coverage.

What constitutes adequate coverage for a business would be difficult to quantify in general terms because it all comes down to the type of enterprise and risk tolerance of the company. (Unless, of course, your client has entered into a contractual agreement requiring a specific coverage amount, which is not uncommon.) One of the easier items to consider and quantify under a cyber insurance policy is business interruption coverage, given that it is a function of revenue and expenses. Other considerations would include the number of unique individuals who might need to be notified in a breach, the size and complexity of the network, the number of vendors to whom the client may end up owing notification and/or indemnification obligations, etc.

In addition to understanding the amount of coverage necessary for the client, it is also important to understand what is and is not covered. For example, does the policy cover conduit risk?<sup>17</sup> Does the policy cover the ransom payment? Does the policy provide for a cyber incident response team?<sup>18</sup>

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But the entire reason insurance companies ask for policies and procedures, trainings and technical controls is because, in all reality, insureds need them anyway. Here's just one example as to why: If a company is experiencing a ransomware attack and the perpetrators are on a sanctions list, then insurance companies cannot legally pay the ransom. The point being, prevention is the best medicine because even with all the right coverage in place, the client can still be left holding the bag. *Indeed, nearly 60% of small businesses fail following a cyber-attack.*<sup>19</sup>

#### LOOKOUT NO. 4: POLICIES AND PROCEDURES ARE BORING BUT IMPORTANT

Policies and procedures are only as good as the paper they are written on. In order to realize their value, businesses must actually operationalize their policies and procedures. This is especially true in the cyber realm. If companies do not think through their cyber policies and procedures, they can face regulatory fines in a growing

number of states and countries – and that is disregarding the fact that failing to operationalize data policies and procedures increases the risk of a cyberattack.

Standard data privacy policies and procedures inform individuals what categories of data are being collected about them, how that data is being used and with whom the information is being shared.<sup>20</sup> Similarly, data privacy policies and procedures also typically inform individuals that they have a right to know what personal data the company has in its possession, how to correct the data, whom the data has been shared with and, in certain cases, how to have the data deleted.<sup>21</sup> These are common terms and conditions, because nearly every state and international law requires these sorts of provisions.<sup>22</sup>

Notice the last sentence omitted “federal law.” This is because the federal government does not have a comprehensive data privacy law requiring anything. Rather, up to now, the federal government’s approach has been sectoral.

For example, your data privacy rights with healthcare providers are generally governed by the Health Insurance Portability and Accountability Act (HIPAA).<sup>23</sup> Your data privacy rights with banks are generally governed by the Gramm-Leach-Bliley Act.<sup>24</sup> But if you share your health information with a general tech company, via your wristwatch, for example, that enterprise does not fall under HIPAA scrutiny; therefore, that information can be bought, sold and traded at will by the company.<sup>25</sup>

As a result, many states have stepped in to regulate the data privacy realm. The first state was California, but since then, a total of nine states have gone on to pass some form of comprehensive data privacy legislation.<sup>26</sup> While state laws vary, they generally require the information contained in the aforementioned privacy policies. To determine whether any given state or country’s data privacy law applies to a company, you generally have to ask two questions: 1) Is the client collecting data on persons within the state or country? and

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If companies do not think through their cyber policies and procedures, they can face regulatory fines in a growing number of states and countries – and that is disregarding the fact that failing to operationalize data policies and procedures increases the risk of a cyberattack.

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2) Does the company fall within the scope of the law? For example, in California, the company must gross a certain amount of money or possess data on a certain number of households or derive a certain percentage of its revenue from the buying and selling of data before the law applies.<sup>27</sup> Corporations generally disapprove of this patchwork regime; as a result, there has been a sincere push to federally regulate data privacy in recent months – if for no other reason than to reduce administrative costs to companies. What the federal law will look like and to whom it will apply is unclear. As a result, attorneys may be asked how to prepare for a federal law. At this stage, compliance with California’s, Colorado’s and Virginia’s data privacy laws would likely be safe starting points for compliance with federal law. Alternatively, compliance with the European Union’s General Data Protection Regulation (GDPR)<sup>28</sup> would likely meet the bar of any federal law because the GDPR is

considered to be one of the most, if not *the most*, onerous of data privacy laws.

#### LOOKOUT NO. 5: IT IS NOT IF YOU’LL BE HACKED BUT WHEN

Every client will want to know what they can do to ensure they will not be hacked. The answer is, “Nothing.” There are, however, best practices. For example, cyber insurance and data privacy policies often limit access to data on a “need-to-know” basis. Limiting access to data can be accomplished in a myriad of ways, ranging from passwords to tokenization.<sup>29</sup> By limiting who can access what data, companies are able to lower the risk of unauthorized access.

Technical controls, such as tokenization or encryption,<sup>30</sup> achieve both data privacy goals and cybersecurity goals. If data privacy policies are done well and actually operationalized, then if a breach occurs, the amount of data that could be gathered is ostensibly lowered as well. Other common

technical cybersecurity controls that decrease risk and can limit damage in the event of a breach include multi-factor authentication, firewalls and endpoint detection and response (EDR). Quality EDR programs utilize artificial intelligence to monitor networks and detect odd patterns that could indicate an infection within the system. This type of monitoring is crucial because viruses can live on networks for months before being detected or deployed.

Still, no system is perfect, and a breach of some type may occur even with the most rigorous of cybersecurity programs. As a result, attorneys advising corporations on cyber-related events need to bear in mind two overarching concepts: First, the scope of attorney-client privilege during a cyber event is currently in debate.<sup>31</sup> Streamlining communications and controlling communications during a cyber event is therefore critical to provide the best shot at retaining the privilege in the event of litigation.

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Second, simply because a computer has been “hacked” does not necessarily mean there has been a breach. For example, Oklahoma’s data breach notification statutes state that a breach occurs if there is unauthorized access to “*unencrypted and unredacted*” data.<sup>32</sup> Thus, if the data is encrypted and redacted, even though it has been extracted, there is no “breach” for the purposes of Oklahoma’s reporting statute. Therefore, understanding a particular state or federal law’s definition of “breach” is critical because it may trigger certain reporting requirements and other obligations.

Finally, cyberattacks come in a variety of forms and accomplish different goals.<sup>33</sup> However, common approaches and attacks can be linked to various organizations. As a result, certain cyberattacks may require you to work with a computer forensics team and/or the FBI. Working with experienced professionals in these areas can help to ensure that your client does not pay a ransomware ransom to an organization that will not actually send the decryption key, thereby resulting in more damage to your client.

## LOOKOUT NO. 6: DIRECT LEGAL LIABILITIES

Failure to abide by state data privacy laws or federal privacy laws (such as HIPAA) can result in regulatory action.<sup>34</sup> But even if your client is exempt from these laws because they operate in states without data privacy laws and are unregulated by federal law, simply using policies that do not accurately reflect the company’s collection, protection and use of data can also result in actions by the Federal Trade Commission.<sup>35</sup>

Since many data privacy laws and cybersecurity laws do not provide private rights of action, cyber litigation is usually pursued under traditional theories of liability, such as negligence, and can be ripe for class certification. Similarly, traditional defenses, like standing, often serve as the basis for dismissal of private cyber claims.<sup>36</sup> This is because it can often be hard to determine whether the breach actually resulted in harm.

Important pre-litigation attention should be paid to contractual agreements that contain cyber-related provisions. Standard provisions found in data sharing agreements (and other cyber-related agreements) include indemnification requirements, cyber insurance coverage, compliance with state and/or federal laws and ownership/usage rights. While these concepts may be generally familiar, the technical side of cyber law is where the problems creep in.

For example, suppose you have a client who has a data privacy policy that states the data it holds is kept in an “anonymized” fashion. The term “anonymized” is a technical term of art that means the data being held cannot, under any circumstances, be linked back to the original provider of the data. However, given the amount of data that is available through the internet and/or data brokers, it can often be very easy to relink an individual’s data through the use of multiple data sets. As a result, it is extremely difficult for many companies to claim that they use only “anonymized” data, as opposed to “pseudonymized” data. But it is just this sort of technical difference that could result in the FTC coming down on your client.<sup>37</sup>

## THE VIEW FROM THE TOP

Hopefully, these lookouts show the interrelated nature of corporate liability in relation to cyber events, ranging from HR law to simple negligence claims for a data breach. Further, one should be able to see how each of these areas is interrelated with the other. Data privacy minimizes damages from a cybersecurity breach, and with good cyber insurance, many of the out-of-pocket costs can be recouped. But a company cannot get good cyber insurance without good data privacy and cybersecurity protocols in place.

Hacking is becoming democratized. For example, just as customers can buy software as a service (SaaS), where you simply pay a monthly subscription fee for software (versus installing it with a disk), people can now buy ransomware as a service (RaaS) off the dark web, meaning even people with no technical skills can now become hackers through the use of RaaS.

The flattening of the hacker realm means more hacks are coming. It is, therefore, more critical than ever that companies get ahead of the curve now. Otherwise, technical debt<sup>38</sup> and administrative inertia will make it more difficult to properly implement cybersecurity and data privacy protocols after the fact. The time to act is not tomorrow, it’s today.

## ABOUT THE AUTHOR



Collin R. Walke leads Hall Estill’s Cybersecurity and Data Privacy Practice Group. He earned his J.D., *magna cum laude*, from the OCU School of Law and is a graduate of Harvard’s Business Analytics program, where he was nominated for distinction in programming and data systems.

## ENDNOTES

1. See, e.g., “The Attack on Colonial Pipeline: What We’ve Learned & What We’ve Done Over the Past Two Years,” <https://bit.ly/3rCZkal> (last visited May 19, 2023).
2. See, e.g., *Rogers v. BNSF Railway Company*, <https://bit.ly/3K75t5a> (wherein BNSF was ordered to pay \$228,000 for violation of the Illinois Biometric Information Privacy Act) (last visited May 19, 2023).
3. *Cook v. McGraw Davisson Stewart, L.L.C.*, 2021 OK CIV APP 32, 496 P.3d 1006 (2021).
4. *Id.*, at ¶18, 1011.
5. *In re McDonald’s Corporation Stockholder Derivative Litigation*, 289 A.3d 343 (Del.Ch.2023).
6. *In re Caremark International, Inc., Derivative Litigation*, 698 A.2d 959 (Del.Ch.1996).
7. Aside from civil liabilities, officers can also face criminal liability if they fail to disclose a data breach. See, e.g., “Former Chief Security Officer of Uber Convicted of Federal Charges for Covering Up Data Breach Involving Millions of Uber User Records,” <https://bit.ly/3O2t205> (last visited May 19, 2023).
8. See, e.g., “What is Cyber Liability Insurance and Why is it Important?” <https://bit.ly/3Y9818G> (last visited May 19, 2023).
9. See, e.g., “What Does D&O Insurance Not Cover?” <https://bit.ly/3q02btq> (last visited May 19, 2023).
10. The reason we ask if the business is prepared for an attack today is because all code has some form of an undiscovered exploit. As a result, software is inherently subject to what is called a “zero-day attack,” meaning there are zero days between the discovery of the exploit and the ability to patch it.
11. Backup systems exist in order to allow clients to immediately restore any data that was lost during an attack. Companies should consider whether on-site, off-site or cloud backup systems are the best route for the company. Each has its benefits and drawbacks. For example, an on-site backup system has the benefit of being within immediate reach and control, but an on-site backup system also means that if a tornado comes through, the company could lose its backup data.
12. A firewall is a network security device that monitors traffic to or from your network and allows or blocks traffic depending on the security rules in place. In other words, it’s a fence that tries to keep the bad stuff out.
13. Multi-factor authentication requires a user to provide at least two verification factors to

gain access to data. For example, it may require the user to respond with a specific code from the user’s phone in order to access an account, in addition to the user’s password.

14. Endpoint detection and response (EDR) monitors network endpoints to determine if there is a potential security threat. For example, an EDR program will know if a particular employee is on their computer at 3 a.m. If that is an atypical time for that employee to be on the system, the EDR might notify the IT department of suspicious activity so that further investigation can ensue. Similar to when you use your credit card in an odd place and subsequently receive a phone call to ensure it is not fraudulent.

15. Mobile management tools are extremely important. For example, if an employee is using their phone to access their email applications, when the employee leaves, they may retain access to the email application. However, with proper mobile management tools, the employer could remotely shut off access to the email application from the phone.

16. “Cost of a Data Breach 2022,” <https://ibm.co/43z6lWY> (last visited May 22, 2023).

17. Cowan, D., “Some Considerations in Insuring Against Cyber Loss” (2017), <https://bit.ly/3QspaiH> (last visited May 22, 2023).

18. A cyber incident response team is the technical team that investigates and assists in the event of a breach.

19. “How to Address the Top 7 Objections to Cyber Insurance,” <https://bit.ly/43EO9v1> (last visited May 19, 2023).

20. See, e.g., *New York Times Privacy Policy* at <https://nyti.ms/46WkQHn> or Google’s Privacy Policy at <https://bit.ly/3Y8qH8A>.

21. See *id.*

22. See, e.g., California Consumer Privacy Protection Agency FAQ, <https://bit.ly/3DpNx1K>; see also, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, at Articles 12-23.

23. 42 U.S.C., §1320d *et seq.*

24. 15 U.S.C., §§6801-6809, 6821-6827.

25. See, e.g., “Smartwatch Data Act Introduced to Improve Privacy Protections for Consumer Health Data,” *HIPAA Journal*, <https://bit.ly/3K7MrLV> (2019) (last visited May 22, 2023).

26. California, Utah, Colorado, Iowa, Indiana, Virginia, Tennessee, Connecticut and Montana.

27. See: Cal.Civ.Code 1798.140(d).

28. See: Note xviii, *supra*.

29. Tokenization is the act of masking data. For example, you could change the word “Name” to “15&\*.” Only people with authorization are then able to unmask “15&\*” to reveal the word “Name.”

30. Encryption is similar to tokenization in that a password or key is necessary to decrypt information. A major point of concern is that the market is currently developing quantum computing. At this stage, there is no quantum-proof encryption technology – meaning, if quantum computing develops faster than encryption technology, we may reach a point where no one is protected via encryption (or anything else for that matter).

31. See, e.g., Yannella, P., Dickens, T., “Attorney-Client Privilege in Data Breach Investigations,” <https://bit.ly/3K7OzDp> (2022) (last visited May 22, 2023).

32. Okla. Stat. tit. 24, §162(1).

33. For example, an attack may limit functionality of certain systems. Or an attack could have multiple layers of encryption, where you pay to decrypt one ransomware attack only to find another underneath it.

34. See, e.g., \$2 million fine against cosmetic company Sephora (<https://bit.ly/476pNgD>) and consent order against BetterHelp (<https://bit.ly/3Y78JmL>) (last visited May 22, 2023).

35. See, e.g., *In the Matter of Flo Health, Inc.*, C-4747, United States of America Before the Federal Trade Commission (<https://bit.ly/3rF0WR4>) (last visited May 22, 2023).

36. See, e.g., *Beck v. McDonald*, 848 F.3d 262 (4th Cir.2017), *Whalen v. Michaels Stores, Inc.*, 689 F.App’x 89 (2nd Cir.2017), and *Reilly v. Ceridian Corp.*, 664 F.3d 38 (3rd Cir.2011).

37. See, e.g., Gigliarolo, B., “FTC suddenly gets very stern about not-really-anonymized anonymized data,” <https://bit.ly/474CRDq> (last visited May 22, 2023).

38. Technical debt is the term used to describe the costs associated with delaying or failing to keep software and cyber policies up to date. If cyber policies and technical controls are not implemented early, it creates extreme problems down the road because it is more difficult to corral data and correct problems.



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# Preserving the Integrity of Professional Limited Liability Company Law Firms: Annual Best Practices for Corporate Governance in Oklahoma

By Natalie K. Leone

**A**S PROFESSIONALS OPERATING PROFESSIONAL limited liability company law firms in Oklahoma, our commitment to corporate governance standards surpasses those of standard limited liability company owners. This article explores annual best practices for corporate governance in Oklahoma professional limited liability company law firms, emphasizing the importance of maintaining a strong and secure barrier between business and personal assets. While limited liability companies can offer limited liability protection, adhering to annual best practices ensures the preservation of those protections. From filing annual certificates and maintaining law licenses to conducting business on behalf of the company and updating your operating agreement, meticulous attention to governance is crucial. By marking these annual goalposts, law firm owners can safeguard their assets and mitigate legal and financial risks.

In explaining limited liability company best practices, it can help to visualize building a brick wall to separate one's business from one's personal life. You don't want a creditor from the business side of the wall to be able to reach across and grab assets from the personal side of the wall. Each of the best practices listed below is its own brick in the wall. Some

bricks are like keystones – if they come out of the wall, the whole thing comes crashing down – but even the most seemingly benign of bricks is important. If you remove enough bricks from the wall, it leaves a hole big enough for creditors to reach through and grab your personal assets from the business side. In order to fully understand the annual best practices below, it's

helpful to first have a brief history of how we got here.

## HISTORY

The concept of limited liability for business owners emerged in the 19th century. In the United States, the first limited liability legislation was introduced in the state of New York in 1811, allowing businesses to be formed as



joint-stock companies with limited liability for their investors. Up until 1977, if you wanted asset protection for your business, your primary option was to form some type of corporation. This was all well and good, but you paid an arm and a leg in taxes, and corporate governance requirements were very strict. If you got one governance measure wrong, it would be enough to “pierce the corporate veil,” and suddenly, your personal assets could be gotten at by creditors of your business. These high standards and costs eventually led to the birth of the limited liability company.

In the United States, the first modern limited liability company legislation was enacted in Wyoming in 1977. Wyoming’s law allowed for the creation of a new type of business entity that

combined the benefits of both corporations and partnerships. The idea gained popularity because it provided limited liability protection for owners while avoiding some of the tax burden and formalities associated with corporations. Following Wyoming’s lead, other states in the U.S. began enacting their own limited liability company statutes throughout the 1980s and 1990s. Limited liability companies were introduced in Oklahoma in 1992.

Through Oklahoma case law over the last 30 years, we’ve come to learn that instead of the all-or-nothing approach to governance requirements for corporations, Oklahoma courts typically look at the same list of factors and do balancing tests instead. For a corporation, if you miss any piece of corporate governance, you’re out of

compliance, and the corporate veil is pierced. For limited liability companies, the courts generally ask, “Are you mostly in compliance?” So if you forgot to do your annual minutes last year, all hope isn’t lost; your status may still be protected.

#### YEARLY REVIEW

Though you might be able to maintain liability protection if you miss some of the items below, it’s best not to leave anything to chance and, instead, it’s recommended that you visit all aspects of governance at least annually. The following are undertakings to visit every year to preserve your professional limited liability company status in Oklahoma.

### *File an Annual Certificate*

Each year, you need to file an annual certificate with the Oklahoma secretary of state.<sup>1</sup> This certificate contains the current contact information for your professional limited liability company, such as its name, address and registered agent. Additionally, you need to include a certification that each member is licensed to practice law in the state of Oklahoma. This is one of those capstone bricks in your wall. If you're not in compliance with the secretary of state, you're not a professional limited liability company in Oklahoma.

### *Maintain Law Licenses*

As a professional limited liability company, you and your members must maintain your professional licenses in good standing. Each member must be licensed and authorized to practice law in the state of Oklahoma.<sup>2</sup> Any changes in licensure status must be reported to the Oklahoma secretary of state.

### *Registered Agent*

All limited liability companies in Oklahoma must have a registered agent. As attorneys, we have a tendency to just list ourselves as our own registered agents when we file our professional limited liability company paperwork with the secretary of state. That's fine under certain circumstances, but you need to make sure you actually meet the requirements to serve as your firm's registered agent. You must have a physical location, and you need to have someone there during regular business hours who can accept personal service. So if you're a solo practitioner who spends a lot of time at the courthouse, you probably shouldn't be your own registered agent.

### *Bank Accounts*

Your professional limited liability company needs to have its own bank accounts separate from your individual accounts. As a law firm, you also need to make sure you have an IOLTA account to hold unearned client funds. Never use company or client funds to pay personal expenses. If it is necessary for owners to contribute additional money to meet payroll or pay other business expenses, document the additional infusion of funds either as a loan the company must repay or as additional equity for the contributing member. Have a business checking account and business credit card, and only use these for business expenses.

### *Ensure Adequate Business Capitalization*

If a limited liability company is undercapitalized intentionally, the owners may become personally liable for claims against the company.<sup>3</sup> Whenever possible, make sure your firm has enough financial resources to adequately manage it. If your firm is undercapitalized, you should also consider getting good insurance policies. Most of us are probably aware of basic liability insurance and malpractice insurance but may be less aware that firms can also obtain errors and omissions insurance to protect members and managers from claims arising from their actions on behalf of the business.

### *Conduct Business on Behalf of the Firm*

Owners and managers must hold themselves out as representatives of the business. For example, if they sign a document, they should do so on behalf of the firm and not in their individual capacity. They

can do this by listing their titles after their name when they sign: for example, "John Doe, Manager."

### *Make Your Professional Limited Liability Company Status Known*

When you print your company name, it should include "PLLC" at the end: for example, "Law Office of Smith & Jones PLLC." Business cards should display the full legal name of your professional limited liability company. If you have a website or retail space, make sure your full legal name is displayed on them correctly. Make purchases and pay invoices via a business checking account or a credit card that has the full name of the business on it. Create invoices in the full company name to send to your clients. Also, any contracts, leases or other documents you sign should be in the full company name.

### *Register All Assumed Business Names*

If you ever refer to your firm as anything other than its full legal name, you need to register the alternate name as a trade name with the Oklahoma secretary of state. For example, if the legal name of your firm is "Law Office of Smith & Jones PLLC" but in your commercials you tell the public to call "The Smith & Jones Firm," you need to register "The Smith & Jones Firm" as a trade name with the secretary of state.

### *Keep Detailed Business Records*

It's essential to keep accurate and up-to-date records of your professional limited liability company's activities. This includes financial statements, tax returns and other important documents. Proper recordkeeping will not only help you stay organized and

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comply with state and federal regulations, but it's also critical to a judicial analysis of your governance. It may seem antiquated, but it's still recommended to keep a physical record book as well.

#### *Update Operating Agreement*

If there are any changes to the ownership structure or management of your firm, you need to update your operating agreement accordingly. Your operating agreement needs to accurately outline the internal management and ownership of the firm to protect the interests of all members. It should also include provisions related to the legal services provided by the professional limited liability company, such as provisions related to conflicts of interest, confidentiality and client representation.<sup>4</sup> It is critical that your operating agreement accurately reflects how your particular firm is currently run. Don't simply rely on an operating agreement form you found online or copied from another firm back when you were first hanging your shingle. If the terms of your operating agreement don't match how you are actually operating, it could be found to be a sham document and just may be that brick that takes down the wall.

