THE Oklahoma Bar JOURNAL
Volume 81 ◆ No. 2 ◆ January 16, 2010

# Meet Your Bar Association

*OBA President Allen M. Smallwood*

## ALSO INSIDE

- Identity Theft: Application of Red Flags Rule to Health Care Providers
- Judicial Review of Administrative Agency Decisions
- Guns and Robes: Uncovering a Second Amendment Right in the Supreme Court

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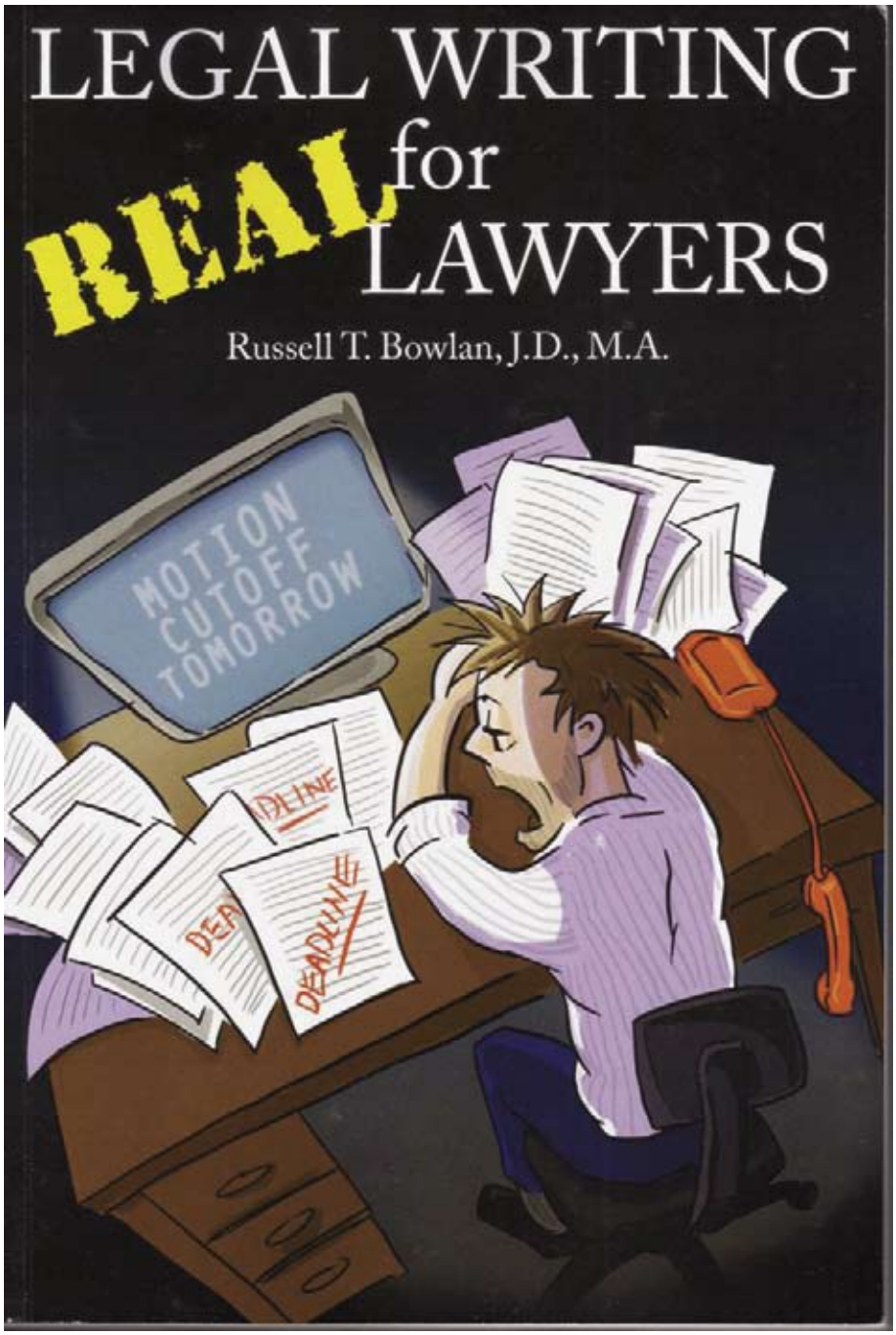


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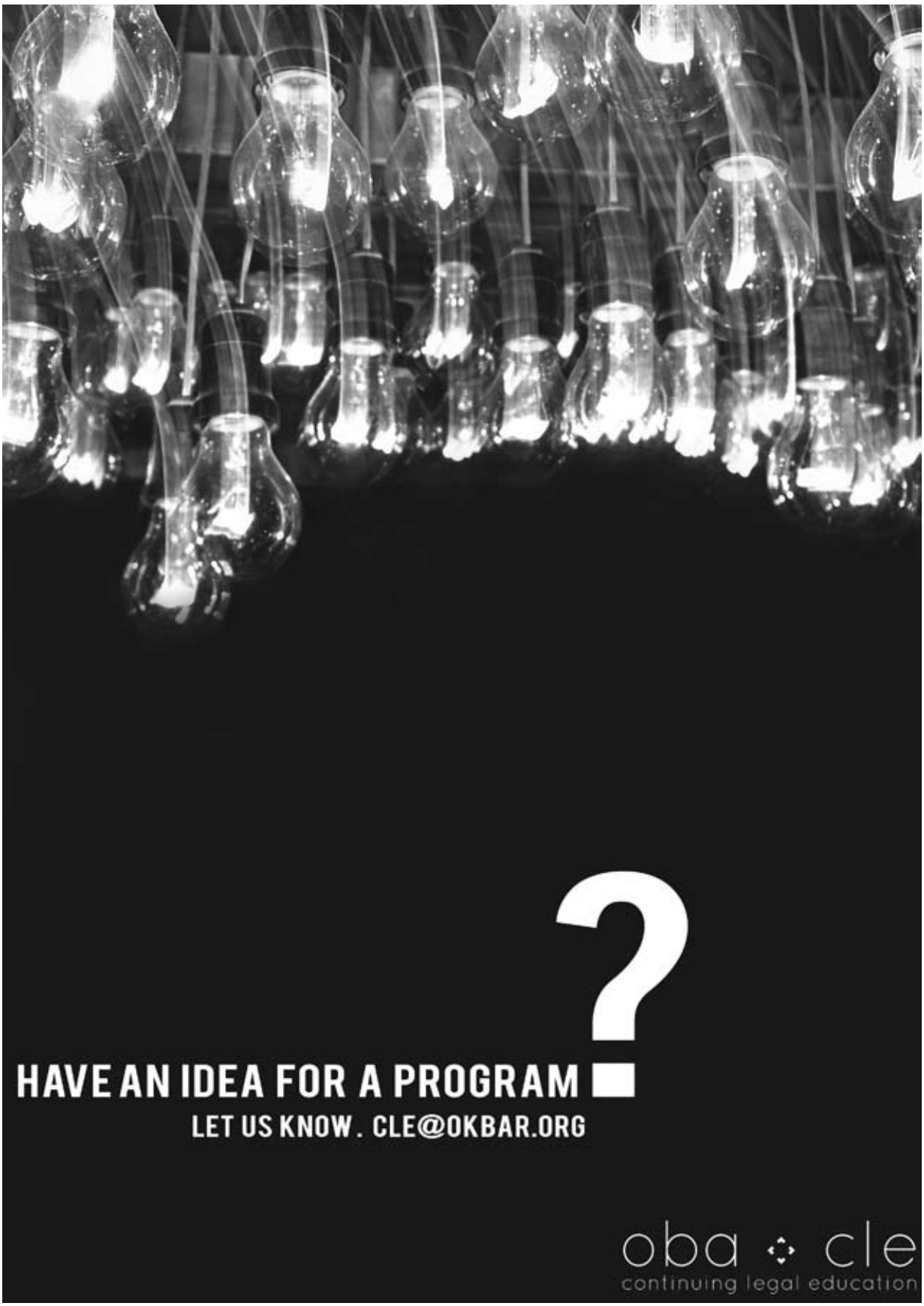
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**THEME:**
**MEET YOUR BAR ASSOCIATION**

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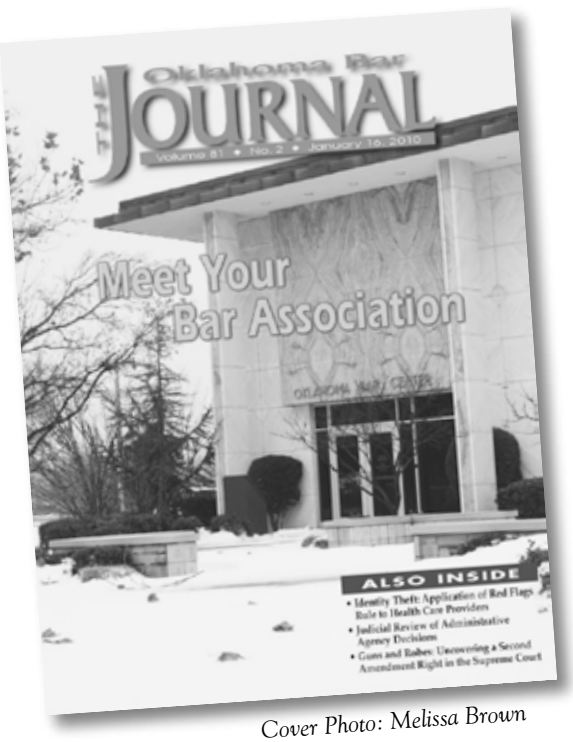


*Cover Photo: Melissa Brown*

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# Year's Focus to be Core Values

*By Allen Smallwood*

It is with both humility and honor that I begin my year's service as your president. It is my intent to continue the focus of our organization on our core values:

- service to our membership and the community,
- support for the independence of the judiciary,
- access to justice by all members of our society and
- an emphasis on ethical conduct in all our relationships with the clients, the judiciary and the public.

As most of you know, we are fortunate to have an extraordinarily gifted and selfless staff dedicated to our profession in this organization. The continuing legal education offered by our organization is second to none. Our administration has scheduled a national mortgage foreclosure expert to conduct a **pro bono** mortgage foreclosure seminar in conjunction with Legal Aid Services on Feb. 19, 2010. As many of us as possible need to take advantage of this unique opportunity, particularly in light of the strained circumstances many of our clients and the public in general are experiencing.

*President Smallwood practices in Tulsa.*
*amsmallwood@swbell.net*
*(918) 582-1993*

***As many of us as possible need to take advantage of this unique opportunity…***

I urge all of you to use the technological services provided by our organization through our Web site, which has recently been updated and will continue operating on the cutting edge for our benefit.

2010 promises to be a challenging, but rewarding, year for all of us. I look forward to meeting as many of you as possible in the coming year.

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# EVENTS CALENDAR

## JANUARY 2010

18 **OBA Closed** – Martin Luther King Jr. Day

20 **Oklahoma Council of Administrative Hearing Officials;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212

**Ruth Bader Ginsburg American Inn of Court;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donald Lynn Babb (405) 235-1611

21 **OBA Law-related Education Committee 2010 Supreme Court Teacher and School of the Year Judging;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jack G. Clark Jr. (405) 232-4271

22 **Oklahoma Bar Foundation Trustee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070

**OBA Law Day Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Tina Izadi (405) 521-4274

**OBA Solo and Small Firm Planning Committee Meeting;** 11 a.m.; Quapaw, Okla.; Contact: Jim Calloway (405) 416-7051

23 **OBA Law-related Education We the People State Finals;** 10 a.m.; Oklahoma History Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

25 **OBA Alternative Dispute Resolution Section Meeting**; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Andrea Braeutigam (405) 640-2819

27 **Luther L. Bohanon American Inn of Court:** 5:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Mary A. Roberts (405) 943-6472

28 **OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211

29 **OBA Lawyers Helping Lawyers Assistance Program Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Tom Riesen (405) 854-8444

## FEBRUARY 2010

2 **OBA Law-related Education Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Jack G. Clark Jr. (405) 232-4271

**For more events go to www.okbar.org/news/calendar.htm**

The Oklahoma Bar Association's official Web site: **www.okbar.org**

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*Allen and his bride of nearly 23 years, Barbara*

*Six-month-old Chelsie with her grandpa Allen at Swan Lake in Tulsa in 1994.*

*Infantryman Allen Smallwood holds the hand of a child in Vietnam.*

# Meet 2010 OBA President Allen Smallwood

Tulsa has always been home to Allen Smallwood, a solo criminal defense attorney, who is this year's leader of the Oklahoma Bar Association. Military service in Vietnam and pursuit of an undergraduate degree at Oklahoma State University were the only things that have pulled him away from his beloved hometown.

**THE EARLY YEARS**

Allen was born and raised in Tulsa. His father, Otis Smallwood, passed away in 1970, and his mother, Gwen Riek, now 90 years old, still lives in Tulsa. He has an older sister and a younger brother, who both live in Tulsa. He's travelled the world, but lives 1 ½ miles from the hospital where he was born. "The city fits me like an old glove," he said.

He graduated from Nathan Hale High School in 1965 and enrolled at OSU for one fun-filled semester before enlisting in the military. He worked as a house boy at the Gamma Phi Beta house while going to school.

During the days of the mandatory draft, he recalled, 35,000 men were being called up each month. "After reading one too many Hemingway books, I decided to join the Marine Corps before my number officially came up. A buddy of mine had already joined, and we went on the buddy system, spending a little over a year in an infantry unit." He served from July 1966 to July 1968, most of it in Vietnam. "I was a rifleman. It was the hardest physical labor I've ever done — averaging 20-22 hours a day with 40 to 50 pounds on your back, one day just like the next one." He also remembers being sleepy and dirty, taking only about a dozen showers within a 14-month period. After his service was over, he vowed to be neither of those two things again. "And that's why I take four showers a day now," he said with a chuckle.

*In a photo taken two years ago, nine-year-old Khloe gets a hug from grandpa Allen.*

**EDUCATION**

Back to Stillwater is where he headed after his military service. He said, "I lived like a hermit during those college days. I had a little VW that I'd drive to go play golf, but I had a bicycle that I used most of the time to get around. The war had changed me, and I wasn't into social events or student organizations… not even a football or basketball game. I was uncomfortable around crowds of people, but I did read hundreds of books. That's all I did." From the

## PERSONAL TRIVIA...

***My first car was a:***
1958 MGA British sports car that cost $850

***Favorite soda:*** Club

***If you won the lottery, what would your first purchase be?***
Hair transplant

***What makes you laugh?***
My cats

***Thin or thick crust?*** Thin

***iPhone or Blackberry?*** Neither

***Best place you've been to?***
My mother's kitchen after serving in Vietnam

***Why did you become a lawyer?***
Too much ego and too little brains

***New Year's resolution?***
Don't make them

***Favorite comfort food:***
Italian sausage pizza from Hideaway

***Best advice I could give a new lawyer:*** Under promise and over deliver

***Ideal vacation spot:***
Grand Lake, Oklahoma

***Most prized possession:***
230-year-old *Baltimore Sun* newspaper

***Favorite movie quote:***
"God how I do love being king." – Peter O'Toole as Henry II in *Lion in Winter*

***Favorite hobby:*** Golf

***Do you have any pets?*** Six cats: Fanny, Fraidy, Feisty, Beau, Gus and Otto. One dog: Sissy

***What do you have set as your home page?*** OSCN.net

books outside of his class work, he gained a great deal of knowledge reading historical works and biographies, including the complete works of William Shakespeare and the Bible. He swore off of most fiction after his previous Hemingway experience.

His major — political science with a minor in history. "I had decided out of high school to have a pre-law major. The last three semesters of college I made a 4.0 average, and that's probably the reason I got into law school." He graduated in 1972 and entered law school at the University of Tulsa, graduating in 1974.

*Allen in costume as "Wolfman," an annual Halloween tradition started 25 years ago to strike terror in neighborhood children invited to a party at the Smallwood home.*

**LEGAL CAREER**

"I wanted to become a trial lawyer and be in the courtroom. Fortunately, TU and the OBA had just started a legal intern program," he said. "I believe I was one of the first law students in the program and interned at the Tulsa County Public Defender's Office. I second chaired (doing the work while supervised by an attorney) seven jury trials before I was admitted to the bar, and three of those trials resulted in acquittals. The experience was invaluable, allowing me to make stupid mistakes early.

"I was sworn in May 1975 and hung out a shingle as a solo practitioner, and that's what I've been doing ever since. My gross receipts for December 1975 were $52. My overhead was $800. I rented an office from a lawyer at 17th and Cheyenne, a beautiful old downtown mansion. Then, Paul Brunton and I bought an office building in January 1979. He moved out in 1992, and I still owe Paul for his half. I've been there since — 30 years."

Serving as OBA president means attending more meetings, more speaking engagements, more focus on actions that shape the association and its direction — which all require time, a valuable commodity for a solo practitioner. To help balance the demands of his practice with his volunteer leadership

*Allen with granddaughter Khloe in the summer of 2000.*

responsibilities, President Smallwood plans to rely on bar association staff. "Fortunately, the OBA staff is so skilled and hard working. I anticipate that by letting them do their jobs, they will make my job as president much easier. I expect to be working Saturday and Sunday, or I'm going to have to cut my caseload a little bit. I'll do the best I can. There might be some cases I won't be able to take," he said.

**FAMILY**

Allen has been married to his wife, Barbara, for almost 23 years. "I didn't get married until I was 39 years old. Part of it was I didn't think I could juggle the dedication to the legal profession and a family at the same time. And since I got married, I found out I was right — I can't, that's what Barbara would tell you. I can read her mind," he said. Although he never had children, his sister's two daughters (now grown) were like his children. Barbara has two children, who have blessed them with grandchildren — Rachel and Michael Collins (9 and 7 years old) and Chelsie and Khloe Downie (16 and 11 years old).

**HOBBIES**

"I used to run 35 miles a week, but the old body won't do it anymore," Allen said. "Barbara bought us a new dog about two years ago, and it's great because Sissy has to pee every two blocks — and I get to stop. I run about 1 ½ miles every day with the dog." To be totally honest, he admits the pace is more like a waddle than a run. Another passion of his is golf. He's a member of the Tulsa Country Club, six minutes from his office. "In the summer I try to

***What is the best Halloween costume you have ever worn?*** Wolf man

***What's the best thing about living in Tulsa?*** It's been home for 62 years; the beautiful downtown

***Favorite Tulsa restaurant:*** Summit Club

***Favorite Oklahoma restaurant:*** The Artichoke in Langley

***Favorite food:*** BLT on wheat

***First job:*** Throwing papers for the *Tulsa Tribune*

***If a movie was made of your life, who would play you?*** Gene Hackman

***Nobody knows I:*** Am slightly impatient.

***Pet peeve:*** People who are late

***Ultimate golf foursome (including yourself) & where would you play?*** Arnold Palmer, Jack Nicklaus, Barbara Smallwood and me at Old Head Golf Club in Ireland. I've actually played there.

***Best thing about being a grandfather?*** You don't have to spank your grandchildren, even though they deserve it.

*At the annual Tulsa County bench and bar party hosted at the Smallwood home at Grand Lake, Allen gives a child a ride on the "bun buster" that's pulled behind the boat.*

get out there two or three evenings a week and play from six to 15 holes. I'll probably find it hard to find the time in the coming year, but I will play as much as I can."

*Allen pilots the boat on Grand Lake with grandson, Michael.*

**BAR ACTIVITIES**

Allen joined the Tulsa County Bar Association as soon as he was admitted to the bar in 1975. Over the years he served in numerous volunteer positions and became its president in 1998-99. He has also served as a director of the Tulsa County Bar Foundation. He has been or is a member of the American College of Trial Lawyers, American Inns of Court - Council Oak Chapter, OBA Board of Governors, Oklahoma Judicial Nominating Commission, Tulsa Criminal Defense Lawyers Association, National Association of Criminal Defense Lawyers, Oklahoma Bar Foundation Fellow, American Bar Foundation Fellow and American Association for Justice.

*In the summer of 2008, Allen holds on his lap granddaughter, Rachel, and Truman, the lake cat who recently died at 17 ½ years old.*

**HONORS**

He has received numerous awards such as the Tulsa County Bar Association Golden Rule Award, OBA Award for Ethics, President's Award for Service to the TCBA Centennial Committee, TCBA Neil E. Bogan Award for Professionalism, OBA Neil E. Bogan Award for Professionalism and ABA General Practice, Solo & Small Firm Division Donald C. Rikli Solo Lifetime Achievement Award (2006).

**GOALS**

Every OBA president has at least one priority for making a difference in the association or the legal profession during his or her year, and Allen Smallwood is no exception. "I think the most important challenges we have right now are maintaining the independence of the bar association as we have in disciplining ourselves and supporting ourselves financially," he said. Another goal is, "Doing what we can to make sure every citizen — corporate or individual — has access to justice and, last but not least, doing everything we can to maintain the integrity and independence of the judiciary." He thinks each of those areas in the recent past has been challenged. "We need to be nonpartisan and nonpolitical. I intend to do everything I can to foster those principles," he said.

*At the lake in 2008, Allen holds cats, Otto and Gus.*

# Meet Your Bar Association Volunteers Who Guide Your Association

**Deborah Reheard**
President-Elect
*Eufaula*

- ***Background:*** Raised on a dairy farm outside Vinita; First career as journalist
- ***Education:*** OSU, NSU, TU Law School
- ***My first car was a:*** Ford Pinto
- ***Favorite soda:*** Don't drink soda or pop
- ***If you won the lottery, what would your first purchase be?*** Another lottery ticket
- ***What makes you laugh?*** Life
- ***Thin or thick crust?*** Thin
- ***iPhone or Blackberry?*** iPhone
- ***Best place you've been to?*** New Zealand
- ***Why did you become a lawyer?*** The independence of a career where I can work for myself and the satisfaction of the ability to make a difference.
- ***New Year's resolution?*** The usual — get healthier, more organized, clean out closets & drawers, file destruction.
- ***Favorite comfort food:*** Blue Bell ice cream
- ***Best advice I could give a new lawyer:*** Do the right thing

**Jon Parsley**
Past President
*Guymon*

- ***Background:*** Born and raised in Guymon; engaged in the general practice of law in Guymon since 1994
- ***Education:*** Guymon High School Graduate 1987, undergrad at UCO in Edmond 1991; Law School at OU 1994
- ***My first car was a:*** 1976 Pontiac Grand Prix (Light Green)
- ***Favorite soda:*** Coca-Cola Classic
- ***If you won the lottery, what would your first purchase be?*** Is the country of Dubai for sale?
- ***What makes you laugh?*** Comedians
- ***Thin or thick crust?*** Thin
- ***iPhone or Blackberry?*** Blackberry but only by necessity. The iPhone won't work in the Panhandle.
- ***Best place you've been to?*** Honolulu was fabulous.
- ***Why did you become a lawyer?*** I was in debate in high school and college. It was a logical thing to do.
- ***New Year's resolution?*** Cuss less
- ***Favorite comfort food:*** French fries
- ***Best advice I could give a new lawyer:*** Get involved in the OBA!

**Mack Martin**
Vice President
*Oklahoma City*

- ***Background:*** Born Chattanooga, Okla. – 1953, graduated Chattanooga High School 1972
- ***Education:*** Cameron University, B.A. 1976, Oklahoma City University School of Law 1978
- ***My first car was a:*** Red rusted and dinged-up 1951 Ford F-150 farm truck.
- ***Favorite soda:*** Coca-Cola
- ***If you won the lottery, what would your first purchase be?*** Another lottery ticket, it worked the last time, apparently.
- ***What makes you laugh?*** Watching people who do foolish things
- ***Thin or thick crust?*** Thin
- ***iPhone or Blackberry?*** Blackberry
- ***Best place you've been to?*** St. Thomas Virgin Islands
- ***Why did you become a lawyer?*** As a child I watched Perry Mason, and it was one of my favorite shows.
- ***New Year's resolution?*** Try to be a better person than I was last year
- ***Favorite comfort food:*** Baked potato with lots of butter
- ***Best advice I could give a new lawyer:*** It takes a long time to get a good reputation and short time to get a bad one. Take your time to get a reputation that you will be proud of carrying with you for your entire legal career.

**Jack Brown**
Governor - At Large
*Tulsa*

- ***Background:*** Born and raised in Miami, Okla.; I have been in private law practice for over 20 years concentrating on business law and litigation, individual and corporate trusts, estate planning and probate. In 1994, I joined the law firm of Jones, Gotcher & Bogan PC where I currently serve as the hiring partner and vice president.
- ***Education:*** B.A. – Journalism, University of Oklahoma 1979; J.D. '84, University of Tulsa School of Law
- ***My first car was a:*** Pontiac Lemans
- ***Favorite soda:*** Diet Coke
- ***If you won the lottery, what would your first purchase be?*** Investments
- ***What makes you laugh?*** Spontaneous humor
- ***Thin or thick crust?*** Thin
- ***iPhone or Blackberry?*** iPhone
- ***Best place you've been to?*** Anywhere in Europe
- ***Why did you become a lawyer?*** Family ingrained
- ***New Year's resolution?*** None
- ***Favorite comfort food:*** Pot roast
- ***Best advice I could give a new lawyer:*** Never compromise your integrity

## Martha Rupp Carter

Governor - District No. Six
*Tulsa*

- ***Background:*** After five years of practice with a Tulsa firm doing litigation and oil and gas work, I entered public service with the Tulsa City Attorney's office. I served in that office for 19 years, and as the city attorney for the last four. I am now general counsel with the Tulsa City-County Health Department.
- ***Education:*** Bachelor of Arts with honors in English from Oklahoma State University; J.D. from University of Oklahoma College of Law.
- ***My first car was a:*** Ford Falcon Futura shared with my brother; when speed reached 60 miles an hour, all the ash trays in the car flipped out into the seats.
- ***Favorite soda:*** Diet Dr. Pepper with vanilla
- ***If you won the lottery, what would your first purchase be?*** Travels to exotic lands with family and friends
- ***What makes you laugh?*** Odd and silly things that happen at inopportune times
- ***Thin or thick crust?*** Thick
- ***iPhone or Blackberry?*** iPhone
- ***Best place you've been to?*** It's a tie between Alaska and Spain
- ***Why did you become a lawyer?*** To make a living as a professional and be of service
- ***New Year's resolution?*** Exercise more patience and restraint
- ***Favorite comfort food:*** Peanut M & Ms
- ***Best advice I could give a new lawyer:*** Do your best and let it go

## Charles Chesnut

Governor - District No. One
*Miami*

- ***Background:*** I'm a third-generation Oklahoma country lawyer.
- ***Education:*** Miami High School; University of Oklahoma (B.B.A.-1974; J.D.-1977)
- ***My first car was a:*** 1972 Chevy Nova (I thought my four speed transmission on the floor was HOT).
- ***Favorite soda:*** I don't drink soda, but I do like Diet Coke from the can and Diet Coke and Coke from the fountain–1/2 and 1/2 to split the caloric difference. (Whoever drafted these must be from the East)
- ***If you won the lottery, what would your first purchase be?*** Probably a nice little place in the country with some horses for my wife
- ***What makes you laugh?*** My wife
- ***Thin or thick crust?*** Thin
- ***iPhone or Blackberry?*** Neither
- ***Best place you've been to?*** Recently, the new Texas Stadium in Arlington, Texas (known by the locals as Jerry's World or the Death Star–it's amazing). Not so recently, the island of Eleuthra in the Bahamas
- ***Why did you become a lawyer:*** Trite, but true: It's a great way to help people solve problems they can't solve on their own. Also, it's in my blood.
- ***New Year's Resolution:*** The usual: Lose weight; work on improving the different areas of my life. Get caught up. Outwit the stock market. Improve my golf game (I just started playing). Except this year I'm really going to do it.
- ***Favorite comfort food:*** Nachos when I get home from work at night; a giant hamburger with "mustard instead and no onions" from the Ku-Ku on historic Route 66 in Miami
- ***Best advice I could give a new lawyer:*** Get an excellent mentor who will teach you how to practice law. Find an area of the law to work in that you really enjoy. Strive to turn out quality work. Remember, ultimately it's about service to others.

**Glenn Devoll**
GOVERNOR - DISTRICT NO. FOUR
*Enid*

- ***Background:*** Born in Altus, Okla.
- ***Education:*** OCU law school
- ***My first car was a:*** 1957 Chevy
- ***Favorite soda:*** Diet Coke
- ***If you won the lottery, what would your first purchase be?*** A second home in a warm climate
- ***What makes you laugh?*** My granddaughters
- ***Thin or thick crust?*** Thin
- ***iPhone or Blackberry?*** Blackberry
- ***Best place you've been to?*** Marcos Island, Florida
- ***Why did you become a lawyer?*** It seemed challenging and fun.
- ***New Year's resolution?*** I don't believe in them.
- ***Favorite comfort food:*** Nachos and peppers
- ***Best advice I could give a new lawyer:*** Stay with it and learn professionalism.

**Steven Dobbs**
GOVERNOR - AT LARGE
*Oklahoma City*

- ***Background:*** Raised in orphanage in Missouri; USMC/Vietnam veteran with two Purple Hearts; no good conduct medal!
- ***Education:*** Bachelor's in sociology; Master of Public Administration, both from Mizzou; J.D. from the OU College of Law
- ***My first car was a:*** 1954 Chevrolet that I always had to park on a slope to get a running start with
- ***Favorite soda:*** Diet Coke
- ***If you won the lottery, what would your first purchase be?*** A condo in Palm Springs
- ***What makes you laugh?*** Our grandson Ty and our dog Leo
- ***Thin or thick crust?*** Neither; hand tossed
- ***iPhone or Blackberry?*** iPhone
- ***Best place you've been to?*** Devil's Tower
- ***Why did you become a lawyer?*** There was always someone there at the darkest of times; just wanted to pass that along.
- ***New Year's resolution?*** Patience, patience
- ***Favorite comfort food:*** Pizza
- ***Best advice I could give a new lawyer:*** Believe in the system and leave it better than you found it.

**Mark Hixson**
GOVERNOR – DISTRICT NO. NINE
*Yukon*

- ***Background:*** Born and raised in Oklahoma City. Married the beautiful Shaa Green and have three wonderful boys, Will (10), Auguste (7) and Alec (2). I interned in the Canadian County District Attorney's Office and never wanted to leave Canadian County. I live and practice in Yukon.
- ***Education:*** Catholic Parochial School brat, Bishop McGuinness High School, Conception Seminary College in Missouri where I received a B.A. in philosophy, and OU Law.
- ***My first car was a:*** used Nissan Sentra hatchback
- ***Favorite soda:*** Dr. Pepper
- ***If you won the lottery, what would your first purchase be?*** Payoff the house
- ***What makes you laugh?*** My sons
- ***Thin or thick crust?*** Thick, but my wife prefers thin — so I eat thin.
- ***iPhone or Blackberry?*** Cheap basic cell phone; I only learned to text this past year.
- ***Best place you've been to?*** My house
- ***Why did you become a lawyer?*** I have always been interested in the law, and with a B.A. in philosophy I did not want to teach.
- ***New Year's resolution?*** More exercise
- ***Favorite comfort food:*** Steak
- ***Best advice I could give a new lawyer:*** Our reputation is all we have — protect it.

**Jerry McCombs**
GOVERNOR – DISTRICT NO. TWO
*Idabel*

- ***Background:*** I was born and raised in Idabel, Okla., where I have practiced law since graduating from law school in 1975. I am married and have two children and four grandchildren. My wife is a retired schoolteacher. I enjoy working around the house, movies and playing golf (although not very well).
- ***Education:*** I graduated high school at Idabel. My undergraduate degree is a B.A. in English from Central State University and I received my J.D. from Oklahoma City University in 1975.
- ***My first car was a:*** 1958 Chevrolet Belaire
- ***Favorite soda:*** Coca-Cola Classic
- ***If you won the lottery, what would your first purchase be?*** Annuities sufficient to send all my grandchildren to college
- ***What makes you laugh?*** A good joke, well told
- ***Thin or thick crust?*** Thick
- ***iPhone or Blackberry?*** Blackberry
- ***Best place you've been to?*** Times Square in New York
- ***Why did you become a lawyer?*** I wanted to come home and it seemed the best way to make a good living in a way that would be good for the community.
- ***New Year's resolution?*** Lose some weight
- ***Best advice I could give a new lawyer:*** Work hard, but make time for family and friends and do some pro bono work — it's good for the soul.

**Lou Ann Moudy**
GOVERNOR – DISTRICT NO. SEVEN
*Henryetta*

- ***Background:*** Family from northeastern Oklahoma – Miami, Commerce, Vinita, raised in Henryetta, returned and opened my practice here in 1996
- ***Education:*** East Central University, OU Law School
- ***My first car was:*** my brother's black 1974 'Cuda
- ***What makes you laugh?*** America's Funniest Videos and Mel Brooks movies, the stupid stuff I do
- ***iPhone or Blackberry?*** Blackberry Curve
- ***Thin or thick crust?*** Thin, only thing about me that's thin
- ***Best advice I could give a new lawyer:*** Don't become a lawyer for the dream of money, because you'll be working late Christmas Eve.

**David Poarch**
GOVERNOR - AT LARGE
*Norman*

- ***Background:*** I was born in Oklahoma but grew up in the Bay Area of California in a small town of 2,500 people about 30 miles east of San Francisco. Went in the Army out of high school; returned to Oklahoma for college and law school after I got out. Been here since 1969. Married, two grown sons and three grandchildren.
- ***Education:*** B.A. University of Central Oklahoma 1973, J.D. University of Oklahoma 1977
- ***My first car was a:*** 1958 Ford with a dented left front fender and leaky radiator; my dad bought from the garbage man for $165. Nice, but it got me to school and work!
- ***Favorite soda:*** Coca-Cola
- ***If you won the lottery, what would your first purchase be?*** An updated estate plan

- ***What makes you laugh?*** Just about anything! Absurdity, incongruity, but usually a good story or joke
- ***Thin or thick crust?*** On pizza? Thin. Personally? I think I have a pretty thick crust. I'm a lawyer.
- ***iPhone or Blackberry?*** iPhone
- ***Best place you've been to?*** Yellowstone and the Grand Tetons
- ***Why did you become a lawyer?*** Initially, I viewed lawyers as people focused on helping others. I still see them that way. When I looked more closely I was drawn to the intellectual challenge and the broad opportunities a legal education afforded me.
- ***New Year's resolution?*** Resolved: No more New Year resolutions!
- ***Favorite comfort food:*** Apple pie
- ***Best advice I could give a new lawyer:*** Get to know some old lawyers!

**Ryland Rivas**
Governor - District No. Five
*Chickasha*

- ***Background:*** Born, Sept. 13, 1949, Tipton, Okla. Married to Brenda Kaye Rivas, 41 years. Two children, Ryland II, OCU Law, and Meredith Kaye Brockman, OU Law; three grandchildren; member of the Comanche Indian Tribe, first tribal member lawyer; Former Magistrate for the Court of Indian Offenses, Chief Justice Cheyenne and Arapaho Supreme Ct., 1998-2009; practice in civil, Indian and criminal law, Chickasha City Council 1995-1999; Board of Directors, Bank of Verden
- ***Education:*** Lawton High School – 1967; Oklahoma University, B.B.A., majors in economics and finance - 1971; Law - 1974
- ***My first car was a:*** 1956 Chevy, two door hardtop; paid $225 for it; wish I still had it
- ***Favorite Soda:*** A&W Root Beer
- ***If you won the lottery, what would your first purchase be?*** Pay off children's school loans
- ***What makes you laugh?*** I laugh a lot - Dilbert comes to mind - so it doesn't take much to make me laugh.
- ***Thin or thick crust?*** Thin crust
- ***iPhone or Blackberry?*** Palm Centro
- ***Best place you've been to?*** Santa Fe, New Mexico
- ***Why did you become a lawyer?*** My wife, mom, dad and tribal leaders asked me to continue my education rather than join the marines. So I took the LSAT and arrangements were made for me to attend the Summer Law Institute for American Indians in Albuquerque at the University of New Mexico Law School. I thought I would get drafted, I was 1-A , but was not. Practicing law has been the greatest profession I could have hoped for and much more than I deserve.
- ***New Year's Resolution:*** Spend more time at the lake with my wife
- ***Favorite Comfort food:*** Chicken and dumplings
- ***Best advice I could give a new lawyer:*** Treat all people like you would want to be treated. Always do what is right. Be kind to the people you come in contact with. You are representing your family and your profession. The impression you make on those who come see you will stay with them always.