#### *Hold Annual Meetings*

As a professional limited liability company law firm, you need to hold meetings of the members at least annually to discuss and approve the firm's activities. The requirements for minutes of meetings are more stringent for professional limited liability companies than limited liability companies. You need to maintain detailed minutes of all meetings that include a summary of the

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If the terms of your operating agreement don't match how you are actually operating, it could be found to be a sham document and just may be that brick that takes down the wall.

discussion and any actions taken. Make sure you've also followed the notice requirements laid out in your operating agreement prior to holding your meetings.

#### *Renew Licenses and Permits*

If your professional limited liability company requires any licenses or permits to operate, you need to ensure that they are renewed on time.

#### *File Taxes*

As a professional limited liability company, you are required to file annual state and federal tax returns. You may also need to file quarterly estimated taxes if your firm has significant income. Each member is also required to report their share of the professional limited liability company's income and losses on their individual tax return. Failure to file taxes can not only result in penalties and interest charges but it is also considered by courts when analyzing your corporate governance compliance.

#### *Register in Every State You Do Business*

Even though your firm is headquartered in just one state, you must also register as an out-of-state business (a "foreign entity") in every other state you operate in. If you aren't registered as a foreign entity in a state you are conducting business in, you will not be able to bring suit in that state – obviously, a big risk to avoid.

#### *Avoid Illegal, Fraudulent or Negligent Acts*

If you were on the fence about whether you should be engaging in illegal, fraudulent or negligent acts, this tidbit may not be the deciding factor for you. But if the threat of jail time and fines wasn't enough to sway you, it's also worth noting that committing illegal, fraudulent or negligent acts in and of itself can pierce the veil. Further, a professional limited liability company is an artificial legal entity that can act only through individuals. If a member or manager commits one of these acts on behalf of the firm, they may be personally liable for claims against the firm arising from the act. Make sure to have company

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policies in effect to avoid illegal, fraudulent or negligent acts by members and managers.

## CONCLUSION

In summary, running a professional limited liability company law firm in Oklahoma requires careful annual attention to state and professional regulations. By following the best practices outlined above, you can preserve your professional limited liability company status and mitigate potential legal and financial risks. Your law firm will be able to operate with confidence, fortified by a robust corporate governance framework that upholds the integrity of your business structure. If you need help with any of these steps, consider consulting with an experienced attorney or financial professional well versed in working with the legal profession.

## ABOUT THE AUTHOR



Natalie K. Leone manages the business formation and estate planning divisions of Rivas & Associates PLLC.

She lives in Broken Arrow with her three fabulous children, two rambunctious puppies and one sassy cat. She enjoys playing nerdy board games, doing overly ambitious home improvement projects and gliding around a ballroom dance floor.

## ENDNOTES

1. Oklahoma Statutes, Title 18, Section 2005.3.
2. Oklahoma Statutes, Title 18, Section 809, and Oklahoma Rules of Professional Conduct, Rule 5.5.
3. *Mattingly Law Firm, P.C. v. Henson*, 2020 OK Civ. App. 19.
4. Oklahoma Statutes, Title 18, Section 806.

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# General Corporate Due Diligence in Mergers and Acquisitions Transactions

By Tiantian Chen

**IT IS COMMON KNOWLEDGE THAT LEGAL DUE DILIGENCE** is a critical step in mergers and acquisitions (M&A) transactions. This article, intended as a quick reference for junior M&A attorneys tasked with the legal due diligence process, includes certain basic discussions of the most common legal diligence issues.

For simplicity purposes, the discussions in this article are limited as follows: 1) this article does not address the business, financial or other types of non-legal diligence that may occur in connection with M&A transactions; 2) this article focuses on the legal due diligence performed after the execution of the letter of intent (LOI) and does not include discussions of the preliminary diligence performed before an LOI; 3) the discussions are centered on a simple transaction with only one acquiring entity (the buyer) and one selling entity (the seller), without any lenders or financing sources, representations and warranties insurance providers and other third parties; 4) the discussions are further limited to the review of the due diligence files provided by the seller and do not extend to any

required legal research; and 5) the discussions are focused on the typical legal diligence performed by the general corporate team, and it does not involve discussions of any specialty diligence that are usually performed by specialists in applicable areas of law, *e.g.*, securities regulations, labor and employment, employee benefits, environmental regulations, healthcare regulations, data privacy, intellectual property, real estate, government contracting, etc. Additionally, this article only focuses on some of the most typical corporate legal diligence issues and does not include exhaustive discussions of all potential legal diligence issues.

The analysis and information included in this article are for general informational purposes only. Nothing herein constitutes, or is intended to constitute, legal advice.

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## GENERAL

### *Review the LOI*

The legal due diligence process frequently starts promptly or soon after the execution of an LOI, and the LOI may contemplate the expected completion date of the legal due diligence process. Failure to complete the legal due diligence within the agreed timeline could result in serious consequences, such as the expiration of the exclusivity period agreed to between the buyer and the seller in the LOI.

It is strongly recommended that all members of the legal diligence team review the LOI before beginning the legal due diligence review in order to 1) understand the deal structure and identify the key diligence issues accordingly and 2) control their diligence progress to ensure timely completion of the diligence process.

#### *The Role of the Corporate Team*

The general corporate team serves a role akin to a “control center” in a legal due diligence process. The corporate team is usually the first among the entire transaction team to have direct coordination with the client regarding the client’s diligence needs and concerns, and it is the corporate team’s responsibility to recommend and bring in the proper legal specialists to assist with the diligence process. The legal specialists rely on the general corporate team to introduce them to the client, gain access to the virtual data room (VDR), where the diligence files are uploaded, and forward relevant diligence files or information to the extent such files or information are



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not properly uploaded to the VDR. The corporate team should inform the legal specialists of the diligence timeline as soon as possible and track the legal specialists' diligence progress. As the specialists proceed with their diligence review, the corporate team is expected to consolidate and pass along the specialists' supplemental diligence requests, comments and recommendations and arrange direct discussions between the client or the counterparty and the applicable specialists as necessary. If a diligence memorandum is required, the corporate team is responsible for collecting all diligence summaries from the specialists and incorporating them properly into the final memorandum.

In addition to generally coordinating the communication between the client, the counterparty and the legal specialists, the corporate team is also expected to perform the typical "corporate diligence," which typically includes the review and analysis of the general corporate and securities records, liens and litigation records and commercial contracts. These subjects are discussed further below.

#### *What To Look For and Why*

The key to successful diligence is to understand what we are looking for, and the answer to that further requires us to understand why we are looking for certain information. Even though the buyer's counsel and the seller's counsel are reviewing the same documents, the buyer diligence and the seller diligence serve slightly different purposes. From the buyer's perspective, the primary concern is identifying any potential risks the buyer may be exposed to post-closing; in a

strategic transaction, the buyer is also concerned with successfully integrating the seller's business resources into the buyer's business structure post-closing. From the seller's perspective, the primary goal of the legal due diligence is to ensure proper and sufficient disclosure to avoid potential breaches of its representations and warranties under the purchase agreement, as well as the proper performance of any required pre-closing actions, such as obtaining any necessary third-party consents for the transaction.

When making the diligence protocol, the seller counsel should at least look for the typical red flags that are often expected to be covered under a disclosure schedule. If a draft purchase agreement is available before the diligence starts, the seller diligence team is recommended to review the draft purchase agreement first, particularly the representations and warranties provisions, to make sure its review covers at least the particular items explicitly required by any disclosure schedule, e.g., commercial contracts with noncompete covenants, pending litigations, etc.

As for the buyer team, its review protocol should include not only the items that need to be disclosed under the purchase agreement but all other issues the client would want to know given its business needs. For example, if the buyer intends to lay off a certain key employee of the seller's business post-closing, the buyer diligence team should not only review such employee's employment agreement to identify potential legal risks associated with such planned layoff but also look out for material commercial contracts where such employee is

currently designated as a point of contact (POC) and where a change in the POC designation requires the counterparty's prior consent.

### **TYPICAL CORPORATE LEGAL DILIGENCE ISSUES**

As mentioned above, the general corporate team is not only expected to serve as the "control center" in the legal diligence process but also to perform the typical corporate diligence. The following sections relate to certain typical subjects in general corporate diligence.

#### *General Corporate and Securities Documents*

This group of documents generally includes all documents related to the formation and governance of the seller's business, as well as issuance of the company's equity which, depending on the form of business entity (e.g., corporation, general partnership, limited partnership, limited liability company, etc.), typically includes the articles of incorporation, certificate of formation, bylaws, stockholders agreements, limited liability company agreements or operating agreements, limited partnership agreements, incentive stock option plans, options, warrants, stockholder resolutions and consents, Board of Directors resolutions and consents, board of managers resolutions and consents, foreign qualification records and other similar instruments. Diligence teams for both the buyer and the seller need to carefully review these documents to understand the target company's history, management structure and capitalization, which typically include the following issues:

**Organization.** Typically, the first representation the seller needs to provide in a purchase

agreement is that its business entity is duly organized, validly existing and in good standing. Verifying such representation requires careful review of the seller's formation and governing documents, including any amendments thereto, where the diligence team should look out for the seller's date and state of organization, entity type, whether the seller has changed its name, state of organization, whether it has converted into a different type of business entity, merged into or with another entity, whether the seller has any subsidiaries and affiliates, whether the seller is in good standing in its state of organization and each jurisdiction where it is qualified to transact business, etc.

**Capitalization.** In any equity transaction, one of the most important representations made by the seller is the proper issuance and ownership of its equities. The diligence team should carefully review the seller's formation and governing documents, including any equity issuance documents

and the capitalization table, to determine the total amount of authorized securities of the company; whether such authorized amount has been adjusted; whether any new categories or classes of securities have been authorized and issued; the current equity holders that own the company's equities; anyone who holds an option, warrant, convertible note or other right to acquire the company's equities in the future; whether all the issued and outstanding equities have been properly authorized; whether any equity holders' equities have been redeemed or repurchased; which classes of equities are voting equities and which are nonvoting equities; etc.

**Transaction authority.** Both the buyer and the seller diligence teams should carefully review the seller's corporate governance documents to determine the proper corporate resolution or consent required to approve the underlying transaction. For example, the seller's bylaws may require approval by the Board of Directors, while the seller's articles

of incorporation may also require approval by most of its voting stockholders. If so, resolutions or written consent should be obtained from both the board and the voting stockholders to ensure that the transaction is properly authorized. Because the seller's corporate governance documents may or may not be properly drafted or updated, the diligence team should also perform proper state law review and analysis to ensure the level of consent required for the contemplated transaction.

#### **Foreign qualifications.**

Frequently, a seller may conduct business in multiple jurisdictions, including other countries, and both the buyer and the seller should ensure that the seller is properly qualified to transact business in all such jurisdictions where its business operations require so. To the extent the seller is qualified in foreign jurisdictions, the diligence team should also review the seller's qualification records and ensure it is in good standing in each such jurisdiction. For example, if the seller's qualification in a foreign jurisdiction is revoked due to its failure to file required annual reports, remedial actions should be taken promptly, and proper disclosures should be made under the purchase agreement.

#### *Commercial Contracts*

Due diligence review of the seller's commercial contracts is usually the most time-consuming part of the diligence process. The diligence team should carefully design a summary table (which is frequently called a matrix) so that each contract is properly summarized based on the key diligence issues. A sample commercial contract matrix is included



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Certain restrictions can be so significant that once seen, should be immediately flagged to the entire deal team and the client.

at the end of the article. Certain key contract issues are discussed below. To avoid confusion, the underlying purchase agreement in the contemplated M&A transaction is referred hereto as “purchase agreement,” whereas “contract” refers to the seller’s commercial contract subject to diligence review.

**Contract description.** Each contract should be properly described so that it can later be properly cited. Typically, a contract should be described by its title, date and contracting party in the form of “[CONTRACT TITLE], dated [DATE], by and between [PARTIES].” If a contract has been amended, the amendments should also be referenced in the description of the contract, *e.g.*, Master Services Agreement, dated Jan. 1, 2021, by and between ABC Inc. and XYZ LLC, as amended by the First Amendment dated May 6, 2022, and the Second Amendment dated June 3, 2023. In addition to the official description of the contract, the diligence team should also note the contract’s file name and VDR number (if any) so that the diligence team can easily find the particular document in the VDR if it needs to.

**Service and product; contract amount.** Sometimes, it is not easy to perceive the service or

product being provided under a contract solely by the contract title. Additionally, whether a contract needs to be disclosed under the purchase agreement frequently depends on whether the contract amount meets the required disclosure threshold. Therefore, the diligence team should also include a brief description of the subject matter and the amount of fees under a contract in its summary. If there are any special payment arrangements between the seller and the counterparty under the contract, such as any sort of profit-sharing, such payment terms should also be noted.

**Term, renewal and termination.** For both disclosure purposes and business integration purposes, it is important for the diligence team to understand whether a contract is still in effect and the circumstances under which it can be terminated. In addition to a contract’s initial term, the diligence team should note the options, if any, for the initial contract term to renew, *e.g.*, a contract may be renewed only by mutual consent from both contracting parties, or a contract may automatically renew unless notice not to renew is provided by either party during a certain period of time before the next

renewal date, or a party may have been given a set number of renewal options that such party may unilaterally exercise during a certain period of time before the contract expiration date. With respect to the circumstances under which a contract may terminate, depending on the client’s particular needs, a termination for convenience is usually the primary concern for the diligence team. In some cases, the buyer may prefer a contract where it may terminate at any time without cause, whereas in others, it may be reluctant to assume a contract that can be terminated by the counterparty for convenience. If termination for convenience would result in any early termination fee or penalty, the diligence team should also include such information in its summary.

**Assignment or change of control.** Assignment or change of control (CoC) restriction is one of the most important contract diligence issues. Failure to obtain proper consent from third parties could have a serious impact on the transaction. Depending on the transaction structure, the diligence team usually looks for either assignment restrictions or CoC restrictions. However, in the uncommon situation where a

transaction structure has not been finalized or where a transaction involves multiple structures, the diligence team may want to look out for both issues in its review. Additionally, the diligence team should look out for any contract provisions where an “assignment” is broadly defined to include a CoC event, in which situation any restrictions applicable to assignment would also apply to a CoC. In respect of CoC, depending on the transaction structure, the diligence team is also recommended to flag any “indirect” CoC restriction, where restrictions are triggered by the CoC event in a parent entity or other affiliates of the seller.

“Restrictions” come in many forms, and the diligence team should look out for all, *e.g.*, whether a contract requires the counterparty’s prior (written) consent before the seller assigns the contract to the buyer or goes through a CoC event, whether an assignment or CoC constitutes an event of default, whether the contract requires the seller to provide assignment or CoC notice letter within a certain period of time before closing, whether the seller is required to provide particular types of documents – such as the buyer’s financial records – when seeking the counterparty’s consent, whether the seller is required to pay any penalty or whether the counterparty is granted any right to terminate the contract in the event of an assignment or CoC, etc.

Certain restrictions can be so significant that once seen, should be immediately flagged to the entire deal team and the client. For example, if the LOI contemplates a 45-day diligence timeline whereas a contract requires a 90-day prior notice to the counterparty in an

event of assignment or CoC, the transaction parties may have to exclude such contract from the transaction. Occasionally, the counterparty may even have been granted a right of first refusal or similar right where it has the right to acquire the seller’s business before anyone else, in which situation the buyer may decide to abort the transaction entirely.

#### **Notable restrictive covenants.**

If a contract includes notable restrictive covenants, such restrictive covenants may have a serious impact on the buyer’s business post-closing. Therefore, almost all M&A purchase agreements require disclosure of notable restrictive covenants, including by example: noncompete covenants, where the seller or the seller’s successor is prohibited from engaging in a certain line of business; non-solicitation covenants, where the seller or the seller’s successor is prohibited from soliciting the counterparty’s employees, contractors, customers, vendors, suppliers or other business relationships; exclusivity covenants, where the seller or the seller’s successor is required to deal with the counterparty exclusively for the service or product provided under the contract; most-favored-nation clauses, where the seller or the seller’s successor is required to offer the counterparty the best pricing or other terms compared to all other customers of the seller or its successor; minimum quantity or requirements contracts, where the seller or its successor is required to purchase a certain minimum quantity of products or services or purchase its entire need for such products or services from the counterparty; etc.

#### **Other notable items.**

Occasionally, a contract may incorporate governing terms

and conditions available on a party’s website, in which case the diligence team should follow the proper link and review such online terms and conditions. While certain contract provisions may not be subject to disclosure requirements under the purchase agreement as frequently as the other notable restrictive covenants, they may, nevertheless, have an important impact on the buyer’s business post-closing. Depending on the client’s business needs and transaction budget, the diligence team may also want to include them in its summary, *e.g.*, whether the seller owes any indemnification obligations to the counterparty, the seller’s liability is capped to a certain amount, the contract provides for mandatory arbitration, etc. Additionally, the diligence team should also note any missing items as it proceeds with the diligence review. For example, if a purchase order incorporates a master agreement by reference but such master agreement has not been uploaded to the VDR, the diligence team should note a supplemental diligence request for such master agreement.

#### *Liens and Litigation Records*

**Liens.** Obviously, the buyer does not wish to acquire a business whose assets and equities have been encumbered with liens in favor of third parties. Therefore, it is imperative for the diligence team to identify if any lien on the seller’s assets and properties exists, and with very limited exceptions, the buyer typically requires all such liens to be terminated before closing.

To properly identify any potential liens, the buyer (and not infrequently the seller) would perform

lien searches over the seller's business, which are performed based on the seller's business name(s) and location(s). That is why it is critical for the diligence team to identify any "doing business as" (DBA) names or former names of the seller based on its corporate records and the seller's state of organization, principal business office and all other office locations. Depending on the specific situation, the lien search may be limited to the seller's official business name and its state of organization. However, frequently the lien search also expands to the seller's DBA names and former names and all countries, states and counties where the seller has any physical location or conducts any business.

The primary source of liens and encumbrances under the Uniform Commercial Code (UCC) typically comes from the seller's financing agreements and capital leases. For the indebtedness and liens the parties intend to terminate before closing, the diligence team should particularly look out for prepayment options and penalties. For the indebtedness and liens the parties intend to continue post-closing, which typically includes capital leases, the diligence team should look out for all red flags in the same way it reviews other commercial contracts.

Normally, the lien search result should match the debt records provided by the seller. However, mismatches may happen under various circumstances, and the diligence team needs to look out for such mismatches. For example, the lien search report may reference certain capital leases or financing agreements the seller omitted to provide, in which case

the diligence team should add supplemental diligence requests accordingly. Also, even under a normal commercial contract, the counterparty may be granted a security interest in the seller's assets, whether or not a UCC financing statement has been filed. In such a situation, such security interest should be disclosed and flagged, even though it is not included in any lien search report.

**Litigation.** Any litigation or adverse action involving the seller is a red flag to the buyer. A typical lien search includes searches of litigation records as well. Whether or not a litigation is closed, the diligence team should review the key diligence records – e.g., the complaint, the answer, any settlement agreement and any key judgment issued by the court – to determine whether the buyer is at any risk of exposure to such litigation if the transaction closes. If there is any ongoing litigation or adverse action involving the seller, the diligence team should actively track the litigation process and provide corresponding risk mitigation strategies accordingly. If any litigation is being threatened against the seller, the diligence team should thoroughly understand the circumstances that may lead to future litigation and take necessary remedial actions as early as possible.

## SUMMARY

At the end of the day, there is not one legal due diligence plan that suits all M&A transactions. The scope and the depth of the legal due diligence process depends on the structure of the transaction, the industry of the transaction parties and the

particular areas of concern for all parties involved. It is imperative for transaction attorneys to understand their client's business and legal needs before designing a diligence plan with the proper level of complexity and coverage.

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## ABOUT THE AUTHOR



Tiantian Chen is an associate at Hartzog Conger Cason. Her practices focus on mergers and acquisitions and private equity transactions. Ms. Chen practices in Texas only and is not licensed in Oklahoma.

## FORM COMMERCIAL CONTRACT MATRIX

### Project Grace – Commercial Contract Matrix (Target Company: XYZ LLC)

No.	Agreement	Subject/Price	Term/Renewal/Termination	Assignment/CoC	RCs	Notes
<b>Customer Agreements</b>						
1.	Master Services Agreement, dated Jan. 1, 2021, by and between ABC Inc. (ABC) and XYZ LLC (XYZ), as amended by the First Amendment dated May 6, 2022, and the Second Amendment dated June 3, 2023.  [VDR No. 3.2.5.1]	<b>Subject:</b> XYZ to provide consulting services to ABC. (Sec. 1)  <b>Price:</b> \$750,000 per year. (Sec. 2)	<b>Term:</b> Initial term is five years. (Sec. 4.a)  <b>Renewal:</b> After initial term, the agreement shall automatically renew for 12-month periods. (Sec. 4.b)  <b>Termination:</b> Either party may terminate this agreement at any time without cause upon 30-day prior written notice to the other. (Sec. 5)	Neither party may assign this agreement, including assignment to a successor that acquires the majority of such party's equity, all or substantially all of such party's assets or the surviving entity in a merger, without the other party's prior written consent. (Sec. 12)	<b>Non-Solicit:</b> Neither party shall solicit the other party's employees, contractors, suppliers, vendors or customers without the other party's prior written consent during the term of the agreement and for 12 months after its termination. (Sec. 14)  <b>Most Favored Nation:</b> The consulting fee charged to ABC shall not be higher than that charged by XYZ to any of its other customers. (Sec. 19)	<b>Indemnification:</b> Mutual indemnification obligations. (Sec. 22)  <b>Missing Information:</b> This agreement incorporates the confidentiality agreement executed by the parties on Jan. 1, 2021, which confidentiality agreement is not provided.
<b>Vendor Agreements</b>						
2.						



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# Sexual Harassment and Respect in the Legal Workplace

*By Katherine Mazaheri and Daniel Zonas*



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**N**AVIGATING THE WORKPLACE AS AN ATTORNEY can be like stepping into a minefield of potential liability; one misstep and you could land in your boss's office, the Human Resources Division or under the scrutiny of the bar association due to a grievance or a bar complaint. Our profession requires a unique balance of making a good impression, respecting others in the workplace and getting things done in a high-stress environment. After 16 years of practicing law, owning a business and mentoring law students and new lawyers, I have cautionary advice for my new colleagues that will help to ensure not just that you are respected at work but that you respect others. By the time you are through with this article, I want you to understand what the climate of the legal workplace looks like today, what type of behavior is expected from you as a member and what may constitute illegal or unethical sexual harassment.