**Susan Shields**
Governor - District No. Three
*Oklahoma City*

- ***Background:*** Grew up in Bartlesville, Okla.
- ***Education:*** Stanford University undergrad; UCLA School of Law
- ***My first car was a:*** Buick Skylark
- ***Favorite soda:*** Diet Coke
- ***If you won the lottery, what would your first purchase be?*** House at the beach
- ***What makes you laugh?*** My children's jokes, and Big Bang Theory and 30 Rock on TV
- ***Thin or thick crust?*** Thin
- ***iPhone or Blackberry?*** Blackberry

- ***Best place you've been to?*** In the last few years, the north shore of Oahu to watch the surfers and a slot canyon hike in Utah
- ***Why did you become a lawyer?*** I followed in my father's footsteps, and enjoy helping to solve problems for my clients.
- ***New Year's resolution?*** To write more letters (not e-mails) to friends and family
- ***Favorite comfort food:*** Ben & Jerry's ice cream
- ***Best advice I could give a new lawyer:*** Return all of your telephone calls in a timely manner and be courteous and professional with other attorneys and colleagues

**Jim Stuart**
Governor – District No. Eight
*Shawnee*

- ***Background:*** Born and raised in Shawnee, 4th generation; Wife, Kathy, and three daughters: Emily, who teaches at Heritage Hall; Rachel, a student at UCO; and Sarah, a student at OU
- ***Education:*** Graduate of Shawnee High School; B.B.A. from Central State University; J.D. from University of Tulsa
- ***My first car was a:*** Volkswagen Bug
- F***avorite soda:*** Dr. Pepper
- ***If you won the lottery, what would your first purchase be?*** A new telephone listing
- ***What makes you laugh?*** Movies, "Animal House" and "Young Frankenstein"
- ***Thin or thick crust?*** Thin
- ***iPhone or Blackberry?*** iPhone
- ***Best place you've been to?*** London
- ***Why did you become a lawyer?*** My mother was a legal secretary, which influenced my decision to attend law school. Law is a profession where I can help people with their problems.
- ***New Year's resolution?*** To be more organized
- ***Favorite comfort food:*** Oreo cookies
- ***Best advice I could give a new lawyer:*** Don't sell out your integrity. The harder you work the luckier you'll get.

**Molly Aspan**
Governor – YLD Chair
*Tulsa*

- ***Background:*** I was raised on a hog farm in Ellsworth, a small town in central Kansas. I am a life-long Jayhawk and stayed in Kansas for college and law school, then was recruited to Tulsa by Hall Estill. I have worked at Hall Estill since 2003. I met my husband Brian (another lawyer) in Tulsa, and we were married last May.
- ***Education:*** Kansas Law School, Fort Hays State University
- ***My first car was a:*** Dodge Daytona
- ***Favorite soda:*** I used to be a runner (note the past tense), so I stopped drinking soda in junior high. However, I do occasionally enjoy a root beer float.
- ***If you won the lottery, what would your first purchase be?*** I should say something philanthropic here, but my first big purchase would probably be a house with multiple walk-in closets. Trying to consolidate two houses into one last year was a real challenge!
- ***What makes you laugh?*** My husband Brian… yes, we're still newlyweds.
- ***Thin or thick crust?*** Thin
- ***iPhone or Blackberry?*** iPhone, even though I haven't learned all the bells and whistles.
- ***Best place you've been to?*** Playa del Carmen last spring for our wedding. The swine flu scared away everyone except us and 50 of our closest friends, so we had the run of the place! I also spent a great month in Australia learning everything there is to know about rugby.
- ***Why did you become a lawyer?*** I have always wanted to be in public service and the law seemed to be a natural fit. That, and my dad didn't want me to come home to take over the hog farm!
- ***New Year's resolution?*** Lower my golf handicap
- ***Favorite comfort food:*** My mom's beef stew and cornbread
- ***Best advice I could give a new lawyer:*** Never lose your integrity and always remain professional

# Attention OETA Donors

Don't forget to call in your pledge on Tuesday, March 16 from 7 – 11 p.m.

To keep the OBA at the "Underwriting Producers" donor level, we need to raise $5,000 from OBA members.

For 31 years, OETA has provided television time as a public service for the OBA's Law Day "Ask A Lawyer" program. By assisting OETA, we show our appreciation.

# OETA Festival Volunteers Needed

OBA members are asked again this year to help take pledge calls during the OETA Festival to raise funds for continued quality public television.

- Tuesday, March 16
- 5:45 - 10:30 p.m.
- OETA studio at Wilshire & N. Kelley, Oklahoma City dinner & training session
- recruit other OBA members to work with you

For 31 years OETA has provided television time as a public service for the OBA's Law Day "Ask A Lawyer" program. By assisting OETA, we show our appreciation. It is also a highly visible volunteer service project.

- Contact Jeff Kelton to sign up.
  Phone: (405) 416-7018
  E-mail: jeffk@okbar.org
  Fax: (405) 416-7089

Name: _____

Address: _____

City/Zip: _____

Phone: _____

Cell Phone: _____

E-mail: _____

**Mail to OBA, P.O. Box 53036**
**Oklahoma City, OK 73152**

# It's this easy...

## TO PAY YOUR DUES ONLINE!

*Questions anyone?*
*Forgot your PIN #?*

*No worries, go to:*

**www.okbar.org/members/dues.htm**

*and receive a new PIN # in minutes.*

Meet Your
Bar Association

# OBA Departments and the Member Services They Provide

Volunteer leaders may be the chief engineers who keep any professional association on track, but it is the staff who provides the power to move forward. Member services are an essential part of the Oklahoma Bar Association. Learn more about what each department offers members, and put a name together with a face in photos of the employees who work for you — bar association members.

## *Administration*

The responsibilities of the Administration Department are multi-faceted, but its primary emphasis is handling finances, human resources, Annual Meeting planning, bar center operations and maintaining official membership information. Specific duties include:

*ADMINISTRATION – (Front Row) Roberta Yarbrough, Suzi Hendrix, Tracy Sanders and Wanda Murray; (Back Row) Director Craig Combs and Durrel "Doc" Lattimore*

- scheduling bar center meeting rooms
- coordinating and scheduling meetings utilizing video conference equipment in Oklahoma City and Tulsa
- assisting committees and sections with mailings to their members
- providing mailing labels of bar members to committees and sections
- tracking expenditures for all committees and sections
- providing monthly committee and section accounting reports upon request
- ensuring the bar center interior and exterior facilities are maintained so members can take pride in their building
- maintaining and updating member roster information
- invoicing senior members and non-members for *Oklahoma Bar Journal* subscriptions

- managing the Legal Intern Program
- producing certificates of good standing for our members
- processing expense claims for OBA officers, YLD officers, and section and committee members
- managing OBA mail room and OBA office equipment
- contract negotiations with Annual Meeting hotels, scheduling and coordinating Annual Meeting events, exhibitors, and committee and section meetings
- accounting and budgeting for all departments
- investing association reserves
- management of employee benefit programs

***Phone: (405) 416-7000***
***Membership: (405) 416-7080***

*COMMUNICATIONS - Jeff Kelton, Director*
*Carol Manning and Melissa Brown*

## *Communications*

The Communications Department has responsibility for the OBA's member communications and external public relations efforts. Areas of major emphasis are:

- publishing 34 issues of the *Oklahoma Bar Journal* every year
- assisting the Law Day Committee in accomplishing extensive Law Day statewide activities and community service projects that generate significant positive public recognition for the legal profession
- publishing the OBA Annual Meeting program and House of Delegates book and promoting award winners, the meeting itself and election results

More specific duties that benefit members are:

- editing information submitted by and about bar members for the FYI and Bench & Bar Briefs section of the bar journal
- publishing the monthly E-News for OBA members with e-mail addresses
- expediting information requests from the news media
- issuing news releases about association events
- assisting OBA committees, sections and divisions in publicizing their projects to both members and the media
- working with sections to publish short law articles related to the section's focus
- assisting sections and committees with placing and designing free ads in the bar journal to promote their activities to other members

The department serves as a liaison for one board and several committees and assists in accomplishing their goals. A summary of services provided to those groups are:

- working with the 10-member Board of Editors that reviews articles submitted and plans for future theme-related *Oklahoma Bar Journal* issues; once articles are approved for publication, the staff has charge of editing, proofreading and layout
- assisting the Communications Committee in its projects including overseeing the publication of 16 brochures on such topics as divorce, landlord/tenant rights and estate planning; Brochures are distributed free as a community service to individuals, libraries, nonprofit organizations, etc., and staff handles the continuous demand for those materials to be mailed across the state

Law Day Committee — Communications Department staff members work closely with committee members in their efforts to promote Law Day, celebrated nationwide on May 1. Activities include:

- conducting statewide contests for Oklahoma students

- providing county Law Day chairpersons with both event and promotion ideas for county celebrations
- coordinating the statewide Ask A Lawyer community service project in which volunteer attorneys give free legal advice to people who call in
- implementing marketing strategies to promote the Ask A Lawyer free legal advice
- produce a one-hour, interview-style TV program, in cooperation with OETA (the state's PBS affiliate) that shows how lawyers work to improve the lives of all Oklahomans

The department also assists the Awards Committee, Disaster Response and Relief Committee, Lawyers Helping Lawyers Assistance Program Committee and Young Lawyers Division.

***Phone: (405) 416-7004***

*CONTINUING LEGAL EDUCATION – (Back Row) Director Donita Douglas, Heidi McComb, Mark Schneidewent and Brandon Haynie; (Front Row) Renee Montgomery and Nina Anderson*

## *Continuing Legal Education*

The most recent OBA Membership Survey established that more than 80 percent of our members identify OBA Continuing Legal Education as an important service to them — more than any other OBA service. The staff of OBA/CLE is honored that members hold that view and will continue to work with the aspiration of becoming an even more integral part of each member's legal life by providing the best, the most creative, the most timely and the most practical in CLE programming and publications. OBA/CLE is a necessity, not a requirement! Let us know what else you want and need because OBA/CLE wants to be your continuing legal education provider. Call CLE Director Donita Bourns Douglas at (405) 416-7028 with your ideas.

Department services include:

- developing and producing over 125 live seminars, webinars and webcasts throughout the state
- offering video replays of the live seminars
- developing and producing online video and mp3 audio seminars, including webcast seminars
- offering recent seminar publications, digital book chapters and CDs for sale to association members
- developing and producing the multi-track, multiple session CLE at the OBA Annual Meeting
  - coordinating with the Management Assistance Program to plan the annual Solo and Small Firm Conference
  - coordinating with the Management Assistance Program to plan the New Lawyer Experience seminar
  - coordinating with the Women in Law Committee to plan the annual Women in Law Conference
  - coordinating with OBA officers to plan leadership training for OBA members
  - coordinating with various OBA sections in the planning of OBA/CLE section co-sponsored CLE seminars
  - attracting and securing nationally recognized experts to present continuing legal education programming to OBA members
- publishing volumes (non-seminar) to members to assist in their practice, including form books, practice manuals and treatises
- providing online registration for OBA/CLE to members
- applying attendance credit electronically to enable members to have an up-to-date view of accumulated OBA/CLE credit on My.Okbar

***Phone: (405) 416-7006***
***E-mail: cle@okbar.org***

*LAW-RELATED EDUCATION – Debra Jenkins and Coordinator Jane McConnell*

## *Law-related Education*

The Law-related Education (LRE) Department of the Oklahoma Bar Association was established in 1989 to further the OBA's goals of increasing public service and enhancing public understanding of the law and the legal system. To that end, LRE endeavors to educate citizens in a constitutional democracy and to create an active, responsible citizenry.

LRE conducts programs independently and in partnership with nonprofits, civic organizations and educational groups. Programs include professional development for teachers and others in the civic community via institutions and workshops. Classroom materials are created and distributed for programs administered by LRE at no cost to educators.

LRE aims to join the education and law communities in its mission of fostering civic-mindedness. An understanding of the role of the law in society is essential to informed participation in democracy. Creating active citizens requires active civic education. LRE is under the direction of Jane McConnell, Law-related Education coordinator and Debra Jenkins, administrative assistant. Among the many programs and resources available are:

- Lawyers in the Classroom: Attorney guest presenters instruct students on topics in law, the Constitution, citizenship and the new INFORM (Information Now for Oklahomans Rejecting Meth) Program. Participating attorneys are trained in making presentations to K-12 students and provide a unique perspective on topics related to scheduled courses. Attorneys are provided reference lesson plans if desired.
- Young Adult Guide: "You're 18 Now — It's Your Responsibility!" Updated in spring 2007. This booklet explains the rights and responsibilities of adult citizens under U.S. and Oklahoma law. Approximately 13 areas of law are addressed, including consumer credit and contracts, criminal law and family law matters such as divorce and parental rights and responsibilities. A new Spanish edition is available in electronic and print format. Both guides are available free of charge and on the Web site at www.okbar.org.
- Pocket Constitutions: These handy editions include the full text of the Constitution and Declaration of Independence. They are available for class-wide distribution and also free of charge.
- Supreme Court Awards: School of the Year and Teacher of the Year. These awards are given annually to those who develop creative, innovative approaches to civic education programming. Members of the Oklahoma Supreme Court recognize outstanding service by presenting honorees with awards and stipends in a ceremony held in the Supreme Court Courtroom.
- Civitas: An International Civic Exchange Program. The Civitas exchange program partners U.S. teachers and civic education leaders with their counterparts in countries with developing democracies. OBA/LRE participates in a partnership with Michigan, Colorado, the Czech Republic and Slovakia.
- Lending Resources: Materials are available on loan for four week check out. These resources include: Foundations of Democracy Series and the *State v. Bean* DVD (mock trial).
- YLD High School Mock Trial Committee: The LRE coordinator serves as the liaison to the committee. LRE staff supports Mock Trial Coordinator Judy Spencer with efforts related to the rounds of competition that lead to the finals competition that determines Oklahoma's state champion, who advances to nationals.
- The PACE Institute: PACE (Programs Advancing Citizenship Education) guides educators through a focused examination of

a topic in law-related education. During the week-long summer session, presenters provide both content and strategies to apply the subject in the classroom. Participants are required to develop lesson plans based on the selected topic, to be added to the LRE resource library and our Web page at www.okbar.org/public/lre. The institute's goal is to educate participants in a topic in citizenship education, to expose them to creative methods in presenting the subject matter to their students, and to encourage them to develop and share their own strategies in teaching law-related education. PACE is offered free of charge to educators. PACE is sponsored by the Oklahoma Bar Foundation.

- We the People: Project Citizen: This is a portfolio-based program for elementary through high school students. As a class, the students identify and study a public-policy issue and develop an action plan for implementing a policy change. The final project is a portfolio including a research binder and presentation boards displaying the group's efforts. Our state winning portfolio (Grades 5-8) will compete at the nationals in Philadelphia, PA in July.
- We the People: The Citizen & The Constitution: Students demonstrate their understanding of their rights and responsibilities as citizens by testifying in a simulated congressional hearing before panels of judges, which include, among other dignitaries, OBA/LRE committee members, concerning the values and principles found in the Constitution and its conception and development. The winning class will represent Oklahoma at the national competition in Washington, D.C., end of April.
- PROS (Peers Responsible for Oklahoma Students): PROS is a collaborative project of the Early Settlement Programs administered by the Supreme Court of Oklahoma, Administrative Office of the Courts and LRE. This school-based peer mediation program encourages young people to resolve conflicts in a positive and constructive manner. Regional trainings will be held in September at the bar center.
- Hatton W. Sumners Foundations of Democracy — LRE Basic 101 Summer Teacher Training Institute will guide educators through a focused examination of K-12 curricular programs based on the four basic concepts fundamental to an understanding of politics and government; authority, privacy, responsibility and justice. This multi-disciplinary institute will draw upon such fields as political philosophy, political science, law, history, literature and environmental studies.
- Representative Democracy in America — This program is a national project to introduce citizens, particularly young people, to the representatives, institutions and processes that serve to realize the goal of a government of, by and for the people.

***Phone: (405) 416-7024***
***E-mail: janem@okbar.org***

*ETHICS COUNSEL –*
*Ethics Counsel Travis Pickens*

## *Ethics Counsel*

The Office of Ethics Counsel is a membership service available only to OBA members. It was created to assist members with conflict dilemmas, confidentiality questions, communication concerns and other ethical inquiries unique to the profession. The Office of Ethics Counsel is completely autonomous from and independent of the Office of the General Counsel. Members seeking assistance with ethical questions are afforded an "attorney/

client" relationship with the full expectation of confidentiality of disclosed information.

Through the Office of Ethics Counsel, Oklahoma Bar Association members can obtain informal advice and interpretations of the rules of professional conduct. Responsibilities of the Ethics Counsel include:

- answering ethics questions from members of the Oklahoma Bar Association
- researching and writing ethics materials for the Oklahoma Bar Association Web site and the *Oklahoma Bar Journal*
- preparing and presenting CLE programs on the topics of ethics and professionalism
- working with the Legal Ethics Advisory Panel to produce practical written advice and opinions
- monitoring attendance and compliance of diversion program attendees
- creating, supervising and administering training in the areas of ethics, professionalism and trust accounting

***Phone: (405) 416-7055***
***E-mail: travisp@okbar.org***

*GENERAL COUNSEL – (Back Row) Krystal Willis, Manni Arzola, Dorothy Walos and Laura Willis; (Front Row) Debbie Maddox, Loraine Farabow and Misty Hill*

*GENERAL COUNSEL – (Back Row) Tommy Butler, General Counsel Gina Hendryx and Ted Rossier; (Front Row) Sharon Orth, Katie Ogden and Debi Lowry*

## *General Counsel*

The Oklahoma Supreme Court possesses original and exclusive jurisdiction in all matters involving the discipline of lawyers licensed to practice law in this state. Through the Rules Governing Disciplinary Proceedings, the court charges certain duties and responsibilities of administering the discipline system to the Office of the General Counsel. These include:

- reviewing and investigating allegations of lawyer misconduct or incapacity
- reviewing and investigating allegations of the unauthorized practice of law
- reporting to the Professional Responsibility Commission the results of investigations and make recommendations concerning the institution of formal complaints
- prosecuting violations of the Oklahoma Rules of Professional Conduct
- representing the OBA in all reinstatements hearings
- diverting less serious matters into the diversion program
- administering the Clients' Security Fund
- maintaining the permanent records of active and inactive discipline matters

In addition to these enumerated duties, the Office of the General Counsel:

- serves as liaison to the OBA Board of Governors advising the governing group on legal matters
- processes and approves the registration for attorneys from other jurisdictions

- administers the trust account overdraft notification program
- presents continuing legal education programs to educate the members of the bar about the discipline system and their ethical responsibilities
- participates on committees and task forces in the development and improvement of the law of professional responsibility and lawyer discipline

***Phone: (405) 416-7007***

communication between the association and the chairs, as well as between the chairs themselves

- providing a members-only Web site where members can update roster information, pay dues, register for CLE, review MCLE credits, etc.
- providing free sign-up for the www.oklahomafindalawyer.com lawyer referral service

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*INFORMATION SYSTEMS – Director Rick Loomis, Robbin Watson and Matt Gayle*

*MANAGEMENT ASSISTANCE PROGRAM - Sharon Dotson and Director Jim Calloway*

## *Information Systems*

The Information Systems Department is responsible for desktop computer support to staff, network management of internal servers and externally accessible servers, Web application development and maintenance, mailing list management, development of association management system and database, network security, audio/visual support to staff, monitoring of evolving technologies and assistance to all departments to utilize technology in their departments. The Information Systems Department's functions are mostly of an internal nature; however, services directly benefiting members are:

- providing a mailing list for each committee and section through the list servers to communicate with members easily and in a cost effective manner
- maintaining a committee chairperson list and a section chairperson list serve to allow communication between the association and the chairs, as well as between the chairs themselves
- providing a members-only Web site where members can update roster information, pay dues, register for CLE, review MCLE credits, etc.
- providing free sign-up for the www.oklahomafindalawyer.com lawyer referral service

## *Management Assistance Program*

The OBA Management Assistance Program focuses on helping Oklahoma lawyers with the nuts and bolts of running their law offices. From "basic training" for the new lawyer to providing management and technology advice for the seasoned professional, the department has a wide array of information to assist every lawyer in every practice setting.