### FUNDAMENTAL CHANGES IN WORKPLACE CULTURE

The culture of the legal workplace has changed significantly, even in the last 16 years. If you came out of law school when I did, you would have been exposed to a different set of spoken and unspoken rules than what you may see today. To look and act like a lawyer meant you had to play by a typical male lawyer's rules. As a woman, you dressed the part: stockings with your hair pulled back and a skirt suit if you were interviewing or appearing before a judge. You laughed off inappropriate comments in interviews where partners would mention your looks or tell you about how sex sells as a new

lawyer. You learned the rules of the game. You knew who was in charge, so you compromised your own values and interests and tried not to stand out so that you could ultimately advance your career.

Things are different in today's society and corporate climate. Women are progressing and evolving into the majority in the legal world. In recent years, there have been more female law students than male law students.<sup>1</sup> The OU College of Law saw an 11% jump in female enrollment in 2018, and the female class population has been above 50% every year since.<sup>2</sup> Right now, about 42% of law school deans are female, *doubling* from 21% in 2014.<sup>3</sup> If male lawyers aren't already outnumbered, they will be soon.

In turn, increased female representation and a new generation of innovative and progressive professionals have positively impacted the legal workplace. The #MeToo movement created a new awareness of previously overlooked sexual harassment problems by educating people and stimulating workplace trainings to enhance preventative measures against sexual harassment.<sup>4</sup> Overt plays at sexual harassment and assault are now less common, and sexual harassment charges under the Equal Employment Opportunity Commission have substantially decreased.<sup>5</sup> The days where sexual harassment was tolerated or even condoned are over and have been

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replaced by a paradigm shift championing an equitable and diverse society where women should have equal opportunities and leadership roles.

Despite the ongoing paradigm shift, less obvious forms of sexual discrimination can still go unnoticed. In the words of Jane Ellis of the International Bar Association Legal Policy & Research Unit, legal workplaces remain a “boys’ club ... which tends to reflect the fact that they were established by men during more ‘traditional times.’”<sup>6</sup> Among legal professionals, offensive jokes, rating someone’s attractiveness and the use of pet names have become more common.<sup>7</sup> Moreover, within the courthouse, judges mistake female attorneys for paralegals or secretaries more often than male attorneys.<sup>8</sup> Similarly, implicit sexual bias is even present in the U.S. Supreme Court, where male justices interrupt female justices about three times more often than they interrupt fellow male justices.<sup>9</sup> It is important to acknowledge these covert or nuanced manifestations of sexual harassment called microaggressions. Microaggressions, like the examples above, are everyday verbal or nonverbal behaviors that communicate derogatory, biased or negative messages to or about individuals based on their marginalized or underrepresented identities.<sup>10</sup> They may be unintentionally offensive but are, nonetheless, objectionable. Unwelcome romantic advances, repeated requests for dates, dismissive behavior, interruptions, pet names, staring and an infinite number of inappropriate comments, jokes, texts, emails or even memes could all be further examples of sex-based microaggressions. Microaggressions can take place because people just don’t

notice them, and the effect can be like a slow death from a thousand papercuts. Though any are unpleasant, tolerance of repeated microaggressions can create a hostile work environment. Although less common, men can also experience sexual harassment in the workplace just as easily through these uncomfortable and unwelcome acts.

Legal workplaces that tolerate sexual harassment are unsustainable. Repeated workplace sexual harassment has a proven correlation with employee disengagement, productivity loss, low morale and increased turnover.<sup>11</sup> This kind of environment reveals a lack of integrity in the attorneys perpetuating it, damaging not only the firm’s reputation but also creating a rift in our workplace culture, stigmatizing those in inferior positions by not affording them the respect they deserve as professionals.

## GENERAL SOLUTIONS FOR EMPLOYERS

One potential solution lies in strengthening our responses to sexual harassment. As little as 14% of sexual harassment incidents are officially reported.<sup>12</sup> Victims don’t report incidents for a recognizable pattern of reasons: fear of retaliation, concerns for safety, concerns for whether the claim would be taken seriously and concerns that the person to report to is the perpetrator.<sup>13</sup> Suppression of sexual harassment is caused by unsuccessful mechanisms for victims to seek help. To fix it, legal workplaces could enlist employees in a multifaceted response team for reporting incidents. Additionally, bystander-focused sexual harassment training should be utilized, as it has been proven to be effective in preventing sexual harassment from occurring

in the first place.<sup>14</sup> Most importantly, employers must take swift and meaningful action when they become aware of sexual harassment.

Another general solution could be the creation of a more diverse group of partners, government officials and other leaders in the legal industry. Representation in leadership positions does not follow gender distribution in the legal workforce. Though the cut of women entering law has been above 45% for the last 20 years, they currently make up a mere 20% of equity partners at law firms.<sup>15</sup> Filling leadership positions with more women not only creates leadership that is more likely to support women, but it also increases female representation, which helps new female lawyers feel like they belong in the industry. Beyond sex, workplace culture is shaped by its leaders – how they act and, more importantly, what they tolerate. The legal profession needs leaders who recognize what gender bias looks like so that they can spot it within themselves and show no tolerance for it in any capacity.

While various potential solutions exist for addressing this problem, it is crucial to be aware of the appropriate actions to take if you or a colleague encounters sexual harassment in your workplace. Here is some information to keep in mind:

### *Workplace Sexual Harassment and Discrimination are Illegal*

Sexual harassment and discrimination in the workplace can give rise to liability under Oklahoma and federal law. An employer may be liable under Title VII of the Civil Rights Act of 1964 if it has at least 15 employees and the discriminatory behavior is “sufficiently patterned or pervasive.”<sup>16</sup> Sexual harassment is similarly actionable under the Oklahoma

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Anti-Discrimination Act, which also requires an employer to have at least 15 employees.<sup>17</sup> If an employer has less than 15 employees, it can still be held liable through a *Burk* tort action, which prohibits constructive or actual discharge of an employee in violation of an Oklahoma public policy goal.<sup>18</sup> In either circumstance, there needs to be a pattern of microaggressions; a onetime crass comment or inappropriate advance is almost never actionable. Further, Oklahoma follows an at-will employment doctrine, so an employer may terminate an employee at any time – even for no cause or a cause that is morally wrong – without consequence.<sup>19</sup> Even so, being fired does not mean you have lost your right to redress for sexual harassment. If you have been fired, demoted or faced any kind of adverse employment action in retaliation for reporting sexual harassment, your employer could be held liable in a Title VII retaliation or *Burk* tort action.<sup>20</sup>

If you are ever subject to sex-based harassment or discrimination in your workplace, document and collect proof and report the behavior to human resources or management. Your employer must investigate

your sexual harassment and/or discrimination complaint; failing to do so would constitute a Title VII violation.<sup>21</sup> This applies even to small firm employers without a Human Resources Department that may have to hire a third-party investigator (typically an employment lawyer) and/or notify its professional liability insurance company if it has employment coverage to fulfill its legal duty. In a perfect system, this is where the harassment ends; the employer investigates and determines whether discipline is warranted. If it doesn't, your employer could be held liable for inaction. If you think you may have a viable discrimination or sexual harassment claim, put your employer on notice (preferably in writing), and find an experienced employment law attorney to evaluate your potential claim with the Equal Employment Opportunity Commission, the Office of Civil Rights Enforcement with the Attorney General's Office and/or ultimately file a suit against your employer. Do so quickly as a Title VII claim could be barred if a discrimination charge is not filed with the EEOC or the OCRE within 180 days of the last unlawful employment action.<sup>22</sup>

### *Sexual Harassment and Discrimination are Unethical*

But sexual harassment isn't just illegal, it's unethical. Attorneys are held to a heightened ethical standard and may be sanctioned for their own discriminatory behavior. Rule 8.4(g) of the Model Rules of Professional Conduct states that it is professional misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of ... sex."<sup>23</sup> Rule 2.3(B) of the Model Code of Judicial Conduct covers the same ground almost verbatim for judges.<sup>24</sup>

Courts take this sort of thing seriously. Take, for example, the case of *Claypole v. County of Monterey*, where an attorney got hit with sanctions after he told his female opposing counsel, "[D]on't raise your voice at me. It's not becoming of a woman."<sup>25</sup> Because of this single comment, the court said the following:

A sexist remark is not just a professional discourtesy, although that in itself is regrettable and all too common. The bigger issue is that comments like [this attorney's] reflect and reinforce the male-dominated attitude of our profession. ... When an attorney makes these kinds of comments, "it reflects not only on the attorney's lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice."<sup>26</sup>

Ethical rules against sexual discrimination are not just meant to protect victims or bring about gender equality but also to protect the integrity and reputation of the legal profession.

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Likewise, the OBA Standards of Professionalism state that attorneys should refrain from personal conduct that exhibits bias against a person based on that person's gender.<sup>27</sup> However, these standards merely reflect expectations for attorneys in Oklahoma; they are not to be used as a basis for discipline.<sup>28</sup> In fact, when you look at the Oklahoma Rules of Professional Conduct, Rule 8.4(g) is nowhere to be found.<sup>29</sup> Oklahoma is astonishingly part of the *majority*, being one of 39 states whose ethical codes have not adopted some form of Rule 8.4(g).<sup>30</sup>

Even though not explicitly addressed in the ORPC, sexual discrimination can still violate Oklahoma ethical rules. In *State ex rel. Okla. Bar Ass'n v. Miskovsky*, an Oklahoma lawyer was suspended for 60 days and ordered to pay more than \$3,000 in court costs after he made sexual comments and described sexual scenarios between him and two different women he initially consulted regarding representation in a divorce.<sup>31</sup> The Oklahoma Supreme Court affirmed that he violated ORPC 1.7 ("[a] lawyer shall not represent a client if the representation of that client may be materially limited ... by the lawyer's own interests"), ORPC 2.1 ("a lawyer shall exercise independent professional judgment and render candid advice"), ORPC 8.4(d) (a lawyer shall not "engage in conduct that is prejudicial to the administration of justice") and Rule 1.3 of the Rules Governing Disciplinary Proceedings (imposing collateral grounds for discipline for unethical acts that bring discredit to the legal profession).<sup>32</sup> Though not mentioned in *Miskovsky*, sexual harassment could also raise a



question of a lawyer's competence or diligence, leading to a violation of ORPC 1.1 or 1.3 respectively.<sup>33</sup>

Therefore, if you are ever subjected to sex-based harassment or discrimination by an attorney, file a bar complaint with the OBA Office of the General Counsel. The Office of the General Counsel will review the grievance and determine whether to initiate formal disciplinary action.<sup>34</sup>

### COMMITTING TO A RESPECTFUL WORKPLACE ENVIRONMENT

The "boys' club" days of sexual discrimination and harassment are over. As a part of the legal community, you have a duty to your coworkers and your profession to keep the workplace inclusive and safe. This includes understanding what behavior is acceptable in the workplace and what type of conduct should be reported. But real inclusion is not limited to enforcing legal remedies

and minimum ethical standards; we should strive to uphold the expectations set forth in the OBA Standards of Professionalism and take proactive steps to change the climate of our workplace and make the legal community better for future generations.

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#### ABOUT THE AUTHORS



Katherine Mazaheri is the founder and managing attorney of Mazaheri Law Firm, a team of trial attorneys who have

gained a reputation for taking on cases that attack various social injustices and help families in crisis. She's the current OBA Labor and Employment Law Section chair and a member of the Oklahoma County Bar Association board. She often mentors law students and new lawyers on employment litigation, sexual harassment and other Title VII best practices.

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Daniel Zonas is a 3L at the OU College of Law. He loves studying Oklahoma law and works primarily in legal research and writing at Mazaheri Law Firm. After graduating, he aspires to leave a lasting mark of excellence on the legal community through legal expertise and a dedication to ethical service.

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## SHOW YOUR CREATIVE SIDE ON THE BACK PAGE

We want to feature your work on "The Back Page" of the *Oklahoma Bar Journal*! Submit articles related to the practice of law, or send us something humorous, transforming or intriguing. Poetry, photography and artwork are also welcomed.

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# Paths to the Supreme Court: A Brief Discussion of the Various Ways to Obtain Review of a District Court Order

By Melanie Wilson Rughani

**N**EARLY EVERY TIME TWO parties enter a courtroom, at least one leaves unhappy. It is the nature of our adversarial system. As an appellate lawyer, I routinely receive calls from trial counsel who are sitting in a district court parking lot, fuming. Inevitably, the district court's ruling was "completely wrong," and they want to know how to "take this up to the Supreme Court" immediately.

Most often, once they get back to the office, cooler heads have prevailed. We walk through the rules of finality and, if the district court's order is indeed final or otherwise appealable as of right, the procedures for appellate review. Sometimes, however, the trial court's order is not final, but the circumstances of the case make immediate review truly necessary. Accordingly, it is important to be familiar with the various paths to obtaining review in the Oklahoma Supreme Court.

There are two primary mechanisms for obtaining Supreme Court review of a district court

order: 1) appeals as of right and 2) discretionary review. This article will discuss the various types of trial court orders reviewable on appeal and the different Supreme Court procedures that are applicable to each type of review.

## APPEALS AS OF RIGHT

As one might expect, the vast majority of the Oklahoma Supreme Court's docket consists of appeals as of right. Primarily, these are appeals from judgments and final orders; however, certain types of interlocutory orders are also immediately reviewable. The nature of the underlying trial court order determines the type of appellate proceeding.

### *Judgments and Final Orders*

Title 12, Section 952(a) gives the Oklahoma Supreme Court jurisdiction to review "judgments of the district court." A "judgment" is defined as "the final determination of the rights of the parties in an action."<sup>1</sup> This includes the ordinary judgment that is entered after a jury or bench trial. It also

includes orders of dismissal and orders granting summary judgment, so long as they resolve all pending claims. And it includes various other orders enumerated in Supreme Court Rule 1.20, including adoption decrees, paternity determinations, driver's license orders, small claims awards, condemnation orders and probate distributions.

To qualify as a final "judgment," an order need not include a statement of costs, attorney fees or post-judgment interest – those issues may be deferred for post-judgment proceedings.<sup>2</sup> Any other outstanding issues, however, must be fully and finally determined. A judgment may not reserve issues like punitive damages or *prejudgment* interest for future resolution, and it may not contemplate future action, like the preparation of findings or a proposed judgment by the parties.<sup>3</sup>

In addition to "judgments," the Supreme Court also has jurisdiction to review "final orders."<sup>4</sup> These include, for example, orders

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granting or denying attorney fees, costs or interest;<sup>5</sup> orders terminating parental rights;<sup>6</sup> orders confirming or refusing to confirm an arbitration award;<sup>7</sup> orders denying leave to intervene;<sup>8</sup> and orders disqualifying counsel.<sup>9</sup> They also include any orders that “conclusively determine the disputed question then before the court” and effectively “leave the aggrieved party *without any relief* at nisi prius because the defeated litigant stands precluded from proceeding further in the case.”<sup>10</sup>

When a case involves multiple parties or multiple claims, orders that fully resolve one part of the case may be certified by the district court as “final” pursuant to 12 O.S. §994(A). For an order to be considered final and appealable under Section 994(A), the district court must both 1) make an express determination that “there is no just reason for delay” and 2) expressly

direct that the order be filed as final.<sup>11</sup> However, such certification by the district court, while necessary, is not always sufficient to transform a nonfinal order into a final one. When counterclaims or other claims arising from the “same transaction or occurrence” remain pending in the trial court, the Supreme Court may consider certification under Section 994 to have been improper and dismiss the appeal as premature.<sup>12</sup>

Whether the ruling at issue is a “judgment” or a “final order,” before it may be reviewed on appeal, it must be reduced to writing and filed by the court clerk – an oral ruling is not appealable.<sup>13</sup> The written order must contain the case caption, the signature and title of the trial court and a complete statement of the relief awarded.<sup>14</sup> Furthermore, it must not be titled in a manner that indicates informality or incompleteness: Orders titled “minute,”

“minute order,” “verdict,” “docket entry,” “summary order” or the like are not final and appealable.<sup>15</sup>

Appeals from judgments and final orders are governed by Supreme Court Rules 1.20-1.37. An appeal is commenced by filing a petition in error in the Supreme Court and paying the requisite fees within 30 days of the entry of the order (or its mailing, in certain circumstances).<sup>16</sup> <sup>17</sup> Certain post-trial motions, such as motions for new trial filed within 10 days of the judgment, will toll this appellate deadline.<sup>18</sup> The rules for tolling are complicated and can be a trap for the unwary, however, and the deadline to commence an appeal is jurisdictional. Practitioners should, therefore, always carefully check and double-check their appellate deadlines and consider filing a protective appeal if the finality of an order or the application of the tolling rule is in doubt.

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Most appeals involving judgments and final orders are governed by Supreme Court Rules 1.20-1.35. The parties designate the items to be included in the appellate record by listing them and/or circling them on the district court docket sheet.<sup>19</sup> The district court clerk then has six months from the date of the underlying order to compile the record as designated.<sup>20</sup> It is the appellant's responsibility to check in with the district court clerk throughout this process to ensure all designated items are available, and the record will be completed within the designated time period.<sup>21</sup>

Once the district court has finished compiling the record, the clerk will file a notice of completion of record in the Supreme Court, which triggers the appellate briefing cycle. The appellant's opening brief is due 60 days from the filing of the notice of completion.<sup>22</sup> The response is due 40 days after the opening brief, and the reply is due 20 days after the response.<sup>23</sup> There are separate briefing rules for cross- and counter-appeals, and there are shorter briefing deadlines for specific types of appeals, like driver's licenses and juvenile appeals, so parties should always double-check the Supreme Court rules before preparing their appellate briefs.

If the judgment or final order being appealed is an order granting a motion for summary judgment or motion to dismiss, a special "accelerated" procedure applies.<sup>24</sup> The record is limited to certain items (primarily the petition, answer and relevant motion briefing and hearing transcripts), and rather than simply designate items in the record for the court clerk to compile later, the appellant must itself obtain copies of all record items, compile and

have them certified by the district court and then submit this certified record along with the petition in error. Absent special circumstances, no appellate briefing is allowed in an accelerated appeal – the appellate court will review only the one-page summary and statement of issues set forth in the petition in error, along with the briefing that was filed in the district court.<sup>25</sup>

#### *Interlocutory Orders Appealable by Right*

In addition to judgments and final orders, there is another category of orders appealable as a matter of right. The Legislature has identified certain types of interlocutory orders that are not final but, nonetheless, are generally critical enough, despite their interlocutory nature, to warrant immediate appellate review. These "interlocutory orders appealable by right" include orders granting a motion for new trial or motion to vacate a judgment, orders granting or denying a temporary injunction, attachment orders, orders appointing or refusing to appoint a receiver, orders directing or refusing to direct the payment of money *pendente lite*, orders certifying or refusing to certify a class action, orders referring or refusing to refer a matter to arbitration, orders denying motions to dismiss under the Oklahoma Citizens Participation Act<sup>26</sup> and certain probate and protective orders.<sup>27</sup>

Because these orders are, by definition, not final and, thus, the underlying trial court proceedings may remain ongoing, the procedure for appellate review is *substantially* accelerated. Like with a judgment or final order, an appeal from an interlocutory order appealable by right is commenced by filing a petition in error and paying the requisite fees

within 30 days.<sup>28</sup> The other appellate deadlines, however, are much shorter. The response to the petition in error and the counter-designation of record must be filed within 10 days, not 20.<sup>29</sup> The record must be completed by the district court within 60 days, not six months.<sup>30</sup> And the appellate briefing schedule is substantially abbreviated, with the opening brief due 30 days from the notice of completion of record, the response due 20 days after the opening brief and the reply due a mere 10 days after the response.<sup>31</sup> Parties not familiar with the different types of appeals often get caught unaware and miss these deadlines, so as always, be sure to consult the Supreme Court rules when calendaring these appeals.

#### **DISCRETIONARY REVIEW**

In addition to appeals as a matter of right, the Supreme Court also reviews certain trial court orders as part of its discretionary docket. Review under these procedures is extraordinarily rare, however, and counsel should advise their clients about both the costs and the likelihood of success when attempting to obtain early review under these procedures.

#### *Review of Certified Interlocutory Orders Under 12 O.S. §952(b)(3)*

First, 12 O.S. §952(b)(3) permits, but does not require, the Supreme Court to review an order that is not final but, nevertheless, "affects a substantial part of the merits of the controversy," so long as the district court certifies that an immediate appeal of that order "may materially advance the ultimate termination of the litigation." This form of review is *doubly* discretionary: First, the district court must agree to certify the

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If a trial court's interlocutory ruling is so problematic that immediate review is necessary and no adequate remedy on appeal exists, a party may file an application to assume original jurisdiction and seek extraordinary relief from that order.

order; second, the Supreme Court must itself determine that immediate review is warranted.<sup>32</sup> And while district courts may be willing to certify orders for immediate review fairly often, the Supreme Court grants *certiorari* in such cases *very* rarely. Indeed, a review of published Supreme Court cases suggests that review under Section 952(b)(3) is granted no more than a couple of times per year.<sup>33</sup> Further, the Supreme Court has made clear that it will *not* review any order denying a motion for summary judgment under this procedure.<sup>34</sup>

Reiterating the fact that review under Section 952(b)(3) is entirely discretionary, the filing required to invoke this procedure in the Supreme Court is termed a “petition for *certiorari*,” not a “petition in error.”<sup>35</sup> While there is no deadline to request certification in the district court, the petition and requisite fee must be filed within 30 days of the trial court's certification order. Importantly, a motion for a new trial or a motion for reconsideration will not extend this deadline.<sup>36</sup>

The petition for *certiorari* must be accompanied by a concise

statement of the record and “the reasons why the order should be reviewed in advance of final judgment.”<sup>37</sup> Notably, this statement must be signed by the trial court.<sup>38</sup> Accordingly, if a lawyer decides to seek certification of an interlocutory order under Section 952, they would be wise to have this statement prepared in advance so that it may be signed by the court at the same time as the certification.

Much like an appeal of an interlocutory order appealable by right, the review of a certified interlocutory order under Section 952(b)(3) takes place on a much faster timetable than an ordinary appeal. Instead of having six months to prepare the record, the district court has a mere 30 days from the date of the order granting *certiorari*.<sup>39</sup> The briefing cycle, moreover, is extraordinarily quick: The opening brief must be filed within 20 days of completion of the record, the response is due 10 days later, and the reply is due a mere *five* days after that.<sup>40</sup> Again, these deadlines and unique requirements often take inexperienced practitioners unaware, so be

sure to consult the Supreme Court rules when considering a request to certify an interlocutory order under Section 952(b)(3).

#### *Extraordinary Relief*

Finally, the Supreme Court has expansive original jurisdiction under Article 7, Section 4 of the Oklahoma Constitution, which includes the authority to issue extraordinary writs (*e.g.*, writs of mandamus or prohibition).<sup>41</sup> If a trial court's interlocutory ruling is so problematic that immediate review is necessary and no adequate remedy on appeal exists, a party may file an application to assume original jurisdiction and seek extraordinary relief from that order.

As with the certification procedure under Section 952(b)(3), the Supreme Court's exercise of its original jurisdiction is wholly discretionary, and it exercises that discretion quite rarely. Indeed, the relief requested in an original action is, by definition, “extraordinary.” The court is most likely to exercise its original jurisdiction in cases involving the public interest.<sup>42 43</sup> It may also, however, choose to intervene early in a trial court proceeding

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when the court has made an error for which there would be no adequate remedy on appeal. As such, the Supreme Court has exercised its original jurisdiction and immediately reviewed trial court orders on, *inter alia*, questions of forum selection (e.g., personal jurisdiction, venue and forum *non conveniens*), disputes over the right to a jury trial, qualified immunity or other immunity issues, and discovery disputes when an error would be difficult to remedy after the fact (e.g., orders to produce privileged material or to submit to medical examination).<sup>44</sup>

Original jurisdiction proceedings are governed by Supreme Court Rules 1.90-1.193. They are commenced by filing an application to assume original jurisdiction and a petition for extraordinary relief (and the requisite fees) in the Supreme Court. There is no deadline for filing such an application, but it cannot be filed within 10 days of a trial absent extraordinary circumstances.<sup>45</sup> The application and petition should be accompanied by a supporting brief, as well as an appendix with any record materials that are necessary for the court to review.<sup>46</sup> Upon the filing of an original action, the court will generally set a date for a response, as well as set the matter for hearing before a Supreme Court referee.

## CONCLUSION

In addition to judgments and final orders, there are several types of interlocutory orders that, by statute, are immediately appealable as a matter of right. If the order at issue is not one of those statutorily enumerated orders, however, Supreme Court intervention in an ongoing trial court proceeding is the exception, not the rule. Accordingly, while there are multiple paths to discretionary review of an interlocutory order,

clients should be cautioned about both the costs and the likelihood of success when seeking such review.

## ABOUT THE AUTHOR



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## ENDNOTES

1. 12 O.S. §681, Sup. Ct. R. 1.20(a).
2. 12 O.S. §696.3(B).
3. See, e.g., *Jones v. Tubbs*, 1993 OK 118, ¶16, 12 O.S. §696.3(B).
4. 12 O.S. §952(b)(1).
5. Sup. Ct. R. 1.20(b)(6), 12 O.S. §990.2.
6. 10 O.S. §7505-4.1(l); Sup. Ct. R. 1.20(b)(7).
7. 12 O.S. §1879.
8. Sup. Ct. R. 1.20(b)(5).
9. See *Bd. of Cty. Comm'rs v. Assoc. of Cty. Comm'rs of Okla. Self-Insured Group*, 2021 OK 15, ¶19; *Arkansas Valley State Bank v. Phillips*, 2007 OK 78.
10. *Hammonds v. Osteopathic Hosp. Founders Ass'n*, 1996 OK 54, ¶13 (holding that order imposing monetary sanctions on attorney before judgment was immediately appealable because attorney was not a party and setting out this two-pronged test); see also Sup. Ct. R. 1.20(b).
11. 12 O.S. §994(A).
12. See, e.g., *Andrew v. Depani-Sparkes*, 2017 OK 42, 396 P.3d 210; *Liberty Bank & Trust Co. of Okla. City, N.A. v. Rogalin*, 1996 OK 10, ¶10, 912 P.2d 836.
13. 12 O.S. §696.2(A).
14. *Id.* §696.3(A).
15. See 12 O.S. §696.2(D); *Laubach v. Laubach*, 2022 OK 78.
16. Sup. Ct. R. 1.23.
17. Note that the form for a petition in error also requires a *certified* copy of the judgment, decree or final order, as well as the signature of the court reporter, if a transcript is involved, so practitioners who plan to appeal should make arrangements to obtain these as soon as possible after the order is issued. See Sup. Ct. R. 1.301, Form 5.
18. See Sup. Ct. R. 1.22(c).
19. See Sup. Ct. R. 1.28.
20. Sup. Ct. R. 1.34.
21. *Id.*
22. Sup. Ct. R. 1.10(a).
23. *Id.*
24. Rule 1.36.
25. Rule 1.36(g).
26. 12 O.S. §1437.
27. See Sup. Ct. R. 1.60 (enumerating these and other interlocutory orders appealable by right); 12 O.S. §993(A); see also 12 O.S. §952(b)(2) (granting the Supreme Court jurisdiction to review any "order

that discharges, vacates or modifies or refuses to vacate or modify a provisional remedy which affects the substantial rights of a party; or grants, refuses, vacates, modifies or refuses to vacate or modify an injunction; grants or refuses a new trial; or vacates or refuses to vacate a final judgment").

28. Sup. Ct. R. 1.61.
29. Sup. Ct. R. 1.63; 1.28(b)(1).
30. Sup. Ct. R. 1.64.
31. Sup. Ct. R. 1.65.
32. 12 O.S. §952(b)(3).
33. For examples of cases where the Supreme Court has granted *certiorari* under Section 952(b)(3), see, e.g., *Purcell v. Parker*, 2020 OK 83 (granting *certiorari* to address whether the notice by publication provisions of statute relating to stream water permits are constitutionally adequate where affected landowner's address is easily discoverable); *Carlson v. City of Broken Arrow*, 1992 OK 163 (granting *certiorari* under §952(b)(3) to consider whether multiple wrongful death claims against a political subdivision must be aggregated under the Governmental Tort Claims Act); *Knight ex rel. Ellis v. Miller*, 2008 OK 81 (granting *certiorari* under §952(b)(3) to consider whether a plaintiff in a negligence case has standing to bring a declaratory judgment action against the alleged tortfeasor's insurer before that tortfeasor had been found liable); *Ross v. Kelsey Hayes, Inc.*, 1991 OK 83, ¶13 (granting *certiorari* to review order denying motion to dismiss action as barred by statute of limitations) (note, other statute of limitations cases have been refused on ground that they did not go to "merits").
34. Sup. Ct. R. 1.50.
35. Sup. Ct. R. 1.51.
36. Sup. Ct. R. 1.51(b).
37. Sup. Ct. R. 1.52.
38. *Id.*
39. Sup. Ct. R. 1.54.
40. Sup. Ct. R. 1.55.
41. Article 7, Section 4 of the Oklahoma Constitution.
42. See, e.g., *Edmondson v. Pearce*, 2004 OK 23 (assuming original jurisdiction and granting declaratory judgment that cockfighting statute was constitutional, even when multiple cases were pending in the district courts).
43. Melanie Wilson Rughani, "Of Public Right: A Modern Look at the Age-Old Doctrine of *Publici Juris* and Its Discretionary Application in Appeals and Original Actions Involving the Public Interest," *OBU*, Vol. 94, No. 2.
44. See, e.g., *Powell v. Seay*, 1976 OK 117 (issuing writ of prohibition to prevent court from proceeding in case against district attorney based on prosecutorial immunity); *Floyd v. Ricks*, 1998 OK 9 (granting writ of mandamus directing trial court to require insurer to participate in discovery, even where it urged that the lawsuit was "frivolous"); *Farr v. VanMeter*, 1970 OK 231 (granting writ of mandamus, requiring trial court to order plaintiff to submit herself to a medical examination); *Goodner v. Lindley*, 1986 OK 40 (prohibiting trial court from enforcing order requiring alleged incompetent to submit to medical examination in guardianship proceeding); *Funnell v. Cannon*, 1978 OK 166 (granting writ to require court to permit court reporter to transcribe hearing); *Butler v. Breckinridge*, 1967 OK 177, ¶133; *Constant v. Biggers*, 1976 OK 77, ¶13-14 (assuming original jurisdiction where appeal would not be sufficiently speedy or equally advantageous).
45. Sup. Ct. R. 1.191(i).
46. Sup. Ct. R. 1.191(c), (d).

# OBA ESTATE PLANNING, PROBATE AND TRUST SECTION ATTORNEY ROLES IN ADULT GUARDIANSHIP

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9:00 – 9:50 AM	Representing Guardianship Petitioners by Attorneys Jerry Shiles and Stephanie Jackson
9:50 – 10:00 AM	Coffee Break/Networking
10:00 – 11:15 AM	Representing Guardianship Subjects by Shannon Taylor
11:15 – 11:20 AM	Coffee Break/Networking
11:20 AM – 1:00 PM	Lunch and Guardianship Judges' Panel – Judge Siderias, Judge Reisen, Judge Kerr, Judge McGuire, Judge Montagna, Judge Hammond and Judge Murphy Bondurant
1:00 – 1:10 PM	Coffee Break/Networking
1:10 – 2:00 PM	The Attorney as Guardian by Attorney Stephanie M. Alleman
2:00 – 2:50 PM	The Attorney as Guardian ad Litem by Terrell Monks and Judge Linda Morrissey
2:50 – 5:00 PM	Pickleball and Reception <i>(2 drink tickets included in registration fee)</i>

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# Residential Restrictive Covenants: The Amendment Process Under 11 O.S. Section 42-106.1

*By Kraettli Q. Epperson*



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## THE NATURE OF RESTRICTIVE COVENANTS

As any title professional is aware, residential subdivisions are typically encumbered by restrictive covenants (restrictions). Such restrictions are initially imposed by the landowner of the real property (usually the developer) through either 1) inclusion in a freestanding dedication deed,<sup>1</sup> 2) incorporation as part of the official subdivision (or addition) plat<sup>2</sup> or 3) after 1975, as part of a real estate development.<sup>3</sup>

“Restrictive covenants are contractual in nature, and contracts generally may not be amended absent the consent of all parties.”<sup>4</sup> A restriction creates a property interest that runs with the land, which is not a legal easement but is a creature of equity in the nature of an easement, and (because it “runs with the land”) it is binding on all initial parties to the contract and also all future owners.<sup>5</sup> Such a restriction “forbids or requires certain uses of the real property which it covers” and “confers vested rights in those owners who desire to own property where the subject uses are either required or forbidden.”<sup>6</sup>

## AMENDING RESTRICTIVE COVENANTS

Restrictions can be amended if permitted by the express terms of the restrictions; however, in the absence of such provisions, case law has held that it takes a 100% vote of all the current landowners to amend such restrictions.<sup>7</sup> The terms “lots” and “parcels” are used interchangeably in this article.

However, in 1995, 11 O.S. 42-106.1 was enacted to permit the amendment of restrictions with less than a 100% vote. Such process was probably created because 1) practically speaking, getting 100% agreement from all members of a diverse group of landowners is difficult, if not impossible, and 2) public policy probably favors keeping operational restrictions “up to date.” Under this new statute, such an opportunity for amendment is granted – even if initial restrictions are silent on allowing such amendment – once the initial restrictions have been of record for a substantial period of time (*i.e.*, 10 or 15 years). This statute allows the landowners of 70% of the parcels to amend the restrictions after they have been filed of

record for 10 years and allows the landowners of 60% of the parcels to amend after 15 years. Note that a lesser percentage is allowed if the restrictions expressly permit such lesser amount.<sup>8</sup>

It should be noted that adding a provision to existing restrictions to create a homeowners association and, if desired, to require the homeowners to participate in a mandatory homeowners association (association) was not possible before 2002.<sup>9</sup> In 2002, the Legislature added part (D) to 11 O.S. §42-106.1 to allow the amendment of existing restrictions to create an association and to make it a mandatory association. This particular amendment – to create an association and to make the existing or new association mandatory – was only effective against “the successors-in-interest of all record owners,” who would then be required to pay dues to the association.<sup>10</sup> Such amendment creating a mandatory association does not require a time period to pass (*e.g.*, 10 or 15 years) before it can be approved, but it does require a “vote of not less than sixty percent (60%) of the record owner of parcels.” It

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also adds the requirement for two advance notices to be published in the 1) newspaper and 2) newsletter.

Such association (if it is an entity) typically is granted the duty and the authority to enforce the restrictions, collect dues to maintain the subdivision infrastructure (such as a community clubhouse or park) and provide subdivision services (such as landscaping, security patrols and holiday events). Otherwise, the restrictions usually empower individual lot owners to enforce the restrictions, although both the association and the lot owners could be granted such authority.

As stated in the Real Estate Development Act:<sup>11</sup>

- A. An “owners association” may be formed by the owner or owners of real estate development for the purpose of:
  1. providing management, maintenance, preservation and control of commonly owned areas or any portion of or interest in them, and/or
  2. enforce all mutual, common or reciprocal interests in or restrictions upon all or portions of such separately owned lots, parcels, or areas, or both.

### FRAMEWORK FOR VALIDLY ADOPTING AN AMENDMENT OF RESTRICTIONS

At first glance, the operative statute to amend restrictions (11 O.S. Section 42-106.1) may appear to be straightforward and complete in itself where it states:

A.1. The restrictive covenant has *been in existence for at least ten (10) years* and the amendment is *approved by the owners of at least seventy percent (70%) of the parcels contained in the addition* or the amount specified in the restrictive covenant, whichever is less;

However, as they say, “The devil is in the details.” When considering how to carry out this statutory procedure (when such statutory provisions are used in lieu of existing amendment provisions in a set of restrictions), there are several questions left unanswered by the limited language of this statute, including:

- 1) What is the required form and content of such written approval by the owners?
- 2) How are the owners correctly identified and then listed in the approval document?
- 3) If a particular owner is an individual or an entity, what are the specific approval and signature requirements, if any?

- 4) Does such approval have to meet standard real property rules concerning joinder of spouses and providing a proper legal description?
- 5) Does this approval form need to include an acknowledgment for each person’s signature so that it can be filed of record in the local land records (as required by the statute) in order to give constructive notice?
- 6) When there are multiple owners of a particular lot, how do you treat conflicting votes among the joint owners of a specific lot on the proposed amendment?

A review of the statutory framework in Oklahoma for validly executing any real property instrument gives guidance on how to answer these questions. Such rules prescribe the required content, execution, acknowledgment and filing of any real property instrument, such as a deed, restrictions, plat, mortgage, easement or release.



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These rules are found scattered throughout the various titles in the Oklahoma statutes beginning with the statute of frauds at 15 O.S. §136 (4) and including, but not limited to, Title 16. Conveyances, Title 60. Property and Title 19. Counties and County Officers. Because restrictions impact an “interest in real property,”<sup>12</sup> these real property rules must be followed during the restrictions amendment process and the filing of the related approval documentation.

Any prospective homeowner or prospective lender will want to ascertain which set of restrictions is effective against their land before completing their transaction – is it the original or the amended version? For instance, does the change raise or lower the minimum square footage of the residence being built, allow or prohibit rentals of houses or require higher or lower quality construction materials (such as brick on new construction or on improvements)? The likelihood that future homeowners will, in fact, receive and review a copy of the restrictions before closing on their purchase is, practically speaking, probably low. Nevertheless, 1) state statutes require that a copy of the restrictions be provided to the buyer at or before closing,<sup>13</sup> and 2) the buyer takes the title subject to the restrictions (if recorded) through constructive notice, even if the restrictions are not reviewed by the buyer.<sup>14</sup> If a party wants the amended version of the restrictions to be binding on present and future owners through constructive notice, rather than only the pre-amendment version, such amended set must be filed of record in the county land records where the land is located after being acknowledged.<sup>15</sup> If seen

by the prospective interest holder, they have actual notice, even if the restrictions are not recorded.<sup>16</sup> The statute also expressly calls for the filing of the amended restrictions.<sup>17</sup>

### CONTENT OF NOTICE AND AMENDED RESTRICTIONS

At a bare minimum, the language in the recorded amended restrictions will need to confirm that the amendatory steps were followed 1) as set forth in the express provisions in the restrictions themselves for amending the restrictions<sup>18</sup> or 2) as set out in the statute. Such confirmation will need to be documented by having the amended restrictions state on their face the following facts or, as appropriate, to have the following attached:

- 1) The fact that the original restrictions were in existence for the period either set forth in the restrictions or for 10 years (or 15 years), as appropriate.
- 2) The fact that the amendment was approved by a) the percentage set forth expressly in the initial restrictions or b) at least 70% (or 60%, as appropriate) of the owners of all the parcels (lots) in the residential addition.
- 3) The content of the approved amendment:
  - a) [Insert content of amendment]
- 4) A copy is attached of the 30-day written advanced notice of meeting scheduled and held to approve this particular amendment (if a meeting is called in lieu of simply collecting the needed acknowledged signatures), including a copy of the

proposed amendment and the location, date and time of the meeting, with proof that such notice was provided to all of the homeowners, such as an affidavit of hand delivery or proof of certified mail delivery.

- 5) *(Note: This is only required if creating a mandatory association.)* A copy is attached of the notice of meeting, which was published in a newspaper in the county where the land is located at least 14 days before the meeting, with proof that such notice was published, such as a publisher’s affidavit.
- 6) The fact that notice of the meeting was published in the neighborhood newsletter, presumably at least 14 days before the meeting (if scheduled and held), by attaching a copy of the notice to the amendment with proof that such notice was published, such as a publisher’s affidavit. *(Note: In the absence of the existence of a newsletter, it is probable that this requirement would be waived with proof of such absence verified by an affidavit from an association officer or other knowledgeable person – perhaps inserted into this amendment.)*
- 7) An official list (e.g., abstractor’s ownership list) of all the signing owners of lots in the addition (lot owners) is attached to the amendment,<sup>19</sup> and such lot owners must be matched to the “specific legal description” for their lot *(not a street address)*.<sup>20</sup>

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- 8) The fact of the approval of the required minimum number of lot owners (60% or 70%) must be reflected on the amendment by:
- a) the signature of each lot owner, using substantially the same name as on the ownership list,<sup>21</sup>
  - b) if an individual (not an entity), stating marital status and, if married, joined by spouse<sup>22</sup> and
  - c) if an entity, signed by the proper representative (e.g., partner, trustee, president, LLC member or manager).
- 9) For the amendment to be acceptable for recording by the county clerk – because such filing is required by the statute – each signature on the amendment must be acknowledged, as on any real property instrument, 1) to authenticate the identity of the signers and 2) to confirm the signing was executed as the “free and voluntary act and deed for the uses and purposes therein set forth.”<sup>23</sup>

As noted above, a copy of the notice of meeting (if held in lieu of pre-meeting balloting or if creating a mandatory association that requires a meeting), the proof of mailing and the publisher’s affidavit for both the newspaper and the newsletter need to be attached to the amended restrictions, which is filed of record in the local land records, to give constructive notice.

It has been suggested that it should be sufficient to attach to

the amended restriction an affidavit from a “knowledgeable” person declaring that each and every one of the required statutory steps had been taken. However, there is no official repository created by statute 1) to store the supporting documents and 2) to give notice of the existence and content of these supporting documents – other than the county land records themselves.<sup>24</sup> Therefore, the cautious approach is for proof of the satisfaction of each of the required statutory steps to be placed directly in the county land records.

### ALTERNATIVE VOTING MECHANISM

Some attorneys and nonattorneys, who are taking steps to amend restrictions, attempt to use pre-meeting ballots or pre-meeting proxies. A pre-meeting ballot is probably acceptable, so long as it contains all the required content and formalities for a real property document: 1) content of amendment, 2) marital status (if married), 3) title of official (if entity), 4) legal description, 5) signature and 6) acknowledgment.<sup>25</sup>

Unless the existing restrictions expressly allow the use of proxies – and prescribe the details of their content and the procedure to use them – the procedure will arguably need to follow the normal steps to create a power of attorney dealing with real property, meaning: 1) identity of person granting the power, 2) content providing sufficient detail as to what actions can be taken by the appointed attorney in fact, 3) name of attorney in fact, 4) marital status if an individual, 5) title of official if an entity, 6) legal description, 7) signature(s) and 8) acknowledgment.

### CONCLUSION

The statute (11 O.S. §§41-101 *et seq*) fails to contain the details a title examiner would like to see to confirm that the steps had actually been taken. In the face of such silence, it is necessary 1) to take a cautious approach to protect a valuable property interest and 2) to look outside the statute to find guidance in other statutes and case law on how to prepare, execute, acknowledge and record real property-related instruments.<sup>26</sup>

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### ABOUT THE AUTHOR



Kraettli Q. Epperson is a partner with Mee Hoge PLLP in Oklahoma City. He received his J.D. from the OCU School of Law

in 1978 and practices in the areas of mineral and real property title disputes. He chaired the OBA Title Examination Standards Committee from 1988 to 2020 and taught Oklahoma Land Titles at the OCU School of Law from 1982 to 2018.

## SAMPLE FORM AMENDMENT WITH NOTICE

Here is a possible form for the amended restrictions, with a suggested certificate of bonded abstractor:<sup>27</sup>

### AMENDMENT OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR NEW TOWNE, COUNTY OF SMITH, STATE OF OKLAHOMA

1. There is a set of restrictive covenants for New Towne Addition executed on [DATE] and filed in the land records of the County of Smith, State of Oklahoma on [DATE], in Book [ ], Page [ ], which is hereby incorporated herein by reference ("Restrictions");
2. Such Restrictions do not contain a procedure for amendment of their terms;
3. It has been at least [10 or 15] years since such restrictions were filed of record;
4. The requirements of 11 O.S. §42-106.1 have been satisfied as noted below and on the attachments hereto;
5. There are [ ] lots in the New Towne Addition as shown on the plat therefore, found recorded on [ ] in Book [ ], Page [ ] of the land records of the County of [ ], State of Oklahoma, hereby incorporated herein by reference; therefore [60% or 70%] of the owners of all lots is [ ];
6. The record owners of each of the lots of New Towne Addition are shown below in the signature portion hereof and such list matches the record owners for each lot to their street address and legal description;
7. The below signing lot owners represent at least [60% or 70%] (being at least [ ] parcels) of all of the lots for New Towne Addition (as shown on the Amended Restrictions Ownership Report, attached hereto as Exhibit A);
8. Such lot owners do, by signing this Amended Restriction, confirm they agree to amend the Restrictions as follows:  
[AMENDED PROVISION] ("Amendment")
9. In addition, all of the lot owners personally received written Notice of this proposed Amendment (notice with proposed Amendment and proof of transmittal are attached hereto as Exhibit "B" with the proposed Amendment included) at least 30 days before a meeting called to consider this Amendment by [notice giver];
10. [If creating a mandatory association.] The Notice of this Meeting (published in the local newspaper) to consider this Amendment is attached to this Amendment, along with the Publisher's Affidavit (as Exhibits "C" and "D," respectively) at least 14 days in advance of this Meeting; and
11. [If creating a mandatory association.] The undersigned lot owners hereby confirm that they received a copy of the Newsletter for New Towne Addition – providing Notice of the Meeting to consider this Amendment – as attached to this Amendment, along with the Publisher's Affidavit (as Exhibits "E" and "F," respectively) at least 14 days in advance of this Meeting.