- Free Telephone Hotline — The OBA-MAP staff attempts to answer brief questions about management and technology issues. Our number is (405) 416-7008. The toll free number is (800) 522-8065. Advice provided is confidential.
- OBA Solo and Small Firm Conference — Attend great CLE programs with nationally recognized experts, network with other small firm lawyers from across the state and meet with vendors in a fun family setting. Join us for the 13th Annual Solo and Small Firm

Conference June 24-26, 2010 at Downstream Casino Resort in Quapaw.

- OBA-NET — This is an incredible online resource that is free to all OBA members. Oklahoma lawyers post questions and brainstorm with other lawyers online. Additional paid premium services, such as downloadable OBA/CLE materials since 1996, are available also.
- Jim Calloway's Law Practice Tips Blog — Weekly postings of Internet tips, law practice tips and hot news in law office management and technology are available by either visiting the blog Web site, subscribing to the e-mail alerts or subscribing to the RSS news feed. Visit the blog at www.jimcalloway.typepad.com.
- *Oklahoma Bar Journal* Articles — Each theme issue of the *Oklahoma Bar Journal* contains the regular column "Law Practice Tips" by OBA-MAP Director Jim Calloway. They are available online at www.okbar.org/members/map/articleindex.htm.
- Office "Health Checks" — These consultations take place in the lawyer's office on a fee for services basis. A wide range of management issues can be covered. Typically all staff and attorneys will be involved both in group and individual interviews.
- Free Consultations at the Bar Center — Any lawyer who is setting up a new practice or has encountered a difficult issue that cannot be comfortably handled over the telephone is welcome to schedule a free one-hour appointment with the OBA-MAP director.
- The New Lawyer Experience: Hit the Ground Running — This innovative program consists of a one-day seminar, scheduled twice a year in Oklahoma City and Tulsa, to assist attorneys setting up new solo practices. A companion project is the "Starting a Law Practice Web Directory" which is available to any attorney at www.okbar.org/members/map/practice.htm.
- Resource Center and Lending Library — Attorneys can browse free management resources and product information. Law practice management books, videos and audio tapes are available for lawyers to "check out" and review. We are also a distributor of ABA Law Practice Management books and offer these for sale to our members at a discounted price.
- Local Bar Presentations — The OBA-MAP director is available to speak at your county bar meetings or other organized lawyer groups at no charge.

***Phone: (405) 416-7008***

*MANDATORY CONTINUING LEGAL EDUCATION - Brenda Card, Administrator Beverly Petry (seated) and Johnny Floyd*

## *Mandatory Continuing Legal Education*

The OBA Mandatory Continuing Legal Education Department is the regulatory office concerned with the accreditation of all continuing legal education programs and the compliance by all Oklahoma Bar members with the MCLE requirement. Often confused with the CLE Department, the MCLE Department does not sponsor CLE seminars.

Mandatory Continuing Legal Education, a program adopted by the Oklahoma Supreme Court in 1986, establishes minimum requirements for continuing legal education for Oklahoma attorneys. The program is administered by the OBA Mandatory Continuing Legal Education Commission, which consists of nine members, that has general supervisory authority over the rules and may adopt regulations consistent with the rules.

Member services provided include:

- reviewing seminars for accreditation
- accreditation of teaching activities

- responding to requests for clarification of the Rules of the Oklahoma Supreme Court for Mandatory Continuing Legal Education
- processing the annual reports of compliance
- helping each member receive all the credit he or she is entitled to for qualified CLE activities
- keeping a record of the Oklahoma approved seminars attended by members

***Phone: (405) 416-7009***
***E-mail: mcle@okbar.org***

*WEB SERVICES –*
*Coordinator*
*Morgan Estes*

## *Web Services Department*

The newly formed Web Services Department is headed by Morgan W. Estes, the OBA's web services coordinator. The primary goal of the department is to create a consolidated image of the association online, mainly through the OBA Web site, www.okbar.org.

Specific responsibilities include:

- coordinating with OBA sections and committees to promote their activities online
- editing and publishing the OBA's official Web site, www.okbar.org
- heading the Web Editorial Board and Web Services Team
- building special Web sites to promote various events of the OBA

***Phone: (405) 416-7085***

# *Don't Know Whom to Contact?*

If you need more information about which employee in a department to contact, check out the staff list at www.okbar.org/public/about/staff.htm. You will find a list of each OBA staff member, a summary of his or her responsibilities, and their e-mail address.

Who you Trust matters

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The ADA at 20 Years: Webcast

Thursday, Feb. 4, 2010
12:30 p.m. - Your Computer

Although the Americans with Disabilities Act is only 20 years of age, Congress gave it a facelift in 2008. Learn about ADA history, the ADA Amendments Act and what the future may hold for employers and employees.

2.5 hours MCLE, 0 hours ethics. $125

Register online at www.okbar.org/cle

oba cle
continuing legal education

Meet Your
Bar Association

# Benefits of Your State Bar Association

Your state bar association offers you a broad selection of opportunities to make the most of your membership. You may not even be aware of some of the professional benefits available to you as an Oklahoma Bar Association member. Check this list to be sure you are taking full advantage of the member services provided.

**ONLINE SERVICES**

**Oklahoma Bar Circle** — Designed in the same fashion as the popular social networking site Facebook, Oklahoma Bar Circle gives OBA members an easy way to communicate and stay in touch with other members through online messages, picture albums and wall posts. And it's a free member benefit. To utilize Oklahoma Bar Circle, members must sign up for their own account. Log in at www.okbar.org.

**OKNewsBar** — www.okbar.org/oknewsbar.htm — Designed with the needs of OBA members in mind, OKNewsBar has been created to allow you to quickly access new Oklahoma and U.S. Supreme Court opinions as well as up-to-date legal news and law practice management tips.

**Fastcase** — The OBA offers online legal research software as a free benefit to all OBA members. The OBA has contracted with Fastcase to provide the member benefit for three years, which includes national coverage, unlimited usage, unlimited customer service and unlimited free printing – at no cost to bar members, as a part of their existing bar membership. To use Fastcase, go to www.okbar.org. Under the Fastcase logo, to log in enter your username (OBA number) and password PIN for the My.Okbar portion of the OBA Web site.

**www.okbar.org** — Main site or front door for the OBA with links to all other OBA Web presences and much information for members as well as a great deal of information for the public.

**MyOkbar** — my.okbar.org — password-protected portion of the OBA's Web site. Easy to do everything from changing your official address, enrolling in a CLE course, checking your MCLE credits to listing your practice areas on the Internet so potential clients can find you. You can also receive electronic communications from the bar by adding your e-mail address to the roster.

**OBA-NET** — Members-only interactive service. Free basic service with premium services available to enhance the member benefit. This is where lawyers are empowered to help each other through online discussions and an online document repository. You must agree to certain

terms and be issued a password to participate in OBA-NET.

**E-News** — Current OBA news and information to assist in your law practice that is sent once a month to members with an e-mail address as part of their official roster information.

**Online CLE** — Quality OBA/CLE online programming, plus online seminar programs from other state bar associations. It's a convenient way to get up to six hours MCLE credit.

**OklahomaFindALawyer** — The OBA's official lawyer listing service. Free to members and the public. It is also a useful tool for lawyers to identify attorney practice area expertise in specific geographic areas. Sign up through MyOkbar.

**www.okbar.org/research/links.htm** — A quick way to find the Oklahoma Supreme Court Web site to look up Oklahoma cases and statutes online. Can be used to find the online site of the Court of Criminal Appeals or any of Oklahoma's District Courts, hunt a state or federal agency, locate a federal court site, find a municipal ordinance or find the rules from local or federal courts. As a bonus there are many other links to assist in your legal and factual research.

**Web site design and hosting** — Provided by the OBA staff to committees, sections and county bar associations.

**Prepared speeches for community/civic groups** — Speeches, outlines and handouts prepared by the OBA's Bench and Bar Committee on selected topics for presentation to public groups. Available through www.okbar.org.

**PUBLICATIONS**

***Oklahoma Bar Journal*** — 34 issues annually, contains articles, court opinions, substantive law, state bar news, professional changes, member news (moves, kudos, additions to firms, etc.), master calendar of judicial and bar events, $55 annual subscription, free to members. Specially printed binders to keep bar journals organized are provided to members at $15.95 each.

**Continuing Legal Education materials** — Seminar materials and form books available for purchase, an affordable way to get quality, state-specific practice aids. Prices start at approximately $40. A complete list of topics is available online, or come by the CLE Dept. at the Oklahoma Bar Center Monday- Friday, 8:30 a.m. - 5 p.m., and review the books available. CLE materials are also available in an electronic format, by chapter, at www.legalspan.com/okbar/e-pubs.asp

**Consumer information brochures** — Pamphlets on 16 topics covering commonly asked questions to give to clients, sold to OBA members at a minimal cost of $16 for 100. Brochure topics are: wills, probate, joint tenancy, home buying, tenant rights and duties, landlord rights, divorce, small claims court, employee rights, bankruptcy, trial juror information, lawyers & legal fees, living wills (brochure and form), criminal law and resolving conflicts and disputes. As a community service, the OBA distributes the brochures free to courthouses and libraries throughout the state.

**PRACTICE MANAGEMENT/ PROFESSIONALISM**

**Young Lawyers Division** — YLD is a professional service network offering the chance to participate in community and bar-related programs. Lawyers of any age who have been in

practice less than 10 years are automatically members. No dues are required. Information about YLD programs is available at www.okbar.org/yld.

**Continuing Legal Education seminars** — The OBA creates and coordinates 125 live seminars, produces numerous videotaped programs annually and offers materials on a full spectrum of legal topics. OBA members can come to the Bar Center anytime during regular business hours to watch a seminar video of your choice and earn CLE, but please call in advance to schedule. Call Renee Montgomery at (405) 416-7029.

**Practice management/ technology hotline service** — Free telephone calls to the Management Assistance Program (MAP) staff and the OBA Director of Information Systems for brief answers about practical management and technology issues, such as law office software, understanding computer jargon, staff and personnel problems, software training opportunities, time management and trust account management. Call (405) 416-7008.

**Office "health checks"** — In-depth personal or group consultations that take place in the lawyer's office, consultations may focus on technology, office procedures or other areas agreed upon by attorney and MAP Coordinator. Fee is $500 per day for small law firms (five attorneys or less) or $750 per day for medium or larger firms (more than five attorneys), program offered by OBA's MAP Dept. Call (405) 416-7008 to schedule.

**MAP workshops** — Customized day-long presentations on technology and office procedures conducted on-site to a group of attorneys and staff members from different firms using a multimedia approach, may include computer generated presentation, videotapes on such topics as professionalism and trust accounting procedures and workshop exercises, afternoon session devoted to answering specific questions anonymously submitted. This is for firms who wish to share costs and have more general information presented to them.

**Book purchasing program** — OBA members can purchase ABA Law Practice Management Section books at the same discount as ABA/ LPM members through the OBA Management Assistance Program.

**Lending library** — Law practice management books, video and audio tapes available for lawyers to check out and review. There is no fee for checking out materials to take home.

**Ethics Counsel** — Assists members with ethical questions and inquiries on subjects such as conflicts, confidentiality and client concerns. The Ethics Counsel also presents continuing education programs on the topics of ethics and professionalism. Call (405) 416-7055.

**Crisis Counseling Services** — Need help with stress, depression or addiction? Call the Lawyers Helping Lawyers Assistance Program toll-free at (800) 364-7886. The OBA offers all bar members up to six hours of free crisis counseling. It's strictly confidential and available 24 hours a day.

**O**BA sections — 23 substantive law sections that offer professional development and interaction, experience professional growth by learning from colleagues in your practice area and develop new contacts, benefits vary by section with a growing number of sections holding midyear or

quarterly meetings that offer free or discount CLE to section members, some sections publish member newsletters. For a list of sections and their annual dues, go to www.okbar.org or see the story on page 85.

**County bar association and civic group speakers** — OBA officers, Board of Governors members and staff members are available (for the price of a meal) to speak at luncheons and banquets on a wide variety of topics including legislative issues, ethics, law office management and law practice tips.

**NETWORKING**

**Leadership opportunities** — Boards, committees, sections and commissions are some of the volunteer opportunities that offer career development and ways to interact with other attorneys and judges.

*Rick Tepker and Micheal Salem at the 2009 OBA Annual Meeting*

**Annual Meeting** — Participate in CLE programs, section and committee meetings, have a voice in determining the OBA's legislative program and electing future state bar leaders, take advantage of networking opportunities with attorneys and judges from throughout the state. The 2010 Annual Meeting will take place Nov. 17-19 at the Crowne Plaza Hotel in Tulsa.

**Solo & Small Firm Conference/YLD Midyear Meeting** — Lawyers have the opportunity to get to know one another and to take advantage of a CLE seminar in a relaxed family setting. The 2010 Solo and Small Firm Conference is scheduled for June 24-26 at Downstream Casino Resort in Quapaw.

*Bill Conger, Linda Thomas and President-Elect Deb Reheard at last year's Solo & Small Firm Conference*

**OTHER SERVICES**

**Direct dial and 24-hour messaging to OBA staff members** — Bypass waiting for the OBA receptionist to answer your call by dialing a staff person or department directly, a list of phone numbers is published in the Oklahoma Bar Journal next to the events calendar, leave a voice message anytime (nights and weekends too). After-hour calls to the general phone numbers (405) 416-7000 or (800) 522-8065 are automated and will list department extension numbers to punch in if you don't know the direct phone number.

**Video conferencing** — Available at the Tulsa County Bar Center and OSU Tulsa so that committee and section members can join in on meetings without traveling to Oklahoma City.

**Legislative services** — The OBA's executive director works for adoption of legislative issues approved by the House of Delegates, and the Legislative Monitoring Committee provides a periodic legislative report highlighting the status of selected bills during the session. The report is published in the *Okla-*

*homa Bar Journal* and on the Web site while the Legislature is in session.

**Meeting rooms at Bar Center** — Many size rooms to choose from to accommodate small and large group meetings, client conferences and depositions, free to members during weekday business hours, nominal fee for evenings.

**Toll-free phone number** — In-state OBA members who live outside the Oklahoma City metro calling area can place free calls to the Oklahoma Bar Center by dialing (800) 522-8065, which connects you to our receptionist (a real, live person - not a machine) to direct your call to the proper person or department.

## OPTIONAL MEMBER PURCHASE

**Oklahoma Legal Directory** — Official directory of OBA members with addresses and phone numbers, roster alphabetical and by county, includes guide to county, state and federal offices plus departments of the U.S. and Oklahoma government, complete digest of courts, professional associations including OBA officers, committees and sections. Published by Legal Directories Publishing Co., hard bound edition $57 + shipping. Call (800) 447-5375 to request order form or go to www.legaldirectories.com.

**Title Examination Standards** — Contains all the presently effective Oklahoma Title Examination Standards and reflects all revisions, produced by the OBA Real Property Law Section, $5 per copy, free to section members. The 2010 Title Examination Standards will be available soon.

**OBA sponsored insurance programs** — Keep rates low through group buying power. For information about OBA programs for life, health (employer-group and individual), individual disability, personal umbrella liability, long-term care and other insurance plans, contact Beale Professional Services (405) 521-1600, (800) 530-4863. For information on professional liability and court bonds, contact Oklahoma Attorneys Mutual at (405) 2471-5380, (800) 318-7505.

**ABA Retirement Funds** — ABA Retirement Funds offers tax-qualified retirement plan services to qualified law professionals. This includes full-service, cost-effective retirement plans such as 401k and profit sharing. Corresponding services include plan design, administration and fiduciary oversight. Program eligibility is open to any law firm or practitioner that has at least one partner or shareholder who is a member of the ABA, or state or local bar association represented in the ABA's House of Delegates. For more information, call (877) 947-2272 or visit www.abaretirement.com.

## MEMBER DISCOUNTS

**Law Firm Merchant Account** — Credit card processing designed for attorneys that safeguards and separates client funds into trust

and operating accounts. Credit cards attract clients, win business, improve cash flow and reduce collections. To learn more call (866) 376-0950 or visit www.affiniscape.com/oklahoma-bar for more information.

**LawWare** — Bar members may subscribe to the document assembly, document management and client management software program at a discounted group rate. Created by Oklahoma attorneys in 1991, LawWare streamlines the process of organizing and generating legal forms and related documents for law offices of any size. With the OBA endorsement, members may subscribe to LawWare at a discounted rate of $49 per month for the first copy and $10 per month for each additional office copy. To inquire about LawWare or to order a subscription, call (866) LAW-WARE or visit www.LawWare.com.

**Online Data Backup & Recovery** — CoreVault offers bar members data backup and recovery services at a discounted rate. The service is automated and centrally managed to help law firms protect their data. It provides daily offsite protection, fast restores, encrypted data and customer service. In addition, CoreVault's two private data centers are geographically separated and possess redundant systems. Don't worry about losing your data and not being able to restore it due to virus, hard drive crash, accidental deleting of data, natural disaster, flood and the many other ways that could cause you to lose your data. To sign up or get more information, visit www.corevault.net/oba or call (888) 265-5818.

**International Travel** — Go Next has been in business for 38 years. They provide high quality, recreational travel to destinations around the globe. Group rates on trips are available to you, your family and your friends. All trips include airfare from either Oklahoma City or Tulsa, accommodations, transfers, breakfast buffet and other amenities. See highlights of the current trip offerings at www.GoNext.com. Call Go Next toll-free at 1 (800) 842-9023 for more information and/or reservations.

**WESTLAW discounts** — West Publishing Corp. offers OBA members a variety of discounts on its products and services, members receive Oklahoma's jurisdictional CD-ROM libraries with the first billable monthly subscription charge waived. For information on other offers available call (800) 762-5272.

**WordPerfect Licensing Program** — The OBA has signed on to Corel Corporation's new bar association licensing program, allowing OBA members to purchase licenses of the award-winning WordPerfect® Office 4 at substantially reduced prices. To place an order, go to www.corel.com/barassociation.