STATE OF \_\_\_\_\_ )  
 )ss:  
COUNTY OF \_\_\_\_\_ )

\_\_\_\_\_ (signature)

Adam Smith (Husband)  
1111 Attorney Way  
Edmond, OK 73034

LOT

13

BLOCK

5

\_\_\_\_\_ (signature)

Barbara Smith (Wife)  
1111 Attorney Way  
Edmond, OK 73034

13

5

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*Statements or opinions expressed in the Oklahoma Bar Journal are those of the authors and do not necessarily reflect those of the Oklahoma Bar Association, its officers, Board of Governors, Board of Editors or staff.*

_____ (signature)	<u>LOT</u>	<u>BLOCK</u>
Charlie Jones (Partner) 2222 Old Street Edmond, OK 73034	2	1
_____ (signature)		
Deborah Hankins (Manager) 2222 Old Street Edmond, OK 73034	1	6
_____ (signature)		
Elsa Brown (President) 3333 Oak Road Edmond, OK 73034	16	1
_____ (signature)		
Flora White (Trustee) 4444 Lane Street Edmond, OK 73034	7	4

The foregoing Amendment to Declaration was signed and acknowledged before me this [ ] day of [ ], 20[ ], by:

Adam Smith and Barbara Smith (husband and wife);  
 Charlie Jones, partner of the Jones General Partnership;  
 Deborah Hankins, sole member/manager of the Hankins LLC;  
 Elsa Brown, President of the Brown Housing Corporation; and  
 Flora White, Trustee of the White Revocable Trust.

My Commission Expires

\_\_\_\_\_

\_\_\_\_\_  
 SEAL NOTARY PUBLIC

**EXHIBITS:**

- A. Amended Restrictions Ownership Report
- B. Personal Notice of Meeting Considering the Amendment with Amendment attached
- C. Newspaper Notice of Meeting
- D. Publisher's Affidavit of Newspaper Notice of Meeting
- E. Publisher's Affidavit of Newsletter Notice of Meeting
- F. Notice of Meeting Considering the Amendment

*Statements or opinions expressed in the Oklahoma Bar Journal are those of the authors and do not necessarily reflect those of the Oklahoma Bar Association, its officers, Board of Governors, Board of Editors or staff.*

## ENDNOTES

1. See *Bumgarner v. Pruitt*, 421 P.2d 651, 1966 OK 254.
2. 11 O.S. Section 41-101 *et seq.*; note that the dedication of the identified streets, alleys, ways, commons or other public use areas is a conveyance of the interest (fee simple or easement) to be held and regulated by the municipality.
3. 60 O.S. Sections 851 *et seq.*
4. 2000 OK AG 38, ¶12.
5. Nonetheless, as explained in *O'Neil v. Vose*, 1944 OK 26, 193 Okla. 451, 145 P.2d 411: “[W]e are not unmindful of the legal right of owners of adjoining properties to bind themselves by enforceable contract, restraining the use of their property for an unlimited period of time, wherein each separate owner grants to the other owners a right in his property in the nature of an easement and which shall run with the land and be binding upon the several property owners as well as all future owners, who succeed to title with actual or constructive notice of such contract or agreement and its terms.” *Id.* at ¶14, 145 P.2d at 414. A restrictive covenant, therefore, creates a property interest although that interest is created by contract. *Vranesevich v. Pearl Craft*, 2010 OK CIV APP 92, ¶6, 241 P.2d 250, 253-254.
6. *Wallace's Fourth Southmoor Addition to City of Enid, In re*, 1994 OK CIV APP 73, para. 10, 874 P.2d 818, 821.
7. *Wallace's Fourth Southmoor Addition to City of Enid In re*, 1994 OK CIV APP 73, para. 9, 874 P.2d 818, 821; 2000 OK AG 38, para. 12.
8. Note that according to 2000 OK AG 38, para. 2, this statute is confined “to efforts to change or alter existing restrictive covenants [and] does not permit homeowners to add a new restrictive covenant.”
9. See 2000 OK AG 38, ¶16.
10. 11 O.S. §42-106.1 “D. The recorded restrictive covenants on property contained in a residential addition may be amended by the addition of a new covenant creating a neighborhood association for the addition that would require the mandatory participation of the successors-in-interest of all record owners of parcels within the addition at the time the amendment is recorded. The amendment must be approved by the record owners of at least sixty percent (60%) of the parcels contained in the addition.”
11. Real Estate Development Act, 60 O.S. §§851 *et seq.* (adopted in 1975), 852 (A).
12. *Vranesevich*, ¶6.
13. 60 O.S. §857.
14. 25 O.S. §§10-13; 16 O.S. §§15-16.
15. *Id.*
16. *Id.*
17. 11 O.S. §42-106.1 (D)(3).
18. If the amendment is approved by following the express procedure set forth in the initial restrictions, proof of following those procedures will need to be documented in a manner similar to the documentation set forth in the statute discussed below.
19. This list must be based on a verifiable public record showing ownership of the lots; for the convenience of the title examiner, while it is not expressly required by the statute, the amended restrictions might include a list certified by an abstractor – based on the county assessor's ownership records or the abstractor's own records. The next owner of a lot – after an amendment to the restrictions – and their title examiner will need

to know not just that their prior lot owner agreed to the amendment of the restrictions but that the required percentage of all lot owners who approved the amendment were, in fact, the record owners of such lots.

20. 19 O.S. §298 provides: “A. Every county clerk in this state shall require that the mandates of the Legislature be compiled with, as expressed in Sections 287 and 291 of this title, and for that purpose, every instrument offered which may be accepted by the county clerk for recording, affecting specific real property whether of conveyance, encumbrance, assignment, or release of encumbrance, lease, assignment of lease or release of lease, shall be an original or certified copy of an original instrument and clearly legible in accordance with the provisions of subsection B of this section, and shall by its own terms describe the property by its specific legal description ... ;” See *Plano Petroleum, LLC v. GHK Exploration, LD*, 2011 OK 18 ¶9, 250 P.3d 328, which provides: “The error was compounded by a willingness to quiet title based on an instrument which contains absolutely no legal description of the legal premises. There is a long-standing black letter rule of law that ‘the description of the premises conveyed must be so certain and definite as to enable the land to be identified.’” *Arbuckle Realty Trust v. Southern Rock Asphalt Co.*, 1941 OK 237, ¶18, 116 P.2d 912, 914. See also *Key v. Key*, 1963 OK 288, ¶122, 388 P.2d 505, 511. “That requirement is more than a legal nicety, it is essential for recording in the county clerk's office and for establishing a chain of title. In fact, a deed that does not sufficiently describe the property interest conveyed is void on its face.” *Coley v. Williams*, 1924 OK 323, 224 P. 345, 346.

21. See Oklahoma Title Examination Standard 5.1 Abbreviations and *Idem Sonans*.

22. See 16 O.S. §4; and see Oklahoma Title Examination Standard:

### 7.2 MARITAL INTERESTS AND MARKETABLE TITLE

23. 16 O.S. §§15-16, §33, §95; 49 O.S. §112 (2), and §119; 60 O.S. §178.11; Oklahoma Title Examination Standard 6.6.

24. *Crater v. Wallace*, 1943 OK 250, ¶11, 140 P.2d 1018, 1020, “The general rule is that the record of an instrument entitled to be recorded will give constructive notice to persons bound to search for it. But constructive notice being a creature or statute, no record will give constructive notice unless such effort has been given to it by some statutory provision.”

25. 16 O.S. §20 & 91; See Oklahoma Title Examination Standards TES 14.2, 14.3, and 14.3.1; See also *Panama Timber Co. v. Barsanti*, 1980 OK CIV APP 18, FN 3 (absence of recorded power of attorney makes instrument invalid) and *Pierce v. Bank One*, 2001 OK CIV APP 62, ¶¶9-10 (instrument is invalid if power of attorney is not recorded).

26. Comments on these issues are invited by this author.

## 27. EXHIBIT “A”

### CERTIFICATE OF BONDED ABSTRACTOR

#### AMENDED RESTRICTIONS OWNERSHIP REPORT

STATE OF OKLAHOMA )  
 )ss:  
COUNTY OF SMITH )

The undersigned bonded abstractor in and for Smith County, State of Oklahoma, does hereby certify that the following Ownership Report is true and correct according to [(a) the current year's tax rolls in the office of the County Treasurer of Smith County, Oklahoma, as updated by the land records of the County Clerk of Smith County, Oklahoma, based on the last conveyance or final decree of record as shown in the land records of the County Clerk of Smith County, Oklahoma] of the specified properties set forth below are the owners; or (b) the land records of the County Clerk of Smith County, Oklahoma, or (c) with the addresses and legal descriptions as shown on the attached pages numbered from (1) to ( ), inclusive.

#### NEW TOWNE HOMEOWNERS ASSOCIATION [DATE]

NAME	LOT	BLOCK
Adam Smith 1111 Attorney Way Edmond, OK 73034	13	5

[ETC.]

Dated: at 7:30 AM

[ ] Company

By: \_\_\_\_\_

Abstractor License No. \_\_\_\_\_

OAB Certificate of Authority No. \_\_\_\_\_

File No. \_\_\_\_\_



# 2023 OBA ANNUAL MEETING

NOV. 1-3 | THE SKIRVIN HILTON | OKLAHOMA CITY

I hope you are making plans to attend this year's OBA Annual Meeting Nov. 1-3 at the historic Skirvin Hilton Hotel in downtown Oklahoma City. The theme of the meeting, "Aspire & Inspire," is reflective of who we are as lawyers, continually striving for the betterment of ourselves and our profession and inspiring others to do the same.

The Annual Meeting is an excellent opportunity for networking, learning and fun, but more importantly, it is also a time for us to come together as colleagues and professionals. The last few years of the pandemic have brought a noticeable shift in the ways we interact with each other. Some of those changes have made us more efficient and productive. Some of the changes in the ways we relate to each other have not been as positive. Sometimes, we are so focused on our daily tasks that it is all too easy to forget that we are talking to real human beings on the other side of a computer screen. I would invite you to help us make this year's Annual Meeting a "homecoming" of sorts. Let's get together and talk to each other. Let's remind ourselves that we are all worthy of empathy, respect and kindness.

All are welcome at our Wednesday night open reception, which I have the honor of hosting. We will also offer CLE focused on topics of concern to every lawyer in Oklahoma. You will have the opportunity to get all your MCLE credits for the year, including two hours of ethics, during this three-day event. We will also continue our tradition of honoring our 2023 OBA Awards winners during Thursday's Annual Luncheon and our Ada Lois Sipuel Fisher Diversity Awards winners during the Thursday night Diversity Awards Dinner. As always, we will finish our gathering with the Friday morning Delegates Breakfast, General Assembly and House of Delegates meetings.

Registration is now open at [www.okbar.org/annualmeeting](http://www.okbar.org/annualmeeting). I look forward to coming home and connecting with you in November!

Brian T. Hermanson, Oklahoma Bar Association President



**REGISTER NOW! [WWW.OKBAR.ORG/ANNUALMEETING](http://WWW.OKBAR.ORG/ANNUALMEETING)**



# REGISTRATION

Join your peers Nov. 1-3 for great CLE, camaraderie, networking and fun events at this year's Annual Meeting. See what's included with your Annual Meeting registration below. Plus, choose from optional CLE courses with nationally recognized speakers and add-on luncheons. Your Annual Meeting registration includes:

- Conference gift for in-person attendees
- OBA continental breakfast and hospitality refreshments daily
- Wednesday evening's open reception
- Thursday's Plenary Session (3 hours general MCLE credit)
- Thursday's Wellness Matters: Lawyers Helping Lawyers program (3 hours ethics MCLE credit)
- Thursday evening Oklahoma Bar Foundation Reception

## HOW TO REGISTER



### ONLINE

Register online at  
[www.okbar.org/  
AnnualMeeting](http://www.okbar.org/AnnualMeeting)



### MAIL

OBA Annual Meeting  
P.O. Box 53036  
Oklahoma City, OK 73152



### PHONE

Call Ben Stokes  
at 405-416-7026 or  
800-522-8065



### FAX/EMAIL

Fax the form to  
405-416-7092 or email  
it to [bens@okbar.org](mailto:bens@okbar.org)

## MEETING DETAILS

### LOCATION

Most activities will take place at the Skirvin Hilton, One Park Avenue, Oklahoma City.

### PARKING

The Skirvin Hilton offers covered on-site valet and self-parking options. There are also several garages, surface lots and street parking spots nearby.

### HOTEL

Fees do not include hotel accommodations, which must be booked separately. To reserve a room, call 1-800-HILTONS and mention the Oklahoma Bar Association 2023 Conference (or group code OKBAR3) or visit <https://bit.ly/3E9b33A> to book online. The deadline to reserve a room under the room block is Oct. 10.

### CANCELLATION POLICY

A partial refund *may* be available after the conclusion of the Annual Meeting. Contact Ben Stokes at [bens@okbar.org](mailto:bens@okbar.org).

### SPECIAL NEEDS AND REQUESTS

Please notify Ben Stokes at [bens@okbar.org](mailto:bens@okbar.org) at least one week in advance if you have a special need and require accommodation.

*Check [www.okbar.org/annualmeeting](http://www.okbar.org/annualmeeting) for updates.*



# **BECOME A SPONSOR**

## **FOR THE**

# **2023 OBA ANNUAL MEETING**

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Sponsoring the OBA Annual Meeting is an excellent way to connect with Oklahoma lawyers.

To find out more about sponsoring the OBA Annual Meeting  
Nov. 1-3 at the Skirvin Hilton Hotel in Oklahoma City,  
email [GigiM@okbar.org](mailto:GigiM@okbar.org).

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Be on the lookout for more information about the  
upcoming OBA Annual Meeting  
on our social media pages and at [www.okbar.org](http://www.okbar.org).



# DIVERSITY AWARDS DINNER

By Devin Frost

## THE OBA DIVERSITY

Committee will host their annual Ada Lois Sipuel Fisher Diversity Awards Ceremony and Dinner during this year's OBA Annual Meeting, held Nov. 1-3 at the historic Skirvin Hilton Hotel in downtown Oklahoma City.

The Diversity Awards are named in honor of Ada Lois Sipuel Fisher, a key civil rights leader born in Chickasha. Ms. Fisher challenged segregation laws in Oklahoma so that she could attend law school, her lifelong ambition. She opened doors not only for herself but also for other Black students who would follow in her footsteps and attend law school in our state.

During this popular event, the committee will recognize attorneys, members of the judiciary and organizations that are dedicated to the promotion of diversity, equity and inclusion initiatives and the protection of civil and human rights. The dinner will begin at 6:30 p.m. on Thursday, Nov. 2.

This year, the guest speaker for the dinner will be Professor Carla D. Pratt, who currently serves at the OU College of Law as the inaugural Ada Lois Sipuel Fisher Chair in Civil Rights, Race and Justice in Law.

Professor Pratt has spent several years in academia prior to her



*Professor Carla D. Pratt, who currently serves at the OU College of Law as the inaugural Ada Lois Sipuel Fisher Chair in Civil Rights, Race and Justice in Law.*

term at the OU College of Law, serving as dean at Washburn University School of Law in Topeka, Kansas, as well as associate dean for Academic Affairs, associate dean for Diversity and Inclusion, and as the Nancy J. LaMont Faculty Scholar and professor of law at Penn State's Dickinson School of Law.

She also served from March 2012 to March 2018 as an associate justice for the Supreme Court

of the Standing Rock Sioux Tribe in Fort Yates, North Dakota. She was a member of the Kansas Advisory Committee to the U.S. Commission on Civil Rights and currently serves as a member of the Council to the American Bar Association's Section of Legal Education and Admissions to the Bar.

Professor Pratt's work focusing on the equal protection clause and balancing civil rights and civil liberties has been published in law journals and other media outlets, including *The New York Times*. She has received numerous awards for her advocacy work, including the Association of American Law Schools' Impact Award, the Society of American Law Teachers' Shanara Gilbert Human Rights Award and the John Mercer Langston Legal Education Leadership Award.

Also performing during the event will be spoken-word poet Samantha Marchand. Diversity Dinner tickets will be \$90 and can be purchased as an add-on or stand-alone ticket on the OBA Annual Meeting registration page, found at <https://bit.ly/3OMAWed>.

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## ABOUT THE AUTHOR

Devin Frost serves as chair of the OBA Diversity Committee.

# HOUSE OF DELEGATES



## Dear County Bar Presidents:

Thank you to the county bar presidents of Choctaw, Cimarron, Greer, Kay, LeFlore, Love, Major, Oklahoma, Pontotoc and Pushmataha counties for submitting your delegate and alternate selections for the upcoming OBA Annual Meeting.

Listed below are the counties that have not sent their delegate and alternate selections to the offices of the Oklahoma Bar Association as of Aug. 18.

Adair	Coal	Grant	Logan	Osage	Tillman
Alfalfa	Comanche	Harmon	Marshall	Ottawa	Tulsa
Atoka	Cotton	Harper	Mayes	Pawnee	Wagoner
Beaver	Craig	Haskell	McClain	Payne	Washington
Beckham	Creek	Hughes	McCurtain	Pittsburg	Washita
Blaine	Custer	Jackson	McIntosh	Pottawatomie	Woods
Bryan	Delaware	Jefferson	Murray	Roger Mills	Woodward
Caddo	Dewey	Johnston	Muskogee	Rogers	
Canadian	Ellis	Kingfisher	Noble	Seminole	
Carter	Garfield	Kiowa	Nowata	Sequoyah	
Cherokee	Garvin	Latimer	Okfuskee	Stephens	
Cleveland	Grady	Lincoln	Okmulgee	Texas	

Please help us by sending the names of your delegates and alternates now. Delegate certification forms are online at [www.okbar.org/governance/delegate-certification](http://www.okbar.org/governance/delegate-certification). In order to have your delegates/alternates certified, mail delegate certifications to OBA Executive Director Janet Johnson, P.O. Box 53036, Oklahoma City, OK 73152-3036, or fax to 405-416-7001. Scanned forms may be emailed to [marks@okbar.org](mailto:marks@okbar.org).

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

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



# 2024 OBA BOARD OF GOVERNORS VACANCIES

Nominating Petition deadline was 5 p.m. Friday, Sept. 1, 2023

## OFFICERS

### President-Elect

Current: Miles T. Pringle, Oklahoma City  
(One-year term: 2024)  
Mr. Pringle automatically becomes OBA president Jan. 1, 2024  
Nominee: **D. Kenyon Williams Jr., Sperry**

### Vice President

Current: D. Kenyon Williams Jr., Sperry  
(One-year term: 2024)  
Nominee: **Vacant**

## BOARD OF GOVERNORS

### Supreme Court Judicial District One

Current: Michael R. Vanderburg, Ponca City  
Craig, Grant, Kay, Nowata, Osage, Ottawa, Pawnee, Rogers and Washington counties  
(Three-year term: 2024-2026)  
Nominee: **Jacob Duane Heskett, Bartlesville**  
Nominee: **William Ladd Oldfield, Ponca City**

### Supreme Court Judicial District Six

Current: Richard D. White Jr., Tulsa  
Tulsa County  
(Three-year term: 2024-2026)  
Nominee: **Philip D. Hixon, Tulsa**

### Supreme Court Judicial District Seven

Current: Benjamin R. Hilfiger, Muskogee  
Adair, Cherokee, Creek, Delaware, Mayes, Muskogee, Okmulgee and Wagoner counties  
(Three-year term: 2024-2026)  
Nominee: **Vacant**

### Member At Large

Current: Kara I. Smith, Oklahoma City  
Statewide  
(Three-year term: 2024-2026)  
Nominee: **Vacant**

## NOTICE

The nominating petition deadline was 5 p.m., Sept. 1. This issue went to press before the deadline, and the list of nominees may not be complete. See <https://bit.ly/3K2m3D2> for updates.

## SUMMARY OF NOMINATIONS RULES

Not less than 60 days prior to the annual meeting, 25 or more voting members of the OBA within the Supreme Court Judicial District from which the member of the Board of Governors is to be elected that year, shall file with the executive director, a signed petition (which may be in parts) nominating a candidate for the office of member of the Board of Governors for and from such judicial district, or one or more county bar associations within the judicial

district may file a nominating resolution nominating such a candidate.

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

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

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

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

Elections for contested positions will be held at the House of Delegates meeting Nov. 3, during the Nov. 1-3 OBA Annual Meeting. Terms of the present OBA officers and governors will terminate Dec. 31, 2023.

# OKLAHOMA BAR ASSOCIATION NOMINATING PETITIONS

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

## OFFICERS

### President-Elect

**D. Kenyon Williams Jr., Sperry**

Nominating Petitions have been filed nominating D. Kenyon Williams Jr., Sperry, for President-Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning Jan. 1, 2024. Fifty of the names thereon are set forth below:

Christopher Lance Carter, Sarah C. Miller, Bailey Bryant Betz, Jack Coryell Bowker, Stuart Edward Van De Wiele, Margo Elizabeth Shipley, Thomas Michael Ladner, James Collins Hodges, Brita Haugland-Cantrell, James Robert Gotwals, Molly Anne Aspan, Paul Mario Catalano, Michael Hoyt Smith, Logan Lawrence James, Daniel Reading Ketchum, Richard Mark Petrich, Brian Timothy Inbody, Aaron Christian Tifft, Stephen Russell McNamara, Mason Blair McMillan, James C.T. Hardwick, James Kevin Hayes, Pamela Sue Anderson, Blake Howard Gerow, Mark Banner, Seth Aaron Day, Jonathan A. Epstein, Collin Robert Walke, John Frederick Kempf Jr., Stephen R. Pitcock, Daniel Jess Glover, Robert Dale Nelson, Raymond Stephen Rudnicki, Moira C. G. Watson, W. Davidson Pardue Jr., Jared Raye Ford, Bryan Ross Lynch, Kent Allan Gilliland, Elaine Renee Turner, Michael Raye Ford, Daniel Vaughn Carsey, Alexandra Albert Crawley, Alyssa Marie Gillette, John Wesley Gile, Hilary Hewitt Price, Emily Paige Pittman, Eric Christopher Money, Braden Wesley Mason, Nicholas Edwin Thurman and Johnathan Louis Rogers.