# www. . . . ptions

your association's Web sites

## Oklahoma Bar Circle at www.okbar.org

Look on the right side of the page next to the Fastcase login. Enter your ID and PIN #. Don't know it? That's okay, just click on the Forgot your PIN? link and one will be provided to you shortly. One shorthand way of thinking of Oklahoma Bar Circle is that it is like Facebook for Oklahoma lawyers, but access is allowed only to other Oklahoma lawyers. Think of Oklahoma Bar Circle as an online pictorial directory. This social networking tool can be used to mentor, market yourself, network with other attorneys or find old classmates from law school and reconnect.

## www.oklahomafindalawyer.com

People from across Oklahoma visit this Web site every day in search of an attorney. How can you get your name on this list for free? Signing up is easy – log into your account at my.okbar.org and click on the "find a lawyer" link.

## www.okbar.org/oknewsbar.htm

Designed with the needs of OBA members in mind, OKNewsBar has been created to allow you to quickly access new Oklahoma and U.S. Supreme Court opinions as well as up-to-date legal news and law practice management tips.

## my.okbar.org

On this site, you can do everything from changing your official address, enrolling in a CLE course, checking your MCLE credits and listing your practice areas on the Internet so potential clients can find you. The PIN number required is printed on your dues statement and can be e-mailed to you if the OBA has your current e-mail address.

## www.okbar.org

The official Web site of the Oklahoma Bar Association. It's your one-click resource to all the information you need, including what's new at the OBA, ethics opinions, upcoming CLE seminars, staff contacts, and section and committee information.

## www.oba-net.org

Members-only interactive service. Free basic service with premium services available to enhance the member benefit. Lawyers are empowered to help each other through online discussions and an online document repository. You must agree to certain terms and be issued a password to participate in OBA-NET.

## Fastcase at www.okbar.org

The OBA teamed up with Fastcase in 2007 to provide online legal research software as a free benefit to all OBA members. Fastcase services include national coverage, unlimited usage, unlimited customer service and unlimited free printing — at no cost to bar members, as a part of their existing bar membership. To use Fastcase, go to www.okbar.org. Under the Fastcase logo, enter your username (OBA number) and password PIN for the myokbar portion of the OBA Web site.

## www.twitter.com/oklahomabar
## www.twitter.com/obacle

Catch the most up-to-date happenings at and around the OBA including bar events and CLE's. You don't even have to register. You can simply read all of our tweets by going to twitter.com/oklahomabar or twitter.com/obacle.

**For all other member benefits and resources: Visit www.okbar.org/members/benefits.htm**

# Meet Your Bar Association

# OBA Sections

Want a way to network with other attorneys in your practice area from across the state? The OBA supports 23 substantive law sections that offer professional development and interaction. Experience professional growth by learning from colleagues in your practice area and develop new contacts, benefits vary by section with a growing number of sections holding midyear or quarterly meetings that offer free or discount CLE to section members, some sections publish member newsletters. The following is a list of those who are leading the sections in 2010.

### Alternative Dispute Resolution Section

Andrea Braeutigam, Co-Chairperson, OKC
OSU Institute for Dispute Resolution
1514 W. Hall of Fame
Stillwater, OK 74078-2026
(405) 744-3011
andrea.braeutigam@okstate.edu

Michael A. Simpson, Co-Chairperson, Tulsa
Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile
1500 ParkCentre
525 S. Main
Tulsa, OK 74103-4524
(918) 582-8877 (x4224)
msimpson@ahn-law.com

Laurence Yadon, Newsletter Editor
One West Third, Suite 1667
Tulsa, OK 74103-3519
(918) 595-6607
larry.yadon@swpa.gov

John Graves, Treasurer
2119 Riverwalk Dr., Suite 161
Moore, OK 73160
(405) 684-6735
john@johnhgraves.com

Robert J. Carlson, Co-Secretary
GableGotwals
1100 ONEOK Plaza
100 W. 5th St.
Tulsa, OK 74103-4217
(918) 595-4873
rcarlson@gablelaw.com

Justin Munn, Co-Secretary
Smakal, Munn PC
320 S. Boston Ave., Suite 1119
Tulsa, OK 74103
(918) 582-3400
jmunn@smakalmunnmathis.com

## Appellate Practice Section

Allison Thompson, Chairperson
1000 W. Wilshire, Ste. 361
Oklahoma City, OK 73118
(405) 840-1661
athompson@lswsl.com

Richard Goralewicz, Chairperson-Elect
Route 1, Box 509
Cashion, OK 73016
(405) 521-1302
rick.goralewicz@laok.org

Katrina Conrad-Legler, Secretary
P.O. Box 926
Norman, OK 73070
(405) 801-2727
katrina@oids.state.ok.us

Greg Eddington, Treasurer
3116 Carlton Way
Oklahoma City, OK 73120
(405) 208-5973
geddington@okcu.edu

## Bankruptcy and Reorganization Section

Jeffrey E. Tate, Chairperson and Chairperson-Elect
Mulinix Ogden Hall Andrews & Ludlam
3030 Oklahoma Tower
210 W. Park Ave.
Oklahoma City, OK 73102
(405) 232-3800
jtate@lawokc.com

John B. Jarboe, Secretary/Treasurer
Jarboe & Stoermer
401 S. Boston, Ste. 1810
Tulsa, OK 74103-4018
(918) 582-6131
jjarboe@jarboelaw.com

Roger D. Everett, Immediate Past Chairperson
508 W. Vandament, Suite 300
Yukon, OK 73099
(405) 350-0990
rdelaw@juno.com

## Business and Corporate Law Section

Mark Schell, Chairperson
Unit Corporation
P.O. Box 702500
Tulsa, OK 74170-2500
(918) 493-7700
Mark.schell@unitcorp.com

## Criminal Law Section

Brian T. Hermanson, Chairperson
P.O. Box 2110
Ponca City, OK 74602
(580) 762-0020
bhermanson@oklawhoma.com

David Brockman, Chairperson-Elect
300 County Building
201 S. Jones
Norman, OK 73069
(405) 321-8268
david.brockman@dac.state.ok.us

Cindy Danner, Secretary
Oklahoma Indigent Defense System
P.O. Box 926
Norman, OK 73070-0926
(405) 801-2727
Cindy@oids.state.ok.us

Charles Rogers, Treasurer
2816 W. 15th Ave.
Stillwater, OK 74074
(405) 372-4883
crogers740@brightok.net

Doug Drummond, Q & A Editor
Tulsa County District Attorney's Office
500 S. Denver Ave.
Tulsa, OK 74105
(918) 596-4865
ddrummond@tulsacounty.org

Ben Brown, CLE Chairperson
5905 Classen Court
Oklahoma City, OK 73118
(405) 713-6770
bbrown2@oklahomacounty.org

Larry Stuart, Past Chairperson
P.O. Box 192
Pawhuska, OK 74056
(918) 287-1510
Larry.stuart@dac.state.ok.us

## Energy and Natural Resources Law Section

Chris A. Tytanic, Chairperson
University of Oklahoma College of Law
300 Timberdell Road
Norman, OK 73019
(405) 227-0547
ctytanic@ou.edu

Vance Brown, Vice Chairperson
Elias Books Brown Nelson
211 N. Robinson Ave. # 1300
Oklahoma City, OK 73102
(405) 232-3722
lvbrown@eliasbooks.com

Pam Anderson, Secretary
Hall Estill
320 S. Boston Ave., Ste. 400
Tulsa, OK 74103
(918) 594-0400
panderson@hallestill.com

Lisa T. Silvestri, Budget Director
GableGotwals
100 W. 5th St., Ste. 1100
Tulsa, OK 74103-4217
(918) 595-4855
lsilvestri@gablelaw.com

Terry Ragsdale, Immediate Past Chairperson
GableGotwals
100 W. 5th St., Ste. 1100
Tulsa, OK 74103-4217
(918) 595-4800
tragsdale@gablelaw.com

## Environmental Law Section

Donald D. Maisch, Chairperson
P.O. Box 1677
Oklahoma City, OK 73101
(405) 702-7189
don.maisch@deq.state.ok.us

Gerald L. Hilsher, Chairperson-Elect
500 OneOk Plaza
100 W. Fifth St.
Tulsa, OK 74103
(918) 587-0000
gerald.hilsher@mcafeetaft.com

Jeri Fleming, Secretary
Oklahoma Water Resources Research Institute
003 Life Sciences East
Stillwater, OK 74078
(405) 744-9994
jeri.fleming@okstate.edu

Mista Turner-Burgess,
Treasurer
6113 NE 107th Street
Oklahoma City, OK 73151
(405) 702-7189
mista.turner-burgess@deq.ok.gov

## Estate Planning, Probate and Trust Section

Lesa Creveling, Chairperson
5716 S. Evanston Pl.
Tulsa, OK 74105
(918) 744-0553
lcreveling@trustok.com

Kent W. Gardner, Chairperson-Elect
P.O. Box 720995
Oklahoma City, OK 73172
(405) 840-5000
kent.gardner@funkcompanies.com

Gale Allison, Secretary
The Allison Firm
P.O. Box 700116
(918) 492-4500
gallison@theallisonfirm.com

D. Benham Kirk Jr., Treasurer
1120 Robinson Renaissance
119 N. Robinson Ave.
Oklahoma City, OK 73102
(405) 606-3333
dbkpc@pclaw.org

Kara M. Greuel, Mid-Year Coordinator
12611 S. 285th E Ave.
Coweta, OK 74429
(918) 486-7274
karagreuel@cox.net

Judy Tuggle, Immediate Past Chairperson
P.O. Box 1569
Edmond, OK 73083-1569
(405) 359-0701
jtuggle@mmmtlaw.com

## Family Law Section

Kimberly K. Hays, Chairperson
248 W. 16th St.
Tulsa, OK 74119
(918) 592-2800
Fax: (918) 592-4143
Kimberlyhayslaw@aol.com

Lori Ann Pirraglia, Chairperson-Elect and CLE Chair
Firm Family Law Solutions PC
6440 Avondale Dr. Suite 208
Oklahoma City, OK 73116
(405) 843-3055
Fax: (405) 843-5581
lpirraglia@flspc.com

Tamera Childers, Secretary
3800 First Place Tower
15 E. 5th St.
Tulsa, OK 74103-4309
(918) 581-8200
Fax: (918) 583-1189
tchilders@jonesgotcher.com

Lindsey Andrews, Budget Officer
1624 Greenbriar Place, Suite 600
Oklahoma City, OK 73159
(405) 691-2648
Fax: (405) 265-3275
landrews@coxinet.net

Amy E. Wilson, CLE Co-Chair Assistant (Tulsa) and Immediate Past Chair
3840 S. 103rd E. Ave., Suite 109
Tulsa, OK 74146
(918) 439-2424
Fax: (918) 439-2430
amy.wilson@okdhs.org

Lynn S. Worley (Past Chair), CLE Co-Chair Assistant (Tulsa)
1861 E. 15th St.
Tulsa, OK 74104-4610
(918) 747-4600
Fax: (918) 744-6300
lynnsworley@yahoo.com

Virginia Henson, Practice Manual Co-Editor and Communications Committee
P.O. Box 929
Norman OK 73070
(405) 642-6696
Fax: (405) 329-5002
vhensonatty@gmail.com

Jon R. Ford (Past Chair), Practice Manual Co-Editor
302 N. Independence, Suite 300
Enid, OK 73701
(580) 234-0253
Fax: (580) 234-0256
jon@jfordlaw.com

Phillip J. Tucker (Past Chair), Practice Manual Co-Editor and Trial Advocacy Institute Co-Chair
P.O. Box 601
Edmond, OK 73083-0601
(405) 348-1789
Fax: (405) 348-9724
pjtlaw@juno.com

Brad Cunningham, Membership Co-Chair
3800 First Place Tower
15 E. 5th St.
Tulsa, OK 74103-4309
(918) 581-8200
Fax: (918) 583-1189
bcunningham@jonesgotcher.com

Judge Gary J. Dean, Membership Co-Chair
Mayes County Courthouse
1 Court Plaza, Suite 230
Pryor, OK 74361
(918) 825-6386
Fax: (918) 825-7460
gary@garyjdean.com

Noel K. Tucker (Past Chair), Legislative Co-Chair, Policies/Procedures Manual and Trial Advocacy Institute Co-Chair
P.O. Box 601
Edmond, OK 73083-0601
(405) 348-1789
Fax: (405) 348-9724
pntucker@juno.com

Rees T. Evans (Past Chair), Historian and Trial Advocacy Institute Co-Chair
501 NW 13th St.
Oklahoma City, OK 73103
(405) 232-4311
Fax: (405) 232-4315
Rees.evans@sbcglobal.net

William G. Lasorsa, By-Laws
15 E. 15th St., Suite 3800
Tulsa, OK 74103
(918) 581-8200
Fax: (918) 583-1189
blasorsa@jonesgotcher.com

David A. Tracy (Past Chair), Nominations and Awards
1701 S. Boston
Tulsa, OK 74119
(918) 582-8000
Fax: (918) 583-1210
davidtracy@gabrielmail.com

Keith A. Jones (Past Chair), Social Co-Chair and Trial Advocacy Institute Co-Chair
1861 E. 15th St.
Tulsa, OK 74104-4610
(918) 747-4600
Fax: (918) 744-6300
KAJoneslaw@gmail.com

Judge Donald L. Deason, Judicial Liaison Co-Chair
Oklahoma County Courthouse
321 Park Ave., Room 105
Oklahoma City, OK 73102
(405) 713-2352
donald.deason@oscn.net

Doug Loudenback, Past Chair Emeritus
228 S. Robert S. Kerr, Suite 620
Oklahoma City, OK 73102
(405) 236-4004
Fax: (405) 236-4114
loudenbk@swbell.net

## Financial Institutions and Commercial Law Section

J. Mark Lovelace, Chairperson
Phillips Murrah PC
Corporate Tower, 13th Floor
101 N. Robinson Ave.
Oklahoma City, OK 73102
(405) 235-4100
jmlovelace@phillipsmurrah.com

Professor Brian M. McCall, Vice Chairperson
OU College of Law
300 Timberdell Road
Norman, OK 73019-5081
(405) 325-1682
brian.mccall@ou.edu

Brian Pierson, Secretary/Treasurer
BancFirst
P.O. Box 26788
Oklahoma City, OK 73126
(405) 270-4791
bpierson@bancfirst.com

Robert T. Luttrell III, Program Coordinator
McAfee & Taft
Two Leadership Square, 10th Floor
211 N. Robinson
Oklahoma City, OK 73102-7103
(405) 552-2291
bob.luttrell@mcafeetaft.com

Mike Rubenstein, List Serve Liaison
Rubenstein, McCormick & Pitts PLLC
1503 E. 19th St.
Edmond, OK 73013
(405) 340-1900
mrubenstein@oklawpartners.com

Paul R. Foster, Immediate Past Chairperson
Paul Foster Law Offices PC
P.O. Box 720550
Norman, OK 73070
(405) 329-9101
pfoster@fgblaw.com

## General Practice/Solo and Small Firm Section

Timothy S. McKinney, Chairperson
923 N. Wentz
Guthrie, OK 73044
(405) 282-5353
Tim@McKinneysLawOffice.com

Brenda K. Nipp, Immediate Past Chairperson
920 S. Main
Stillwater, OK 74074
(405) 624-1734
brenda.nipp@legalaidok.org

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Jami Fenner, Chairperson
1701 S. Kelly Ave.
Edmond, OK 73013
(405) 844-9900
jfenner@lldlaw.com

Bryan D. Neal, Chairperson-Elect
529 NW 174th St.
Edmond, OK 73012
(405) 522-0118
Bneal45@yahoo.com

Scott Boughton, Treasurer
313 NE 21st St.
Oklahoma City, OK 73105
(405) 521-4274
Scott_boughton@oag.state.ok.us

## Health Law Section

Susan Moebius Henderson, Chairperson
Legal Counsel, INTEGRIS Health
3030 NW Expressway, Suite 1700
Oklahoma City, OK 73112
(405) 951-4779
hendsm@integris-health.com

Michael J. McDaniel, Chair-Elect
Coffey, Gudgel & McDaniel PLLC
4725 E. 91st St., Suite 100
Tulsa, OK 74137
(918) 292-8787
michael@cgmlawok.com

Beau Patterson, Secretary
McAfee & Taft
Two Leadership Square, 10th Floor
211 N. Robinson
Oklahoma City, OK 73102
(405) 235-9621
beau.patterson@mcafeetaft.com

Hilary L. Velandia, Budget Officer
Doerner, Saunders, Daniel & Anderson LLP
320 S. Boston Ave., Suite 500
Tulsa, OK 74103
(918) 591-5227
hvelandia@dsda.com

Chip Edmunds, Immediate Past Chairperson
Assistant General Counsel
Blue Cross and Blue Shield of Oklahoma
1215 S. Boulder Ave.
Tulsa, OK 74119
(918) 551-3169
chip_edmunds@bcbsok.com

## House Counsel Section

Brent Mills, Chairperson
P.O. Box 53036
Oklahoma City, OK 73152-3036
(918) 520-6886
bmills@crimsontech.edu

## Indian Law Section

Debra Gee, Chairperson
Deputy Attorney General
The Chickasaw Nation Division of Justice
P.O. Box 1548
Ada, OK 74821-1548
(580) 310-6410
debra.gee@chickasaw.net

Jeff Keel, Chairperson-Elect
General Counsel
Office of the Gaming Commissioner
The Chickasaw Nation
P.O. Box 1548
Ada, OK 74820
(580) 310-0570
jeff.keel@chickasaw.net

Chrissi Ross Nimmo, Secretary
Assistant Attorney General
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74464
(918) 458-6998
chrissi-nimmo@cherokee.org

Casey Ross-Petherick, Treasurer/
Budget Officer
Asst. Director Native American Legal
Resource Center
Oklahoma City University School of Law
2501 N. Blackwelder
Oklahoma City, OK 73106
(405) 208-5337
crosspetherick@okcu.edu

O. Joseph Williams, Immediate Past
Chairperson
Pitchlynn & Associates PLLC
P.O. Box 427
124 E. Main St.
Norman, OK 73070
(405) 360-9600
jwilliams@pitchlynnlaw.com

## Insurance Law Section

Jon Starr, Chairperson
McGivern, Gilliard & Curthoys
P.O. Box 2619
Tulsa, OK 74101
(918) 584-3391
jstarr@mcgivernlaw.com

Ryan Harper, Vice Chairperson
Spirit Tower, Suite 500
1800 S. Baltimore Ave.
Tulsa, OK 74119
(918) 382-7523
rharper@lswsl.com

Daniel Monty Delluomo, Treasurer
5617 N. Classen Blvd.
Oklahoma City, OK 73118
(405) 843-0400
dmdelluomo@aol.com

## Intellectual Property Law Section

Michael J. LaBrie, President
McAfee & Taft
Two Leadership Square, 10th Floor
211 N. Robinson
Oklahoma City, OK 73102-7105
(405) 552-2305
michael.labrie@mcafeetaft.com

Sean V. O'Connell, Vice President
Tomlinson & O'Connell PC
Two Leadership Square
211 N. Robinson Ave., Ste. 450
Oklahoma City, OK 73102
(405) 606-3360
seano@tomlinsonoconnell.com

Julianna G. Deligans, Secretary/Treasurer
Hall, Estill, Hardwick, Gable, Golden &
Nelson PC
100 N. Broadway
Chase Tower, Suite 2900
Oklahoma City, OK 73102
(405) 553-2828
jdeligans@hallestill.com

Todd A. Nelson, Director-at-Large/
Immediate Past Chairperson
Fellers, Snider, Blankenship, Bailey &
Tippens PC
321 S. Boston, Ste. 800
Tulsa, OK 74103-3318
(918) 599-0621
tnelson@fellerssnider.com

Scott R. Zingerman, Dist. 2 Director
Fellers, Snider, Blankenship, Bailey &
Tippens PC
321 S. Boston, Suite 800
Tulsa, OK 74103-3318
(918) 599-0621
szingerman@fellerssnider.com

Barabara Krebs-Yuill, Dist. 1 Director
Dunlap Codding PC
1601 NW Expressway, Suite 1000
Oklahoma City, OK 73118
(405) 607-8600
byuill@dunlapcodding.com

## Labor and Employment Law Section

Todd A. Court, Chairperson
McAfee & Taft
Two Leadership Square, 10th Floor
211 N. Robinson
Oklahoma City, OK 73102-7103
(405) 552-2330
Fax: (405) 228-7330
todd.court@mcafeetaft.com

Stephanie Johnson Manning, Vice Chairperson
Titus Hillis Reynolds Love Dickman &
McCalmon
First Place Tower
15 E. Fifth Street, Suite 3700
Tulsa, OK 74103
(918) 587-6800
Fax: (918) 587-6822
smanning@titushillis.com

Christine Cave, Treasurer
Employers Legal Resource Center
301 NW 63rd St., Ste 390
Oklahoma City, OK 73116

## Law Office Management and Technology Section

Judge Charles Hogshead, Chairperson
Tulsa County Courthouse
500 S. Denver Ave.
Tulsa, OK 74103
(918) 596-5388
chogshead@gmail.com

Kent Morlan, Chairperson-Elect
406 S. Boulder, Suite 450
Tulsa, OK 74103
(918) 582-5544
kent@morelaw.com

John N. Brewer, Secretary/Treasurer
3113 N. Classen Blvd.
Oklahoma City, OK 73118
(405) 606-8424
johnb@jnbrewer.com

A. Gabriel Bass, Immediate Past Chairperson
P.O. Box 157
El Reno, OK 73036
(405) 217-0703
agbass@basslaw.net

## Litigation Section

Renee DeMoss, Chairperson
100 W. 5th St., Suite 1100
Tulsa, OK 74103
(918) 595-4800
rdemoss@gablelaw.com

Larry Lipe, Vice Chairperson
4000 One Williams Center
Tulsa, OK 74172
(918) 586-8512
llipe@cwlaw.com

## Real Property Law Section

Jack C. Mackey, Chairperson
431 SW C Ave., Suite 100
Lawton, OK 73501
(580) 695-2811
mackeylaw@hotmail.com

Scott Byrd, Vice Chairperson
3726 E. 43rd St.
Tulsa, OK 74135
(918) 587-3161
Swbyrd42@hotmail.com

Briana Ross, Budget Officer
7306 S. Lewis, Suite 105
Tulsa, OK 74136
(918) 894-4150
bross@ameagletitle.com

Jeff Noble, Secretary
4040 N. Tulsa
Oklahoma City, OK 73112
(405) 942-4848
jnoble@oldrepublictitle.com

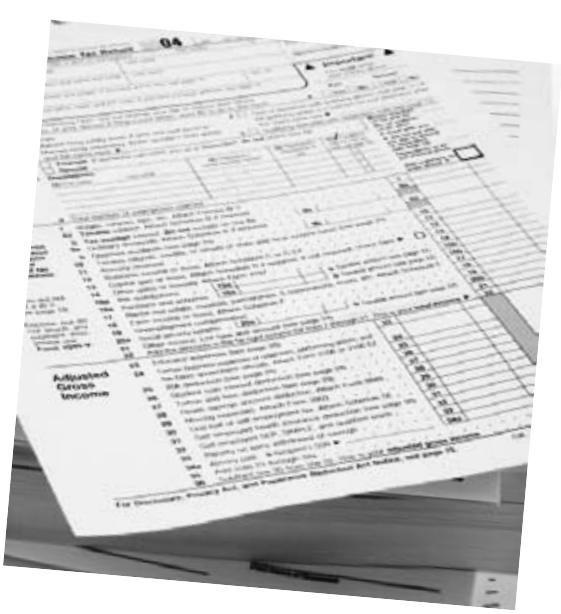
Rebecca Sherwood, Member at Large
American Eagle Title
7306 S. Lewis, Suite 105
Tulsa, OK 74136
(918) 894-4150
rsherwood@ameagletitle.com

Chris J. Smith, Member at Large
1000 W. Wilshire
Oklahoma City, OK 73116
(405) 919-6876
Chris.smith.ok@gmail.com

O. Saul Reid, Immediate Past Chairperson
6 NE 63rd St., Suite 400
Oklahoma City, OK 73105
(405) 848-3537
saulreid@att.net

## Taxation Law Section

Sean R. McFarland, Chairperson
Oklahoma Tax Commission
120 N. Robinson, Suite 2000W
Oklahoma City, OK 73102
(405) 319-8550
smcfarland@tax.ok.gov



Hal Wm. Ellis, Vice-Chairperson
711 S. Husband St.
Stillwater, OK 74074
(405) 743-3770
hwellis@ellisanddrummond.com

W. Todd Holman, Secretary
1257 W. 112th St. S.
Jenks, OK 74037
(918) 599-7755
tholman@barberbartz.com

Alan G. Holloway, Treasurer
2 Leadership Square
211 N. Robinson, 10th Floor
Oklahoma City, OK 73102
(405) 552-2344
Alan.holloway@mcafeetaft.com

Kenneth L. Hunt, Member at Large (East)
320 S. Boston Ave., Suite 200
Tulsa, OK 74103
(918) 594-0420
khunt@hallestill.com

Richard B. Kells, Member at Large (West)
201 Robert S. Kerr, Suite 1600
Oklahoma City, OK 73102
(405) 235-7000
rkells@hartzoglaw.com

Pamela Cai Goins, IRS Liaison
55 N. Robinson, Stop 4123
Oklahoma City, OK 73102
(405) 297-4791
Pam.c.goins@irs.gov

Sheppard F. Miers Jr., OTC Liaison
100 W. 5th St., Suite 1100
Tulsa, OK 74103
(918) 595-4800
smiers@gablelaw.com

### Workers' Compensation Section

Emily J. Biscone, Chairperson
105 N. Hudson, No. 100
Oklahoma City, OK 73102
(405) 232-6490
ebiscone@oklalegal.com

Frank L. Gruntkowski, Chairperson-Elect
4138 E. 47th St.
Tulsa, OK 74135
(918) 743-4391
Frank.gruntkowski@sbcglobal.net

John L. Shears, Treasurer
Corporate Tower, 13th Floor
101 N. Robinson Ave.
Oklahoma City, OK 73102
(405) 235-4100
jlshears@phillipsmurrah.com

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# Identity Theft: Application of Red Flags Rule to Health Care Providers

*By Mary Holloway Richard*

The most recent, highly publicized regulations facing many businesses and organizations is known as the Red Flags Rule[1] and is designed to identify, deter and mitigate identity theft. The regulations require those covered by the statutes and implementing regulations to create written policies for determining signs of identity theft and work to mitigate resultant damages. The hue and cry from organizations such as the American Medical Association (AMA) who could not imagine that they were covered by these new rules has forced the Federal Trade Commission (FTC) to engage in an extended educational campaign prior to its compliance deadline. The new compliance date is June 1, 2010.

In the last months of 2007, the FTC issued a final rule requiring financial institutions and "creditors" to institute identity theft prevention programs as part of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act). In October 2008, the FTC announced that it was moving the compliance deadline from November 2008, to May 2009. That date was first extended to Aug. 1, 2009, to Nov. 1, 2009, and then to June 1, 2010, to allow for compliance by health care providers and others who were caught unaware by the application of these regulations. Advocates objecting to application of the rule believe that the numerous delays have resulted from these continued, vociferous objections. The AMA, one such advocate, led a large group, including many national sub-specialty and state medical associations, in dialogue with the FTC to advocate for exclusion of health care providers from the "creditor" moniker. The most recent extension illustrates the depth and breadth of confusion among businesses attempting to determine if they are covered by these rules and, perhaps more importantly, what appears to be agency recognition that significant effort on their part will be required to facilitate and ensure compliance on such a grand scale.

This article is pertinent not only to Oklahoma attorneys serving health care clients, but also to counsel for a wide range of clients, including attorneys themselves, who can be considered "creditors" involved in "covered accounts" under the new Red Flags Rule. (Refer to note 31 *infra* and accompanying text regarding the objections by the American Bar Association to the application of the Red Flags

Rule to attorneys.) The almost certainly unavoidable task at hand to creditors is to identify and detect relevant red flags, prevent and mitigate identity theft, and to periodically update the programs by which they are accomplishing these things – at least until these regulations are successfully challenged or revised.

## ADDRESSING THE BAR: REPRESENTING HEALTH CARE CLIENTS AND OTHERS

Health care law has taken many twists and turns over the last 20 years. It is today a substantive body of law and field of practice that, though initially misunderstood as limited to medical liability litigation, now places great demands on counsel because of the variety of laws and regulations and their ever-changing directives and limitations. In fact, it can be said that health care law may be described by the types of clients served rather than by the substantive laws impacting this diverse sector. Health care lawyers find themselves responsible for mastering a wide range of regulatory schemes, advocating on behalf of health care clients before government entities, negotiating with other providers that are constantly evolving and wishing for crystal balls as they ride the regulatory waves. In a state such as ours, members of the bar who consider themselves generalists, employment lawyers, corporate lawyers and tax lawyers, to name just a few relevant practice areas, find themselves treading the murky waters of the burgeoning "health care law." This time around, health care lawyers will have a great deal of company mired in the trenches on the newest rung on the compliance ladder – the Red Flags Rule.

## IDENTITY THEFT IN PERSPECTIVE

The wave of identity theft has been popularized over the last 15 years in productions for television and cinema such as *The Talented Mr. Ripley, Firewall* and *Identity Theft*. In the film titled *The Net*, Sandra Bullock parried and outwitted her nemesis in a fact situation that seemed implausible when released in 1995. It is difficult for most people to accept the purported magnitude and impact of the threat of identity theft without some modicum of experience with the problem through personal knowledge that may include exposure to compelling testimonials.[2]

The Consumer Sentinel Network, a secure online database of millions of consumer complaints available only to law enforcement, reports 7.2 million complaints since it began collecting this information 12 years ago.[3] It reports that more than 1.2 million complaints were received in 2008, and, while there is some overlap among the 30 categories of complaints, identity theft accounted for approximately 26 percent of all consumer complaints in 2007.[4] The number of complaints has risen steadily since 2000 from 31,140 to 313,982 and the FTC estimates that approximately 9 million identities are stolen from Americans annually representing losses of billions of dollars to citizens, business and government.[5] Complaints involving health care have risen steadily from 2006 (7,439) to 2007 (15,961) to 2008 (16,275).[6] Some of these victims find that they must spend hundreds, even thousands, of dollars repairing the damage done to their credit ratings and good names.[7]

## CHARACTERIZING THE PROBLEM

Identity theft occurs when personal information is purloined and used to commit fraud or other crimes. It is on the rise due to many factors, including advances in computer technology that have made it possible and inexpensive to collect, store and disseminate massive amounts of detailed information about people.[8] The tools of this trade include phishing (*i.e.*, sending electronic messages to customers of creditors and financial institutions directing them to provide personal information in response to a fraudulent e-mail), security breaches/theft of personal information and use of "Malware" such as spyware and viruses.

Amid remarkable technological innovations in our ability to communicate and remain connected to one another in our personal lives and business ventures, our personal information is at increasing risk. As a result, the FTC's consumer protection mission focuses on privacy, and the federal government has dedicated significant resources toward that end.[9]

## REGULATORY HISTORY

The regulatory history of federal efforts to protect citizens from identity theft begins in important part with the Fair Credit Reporting Act of 1970 (FCRA).[10] With passage of FCRA, which has been repeatedly amended, Congress sought to ensure that credit and consumer reporting agencies deal with consumers, and their information, in a fair, impartial way and so as to actively exercise respect for the consumer's right of privacy. That act was amended by the Fair and Accurate Credit Transactions Act (FACT).[11] The FACT Act was signed into

law in the final days of 2003 to add provisions that required anti-identity theft guidelines and to charge federal agencies with the task of promulgating more specific rules thereunder. At that time, President Bush called for tougher privacy laws and created an Identity Theft Task Force to investigate the problem in detail. The result was a strategic plan of unprecedented effort for a problem not considered a priority by many citizens. Perhaps that is why many health care providers, financial institutions, creditors and other businesses are reacting with surprise to the purported magnitude of both the problem and the solution as applied to their businesses and professions.

FACT (15 U.S.C. §1681m) amends FCRA by directing a group of agencies to issue regulations and guidelines jointly to provide for "detection, prevention, and mitigation of identity theft" and, importantly, requires these federal agencies to cooperate in issuing joint regulations for financial institutions and creditors to use with respect to their customers and account holders. The agencies — FTC, the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), the Department of the Treasury Office of Thrift Supervision (OTS) and Office of Comptroller of the Currency (OCC), and the National Credit Union Administration (NCUA) — are to issue guidelines to assist financial institutions and creditors in designing a program that embodies the purpose and spirit of the rules.[12]

It is noteworthy that FRCA provides for civil monetary penalties and distinguishes between willful noncompliance (maximum actual damages of $1,000, attorney's fees where a pleading is filed in bad faith and punitive damages as a court may allow) and negligent noncompliance (actual damages and costs of a successful action to enforce, if any).[13] Even heftier civil penalties can be meted out for creditors failing to comply with the Equal Credit Opportunity Act (ECOA.)[14] According to concerns stated by one compliance consultant, fines could also expose "creditors" such as physicians to lawsuits.[15] In the absence of criminal penalties for failing to comply with the rule, violators perhaps also should be concerned with implications for contracts with federal, state and other payers.[16]

As the foregoing suggests, and is discussed below, a popular source of debate recently has been the application of these amendments and regulations to the health care sector. Three concepts provide the answers, at least according to the agencies. The first has to do with entities in control of the information at risk – "creditor" and "financial institution" as established by ECOA.[17] Importantly, for the purposes of this article, Section 702 of ECOA defines "creditor" to include a person who arranges for the extension, renewal or continuation of credit:

> (d) The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.
>
> (e) The term 'creditors' means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of the original creditor who participates in the decision to extend, renew or continue credit.[18]

The rule continues the process of identifying those to whom it applies by a broad definition of "covered account":

> (3)(i) An account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes, that involves or is designed to permit multiple payments or transactions, such as a credit card account, mortgage loan, automobile loan, margin account, cell phone account, utility account, checking account, or savings account; and
>
> (ii) Any other account that the financial institution or creditor offers or maintains for which there is a reasonably foreseeable risk to customers or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation, or litigation risks.[19]

The regulations, promulgated in 2007, expand the FACT Act's arsenal for protecting these victims by creating an exacting though flexible framework for those to whom they apply.

## THE REGULATION: THE RED FLAGS RULE[20]

The final Red Flags Rule created, in essence, a prevention program. That program is built upon policies and procedures designed with three goals — detecting, preventing and mitigating

the harm caused by identity theft. Specifically a creditor or covered entity's (hereafter referred to as "provider") unique program must achieve four objectives that will result in identifying patterns and activities that cause sufficient concern that someone's identity has been placed at risk and incorporating responsive procedures that, if not resulting in prevention, at least result in mitigating harm to victims and costs to the provider.

> "Health care providers were shocked to find that the FTC intended to include them in this regulatory schema."

First the provider must undertake the initial task of identifying relevant patterns, practices and specific activities (*i.e.*, red flags) that would put an attuned provider on guard about possible identity theft and to create appropriate responsive procedures; this can only take place in the specific context of the provider's business. Therefore, there is no boilerplate response appropriate or compliant under this rule. Second, existing red flags, meaning specific experiences or fact situations already encountered, must be incorporated into the system of procedures. These are the known risks that exist in each particular business context. Third, the program must shore up these known risks with procedures appropriate to the specific practice or business to prevent and mitigate identity theft. Fourth, the rule mandates updating the internal program periodically after analyzing the experiences with the new procedures.

As stated in Schedule A of the Red Flags Rule, this program is concerned with **reasonably foreseeable** risks. The discernment of red flags in any individual practice setting will take into account the types of covered accounts used and the methods for opening them and providing access to them, as well as their history. The plan for an entity that has experienced identity theft is different from an entity that tries to imagine how it might be encountered for the first time in their practice. Perhaps most helpful is Schedule A's list of categories of red flags such as identifying information that appears to have been altered and notice of billing for a service apparently not rendered. These guidelines include a listing of 31 patterns, practices and activities that point to possible identity theft.[21] The task for providers is to incorporate those 31 items, as well as indicators that exist in a particular business and industry, into the programs to mitigate the possibility of identity theft and their unintended facilitation of such. In addition to periodic and responsive review of the plan, the regulations require approval by the board of directors or board committee (or key administrative official as would be the case in many private health care practitioners' offices) and staff training. It is the understanding of those who drafted the regulations that the programs will necessarily be fluid in order to respond to changing technology, current affairs and overriding federal policies such as the USA Patriot Act, and changes in the covered entities themselves as providers respond to increased regulation and revamping of the health care system.[22]

The FTC has provided a structure online for a do-it-yourself program to assess a provider's potential exposure to identity theft and to create a unique program for mitigating the risk appropriately, however slight the actual risk. While this guide may be helpful to small businesses, it will require sufficient qualified staff support for it to be done appropriately.[23] The FTC guide walks providers and staff through the analysis of the business or practice and provides an opportunity for simplifying and tailoring the process that is compliant in their context. The FTC is pouring significant resources into its efforts to educate the public and position providers for compliance. One component of FTC strategy includes consumer education including familiarity with the alert system,[24] awareness of easy preventive steps to prevent appropriation of information (*e.g.*, not carrying a Social Security card in one's wallet and shredding trash), and the availability of annual (free) credit reports.