**Tulsa County Bar Association and a total of 126 signatures appear on the petitions.**

## BOARD OF GOVERNORS

### Supreme Court Judicial District No. 1

**Jacob Duane Heskett, Bartlesville**

Nominating Petitions have been filed nominating Jacob Duane Heskett, Bartlesville, for election of Supreme Court Judicial District No. 1 of the Oklahoma Bar Association Board of Governors for a three-year term beginning Jan. 1, 2024. Twenty of the names thereon are set forth below:

Jerald M. Maddux, David Brice King, Bruce W. Robinett, Scott Buhlinger, Thomas James Brow, Rick Don Tucker, Jess Morgan Kane, James Michael Elias, Jeff Steven Jones, Michael Edward Fisher, Cindy Ann Pickerill, J. Fletcher Daniels, William Ray Keene, Steven George Venturi, Perry Wayne Newman, Mary Beth Heskett, John Franklin Heskett, Kristi Kay Sanders, Wade Lee Fathree and Deborah Rachel Fathree.

**A total of 25 signatures appear on the petitions.**

### William Ladd Oldfield, Ponca City

A Nominating Resolution from the Kay County Bar Association has been filed nominating William Ladd Oldfield, Ponca City, for election of Supreme Court Judicial District No. 1 of the Oklahoma Bar Association Board of Governors for a three-year term beginning Jan. 1, 2024.

### Supreme Court Judicial District No. 6

**Philip D. Hixon, Tulsa**

A Nominating Resolution from the Tulsa County Bar Association has been filed nominating Philip D. Hixon, Tulsa, for election of Supreme Court Judicial District No. 6 of the Oklahoma Bar Association Board of Governors for a three-year term beginning Jan. 1, 2024.



## NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office of Associate District Judge, Third Judicial District, Jackson County, Oklahoma. This vacancy is due to the appointment of the Honorable Rafe Hall to District Judge on August 3, 2023.

To be appointed an Associate District Judge, an individual must be a registered voter of the applicable judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, the appointee must have had a minimum of two years experience as a licensed practicing attorney, or as a judge of a court of record, or combination thereof, within the State of Oklahoma.

Application forms may be obtained online at [okjnc.com](http://okjnc.com) or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the JNC no later than 5:00 p.m., Friday, September 29, 2023. Applications may be mailed, hand delivered or delivered by third party commercial carrier. If mailed or delivered by third party commercial carrier, they must be postmarked on or before September 29, 2023 to be deemed timely. Applications should be mailed/delivered to:

Jim Bland, Chairman  
Oklahoma Judicial Nominating Commission  
c/o Tammy Reaves  
Administrative Office of the Courts  
2100 N. Lincoln Blvd., Suite 3  
Oklahoma City, OK 73105



## NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office of Associate District Judge, Twentieth Judicial District, Murray County, Oklahoma. This vacancy is due to the resignation of the Honorable Aaron Duck on October 1, 2023.

To be appointed an Associate District Judge, an individual must be a registered voter of the applicable judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, the appointee must have had a minimum of two years experience as a licensed practicing attorney, or as a judge of a court of record, or combination thereof, within the State of Oklahoma.

Application forms may be obtained online at [okjnc.com](http://okjnc.com) or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the JNC no later than 5:00 p.m., Friday, September 29, 2023. Applications may be mailed, hand delivered or delivered by third party commercial carrier. If mailed or delivered by third party commercial carrier, they must be postmarked on or before September 29, 2023 to be deemed timely. Applications should be mailed/delivered to:

Jim Bland, Chairman  
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2100 N. Lincoln Blvd., Suite 3  
Oklahoma City, OK 73105

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Oklahoma Access to Justice Commission  
and American Bar Association



Chandler Baker

Chandler Baker, a *New York Times* bestselling author and lawyer, will serve as the Keynote Speaker for this year's Mona Salyer Lambird Spotlight Awards Luncheon. Ms. Baker grew up in Sarasota, Florida, attended college at the University of Pennsylvania and received her J.D. from the University of Texas at Austin School of Law. She has worked at a Washington, D.C., law firm, in Dallas for a major sports franchise and as a corporate attorney. Now, she can usually be found listening to audiobooks at two times the normal speed, overspending at bookstores or obsessing over true crime. She lives in Austin, Texas, with her husband and toddlers.



CARNS CURTISS LAW, PLLC

P|M

PHILLIPS MURRAH P.C.

Attorneys and Counselors at Law

# Women in Law Conference

**SEPTEMBER 22, 2023  
CIVIC CENTER MUSIC HALL  
OKLAHOMA CITY**

- |                  |  |
|------------------|--|
| <b>8:30 AM</b>   | Registration and Continental Breakfast   |
| <b>9 AM</b>      | Welcome  |
| <b>9:10 AM</b>   | Law Firm Branding: How to Build a Strong Brand   |
| <b>10 AM</b>     | "The Civility Conundrum" - Civility in the Practice of Law and Its Effect on Mental Health |
| <b>11 AM</b>     | Judicial Leadership: A Panel of Female State Court Judges                                  |
| <b>NOON</b>      | Mona Salyer Lambird Spotlight Awards Luncheon<br>Keynote Speaker: Chandler Baker           |
| <b>1:50 P.M.</b> | How to Run for Office in Oklahoma: A Panel Discussion                                      |
| <b>3 P.M.</b>    | The Many Ways to Use a Law Degree: Alternative Careers in Law                              |
| <b>3:50 P.M.</b> | Closing Remarks and Adjourn  |
| <b>4 P.M.</b>    | Closing Reception and Happy Hour   |

*Agenda is subject to change*

**REGISTER NOW AT  
[WWW.OKBAR.ORG/WIL](http://WWW.OKBAR.ORG/WIL)**

# 2023 MONA SALYER LAMBIIRD AWARD RECIPIENTS

The Awards Luncheon will include 1 hour of CLE. The price of the luncheon for attorneys and guests is \$75. If you would like to register a guest for the luncheon, please contact Renee Montgomery at 405-416-7029 or [reneem@okbar.org](mailto:reneem@okbar.org).

Tables for eight people are available for purchase as well. To reserve a table, please contact Renee Montgomery. The luncheon will begin at noon in the Hall of Mirrors at the Civic Center Music Hall.



LeAnne Burnett  
Oklahoma City



Susan Carns Curtiss  
Oklahoma City



Tricia Louise Everest  
Oklahoma City



Betsy Jackson  
Tulsa



Sharolyn Whiting-Ralston  
Tulsa



*Mona Salyer Lambird*

The Spotlight Awards were created in 1996 to annually honor five women who have distinguished themselves in the legal profession and who have lighted the way for other women. The award was later renamed to honor 1996 OBA President Mona Salyer Lambird, the first woman to serve as OBA president and one of the award's first recipients, who died in 1999.

# **INTERESTED IN ANIMAL LAW?**

**New OBA Section Forming Now**



The Animal Law Section has been created to promote and assist OBA members with studying and understanding the laws, regulations and court decisions dealing with the legal issues involving animals. It is also intended to provide a forum for members to consider, educate and discuss the legal issues involved in humanity's relationship and coexistence with animals. Annual dues are \$20, and any OBA member in good standing is eligible to join. Interested in section leadership? Contact Enid attorney Gary Maxey at [60maxey@gmail.com](mailto:60maxey@gmail.com) or 918-323-5160 for more information.

**VISIT [AMS.OKBAR.ORG](http://AMS.OKBAR.ORG) TO JOIN!**

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- Student Loan Forgiveness: Where Are We Now?
- Language Access: Removing Barriers to Justice
- Innovative Use of Technology in the Courts
- Accessible Legal Forms: Automation and Plain Language
- Building a Justice-Conscious Practice
- Rural and Indigenous Solutions to the Technology Justice Gap
- Legislative Highlights Hour (Top Hits of 2023 Session)
- Opening Plenary: Artificial Intelligence and Access to Justice
- Closing Plenary: Innovative Technology Solutions for Justice

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OKLAHOMA  
ACCESS TO  
JUSTICE  
FOUNDATION

# 2024: Your Time to Get Involved!

**NOW IS YOUR OPPORTUNITY** to join other volunteer lawyers in making our association the best of its kind – by signing up to serve on an OBA committee in 2024.

Did you know the OBA has more than 20 active committees – meaning there are many opportunities for you to serve and lead in your profession? By joining a committee, you can get more involved in the association, network with colleagues and work together for the betterment of

our association and our communities – all in a way that is meaningful and relevant to you!

By serving on an OBA committee, you can tackle projects for which you have a passion – whether that’s improving access to justice for all Oklahomans, fostering public understanding of the law or helping your fellow lawyers who may be facing challenges with addiction or substance abuse. Plus, you’ll have the opportunity to build relationships with your professional

colleagues and build your network and leadership skills at the same time.

I invite you to review the full list below. We will make appointments for 2024 soon, so choose your top three committee choices and fill out the online form at <https://bit.ly/3SjMzcE>.

I am looking forward to hearing from you!

**Miles Pringle**  
*President-Elect*



To sign up or for more information, visit [www.okbar.org/committees/committee-sign-up](http://www.okbar.org/committees/committee-sign-up).

#### **Access to Justice**

Works to increase public access to legal resources

#### **Awards**

Solicits nominations for and identifies selection of OBA Award recipients

#### **Bar Association Technology**

Monitors bar center technology to ensure it meets each department’s needs

#### **Bar Center Facilities**

Provides direction to the executive director regarding the bar center, grounds and facilities

#### **Bench and Bar**

Among other objectives, aims to foster good relations between the judiciary and all bar members

#### **Cannabis Law**

Works to increase bar members’ legal knowledge about cannabis and hemp laws

#### **Civil Procedure and Evidence Code**

Studies and makes recommendations on matters relating to civil procedure or the law of evidence

#### **Disaster Response and Relief**

Responds to and prepares bar members to assist with disaster victims’ legal needs

#### **Diversity**

Identifies and fosters advances in diversity in the practice of law

#### **Group Insurance**

Reviews group and other insurance proposals for sponsorship

#### **Law Day**

Plans and coordinates all aspects of Oklahoma’s Law Day celebration

#### **Law Schools**

Acts as liaison among law schools and the Supreme Court

#### **Lawyers Helping Lawyers Assistance Program**

Facilitates programs to assist lawyers in need of mental health services

#### **Legal Internship**

Liaisons with law schools and monitors and evaluates the legal internship program

#### **Legislative Monitoring**

Monitors legislative actions and reports on bills of interest to bar members

#### **Membership Engagement**

Facilitates communication and engagement initiatives to serve bar members

#### **Member Services**

Identifies and reviews member benefits

#### **Military Assistance**

Facilitates programs to assist service members with legal needs

#### **Professionalism**

Among other objectives, promotes and fosters professionalism and civility of lawyers

#### **Rules of Professional Conduct**

Proposes amendments to the ORPC

#### **Solo and Small Firm Conference Planning**

Plans and coordinates all aspects of the annual conference

#### **Strategic Planning**

Develops, revises, refines and updates the OBA’s Long Range Plan and related studies

# WHAT'S THE **VALUE** OF YOUR OBA MEMBERSHIP?

WORTH OVER  
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## **FASTCASE**

Online legal research software with unlimited usage, customer service and printing

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## **OKLAHOMA BAR JOURNAL**

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## **ETHICS COUNSEL**

Confidential assistance with ethical questions and inquiries

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Business and management help through organization and operation assistance

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## **LAWYERS HELPING LAWYERS**

Monthly discussion groups and up to six hours of counseling

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## **LEXOLOGY**

Personalized daily newsfeed of legal updates with research tools

**\$500/YR**



## **COURTS & MORE**

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## **PLUS...**

### **NETWORKING OPPORTUNITIES**

#### **Leadership and volunteering** –

Opportunities to serve in committees, sections, boards and commissions.

**Events** – Network and earn CLE at Annual Meeting and Solo & Small Firm.

**Young Lawyers Division** – Professional service network for lawyers who have been practicing for less than 10 years

### **PROFESSIONALISM SERVICES**

#### **Continuing Legal Education** –

Hundreds of seminars, webcasts and audio programs

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**LawPay** – Credit card processing service specially designed for attorneys

### **MEMBERSHIP DISCOUNTS**

Discounts are available on services like Clio, Ruby, Smokeball, CaseText, Tabs3, TimeSolv and more! Just log into MyOKBar and select Practice Management Software Benefits.

FIND MORE AT **OKBAR.ORG/MEMBERBENEFITS**

# The 119th Annual Meeting: Aspiring and Inspiring Members

By Janet Johnson

**T**HE OBA ANNUAL MEETING is a great time for all our members to socialize and get quality continuing legal education. This year's theme is "Aspire & Inspire," and we ask that you all join us, so we can gather and discuss growth, collaboration and visions for the OBA.

One of the central aspects of the Annual Meeting is the power of aspiration. It's a time to aspire for greatness, set new goals, envision future accomplishments and chart the path forward. As members come together, we are hopeful that visions will be shared and that a collective ambition will grow to push our association to evolve and thrive.

But let's take it one step further – another central tenet of this year's meeting is our drive to inspire. It is time to motivate others by recognizing and celebrating the accomplishments of the past year. From our many OBA awards to section and committee work, our members continually go above and beyond. Seeing such great work gives me a sense of pride and determination to find ways to inspire more involvement for the greater good of the OBA. All our membership accomplishments, whether big or small, serve as beacons of inspiration and demonstrate what can be achieved with dedication and teamwork.



Register now at  
[www.okbar.org/annualmeeting](http://www.okbar.org/annualmeeting)

In today's fast-paced world, the value of face-to-face interaction cannot be understated. The Annual Meeting provides a space for members to build relationships beyond virtual exchanges and emails. Personal connections are formed, friendships are kindled and collaborations are sparked. This human touch brings warmth and authenticity to the association, strengthening its foundation for future endeavors.

I call on each of you to join us at this year's Annual Meeting – it will be a touchstone event that embodies the spirit of coming together, aspiring and inspiring. It's a merging of minds and hearts,

where diverse perspectives meld into a shared vision for the future. Through this gathering, aspirations are transformed into goals, and inspiration is harnessed to fuel action. The connections made during this time connect members and create unity.

Please join us this Nov. 1-3 at the historic Skirvin Hotel for the 119th Annual Meeting, and let's embark on a collective journey toward growth, collaboration and the realization of shared dreams. See you all then as we strive to "Aspire & Inspire" all!

*Janet*



To contact Executive Director Johnson, email her at [janetj@okbar.org](mailto:janetj@okbar.org).

FRIDAY,  
OCTOBER 13, 2023

9 a.m. - 3:20 p.m.

Oklahoma Bar Center



# 2023 BANKING AND COMMERCIAL LAW UPDATE

*Cosponsored by the OBA Banking and Commercial Law Section*

**PROGRAM PLANNER:** Eric Johnson, Hudson Cook, LLP

**Not Experts but Leaders: CEOs, Boards, and Cybersecurity**  
Anthony Hendricks, Crowe Dunlevy

**UCC Amendments, Recent Judicial Developments, or Both**  
Professor Stephen Sepinuck, Paul Hastings

**Banking Law Updates**  
Matt Mowdy, Oklahoma Banking Department

**Artificial Intelligence Risk and Regulation**  
Josh Snavely, McAfee Taft

**SARs and other Hot Topics**  
Wilson D. McGarry, Assistant U.S. Attorney, Western District of Oklahoma

**CFPB Updates for the Banking/Commercial Lawyer**  
Eric Johnson, Partner, Hudson Cook, LLP

**Disclaimer:** All views or opinions expressed by any presenter during the course of this CLE is that of the presenter alone and not an opinion of the Oklahoma Bar Association, the employers, or affiliates of the presenters unless specifically stated. Additionally, any materials, including the legal research, are the product of the individual contributor, not the Oklahoma Bar Association. The Oklahoma Bar Association makes no warranty, express or implied, relating to the accuracy or content of these materials.

# Artificial Intelligence Tools and Tips

By Jim Calloway and Julie Bays

**I**N AUGUST'S LAW PRACTICE Tips article, "ChatGPT, Artificial Intelligence and the Lawyer,"<sup>1</sup> we covered the development of AI tools and some challenges they have presented to attorneys who did not appreciate the limitations of ChatGPT. This month, we will look at more AI-powered tools and techniques for using them.

## DOCUMENT AND DEPOSITION SUMMARIES

One thing artificial intelligence does well is summarizing lengthy documents, such as depositions or long court opinions.

The Association of Immigration Lawyers of America (AILA) has been experimenting with powerful AI tools in their area of interest. A recent U.S. Supreme Court opinion, *U.S. v. Texas*, involved immigration law and was 75 pages long. Their tool quickly prepared a summary of the opinion, just over 14 pages in length. The summary is separated by page numbers in the original opinion so that if one had questions, it would be simple to read the page the summary was created from. Greg Siskind, an attorney in AILA, shared the summary, and I have placed it for download on Dropbox.<sup>2</sup>

While many AI tools can create document summaries, browser-based tools are a good place

to begin since they are free. But before we get to those, we should mention Claude.<sup>3</sup>

### Claude

Claude is an advanced natural language chatbot with capabilities that seem superior to those of ChatGPT. It is available at no cost during its beta phase. What distinguishes Claude from other chatbots is several features that surpass those of ChatGPT, including the ability to analyze documents containing up to 75,000 words and understand and compare multiple documents. Claude's database knowledge is updated through early 2023, and it supports multiple languages. The platform also demonstrates remarkable strengths in advanced reasoning and logic, as well as specialized academic knowledge.

## BROWSER-BASED AI TOOLS

If one wants to have an AI-powered research (not legal research) tool, the best option may be the AI tools built into existing search engines. The lawyer will need to review and revise the settings to share as little of your prompt information as possible.

### Google's Bard

Google's Bard is everyone's favorite price – free. To use Bard, you need a personal Google account

that you manage on your own or a Google Workspace account for which your administrator has enabled access to Bard. You still can't access Bard with an account managed by Family Link or with a Google Workspace for Education account designated as under the age of 18. It can be accessed at <https://bard.google.com>.

Google's Bard is listed as an experiment and readily admits to having limitations and learns from feedback. Bard is a conversational AI model capable of dialog, built on Google's LaMDA (Language Model for Dialogue Applications). Be aware that Google collects conversations you have with Bard, along with your IP address, feedback and usage information. A subset of conversations is sent to trained reviewers and kept for three years, with automation tools to remove personally identifiable information. Google asks that you please not include information that could identify you or others in Bard conversations. To limit it from using your prompts, you can go to your Google My Activity page<sup>4</sup> to toggle off storing your activity. You can also delete your activity from this page.

Bard's data, unlike ChatGPT, comes from the internet. Crafting good prompts is a skill many of us will be trying to improve.



Rokas - stock.adobe.com

Document summaries are one of the AI tools lawyers will use – a lot. There is a character limit for a Bard prompt. When prompted to summarize a 10,000-character article, it would only accept about 3,000 characters. However, you can obtain summaries of longer articles posted online by using the prompt “Summarize the article at [link to document].” These are generally quite accurate, but it is possible that AI may add its own “thoughts.” At least with document summaries, you will have the document handy for comparisons.

#### *Bing Chat*

The “new Bing”<sup>5</sup> is a chatbot incorporated into the search engine. You may be logged in to a personal Microsoft account. The chatbot is also available in the Edge browser,<sup>6</sup> the Edge mobile

browser<sup>7</sup> and the Windows 11 search bar.<sup>8</sup> The new Bing screen prompts, “Ask me anything,” allowing up to 1,000 characters. You can run a regular web search or toggle Chat. Bing Chat works best with Microsoft Edge or the Bing mobile app. It is available at no additional cost to subscribers to Microsoft 365 E3, E5, Business Standard and Business Premium. And in the future, it will be available as a stand-alone offering for \$5 per user per month.

Chat in Bing is developed on code from their partner, OpenAI. OpenAI powers ChatGPT. Bing, owned by Microsoft, acknowledges the same foibles as Google. You can review their approach to responsible AI.<sup>9</sup>

Bing Chat has a few different elements that contrast with Bard. First, the user chooses a

conversational style: more creative, more balanced or more precise. In Chat, you can add 2,000 characters, which is an increase from the regular Bing search. Instead of editing your prompt, you can continue to converse with Bing Chat by adding qualifying questions until you choose “New Topic.” The results for each type of search (creative, balanced or precise) are color coded so that it is easy to distinguish which mode is used.

Bing Chat also has a feature distinct from Google’s Bard. In the more creative mode, it will generate images powered by DALL-E.<sup>10</sup> It has restrictions so that you cannot misuse certain images, like celebrities, public figures and organizations. For more information, see *PC Mag’s* review of Bing Chat.<sup>11</sup>

## DRAFTING TOOLS

### *Copy.ai*

Copy.ai<sup>12</sup> is not for legal writing, but it is a great tool for writing for a general audience, whether it is a blog post or website copy. There is a free version that is limited to writing 2,000 words per month. The Pro version costs \$36 per month but licenses up to five users and includes priority tech support.

### *Spellbook*

Spellbook is an AI contract drafting software trained on thousands of business contracts, as well as other data. I would encourage you to watch the four-minute video at [www.spellbook.legal](http://www.spellbook.legal). In just a few short years, many, or perhaps most, contracts will be drafted using contract drafting tools. Spellbook's website states it was trained on billions of lines of legal text. We saw this demonstrated at ABA TECHSHOW. It was amazing to watch as it proposed several contract provisions and allowed the lawyer to choose the one that was preferred.

## VIDEO TRANSCRIPTION AND EDITING TOOLS

### *Descript*

Descript allows you to record a video or audio, and it will create a transcript of the words in the recording. One can then edit the audio by editing the text, and it will change the recording to reflect your changes. It will also *automatically* remove the "err" and "umm" sounds we often utter while recording.