Health care providers were shocked to find that the FTC intended to include them in this regulatory schema. Although some of the shock is wearing off, they could not imagine that they would be considered as "creditors" or that their dealings with patients would be considered as "covered transactions" under the regulations. Their surprise at being so included ultimately led the FTC to delay implementation of the regulations to health care providers until June 1, 2010.

## APPLICATION TO THE HEALTH SECTOR

Even properly acknowledging the common strictures of reimbursement and the changes they have wrought in the provision of health services, applying the "creditor" moniker to non-institutional providers (who would gladly collect all fees at time of service were it not for co-pays and other inventions of insurers), is a little like fitting the glass slipper on those stepsisters. While definitionally troublesome, the FTC's consistent response to such criticism is to advise health care providers to adopt the perspective of the identity theft victim. This can be an effective exercise and there are benefits for health care practices as there have been with the Health Insurance Portability and Accountability Act (HIPAA) compliance. (See note 34 and accompanying text.) Recent participants in an ABA webcast heard a hospital representative speak about her experience instituting the rules while providers still had hopes of being excluded from the regulations.[25] She spoke of an identity theft detection program being the "right thing to do" and of her hospital's experience in detecting attempts at identity theft, which in her experience occurs with some frequency within families.[26]

The industry as a whole was not immediately on board, in part because of the perception that providers were implicated or in a position to identify identity theft, skepticism about increased regulation of any kind, and concern about scarce resources available to dedicate to this effort. The AMA challenged the FTC informally on application of the rule to its physician members.[27] The FTC response hinged on application of the seminal definitions from statute and regulation to the practice of medicine and the prevalence of the problem within the health sector. The FTC's consistent position has been that "credit," under the law, is a deferral of debt and so applies to doctors' offices and their billing practices even though they may not charge interest.[28] Thus, although the primary responsibility of physicians is to provide health care, they also are conducting a business – a business that provides service for which payment is regularly deferred.[29] The FTC view is that providers are covered when they "regularly defer payment for goods or services.[30]

Accepting credit cards, however, does not make one a creditor. The federal perspective, that implementation of the rule in the health sector will help reduce the incidence of medical identity theft and that the burden on health care professionals need not be substantial, are addressed in the FTC's letter response to the AMA: "As staff has discussed with you, we believe the plain language and purpose of the Rule dictate that health care professional are covered by the Rule when they regularly defer payment for goods and services."[31] It is also significant, as mentioned earlier, that the ABA recently challenged application of the Red Flags Rule to law firms.[32]

Regarding prevalence, according to the FTC, 4.5 percent of the 8.3 million victims of identity theft experienced medical identity theft. For example, identity thieves have received treatment using names of other people who were then billed, and, in fact, the term "medical identity theft" was coined to refer to efforts to obtain medical services using a stolen identity."[33]

## WHAT DOES THIS MEAN TO HEALTH LAWYERS AND CLIENTS?

First, it bears repeating that these rules do not apply to physicians alone; all providers of health services are implicated whether they are for-profit, non-profit or governmental entities. The analysis must take place to determine what procedures will be required to be compliant in each unique practice or institutional setting. Medical identity theft exists in the health sector and has been expressly included in the Red Flags Rule guidelines. Because of this recognition providers have a concomitant duty to be vigilant in monitoring for potential victims. Some providers will be equipped to analyze their situations using the checklist and guides provided by the FTC. Others will need minimal guidance and structure to approach the process themselves. Still others will contract out the service with attorneys and consultants. Where the risk is minimal the response can be minimal. All providers would do well to be watchful of both employee and vendor access to patient information regulations notwithstanding. In terms of positioning those regu-

lated to embrace compliance, the federal agencies have made an egregious error. In estimating the burden of the identity theft regulations the agencies estimated that "…the annual burden per respondent is 41 hours…" For low-risk entities FTC staff has estimated an hour to review the regulations and create a program, ten minutes to training staff annually, and ten additional minutes to prepare the annual report.[34] Having prepared numerous Red Flags Rule programs, this author finds such assertions by agency staff of the costs to providers in terms of their time to be specious at best.

Secondarily, but equally important, is the element of authority fundamental to creating and administering a compliant program. This means that a board, committee of the board or an appropriate senior manager must approve the written program (policies and procedures) for the practice and be responsible for overseeing its implementation. Staff training will also be an integral component of an identity theft prevention program. Training is required not just for following the procedures created for the program but for initiating the process and identifying the risks posed in the practice and those that may have actually occurred.

It is helpful in getting started to brainstorm about red flags generically and then specifically in one's practice. The World Privacy Forum's "Red Flag and Address Discrepancy Requirements: Suggestions for Health Care Providers" authored by Robert Gellman and Pam Dixon and presented at the World Privacy Forum September, 2008, recommends the following red flags for health care providers:

1) A complaint or question from a patient based on the patient's receipt of a bill for another, a bill for a product the patient denies receiving, bill from a health care provider the patient has never patronized, or a notice of benefits (or EOB) for health services never received.

2) Records showing medical treatment that is inconsistent with a physical examination or with a medical history as reported by the patient.

3) A complaint or question from a patient about the receipt of a collection notice from a bill collector.

4) A patient or insurance company report that coverage for a legitimate hospital stay is denied because insurance benefits have been depleted or a lifetime cap has been reached.

5) A complaint or question from a patient about information added to a credit report by a health care provider or insurer.

6) A dispute of a bill by a patient who claims to be the victim of any type of identity theft.

7) A patient who has an insurance number but never produces an insurance card or other physical documentation of insurance.

8) A notice or inquiry from an insurance fraud investigator for a private insurance company or a law enforcement agency.

Analyzing medical identity fraud risk — false use of another's insurance, false billing, unauthorized securing of prescription drugs, damage to credit history and potentially life-threatening corruption of a privileged medical records — can prove to be a beneficial exercise when properly guided by a perspective not just of compliance but of personal gain for the practice. This author's experience is that the benefits are similar to those gained from creating or revising short- and long-term business plans. One example of thinking outside the box is provided by an urban Oklahoma pediatric practice that responded to an existing red flag by creating passwords for patients embroiled in domestic disputes to use in accessing medical information on the telephone. This is precisely the type of tailored response required by the Red Flags Rule.

While providers will be challenged to scrutinize their practices, the health care lawyer will be concerned about penalties for failure to satisfactorily do so, advising in a medical or health services context about placing red flags or other alerts in medical records and other privileged information, and guiding providers and practice staff through potential changes in the character of the provider-patient relationship. In addition, counsel will need to continue to be cognizant of the burgeoning privacy regulations that are changing the way care is provided. It will serve counsel well to access nonlegal information sources in an effort to encourage effective compliance such as "Responses to Medical Identity Theft: Eight Best Practices for Helping Victims for Medical Identity Theft" by the World Privacy Forum in April 2007, as well as the bottomless well of material being

produced by the FTC and an army of prolific private consultants.

Another layer of regulation protecting the maintenance and flow of personal health information must not be omitted from a consideration of the Red Flags Rule. Regulatory schemes presenting additional challenges for counsel are HIPAA and the Health Information Technology for Economic and Clinical Health (HITECH) Act.[35] In 1996, ERISA was amended by HIPAA's privacy and administrative simplification rules, and these were followed by the HITECH Act passed as part of the American Recovery and Reinvestment Act of 2009 (P.L.111-5). The impact on health care providers, and upon those advising them, can hardly be overstated. HIPAA, originally designed to protect employees changing jobs from losing their health insurance coverage, arguably has had the greatest impact in terms of its administrative simplification rules that establish permitted disclosures of personal health information. The HITECH Act placed notification requirements on covered entities for certain security breaches of protected health information. It also expands civil monetary penalties, requires the promulgation of future regulations (February 2012), authorizes states' attorneys general to pursue civil actions for HIPAA privacy and security violations, and expands the "business associate" designation (current inclusion of just about everyone except plumbers, construction workers, janitors and those tending the fish tanks).

Attorneys, therefore, will need to be cognizant of the plethora of rules related to privacy when assisting clients with creating a program to comply with the Red Flags Rule. Undoubtedly legal issues will arise for patients who lack enforceable rights to correct and delete misinformation in medical records, to locate all of their medical records, and to identify resources to provide aid to victims of identity theft. That will be uncharted territory in a sea of regulations to occupy providers and their counsel for some time to come.

No amount of loyalty or sensibility to the client, no amount of concern for providers' struggles in the face of metastasizing governmental regulation is going to turn back the bureaucratic groundswell in response to the undeniable hardships facing victims of identity theft. Extrapolate the loss of a single credit card to the identity theft victim's loss of control of extensive personal and financial information, and you have a feel for the sufferings of these victims in this age of technology. One victim tells the story of the authorities' attempts to pursue her perpetrator that resulted in her own arrest![36] In fact, informal efforts by health care providers and their representatives to communicate with the regulators consistently results in comments such as "Perhaps this would be easier for you to accept if you thought of it from the position of the victims of identity theft rather than from the perspective of your client the medical clinic."[37] The silver lining? You decide how much procedure is due — and you and your client might just find that there are benefits to be gained from the process.

1. 15 U.S.C. §§1601 et seq. amending 15 U.S.C. §1681m(e)(1)(A); 16 C.F.R. Part 681 §68.1 et seq.

2. Identity Theft Red Flags and Address Discrepancies Under the Fair and Accurate Credit Transactions Act of 2003, (discussing final regulations codified at 16 C.F.R. §§681.1-2), 72 Fed.Reg. 63723 (Sep. 9, 2007). *See also* www.ftc.gov/bcp/edu/microsites/idtheft/video/avoid-identity-theft-video.html.

3. Sentinel is available to 1,500 civil and criminal law enforcement law enforcement agencies in this country and abroad. Complaints housed in this database were lodged with the FTC, Better Business Bureaus, U.S. Postal Inspection Service, National Association of Attorneys General, Social Security Administration, National Fraud Information Center, Identify Theft Assistance Center, and other such entities. "Consumer Sentinental Network Data Book for Jan-December 2008," Federal Trade Commission, February, 2009 (hereinafter "Sentinel").

4. *Id.* at 4. The estimates vary for 2007 ranging from 26-32 percent.

5. *Id.* www.ftc.gov/bcp/edu/microsites/idtheft/consumers/about-identity-theft.html. Sooner fans will appreciate knowing that in 2008, Oklahoma ranked 28th in incidence of identity theft in the U.S., while our rivals to the south led at 4th; this represents 74 per 100,000/population and 103.3/100,000 population, respectively. Sentinel at 54-61.

6. *Id.*

7. Efforts on the federal level to limit consumer losses include the Truth in Lending Act, 15 U.S.C. §1601 et seq. and the Electronic Fund Transfer Act, 15 U.S.C. §§1693 et seq.

The Federal Trade Commission is educating consumers and businesses about the importance of personal information privacy, including the security of personal information. Under the FTC Act, the Commission guards against unfairness and deception by enforcing companies' privacy promises about how they collect, use and secure consumers' personal information. Under the Gramm-Leach-Bliley Act, the Commission has implemented rules concerning financial privacy notices and the administrative, technical and physical safeguarding of personal information, and it aggressively enforces against pretexting. The Commission also protects consumer privacy under the Fair Credit Reporting Act and the Children's Online Privacy Protection Act. Use the topic links on the left to read more about our efforts in each of these areas, including what we've learned, and what you can do to protect the privacy of your personal information.

8. "FTC Privacy Initiatives" Introduction". www.ftc.gov/privacy/.

9. Medpage Today "Physicians Under Gun to Comply with 'Red Flag [sic] Identity Theft Rules" by Emily P. Walker, April 6, 2009. www.medpagetoday.com/PracticeManagement/PracticeManagement/13608. This is happening amid media coverage of cases such as the fining of CVS/Walgreens for HIPAA violations by improper disposal of patient's personal information. S"2nd HIPAA Sanction: CVS Must Pay $2.25 Million and Improve Information Security Practices for Improper Disposal". www.realtime-itcompliance.com/laws_regulations/2009/02/2nd_hipaa_sanction_cvs_must_pa.htm and www.phoenixhealth.com/hipaaadvisory/.

10. 15 U.S.C. §§1681 et seq.

11. 15 U.S.C. §§1681j et seq. *See also* "The President's Identity Theft Task Force Releases Comprehensive Strategic Plan to Combat Identity Theft." FTC Release April 23, 2007. ftc.gov/opa/2007/04/idtheft.shtm.

12. 72 Fed.Reg. 63718-63719 (Nov. 9, 2007).

13. 15 U.S.C. §§1681(n) and (o).

14. 15 U.S.C. §1691a (Sec. 618 FACT Act).

15. "Physicians Under Gun to Comply with 'Red Flag' Identity Theft Rules" by Emily Walker, MedPage Today (April 6, 2009) (quoting Compliance Coach CEO Sai Hud).

16. Tiffany George and Pavneet Singh, FTC Division of Privacy and Identity Protection. May 2009 "Articles for Business-The Red Flags Rule: What Utility Companies Need to Know About Complying with the New Requirements for Fighting Identity Theft" May 2009; accessed June 23, 2009 at www.ftc.gov/bcp/edu/pubs/articles/art13.shtm.

17. ECOA (15 U.S.C. §1691) prohibits discrimination in any aspect of a credit transaction.

18. *Id.*

19. 16 C.F.R. §681.2(b)(3).

20. See 72 Fed. Reg. 63723 Nov. 9, 2007 (discussion final regulations promulgated under the Fair and Accurate Credit Transactions Act of 2003, 15 U.S.C. §1681 et seq.).

21. *Id.*

22. 31 U.S.C. §5318(l).

23. www.ftc.gov/bcp/edu/microsites/redflagsrule/RedFlags_forLowRiskBusinesses.pdf. Undoubtedly this will result in the need for legal services for some clients, and we are already witnessing the sprouting up of consulting services tailored to meet the needs created by the rule.

24. www.ftc.gov/bcp/edu/pubs/consumer/idtheft/idt09.pdf and www.ftc.gov/opa/2008/02/fraud.pdf (Sentinel complaints).

You have the right to ask that nationwide consumer reporting agencies place "fraud alerts" in your file to let potential creditors and others know that you may be a victim of identity theft. A fraud alert can make it more difficult for someone to get credit in your name because it tells creditors to follow certain procedures to protect you. It also may delay your ability to obtain credit. You may place a fraud alert in your file by calling just one of the three nationwide consumer reporting agencies. As soon as that agency processes your fraud alert, it will notify the other two, which then also must place fraud alerts in your file. An *initial fraud alert* stays in your file for at least 90 days. An *extended alert* stays in your file for seven years. To place either of these alerts, a consumer reporting agency will require you to provide appropriate proof of your identity, which may include your Social Security number. If you ask for an extended alert, you will have to provide an *identity theft report*. An *identity theft report* includes a copy of a report you have filed with a federal, state, or local law enforcement agency, and additional information a consumer reporting agency may require you to submit. For more detailed information about the *identity theft report*, visit www.consumer.gov/idtheft.

25. "Identity Theft Red Flags Rule: What Healthcare Providers Need to Know" ABA Health Law Section and ABA Center for Continuing Legal Education Webcast July 16, 2009.

26. Comments made by Debbie Wilson, Administrator, Trinity Health System, Minot, Wisconsin in ABA Podcast, "Identity Theft Red Flags Rule: What Healthcare Providers Need to Know" July 16, 2009.

27. Letters from Margaret Garikes, AMA to William E. Kavacic, FTC Chairman , (Sept. 30 2008 and Feb. 23, 2009).

28. Letter from Joel Winson, Associate Director, FTC Bureau of Consumer Protection, to Margaret Garikes, AMA( March 11, 2009).

29. I*d.* Acceptance of credit cards does not if and of itself make one a "creditor" under the regulations.

30. Letter from Eileen Harrington, Acting Director of FTC Bureau of Consumer Protection to Mararet Garikes, AMA (Feb. 4, 2009).

31. Correspondence from Eileen Harrington, Acting Director of Bureau of Consumer Protection, FTC, to Margaret Garikes, Director of Federal Affairs, AMA, dated Feb. 4, 2009. See also 72 Fed.Reg. 63727 (Nov. 9, 2007).

32. Statement of H. Thomas Wells, Jr. President American Bar Association Re Fair and Accurate Credit Transaction Act "Red Flags" Rule June 22, 2009. www.abanet.org/abanet/media/statement/statement.cfm?releaseid=684. Accessed 7/2/09. It is noteworthy that the argument used by ABA President Wells is in important part precisely the argument put forth by AMA representatives in challenging application of the rules to the medical profession — undue burden with scant accomplishment and impingement on confidential relationship. To quote President Wells: "This temporary reprieve is important to all in the legal profession. However, the FTC's continued assertion that it can, as it sees fit, regulate lawyers under the "red flags" provisions is troubling, and unacceptable to the ABA. It undercuts an unbroken history of strong regulation by state bars and supreme courts. It threatens the independence of the profession from federal controls, independence that is fundamental to the lawyer's role as client confidante and advocate. And it is goes against Congress' intent when the law was passed. The ABA and its counterparts at the state and local levels will continue to work with Congress to clarify that this rule should not apply to lawyers. And if necessary, the ABA remains prepared to take the issue to the courts for a final resolution. " As one representing health care providers, this author finds it specious reasoning to suggest that the rule should not apply simply because the perpetrator would have to assume not only identity but legal needs of one whose identity was stolen as well. At least in regards to health care providers, medical need can be assessed and such needs are somewhat less likely to be misappropriated.

33. 72 Fed. Reg. 63723 n. 21 (Nov. 9, 2007) *See also* Emily P. Walker, Medpage Today "Physicians Under Gun to Comply with 'Red Flag [sic] Identity Theft Rules" (April 6, 2009) www.medpagetoday.com/PracticeManagement/PracticeManagement/13608.

34. 72 Fed.Reg. 63741-63742 Nov. 9, 2007.

35. 42 U.S.C. §§1320d et seq.; 45 C.F.R. Parts 160 and 164; 29 U.S.C. §§1181 et seq; 45 C.F.R. §§160 et seq.; 42 U.S.C. §§300jj.

36. Testimony by Michelle Brown, U.S. Senate Committee Hearing on the Judiciary Subcommittee on Technology, Terrorism and Goverment Information — "Identity Theft: How to Protect and Restore Your Good Name" July 12, 2000.