Descript offers different plans to suit different needs and budgets. With the Free plan, you can record, transcribe, edit and mix up to one hour of content per month with filler word removal. With the Creator plan, you can access more features – such as overdub, screen record and publish – and

transcribe up to 10 hours of content per month for \$12 per month or \$144 per year. With the Pro plan, you get advanced features, such as multitrack editing and advanced export options, and can transcribe up to 30 hours of content per month for \$24 per month or \$288 per year. If one desires custom invoicing, more flexibility, security or expedited support, you can also opt for an Enterprise plan by contacting the Descript team.

Julie Bays reviewed Descript for the *ABA Law Practice Magazine*.<sup>13</sup>

## PRESEASON MVP PICKS

### *CoCounsel and Copilot*

CoCounsel from Thomson Reuters and Copilot from Microsoft were covered in the first installment of this series. We note them here again just to say that we believe these will be the tools most likely to be adopted initially and broadly by lawyers.

CoCounsel, the legal research tool, was retailing for \$500 per user per month. Even at that price

point, we have heard many positive comments from satisfied customers as to how their legal research was improved by using this tool.

Copilot from Microsoft is coming soon and will use all your data in Microsoft files (e.g., Word, Excel, Outlook and PowerPoint). That will provide some amazing capabilities. Sharon Nelson and Jim Calloway recently recorded a *Digital Edge* podcast, "Microsoft's Copilot: New AI Tools for Microsoft 365!"<sup>14</sup> with Microsoft's Ben Schorr. The day after they recorded their podcast, Microsoft announced pricing for Copilot at \$30 per user per month on top of your Microsoft 365 subscription.

## PROMPTS

In the AI world, your questions or queries are called prompts. These are sets of instructions we provide to AI chatbots to get them to perform a task. Multiple queries can sharpen the results, with each building on previous prompts.

## ARTIFICIAL INTELLIGENCE IN LAW PRACTICE

### ***On-Demand CLE Coming Soon!***

Ever since ChatGPT made its debut in November 2022, the world has been abuzz about artificial intelligence. In this on-demand session, we will discuss and demonstrate some AI built-in tools that you may already have, plus some that can be useful right away. Putting aside the issues surrounding ethics, IP, security and robot overlords, how can AI help you to get things done faster? Join Catherine Sanders Reach, director of the North Carolina Bar Association Center for Practice Management, and Julie Bays, practice management advisor for the OBA Management Assistance Program, as we explore practical and tactical uses of AI in your practice.

The program will be available in late September. Visit <https://ok.webcredenza.com> to access the session.

On one level, prompts are very simple. Just ask the AI a question. But learning how to use prompts effectively is something that requires a great deal of research and some trial and error. If you are worried about the impact of AI on your future, invest some time in learning how to do prompts on your preferred tool well.

According to the *Prompt Engineering Guide*,<sup>15</sup> elements of a prompt may contain any of the following elements:

- Instruction – A specific task or instruction you want the model to perform
- Context – External information or additional context that can steer the model to better responses
- Input Data – The input or question that we are interested to find a response for
- Output Indicator – The type or format of the output

In addition, your attention is directed to “Basics of Prompting,”<sup>16</sup> also from the *Prompt Engineering Guide* site. This resource is well written with very basic language. For a deep dive into prompt engineering, see the primer from *aman.ai*.<sup>17</sup> Dozens of similar resources are available online.

## INTELLECTUAL PROPERTY ISSUES

It is worthwhile to note that ChatGPT and other generative AI tools present many intellectual property issues. If you create something useful with AI, can it be copyrighted? According to the courts and the U.S. Copyright Office, the answer is no. But you can modify the AI-created content sufficiently to claim it as your own and copyright it. That sounds like there will be many factual questions involved.

One entertaining AI activity is to create images for entertainment.

So you could upload pictures of a relative, and it will generate their portrait as if painted by Picasso, Van Gogh or Rembrandt. Harmless fun. That is, until a well-known living American artist shows up at the lawyer’s office complaining of a huge drop in sales since the release of these AI tools and that six of the top 10 Google searches for her work are now AI-generated images in the style of her work. Authors may feel it is inappropriate that the online versions of their books were used to train the AI. There have already been suits filed by creators claiming the AI training violates their rights.

A recent *Digital Edge* podcast, “Generative AI and Copyright: Collision is Inevitable,”<sup>18</sup> featured Vedia Jones-Richardson, a principal with Olive & Olive PA, a North Carolina-based intellectual property law firm, where she leads the trademark and copyright practice group.

## CONCLUSION

ChatGPT and other LLM (large language model) AIs are easy and fun to use. That is how they became so popular so quickly. Despite some lawyers’ well-reported stumbles with initial uses of ChatGPT, most lawyers will use AI tools because they are powerful and accomplish tasks in minutes that would take a human hours or days. Now we are at the “good time to experiment” stage. It is time to give some of these tools a try.

And if we haven’t provided you with enough reading material in this column, let’s close by directing you to a post from author and legal futurist Richard Susskind, who is well known for his observations on the future of law practices and the legal system, “AI in the law - six thoughts.”<sup>19</sup>

*Authors’ Note: Thanks to Catherine Reach, director of the Center for Practice Management at the North Carolina Bar Association, for her contributions to this column.*

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

Ms. Bays is the OBA practice management advisor, aiding attorneys in using technology and other tools to efficiently manage their offices.

### ENDNOTES

1. <https://bit.ly/47x6ayu>.
2. <https://bit.ly/3qx84pW> (this link will likely only be active for a few months).
3. [www.claude.ai](https://www.claude.ai).
4. <https://myactivity.google.com>.
5. [www.microsoft.com/en-us/bing](https://www.microsoft.com/en-us/bing).
6. <https://bit.ly/3KJ6All>.
7. <https://bit.ly/3qzw04w>.
8. <https://bit.ly/3QFnprC>.
9. <https://bit.ly/3KGmiEc>.
10. <https://openai.com/dall-e-2>.
11. <https://bit.ly/3sc2GBv>.
12. [www.copy.ai](https://www.copy.ai).
13. <https://bit.ly/3ytKV0p>.
14. <https://bit.ly/3YzW7EQ>.
15. <https://bit.ly/3QIXIGv>.
16. <https://bit.ly/448XYBJ>.
17. <https://bit.ly/3OAnDh0>.
18. <https://bit.ly/3shl0ce>.
19. <https://bit.ly/470ufhd>.

## Meeting Summary

*The Oklahoma Bar Association Board of Governors met June 22, 2023.*

### REPORT OF THE PRESIDENT

President Hermanson reported he virtually attended meetings for the Legislative Monitoring Committee, the Oklahoma District Attorneys Association board, the Uninsured Vehicle Enforcement Diversion Program and the Membership Engagement Committee. He participated in discussions about the proposed front entry/handicap access for the Oklahoma Bar Center, worked on the 2023 OBA Annual Meeting with Executive Director Johnson and reviewed documents from OBA litigation. He attended the Southeastern Oklahoma Summit in Durant, the Sheep Creek Event hosted by the Pontotoc County Bar Association, the District Attorneys Council Special Committee meeting and the Sovereignty Symposium dinner to honor Baroness Emma Nicholson. He also gave the welcome presentation during the Sovereignty Symposium Tribal Leaders and Faculty Luncheon and presented service awards to OBA members at the Oklahoma County Bar Association luncheon meeting. He presented a program to the Oklahoma Supreme Court, Court of Criminal Appeals and Office of the Courts summer interns. Additionally, he had discussions and reviewed reports on the OBA Solo & Small Firm Conference, as well as discussions on the process for handling the

forming of a new section dealing with animal rights. He met with the Board of Governors' Lawyers Helping Lawyers liaison and Executive Director Johnson concerning the LHL Committee and Foundation. He also met with Executive Director Johnson, Executive Director Emeritus Williams and Clay Taylor on possible legislation relating to the Judicial Nominating Commission for next year's legislative session. He planned for the August meetings of the National Conference of Bar Presidents and the Southern Conference of Bar Presidents to be held in Denver and the October meeting of the Southern Conference of Bar Presidents to be held in West Virginia.

### REPORT OF THE VICE PRESIDENT

Vice President Williams reported he attended the June meetings of the Legislative Monitoring Committee, the Membership Engagement Committee and the Strategic Planning Committee, which was a virtual demonstration of the Breezio community platform. He also attended the Louisiana State Bar Association Annual Meeting, chaired the June meeting of the Professionalism Committee and planned and made arrangements for an alcohol-free hospitality suite at the Solo & Small Firm Conference.

### REPORT OF THE PRESIDENT-ELECT

President-Elect Pringle reported by email he worked on planning for the 2024 Annual Meeting with the Judicial Conference and attended a board meeting for the Oklahoma Attorneys Mutual Insurance Co. He also attended meetings for the Oklahoma Bar Foundation Development Committee and the Legislative Monitoring Committee.

### REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Johnson reported she attended meetings for the Membership Engagement Committee, the Legislative Monitoring Committee and the Military Assistance Committee, planning meetings for the Solo & Small Firm Conference and meetings for possible technology update demonstrations. She prepared and filed applications to suspend/strike for MCLE and dues and further researched and prepared for the 2023 and 2024 Annual Meetings. She attended multiple Federal Emergency Management Agency meetings, the Sheep Creek Event hosted by the Pontotoc County Bar Association and the Southeastern Oklahoma Summit planned by Governor Barbush. She met with the outreach coordinator and executive director of A Chance to Change to discuss education and service opportunities for LHL and OBA members and discussed

with the Bar Center Facilities Committee chairperson, the OBA president and the president-elect the next steps for front entry updates, as well as a consultant on possible project details. She reviewed petitions and bylaws for a proposed new section for animal law and met with the Board of Governors' Lawyers Helping Lawyers liaison and President Hermanson about the committee and foundation. She attended the Sovereignty Symposium and concluded the Judicial Nominating Commission District 1 election by notifying candidates and preparing certifications and communications. Additionally, she met with President Hermanson, Executive Director Emeritus Williams and Clay Taylor about possible legislation related to the Judicial Nominating Commission next session. She attended the Solo & Small Firm Conference, which included attending the Young Lawyers Division meeting and the Board of Editors meeting as well as presenting a CLE session.

#### REPORT OF THE IMMEDIATE PAST PRESIDENT

Past President Hicks reported by email he attended the Southeastern Oklahoma Summit in Durant, the State Bar of Texas Annual Meeting and the Tulsa County Bar Association Past Presidents Luncheon.

#### BOARD MEMBER REPORTS

**Governor Ailles Bahm** reported she attended the Legislative Monitoring Committee meeting and is assisting in the planning of the August Legislative Debrief. She also met with Executive Director Johnson and A Chance to Change's executive director and liaison to discuss existing services and possible additions. She attended the Lawyers Helping Lawyers Assistance Program Committee meeting, the Oklahoma County Bar Association Awards Luncheon and the Bench and Bar Committee meeting. Additionally, she participated as a lawyer member of a Professional Responsibility Tribunal hearing. **Governor Barbush** reported he organized, moderated and attended the Southeastern Oklahoma Summit, as well as attended the Sovereignty Symposium and the Solo & Small Firm Conference. **Governor Bracken** reported he attended meetings for the Legislative Monitoring Committee, the Military Assistance Committee and the Veterans Administration Sooner Stand Down Committee. He chaired the Military Assistance Committee meeting, worked with the Family Law Section on a joint CLE session with the committees and met with OBA staff about how to improve the OBA Heroes Program. **Governor Smith** reported the Diversity Committee met and discussed the annual Diversity Dinner and the planning of a CLE session centered on voting rights. **Governor Thurman** reported by email he hosted the Sheep Creek

Event in Pontotoc County. **Governor Vanderburg** reported he attended the May and June meetings of the Oklahoma Association of Municipal Attorneys Board of Directors, audited the Climate Change meeting of the International Municipal Lawyers Association and taught a seminar on SB 462 and HB 2259 with the Oklahoma Municipal Court Clerks Association. **Governor White** reported he attended the Tulsa County Bar Association board meeting and gave the Professionalism Moment. He also attended the Legal Internship Committee Meeting as the board liaison.

#### REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported from May 1 to May 31, the Office of the General Counsel received 15 formal grievances and 66 informal grievances. These numbers compare with 13 formal grievances and 61 informal grievances, respectively, for the same time period last year. As of May 31, there were three disciplinary cases, two reinstatement cases, one resignation pending disciplinary proceedings and one petition for rehearing awaiting decisions from the Oklahoma Supreme Court. Between May 1 and May 31, the Supreme Court issued four orders of suspension and one order holding case in abeyance. As of May 31, 2023, there were 159 grievances pending investigation by the Office of the General Counsel for future presentation to the Professional Responsibility

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## Governor Ailles Bahm reported the Lawyers Helping Lawyers Assistance Program Committee met with A Chance to Change, and she noted OBA publications have been regularly sharing and repurposing their mental health content.

Commission. In addition to the pending investigations, there are three grievances awaiting a private reprimand and 15 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 12 grievances and letters of admonition involving 10 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 Conner reported the **Awards Committee** has extended its deadline for awards nominations until July 14 and encouraged his fellow board members to submit nominations. Governor Ailles Bahm praised the **Bench and Bar Committee** leadership for its excellent recent meeting. She reported the **Lawyers Helping Lawyers Assistance Program Committee** met with A Chance to Change, and she noted OBA publications have been regularly sharing and repurposing their mental health content. She said the committee is seeking lawyer volunteers to better address mental health issues

in the legal profession, and more help is needed. Governor Barbush noted the committee presented on mental health topics during the Southeastern Oklahoma Summit. Governor Barbush also said the **Cannabis Law Committee** is meeting regularly and is successfully facilitating communication through a widely used message board. Governor Smith noted the **Diversity Committee** met and finalized plans for its annual Diversity Dinner and Diversity Awards presentations. The keynote speaker will be Professor Carla Pratt, who serves as the Ada Lois Sipuel Fisher Chair in Civil Rights, Race and Justice in Law at the OU College of Law. The committee is also planning a CLE on voting rights. Governor Hilfiger said that the **Law Day Committee** recently wrapped up a successful event and that the committee chair would be presenting later during the meeting. Vice President Williams said the **Legislative Monitoring Committee** and the **Professionalism Committee** are both meeting regularly. He said the **Membership Engagement Committee**, at its recent meeting, received an analysis of Annual Meeting membership survey results. Governor Bracken reported the **Military Assistance Committee**

met and focused on planning for joint Family Law and MAC CLE. The committee is also discussing plans for the OBA Heroes Program, which provides assistance to veterans and military service members.

### PETITION TO CREATE ANIMAL LAW SECTION AND PROPOSED BYLAWS

The board passed a motion to approve the creation of a new Animal Law Section.

### CONSIDERATION OF AMENDING OBA BYLAWS TO ADD THE PAST PRESIDENT AS AN OFFICER OF THE OBA BOARD OF GOVERNORS

The board passed a motion to advance a recommendation to the House of Delegates to amend the bylaws so that the immediate past president serves as an officer during their one-year term as such.

### ANNUAL LAW DAY COMMITTEE REPORT

Ed Wunch, committee chair, reported that Law Day activities were held across the state on May 1 and enjoyed a high degree of success. Details were included along with goals for Law Day 2024.

### UPCOMING OBA AND COUNTY BAR EVENTS

President Hermanson reviewed upcoming bar-related events, including the New Admittee Swearing-In, September; the annual Women in Law Conference, Sept. 22; and the OBA Annual Meeting, Nov. 1-3, Skirvin Hilton Hotel, Oklahoma City.

### NEXT BOARD MEETING

The Board of Governors met in July and August, 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 Friday, Sept. 22, in Muskogee.

# 75 YEARS OF IMPACT AND BEYOND

## A History of the Oklahoma Bar Foundation

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By Renée DeMoss and Bob Burke  
*Foreword by The Honorable Noma Gurich*



*"The history of the Oklahoma Bar Foundation will always be intertwined with the history of the Oklahoma Bar Association and the dynamic evolution of the legal profession in Oklahoma."*

"Oklahoma's legal profession is strong and innovative, and at the same time, our state courts and citizens have many needs that go unmet due to lack of funding. ... Through grants and scholarships, the OBF fills critical funding gaps which benefit the statewide judiciary in meaningful ways. OBF Grants have been used to improve legal services and juvenile court facilities to assist children and families."

*- The Honorable Noma Gurich*

### About the Authors

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Renée DeMoss is the executive director of the Oklahoma Bar Foundation. She served as president of the OBF in 2008 and president of the OBA in 2014. Ms. DeMoss maintained a business litigation practice at GableGotwals in Tulsa for 35 years.



Bob Burke has been a workers' compensation and constitutional lawyer for 42 years. He is vice chair of the Oklahoma Supreme Court Committee on Judicial Elections and a Trustee of the Oklahoma Bar Foundation. Mr. Burke is a member of the Oklahoma Hall of Fame and has written more historical nonfiction books (154) than anyone in history.

### Book Signing

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Join authors Renée DeMoss and Bob Burke for a come and go book signing event. RSVP to 405-416-7070 or [foundation@okbar.org](mailto:foundation@okbar.org).

Thursday, Sept. 28  
4:00-6:30 p.m.

Oklahoma Judicial Center Great Hall  
2100 N. Lincoln Blvd., Oklahoma City

### Purchase the Book

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\$30 minimum donation to the Oklahoma Bar Foundation. Purchase books at the book signing, OBF office or at the OBF Booth at OBA Annual Meeting.

# Community Partners for Justice Campaign

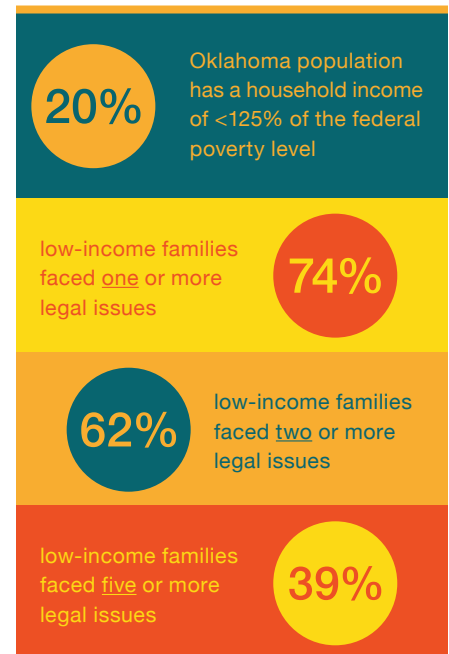
**ACCESS TO LEGAL SERVICES** can be life-changing, but sadly, most of the legal issues faced by low-income Oklahomans go unresolved due to insufficient resources to get legal help. Such unmet legal needs are often the reason Oklahoma families remain in a perpetual cycle of poverty, abuse and hardship. This is why the OBF recently launched its Community Partners for Justice Campaign – to raise more funds to better meet the legal needs of those living in our state.

According to the 2022 *Justice Gap Study* by the Legal Services Corp., 20% of Oklahoma household incomes are less than 125% of the federal poverty level. This puts us at fourth in the U.S. for the proportion of low-income residents.

This same report shows alarming national estimates that more than half of low-income households have one or more legal issues. Nonprofits work hard every day to meet the demand, but unfortunately, the number of people trying to get help with legal issues overwhelms the resources available.

“The legal needs in our state are vast, and it will take every Oklahoma lawyer to make an impact on them,” said OBF President Deanna Hartley-Kelso. “Partnering with the OBF is one of the best ways to do that and ensure there is adequate funding to support our communities.”

Contributions to the Community Partners Campaign will directly support OBF Grantees providing critical legal services across the



state. These services include legal representation for a wide-ranging group of vulnerable populations, including deprived children, domestic violence victims, homeless people, refugees, victims of human trafficking and low-income individuals in need of civil legal aid.

All law firms, organizations and businesses are invited to join the 2023 Community Partners Campaign. The deadline for donations is Sept. 30. Donor recognition for this campaign starts at \$1,000, but all donations are accepted.

Contact OBF Development Director Candice Pace for more information and if you would like to schedule a presentation for your group. Email [candicej@okbar.org](mailto:candicej@okbar.org) or call 405-416-7070.

### 2023 COMMUNITY PARTNERS FOR JUSTICE CAMPAIGN

Choose your level of impact:

- \$1,000/year – Community Partner
- \$2,500/year – Community Supporter
- \$5,000/year – Community Champion
- \$7,500/year – Community Pillar
- \$10,000+/year – Community Cornerstone

Give online at [www.okbarfoundation.org/donate](http://www.okbarfoundation.org/donate)  
Mail checks to: Oklahoma Bar Foundation, P.O. Box 53036,  
Oklahoma City, OK 73152

# PARTNER WITH THE OKLAHOMA BAR FOUNDATION

Make access to justice a priority in your charitable giving!

## Partners Advancing Justice



### Partners Advancing Justice

Individual giving program – giving starts at \$10/month or \$100/year.



### Community Partners for Justice

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](mailto:foundation@okbar.org)).



**Give Now!**



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# The YLD's Call to Service Goes to Those Who Answer Heroic Calls

*By Caroline Shaffer Siex*

**H**EROES OFTEN APPEAR in tales of bravery, hope and adventure. They have been popular since ancient Greece. However, we forget that some of these tales have a dark part: As our heroes rise to help us, they, unfortunately, might fall.

When the unexpected happens, the heroes who served us leave behind their legacy. Likewise, they leave behind loved ones. In a small effort to honor their work, the Oklahoma Bar Association has maintained a Wills for Heroes program. The program helps those who serve their communities by

offering no-cost legal assistance in the areas of wills and estate planning. The Wills for Heroes program serves first responders, emergency personnel and veterans.

The program is offered by volunteer attorneys who provide their time to assist the community. It has, for a number of years, been the responsibility of the OBA Young Lawyers Division to sponsor these events. During that time, the program has changed locations to increase participation and awareness.

The YLD hosted a Wills for Heroes event in northeastern Oklahoma at the Shangri-La Resort on July 29. The event allowed for multiple wills to be created for "heroes." Most of the YLD board was present, with one board member being based in the area.

This is the second event in the past few years that the YLD has participated in in the northeastern Oklahoma area. In 2019, the YLD partnered with Lee | Coats Law PLC to host an event in Vinita, which was also successful in providing a number of heroes with wills. In 2018, the YLD hosted an event in Broken Arrow around the time of the Solo & Small Firm Conference. This event launched the success that followed in helping the heroes.



YLD members provide free legal services to a client during the Wills for Heroes event.

The YLD continues to work on expanding this program and hopes that future partnerships with law firms or other vendors will help in creating a larger event next year. I know so many board members are dedicated to offering their services on the YLD board, and my successor, Laura Talbert, will continue leading everyone to offer a little bit back to heroes.

If you would like to sponsor or host future Wills for Heroes events, contact the current chair at [cshaffer@gablawyers.com](mailto:cshaffer@gablawyers.com) and/or the chair-elect at [lrtalbert@gmail.com](mailto:lrtalbert@gmail.com).

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Ms. Shaffer Siex practices in Tulsa and serves as the YLD chair. She may be contacted at [cshaffer@gablawyers.com](mailto:cshaffer@gablawyers.com).



Ten attorneys volunteered to help Oklahoma first responders, emergency personnel and veterans during the Wills for Heroes event on July 29 at the Shangri-La Resort in Afton.

# FOR YOUR INFORMATION

## OU LEGAL PROGRAM UNDERGOES NAME CHANGE

In 2020, the American Bar Association exchanged the term “legal assistant” for “paralegal” in its definition of “a person qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible.” After receiving feedback from students, graduates and administrators, the OU Law Center has followed suit, changing the name of the Department of Legal Assistant Education to Paralegal Studies.

Katheleen Guzman, dean of the OU College of Law, explained, “This change lets employers know that our program’s graduates are educated in substantive areas of law and are prepared to complete substantive legal work under the supervision of a licensed lawyer.”

OU’s paralegal program stresses understanding and reasoning rather than rote learning of facts. Students are taught to perform tasks that have traditionally been handled by lawyers: They may interview clients, research legal issues, prepare documents and assist in litigation, allowing the supervising lawyer to provide quality representation at a lower cost to the client. Paralegals cannot give legal advice, accept cases, represent clients in court or perform any legal service without the supervision of a licensed lawyer. To learn more about the program, visit <https://bit.ly/3QKXMWu>.



COLLEGE OF LAW  
*The UNIVERSITY of OKLAHOMA*

## NEW OBA SECTION SEEKS LEADERSHIP

The Animal Law Section has been created to promote and assist OBA members with studying and understanding the laws, regulations and court decisions dealing with the legal issues involving animals. It is also intended to provide a forum for members to consider, educate and discuss the legal issues involved in humanity’s relationship and coexistence with animals. Annual dues are \$20, and any OBA member in good standing is eligible to join. Register at [ams.okbar.org](https://ams.okbar.org). Section leadership is forming now! Contact Enid attorney Gary Maxey at [60maxey@gmail.com](mailto:60maxey@gmail.com) or 918-323-5160 for more information.



## IMPORTANT UPCOMING DATES

The Oklahoma Bar Center will be closed Monday, Sept. 4, in observance of Labor Day. Remember to register and join us for the OBA Annual Meeting to be held at the Skirvin Hilton in downtown Oklahoma City Nov. 1-3.

## LHL DISCUSSION GROUPS HOSTS OCTOBER MEETINGS

The new Lawyers Helping Lawyers women’s discussion group will meet on the fourth Thursday of every month from 6-7:30 p.m. in Oklahoma City at the Oil Center, 2601 NW Expressway. Discussion groups will also meet Oct. 5 in Oklahoma City at the office of Tom Cummings, 701 NW 13th St, and Oct. 12 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](https://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 CLEs, upcoming events and the latest information about the Oklahoma legal community. Connect with us on LinkedIn, Facebook and Instagram.



## ON THE MOVE

**Andrew G. Wakeman** has joined the Tulsa law firm of Atkinson, Brittingham, Gladd, Fiasco & Edmonds as a partner. He received his J.D. from the TU College of Law with highest honors in 2006. During school, he worked as an editor of the *Tulsa Law Review* and was awarded the Order of the Curule Chair. As a litigator, Mr. Wakeman has defended cases involving automobile negligence, insurance breach of contract, insurance bad faith and medical malpractice. He has also taken numerous cases to trial as both first and second chair counsel. He is a member of the American Bar Association and the Tulsa County Bar Association and is admitted to practice in the U.S. District Courts for the Northern, Eastern and Western districts of Oklahoma.

**Scott Delaney** has joined the Dallas office of Winston & Strawn as a partner. He is in the Transactions Department's Private Equity Transactions Practice and is focusing involvement with the firm's Energy & Infrastructure Industry Group. He practices in the areas of corporate transactions for companies, as well as private equity sponsors and their portfolio companies, with an emphasis on the energy sector. Mr. Delaney also assists in advising clients on general corporate matters, including operating and commercial contract matters.

**Timothy F. Campbell** has joined the Oklahoma City office of Hall Booth Smith as an associate attorney. He practices in the areas of

health care, medical malpractice, premises liability, general liability, professional liability and bad faith defense matters. Previously, he has gained experience in civil litigation at several Oklahoma City defense firms and has conducted numerous bench and jury trials, both solo and as second chair. Mr. Campbell received his J.D. from the OCU School of Law.

**Jordan L. Miller** has been named partner at the Oklahoma City law firm of Collins, Zorn & Wagner. He has been with the firm since 2012 when he first moved to Oklahoma. Mr. Miller is involved in the firm's defense of municipalities and counties in civil rights, tort claims and employment matters, as well as maintaining an appellate practice. He received his J.D. from the University of Washington School of Law, where he was a member of the Order of the Coif.

**Sean Harrington** has joined the Donald E. Pray Library at the OU College of Law as the director of technology innovation. He previously served as the law and technology librarian for the Arizona State University Sandra Day O'Connor College of Law, where he focused his attention on new technologies in legal research and taught a course for J.D. students.

**Allison J. Wilson, Lucas R. Stephens** and **Thomas A. Swafford** have established Wilson Stephens Swafford Law in Stillwater. The firm, which will primarily serve Payne, Noble, Pawnee, Logan, Kay

and Lincoln counties, will provide services in the area of family law, including divorce, child custody, guardianship and adoption. Mr. Swafford will also provide services in the area of criminal defense, including expungements of criminal records. Mrs. Wilson and Mr. Stephens previously worked together as Wilson Law Group.

**John Sullivan** and **Brian Tully** will launch GableGotwals' new office in Houston as the firm expands to Texas. The office is located in Houston's Central Business District at 1100 Louisiana St., Ste. 5000.

**Hunter M. Siex** has joined the law firm of McBride & McBride as an attorney. He will practice in all aspects of services provided by the firm, with a focus on civil and personal injury litigation. Mr. Siex has experience in personal injury, medical and dental malpractice defense, insurance defense and subrogation and civil rights litigation.

**Judge Rafe Hall** has been appointed district judge for the 3rd Judicial District, which includes Greer, Harmon, Jackson, Kiowa and Tillman counties. He has served as the associate district judge for Jackson County since being appointed by Gov. Kevin Stitt in January. Prior to that appointment, Judge Hall served as a special judge for Jackson County, a private practice attorney and an assistant district attorney for Oklahoma County. He received his J.D. from the OCU School of Law.

## KUDOS

**Melissa Handke** was appointed by Gov. Stitt to serve as district attorney for the 20th Judicial District. The district includes Carter, Johnston, Love, Marshall and Murray counties. Prior to her appointment, Ms. Handke served as the first assistant district attorney for the 20th Judicial District since 2021 and as assistant district attorney since 2015. In these roles, she prosecuted one-third of all criminal cases for the district and oversaw judicial district and Child Support Office personnel. She has worked for firms covering all areas of the law.

## AT THE PODIUM

**David H. Herrold** spoke at the In-House Counsel 101 session of the Advanced In-House Counsel Course in San Antonio. This seminar is hosted annually by the State Bar of Texas. Mr. Herrold spoke about the nuances of the attorney-client privilege as it exists between in-house lawyers and their corporate employer clients.

**John J. Foley** received the 2023 James Waite Mahoney Award presented by the State Bar of Arizona Juvenile Law Section. The award is presented annually to a person who provided distinguished meritorious service to the Juvenile Law Section. Mr. Foley is the former head of the Juvenile Division of the Oklahoma County District Attorney's Office and was the first general counsel of the Office of Juvenile Affairs. He currently lives and practices in Phoenix.

**Nick Atwood** has joined The Counselors of Real Estate. The international organization is comprised of professionals who provide expert advice and guidance on complex real estate matters. Mr. Atwood, a partner at the law firm of Ritchie Rock & Atwood, practices in the areas of property law, eminent domain law, general civil litigation, business law, banking law, municipal law, family law and tribal law.

**Irving L. Faught**, a 58-year OBA member, has published *Oklahoma Business and Commercial Law* through Matthew Bender. He is the author of *Oklahoma Business Organizations: Formation and Representation* (Lexis/Matthew Bender, 1990 – supplemented annually through 2010), a practice manual for lawyers concerning material specific to Oklahoma corporate, partnership, limited liability companies and securities law. Mr. Faught is an adjunct professor of law at the OCU School of Law. **Moira C.G. Watson**, of the Oklahoma City office of Hall Estill, co-authored the "Commercial Law" chapter. The publication is available for purchase at <https://bit.ly/44oRgYm>.

### 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](mailto:barbriefs@okbar.org)

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

## IN MEMORIAM

**Paul Willson Austin** of Norman died Jan. 16. He was born June 25, 1960, in Topeka, Kansas. Mr. Austin studied law at the University of Oxford and received his J.D. from the OCU School of Law in 1985. He practiced with the law firm of Israel & Israel and with Legal Aid Services of Oklahoma in Lawton, where he later served as managing attorney in the Norman office. He then practiced in the private sector as a tireless advocate for children and families. Mr. Austin donated his time as a guardian *ad litem* and volunteered as a moot court and skills competition judge, passing his knowledge on to future lawyers. He also provided his auctioneering services to the Organization for the Advancement of Women in the Law and served as president of the Cleveland County Bar Association, past president of the Sooner Theatre board and commissioner on the Norman Housing Authority board. Memorial contributions may be made to any of Mr. Austin's favorite organizations or to one that is dear to your heart.

**Carlton Wayne Dimery** of Norman died July 8. He was born March 29, 1972, in Norman. Mr. Dimery received his J.D. from

the OU College of Law in 2001. He began his legal career at the Dimery Law Offices in Norman, working alongside his father who had been practicing for more than 60 years. He was involved in community organizations such as Leadership Norman and previously served as vice president of the Jazz in June Board of Directors.

**Roger Duncan Graham** of Fort Worth, Texas, died June 27. He was born Aug. 22, 1951, in Rotan, Texas. He received his J.D., *magna cum laude*, from the Texas Tech University School of Law in 1981. Mr. Graham and his wife practiced law in Oklahoma City offices for 20 years before moving to Southlake, Texas. He was dedicated to the oil and gas industry and the law, practicing until his death.

**Donna Dee McLain** of Sand Springs died Oct. 14, 2022. She was born Oct. 2, 1953. Ms. McLain received her J.D. from the OU College of Law in 1987. After college, she worked in Los Angeles as an accountant for several different companies before returning to Oklahoma and practicing law. Ms. McLain also worked

at the Oklahoma Corporation Commission before returning to Sand Springs, where she set up a CPA law firm. She was co-chair of the first Sand Springs Community Thanksgiving Dinner and a member of the Sand Springs First United Methodist Church and the Sand Springs Rotary Club, in which she served as president and fellow.

**Mark William Osby** of Yukon died July 23. He was born Nov. 29, 1968, in Fort Worth, Texas. Mr. Osby received his J.D. from the OCU School of Law in 1994. He was a member of St. Luke's United Methodist Church and served as master councilor and eventually state master councilor at the Will Rogers Chapter of DeMolay International. Mr. Osby was a director of the YLD board beginning in 1998 and the YLD chair in 2004. Additionally, he was involved in Mock Trial, including serving as the chair of the OBA YLD Mock Trial Committee and volunteering as a mentor and judge for several years. In 2000, he served as the president of the Canadian County Bar Association, and he was awarded the OBA Outstanding Young Lawyer Award in 2005.

The obituary published in the August *Oklahoma Bar Journal* for Federal Administrative Law Judge Angelita Aunko Hamilton incorrectly stated that she had passed away. **This information is not correct. Ms. Hamilton is alive and doing well.** The *Oklahoma Bar Journal* and the Oklahoma Bar Association deeply regret this serious error and express our apologies to her and her family and friends.

## 2023 ISSUES

### OCTOBER

**Access to Justice**  
Editor: Evan Taylor  
tayl1256@gmail.com

### NOVEMBER

**Agricultural Law**  
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### OCTOBER

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**Experience (Sample Successful Appeals):**

- Forty-Four Years Legal Experience
- 2020 – Amicus Brief: Washing Out ORRI (*Arnold v. Cabot Oil*, 2021 OK 4)
- 2019 – Appellant Counsel: Inadequate Legal Description (*Riverbend Lands, LLC v. State of Oklahoma, ex rel, Oklahoma Turnpike Authority*, 2019 OK CIV APP 31)
- 2017 – Amicus Brief: Enforcement of Ancient Probate (*Bebout v. Ewell*, 2017 OK 22)

**Reputation (Articles Cited By Courts):**

- *RCB Bank v. Stitt*, 2022 OK CIV APP 3, ¶38: Race/Notice Interpretation
- *In the Matter of the Estate of Hyer*, 2020 OK CIV APP 31, FN 6: Marital Homestead Conveyance Signatures
- *Logan County Conversation District v. Pleasant Oak Homeowners Association*, 2016 OK 65, ¶14: Easement Definition

**Knowledge (Research and Teaching):**

- Wrote Textbook and Taught “Oklahoma Land Titles” for Over Thirty Years at OCU Law School
- Oklahoma Title Examination Standards Committee Chair for Over Thirty Years
- Editor and Contributor to West’s *Oklahoma Real Estate Forms* Book for Over Twenty Years
- Numerous Articles and Presentations on Real Property Title Issues (See Website)
- Taught Oklahoma Bar Review: Real Property for Several Years

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JUDGE ADVOCATE GENERAL'S (JAG) CORPS for Oklahoma Army National Guard is seeking qualified licensed attorneys to commission as part-time judge advocates. Selected candidates will complete a six-week course at Fort Benning, Georgia, followed by a 10 ½-week military law course at the Judge Advocate General's Legal Center on the University of Virginia campus in Charlottesville, Virginia. Judge advocates in the Oklahoma National Guard will ordinarily drill one weekend a month and complete a two-week annual training each year. Benefits include low-cost health, dental and life insurance, PX and commissary privileges, 401(k) type savings plan, free CLE and more! For additional information, contact CPT Jordan Bennett at [jordan.r.bennett.mil@army.mil](mailto:jordan.r.bennett.mil@army.mil).

THE OKLAHOMA ETHICS COMMISSION SEEKS APPLICANTS FOR AN EXECUTIVE DIRECTOR. More information on the Commission and the Director expectations may be found in the posting about the position at [www.ethics.ok.gov](http://www.ethics.ok.gov). Applicants must submit a cover letter, resume, and three references (one may be personal reference) to the Commission by 4:30 p.m. September 15, 2023.

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The Office of Legal Counsel for the OSU/A&M Board of Regents has an opening for a staff attorney position in its Tulsa office. The position will be primarily dedicated to the OSU Center for Health Sciences system and will focus on regulatory compliance, contracts and healthcare law issues impacting a research center and Osteopathic Medical School. Prior experience in healthcare law is preferable but not required. The precise duties assigned may vary from the above, based upon the experience and aptitude of the successful applicant. The position requires a Bachelor's degree and J.D./LL.B. degree from an accredited law school and membership in good standing in the Oklahoma Bar Association. The position also requires superior oral and written communication skills, an ability to identify and resolve complicated, sensitive problems creatively and with professional discretion, and an ability to interact and function effectively in an academic community.

To receive full consideration, resumes should be submitted via email by Sept. 30, 2023, to [cindy.pearson@okstate.edu](mailto:cindy.pearson@okstate.edu).

*For accommodation requests and assistance visit the OSU System Campus Human Resources Contacts. The OSU System includes campuses located in Oklahoma City, Okmulgee, Stillwater and Tulsa, Oklahoma.*

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THE U.S. ATTORNEY'S OFFICE FOR THE EASTERN DISTRICT OF OKLAHOMA in Muskogee, OK is seeking applicants for one or more Assistant U.S. Attorney positions for our Criminal Division. AUSAs in the Criminal Division have the unique opportunity to represent the United States of America by directing the investigation and prosecution of federal offenses occurring within the Eastern District, including Indian Country. Salary is based on the number of years of professional attorney experience. Applicants must possess a J.D. degree, be an active member of the bar in good standing (any U.S. jurisdiction) and have at least one (1) year post-J.D. legal or other relevant experience. Prior violent crime prosecution and jury trial experience is preferred. AUSAs may live within 25 miles of the district, which includes much of the Tulsa metropolitan area. See vacancy announcement 23-12029252-AUSA at [www.usajobs.gov](http://www.usajobs.gov) (Exec Office for US Attorneys). Applications must be submitted online. See How to Apply section of announcement for specific information. Questions may be directed to Jessica Alexander, Human Resources Specialist, via email at [Jessica.Alexander@usdoj.gov](mailto:Jessica.Alexander@usdoj.gov). This is an open, continuous announcement that will close no later than December 26, 2023. Applications will be reviewed on a rolling basis, with the first review no earlier than 5 days after the date of this announcement. Additional reviews of applications will be conducted periodically, after the initial review, until all positions are filled.

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ESTABLISHED PREMIER SMALL TOWN LAW FIRM is seeking a full or part-time Attorney or Legal Intern. Candidates should be a licensed attorney or enrolled in law school, and interested in criminal defense, family law and Native American venues. Interested candidates will have an opportunity to participate in ongoing defense cases and trials in diverse venues. Compensation will depend on experience and/or level of education. Interested candidates should contact Bennett & Gallon PLLC, 918-540-1818.

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## POSITIONS AVAILABLE

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Defense Counsel provide clients with competent legal advice and zealous advocacy at every phase of the criminal trial process, while representing indigent individuals in state court at the trial level in felony, misdemeanor, juvenile delinquency, traffic and wildlife cases. Applicants should possess a Juris Doctorate degree, active membership, and good standing with the State Bar of Oklahoma, or eligibility for admission; OR should be scheduled to take the Oklahoma Bar Exam.

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Applications must be submitted online. Visit [www.oids.ok.gov](http://www.oids.ok.gov) or <https://bit.ly/3lsI70r> to view job announcements and apply online. This is an open, continuous announcement; application reviews will be conducted periodically until all positions are filled.

## POSITIONS AVAILABLE

NATIONAL LAW FIRM SEEKS ASSISTANT SUPERVISING ATTORNEY with three or more years' experience. Successful candidates will be motivated and detail-oriented individuals with excellent communication skills and ability to navigate complex, multi-dimensional initiatives. The job involves working a comprehensive traffic case docket and professionally negotiating with court personnel toward a favorable outcome for client(s). Additional job duties include supervising other attorneys and legal staff. Starting salary is \$95,000 per year. Benefits include company-paid annual Bar dues, company-paid CLE expenses, medical, dental, vision, 401(k) 4% matching, and paid vacation and sick time. Forward resumes to [pam@klepperlaw.com](mailto:pam@klepperlaw.com).

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Application forms may be obtained online at [okjnc.com](http://okjnc.com) or by contacting Tammy Reaves at (405) 556-9300. Applications must be submitted to the Chairman of the JNC no later than 5:00 p.m., Friday, September 15, 2023. Applications may be mailed, hand delivered or delivered by third party commercial carrier. If mailed or delivered by third party commercial carrier, they must be postmarked on or before September 15, 2023 to be deemed timely. Applications should be mailed/delivered to:

Jim Bland, Chairman  
Oklahoma Judicial Nominating Commission  
c/o Tammy Reaves  
Administrative Office of the Courts  
2100 N. Lincoln Blvd., Suite 3  
Oklahoma City, OK 73105

# A Personal Reflection on the Rehabilitation Act at 50

By Amy Gioletti

**S**EPT. 26 IS THE 50TH anniversary of the Rehabilitation Act of 1973, a landmark law that includes “Section 504,” prohibiting discrimination against persons with disabilities in federally funded programs and services. The Rehabilitation Act, and in particular, Section 504, was groundbreaking because it provided civil rights to persons with disabilities, and it served as a model for the Americans with Disabilities Act.

My brother was four years old. He spoke only a few words, one of which was “swimming.” I was sitting with my mother in the first of many meetings with school officials. That time, they wanted to remove Zach from swimming time. It was clear to me this conversation would devolve quickly into stereotypes and hurt feelings, not to mention potential legal challenges. I knew that every morning, my brother woke up excited for swimming time, even on weekends. “Swimming, swimming, swimming!” he sang. The water soothed the strain on his muscles and bones. Equally important was the laughter he shared with his friends during swimming time. By suggesting the removal of it, school officials proposed to deny Zach one of the few chances he had to freely exist in the world as a child with other children. This meeting mattered.

We left the meeting with a solution, and Zach kept swimming. It is no small thing that my brother had the opportunity to continue to

participate with his peers in a meaningful activity to him because of Section 504 of the Rehabilitation Act. In fact, the doors of public education were only open to him because of the law: Section 504, preceding court cases and other federal laws providing access to public education for students with disabilities.

Since the Rehabilitation Act was enacted 50 years ago, other civil rights laws have been enacted, and there have been cultural shifts as well. There have been remarkable technological advances as well as more basic advancements in society, such as accessible shopping carts and adult-sized changing tables. These types of supports assist persons with physical disabilities in navigating the built environment and expand opportunities to participate in basic community life with dignity.

Even still, there are not enough services. My brother remained on the state waiting list for the Medicaid waiver program for a decade. He died waiting, like so many other people whose lives would have vastly improved with access to myriad in-home supports. Community-based living – true choice and self-direction – benefits the person and the entire community. All our lives are enriched when we can know our neighbors and move through the world as we choose for ourselves. Not to mention the immeasurable benefits of the removal of physical, systemic



and attitudinal barriers so that all of us can enter society through the front door.

In law school, one of my professors frequently asked, “Do laws change first, or do people?” As guardians of the Constitution, we often see first-hand how rhetorical – perhaps even silly – this question is. In my view, people change laws, and sometimes, laws change people. Change can be slow, but it feels even slower when your life depends on it.

On 50 years of the Rehabilitation Act, may we reflect on the legacy of persons with disabilities and their allies, who participated in protests and sit-ins to demand its passage and, later, regulatory enactment. May we also reflect on the work we might all do, personally or professionally, to ensure the front door is open to everyone.

---

Ms. Gioletti lives in Oklahoma City.

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FEATURED SPEAKER:



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