37. Telephone Interview with Naomi Lefkowitz, FTC staff on July 15, 2009.

## ABOUT THE AUTHOR

Mary Holloway Richard practices health care law with Scoggins & Cross PLLC in Oklahoma City. She is a member of the OBA Health Law Section and was an original member and officer of the Oklahoma Health Lawyers Association. She is also a member of the American Health Lawyers Association and the American Society of Medical Association Counsel. She has taught and authored articles about health services research, health management and health law.

# Judicial Review of Administrative Agency Decisions

## A Discussion of Jurisdiction and Standards of Review

*By Justice John F. Reif*

The Oklahoma Administrative Procedures Act, 75 O.S.2001 and Supp. 2008 §§250 through 323, provides the right to receive judicial review of final orders rendered by Oklahoma administrative agencies in individualized proceedings. As one court has observed, "the Act provides… *a right to two reviews*, once in District Court and thereafter… in the Supreme Court. 75 O.S.[2001] § 318 (judicial review in district court); 75 O.S.2001 §323 (judicial review of district court's order by appeal to Oklahoma Supreme Court)."[1]

While this regime of judicial review applies to the final orders of *most* agencies, the final orders of some agencies are appealed directly to the Oklahoma Supreme Court. Agencies whose orders are directly appealable to the Oklahoma Supreme Court include 1) the Oklahoma Corporation Commission;[2] 2) the Oklahoma Board of Medical Licensure;[3] 3) the Oklahoma Tax Commission;[4] and 4) the Oklahoma Securities Commission,[5] (except cease and desist orders which are appealable to the district court of Oklahoma County).

The Court of Civil Appeals also plays a role in judicial review of administrative orders. This occurs when the Supreme Court assigns a direct appeal or an appeal after district court review to the Court of Civil Appeals. However, further review by the Supreme Court of the Court of Civil Appeals decision is not allowed as a matter of right, but is based upon the discretionary writ of certiorari.[6]

While judicial review of administrative orders is a common feature of the legal landscape in Oklahoma, practitioners and judges alike are often confused about the adjudicative relationship between the administrative agencies and the courts. The purpose of this paper is to shed some light on the nature of the jurisdiction exercised by the courts and the rules that guide the exercise of that jurisdiction.

### JURISDICTION AND SCOPE OF REVIEW

In conducting judicial review of administrative orders, the court at each level exercises appellate jurisdiction only. "Appellate jurisdiction is that power to review and correct proceedings of inferior courts [or tribunals] brought for determination in the manner provided by law."[7]

Even though the act does not use the term "appellate jurisdiction" to describe judicial review, section 321 of the Administrative Procedures Act states that "review shall be

> The U.S. Supreme Court has provided a simple and useful framework for examining standards of review.

conducted by the court without a jury and shall be confined to the record." Section 322(1)(e) further prohibits the court from "substituting its judgment as to the weight of the evidence for that of the agency on question[s] of fact."

The exercise of appellate jurisdiction by a reviewing court is further indicated by the directive in section 322(2) that the court "remand the case to the agency for the taking and consideration of further evidence, if it is deemed essential to the proper disposition of the issue." This demonstrates the Legislature's intent for administrative agencies to exercise original jurisdiction in the cases they adjudicate. Original jurisdiction is "*jurisdiction to consider a case in the first instance [and] pass judgment upon the law and facts*."[8]

This distinction in jurisdiction is the primary reason the scope of judicial review is limited to issues raised before the administrative agency. It has long been recognized the "the Trial Court [*i.e.*, the district court conducting judicial review] may not adjudicate issues which are not presented by the record."[9] As the Oklahoma Supreme Court has observed, "[w]hen issues adjudicated in a §318 appeal [to district court] are broader than those presented to the agency, the district court's action operates to invade the forbidden arena of the [agency's] original cognizance."[10]

**STANDARDS OF REVIEW**

In addition to limits on the scope of review, intent to limit reviewing courts to appellate jurisdiction is found in section 322 of the act. This section prescribes standards of review to be applied in review of the record and decisions. A standard of review is the legal scale to be used by an appellate court in weighing a claim of error.[11] More particularly, a standard of review provides the degree of deference the decision under review should receive.[12]

Section 322 of the act authorizes the reviewing court to review the findings, inferences, conclusions and decision to determine whether they are:

1) in violation of constitutional provisions;
2) in excess of statutory authority or jurisdiction of the agency;
3) made upon unlawful procedure;
4) affected by other error of law;
5) clearly erroneous in view of reliable, material, probative and substantial competent evidence;
6) arbitrary and capricious; or
7) lacking in findings of fact upon issues essential to the decision.

Regardless of the level of review, "[the] district court, the Court of Civil Appeals, and [the Supreme] Court apply the same review standards to the administrative record."[13]

The U.S. Supreme Court has provided a simple and useful framework for examining standards of review. The U.S. Supreme Court has observed that: "For purposes of standard of review, decisions… are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for abuse of discretion)."[14]

The U.S. Supreme Court has said that "[w]hen *de novo* review is compelled, no form of appellate deference is acceptable."[15] This means the appellate court independently determines the question of law.[16] The Oklahoma Supreme Court has similarly said: "Issues of law are reviewable by a *de novo* standard and an appellate court claims for itself plenary independent

and non-deferential authority to reexamine a trial court's legal rulings."[17]

"[R]eview under the 'clearly erroneous' standard is significantly deferential, [because it requires] a 'definite and firm conviction [on the part of the appellate court] that a mistake has been committed.'"[18] Oklahoma case law has similarly construed the clearly erroneous test in section 322(1)(e).[19] (Generally, the reviewing court will not reverse an administrative decision unless "upon examination of the complete record it is left with a 'definite and firm conviction that a mistake has been committed.'")

Finally, abuse of discretion is considered the most deferential standard because a reviewing court may strongly disagree with the decision under review, and even articulate a better decision, but will not reverse if the decision was one of the reasonable choices presented by the facts and the law. In general, a decision will not be disturbed for abuse of discretion unless it involves "arbitrary action not justifiable in view of [the] situation and circumstances."[20] The abuse of discretion standard and the arbitrary and capricious standard are equivalent standards in that they both involve arbitrariness and patently unreasonable action.

In Oklahoma, when an agency's decision is challenged as arbitrary and capricious, the reviewing court must show "great deference" for the agency decision and will not disturb it unless it is "not founded on reason."[21] One Oklahoma court has said arbitrary and capricious action is "unreasoning action, in disregard of facts and circumstances."[22] To fully appreciate the deference that a reviewing court must show an administrative decision, it is helpful to see how appellate courts have applied the statutory review standards. Generally, each of the statutory review standards fall within one of the three tiers of deference identified by the U.S. Supreme Court.

In cases where an adjudication has been challenged as violative of a constitutional protection, the U.S. Supreme Court has said "[its] duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied."[23] In such cases, "it [is] only natural that [the Court] should conduct an independent review of the evidence on the dispositive constitutional issue."[24] Oklahoma case law similarly recognizes that "[w]here a case involves a violation of constitutional rights, an appellate court shall exercise its own independent judgment on questions of both law and interpretation of facts."[25] Clearly, constitutional issues are questions of law that are reviewable *de novo*.

In cases involving a challenge to the agency's jurisdiction, "neither the district court nor an appellate court will accept as conclusive the [agency's] findings of fact concerning a jurisdictional question, but will weigh the evidence and make its own independent findings of fact."[26] "In making this determination, courts generally will not enlarge upon the statutory provisions nor make them applicable in any case not clearly within the contemplation of the legislature."[27] Issues concerning an agency's jurisdiction or authority present questions of law that are reviewable *de novo*.

In cases involving challenges to the legality of an agency's procedure, Oklahoma courts have undertaken non-deferential review without expressly declaring the review to be *de novo*. In *Henry v. Corporation Commission*,[28] the Oklahoma Supreme Court said "[w]hen an administrative agency… promulgates rules to govern its proceeding these rules must be scrupulously observed." The court further noted, "Once the agency creates procedural rules it denies itself the right to violate these rules, and an action taken in violation of these procedural rules will be stricken down by the courts."[29] The court expressly considered and rejected the agency's claim that deviation from the rules was a matter of discretion upon which the court should defer.[30] Issues regarding the legality of an agency's procedure present questions of law that are reviewable *de novo*.

Challenges that fall within the review standard of "other error of law" most commonly involve an agency's interpretation of its rules or statutes. In *Oklahoma Employment Security Commission v. Oklahoma Merit Protection Commission*,[31] the court observed: "Interpretation of statutory language is a question of law and [appellate courts] review the determination of the language *de novo*." This case applied this same rule to an agency's interpretation of an administrative rule, because "[a] rule promulgated by an administrative agency charged with the administration of an act…'has force and effect of law.'"[32]

There is one instance, however, in which the courts will show the "highest respect" and give "great weight" to the interpretation or con-

struction of an ambiguous or uncertain statute by the agency charged with its administration. That instance is where the administrative construction is "definitely settled and uniformly applied for a number of years."[33]

Courts are especially reluctant to overturn a long-standing executive or departmental construction where 1) great interests have grown up under it and will be disturbed or destroyed by announcement of a new rule; 2) parties who have contracted with the government upon the faith of such construction will be prejudiced; or 3) the construction has been substantiated by legislative acquiescence, manifested by amending the statute without disturbing the agency interpretation of the statute.[34] However, the court (and the agency itself) can disregard or overturn a long-standing agency interpretation for "cogent reasons" as in the case where it is "clear that [the] construction is erroneous."[35] Even in cases where reviewing courts show deference to administrative agency interpretations, the issue of whether such interpretations are correct is ultimately a question of law.

As previously noted, the clearly erroneous standard is applied in review of agency decisions on questions of fact. In applying this standard, section 322(1)(e) expressly prohibits the reviewing court from "substituting its judgment as to the weight of the evidence for that of the agency on question[s] of fact."

In addition, "[a]djudicatory orders will be affirmed if the record contains substantial evidence in support of the facts upon which the decision is based."[36] "Substantial evidence is more than a scintilla of evidence [and] possesses something of substance and relevant consequence that induces conviction [as to the existence of a fact]."[37] Evidence can be substantial, but still allow for "reasonable people to fairly differ on whether it establishes a case" as well as having other evidence fairly detract from its weight.[38] In deciding whether the evidence relied upon by the agency is substantial evidence, "great weight is accorded the expertise of an administrative agency."[39]

Cases applying the arbitrary and capricious standard have involved 1) a decision for which there was no support in the record;[40] and 2) a decision that disregarded a prior agency interpretation of its own rules upon which the aggrieved party had relied.[41] The reviewing court in *Patrick* found the decision to be arbitrary and capricious because it involved "unreasoning action, in disregard of facts and circumstances," while the reviewing court in *Garrett* held the agency "unreasonably disregarded the facts and circumstances [and acted] without determining principle." As previously noted, an agency decision is arbitrary and capricious when the agency reaches a conclusion that is not reasonably supported by the facts and circumstances.

In summary, claims of error involving constitutional protections, the agency's authority or jurisdiction, the legality of an agency's procedure, or error in determining the law, present questions of law that the reviewing court must independently decide. Similarly, a claim of error based on *absence of a required finding of fact* would present a question of law given the statutory directives concerning findings of fact set forth in section 312(A)(2). A claim of error that agency findings, inferences, conclusions and decisions are clearly erroneous presents a question of fact that the reviewing court must decide with deference to the agency's weighing of the evidence and as supported by substantial evidence. A reviewing court will not disturb an agency's factual determinations unless the court reaches a definite and firm conviction that a mistake has been committed. Finally, a claim of error that a decision is arbitrary and capricious is analogous to a claim that the agency abused its discretion; in such cases, a decision must be patently unreasonable in light of the facts and circumstances in the record to be disturbed on review.

## CONCLUSION

The relationship between administrative agencies and reviewing courts is one of shared decision-making in adjudicating a particular case. Realizing that decisions by administrative agencies often involve the application of expertise that the reviewing courts do not possess, the Legislature has given reviewing courts appellate jurisdiction to review agency decisions and provided standards of review that show appropriate deference to the agency's expertise. While the standards of review provide wide latitude in reviewing "legal errors" by the agency, the standards are correspondingly restrictive in the areas of factual determinations and the exercise of discretion. While not perfect in design and application, the system of judicial review discussed herein strikes a good balance in the shared decision-making relationship between agencies and the courts

and provides an efficient, economical and fair remedy to all concerned.

1. *In re Mainstreet Pharmacy*, 2003 OK CIV APP 68, ¶ 6, 76 P.3d 91, 93 (emphasis added).
2. Okla. Const., art. 9, §20.
3. 59 O.S. Supp. 2008 §513.
4. 68 O.S. Supp. 2008 §225(A).
5. 71 O.S. Supp. 2008 §1-609(B).
6. 20 O.S.2001 §30.1.
7. *State ex rel. Henry v. Mahler*, 1990 OK 3, ¶ 12, 786 P.2d 82, 85.
8. *Sipes v. Department of Public Safety*, 1997 OK CIV APP 82, ¶ 14, 950 P.2d 881, 883 (emphasis added).
9. *Seely v. Oklahoma Horse Racing Commission*, 1987 OK CIV APP 61, ¶ 11, 743 P.2d 685, 690 (citation omitted).
10. *Ricks Exploration Co. v. Oklahoma Water Resources Board*, 1984 OK 73, ¶ 5, 695 P.2d 493, 502 (footnote omitted).
11. *Unified School District No. 500 v. Robinson*, 940 P.2d 1 (Kan. 1997) (syllabus 3).
12. *Unified*, 940 P.2d at 4.
13. *City of Tulsa v. State ex rel. Public Employees Relations Board*, 1998 OK 92, ¶ 12, 967 P.2d 1214, 1219 (citations omitted).
14. *Pierce v. Underwood*, 487 U.S. 552, 558, 508 S. Ct. 2541, 2546 (1988).
15. *Salve Regina College v. Russell*, 499 U.S. 225, 237, 111 S. Ct. 1217, 1224 (1991).
16. *Id.* at 231, 111 S. Ct. at 1221.
17. *Kluver v. Weatherford Hospital Authority*, 1993 OK 85, ¶ 14, 859 P.2d 1081, 1084 (citations omitted).
18. *Concrete Pipe and Products of California Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 623, 113 S. Ct. 2264, 2280 (1993).
19. *See Oklahoma Employment Security Commission v. Oklahoma Merit Protection Commission*, 1995 OK CIV APP 76, ¶ 3, 900 P.2d 470, 472, citing *Independent School Dist. 4 v. Orange*, 1992 OK CIV APP 145, ¶ 10, 841 P.2d 1177, 1180.
20. *N.L.R.B. v. Guernsey-Muskingum Electric Co-operative Inc.*, 285 F.2d 8, 11 (6th Cir. 1960) (citation omitted).
21. *Metcalf v. Oklahoma Board of Medical Licensure*, 1992 OK CIV APP 174, ¶ 6, 848 P.2d 48, 50.
22. *Patrick v. State ex rel. Board of Education*, 1992 OK CIV APP 153, ¶ 14, 842 P.2d 767, 770.
23. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285, 84 S. Ct. 710, 728 (1964).
24. *Bose Corp. v. Consumers Union of U.S. Inc.*, 466 U.S. 485, 508, 104 S. Ct. 1949, 1963 (1984).
25. *Tsotaddle v. Absentee Shawnee Housing Authority*, 2001 OK CIV APP 23, ¶ 15, 20 P.3d 153, 159 (citation omitted).
26. *Christesson Reporting Service v. Oklahoma Employment Security Commission*, 1995 OK CIV APP 92, ¶ 2, 903 P.2d 336, 337-38.
27. *Id.*
28. *Henry v. Corporation Commission*, 1990 OK 103, ¶ 15, 825 P.2d 1262, 1267 (footnote omitted)
29. *Id.*
30. *Id.* at ¶ 18, 825 P.2d at 1267.
31. *Oklahoma Employment Security Commission v. Oklahoma Merit Protection Commission*, 1995 OK CIV APP 76, ¶ 6, 900 P.2d 470, 473
32. *Id.*
33. *Oral Roberts University v. Oklahoma Tax Commission*, 1985 OK 97, ¶ 9, 714 P.2d 1013, 1015 (footnote omitted).
34. *Id.* at ¶¶ 10 and 17, 714 P.2d at 1015-16.
35. *Id.* at ¶ 10, 714 P.2d at 1015.
36. *City of Hugo v. Oklahoma Public Employees Relations Board*, 1994 OK 134, ¶ 9, 886 P.2d 485, 490 (footnote omitted).
37. *Id.* at ¶ 10, 886 P.2d at 490 (footnote omitted).
38. *Id.*
39. *Id.*
40. *Patrick*, 1992 OK CIV APP 153, ¶ 14, 842 P.2d at 770.
41. *State ex rel. Board of Trustees of the Teachers Retirement System v. Garrett*, 1993 OK CIV APP 29, ¶ 7, 848 P.2d 1182, 1183.

## ABOUT THE AUTHOR

Justice John Reif of Skiatook was appointed to the Oklahoma Supreme Court by Gov. Brad Henry in October 2007. He has served in the state judiciary for over 28 years. Before joining the Supreme Court, Justice Reif served as a member of the Oklahoma Court of Civil Appeals for 23 years. He has also served as a special district judge and an assistant district attorney in Tulsa County. He earned a law degree and a bachelor's degree at the University of Tulsa.

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# 'Guns and Robes'

## Uncovering a Second Amendment Right in the Supreme Court

*By Micheal Salem*

In *District of Columbia v. Heller*,[1] the Supreme Court decided that the Second Amendment reference to a right to bear arms is a personal right, not limited to a collective right of all citizens to use arms as members of citizen militias. *Heller* attracted unusual attention with 70 amicus briefs[2] filed by groups as diverse as the American Academy of Pediatrics, Professors of Linguistics and English, Buckeye Firearms Foundation LLC, Pink Pistols, Gays and Lesbians for Individual Liberty, and Jews for the Preservation of Firearms Ownership.

While the decision settled the issue of a personal right under the Second Amendment for the first time in the court's history, the new uncovering of a constitutional right opens uncharted waters, new questions unanswered and abundant litigation opportunities.

Whether all nine justices held that the right to bear arms is an individual right has been questioned. Some commentators concluded that all nine justices found an individual right to own guns. For example, *The Wall Street Journal* said, "All nine justices agreed that the Second Amendment established an individual right. But four dissenters offered an interpretation of that right so cramped as to render it a nullity."[3]

Confusion may have arisen from Justice Stevens' separate opinion (on behalf of all four dissenters) which acknowledged that the Second Amendment "protects a right that can be enforced by individuals." *Heller*, 128 S.Ct. at 2822. The enforcement of a "right" by an "individual" suggests an "individual right." But two paragraphs later Stevens says, "Neither the text of the Amendment nor its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian use of firearms. Specifically, there is no indication that the framers of the Amendment intended to enshrine the common law right of self-defense in the Constitution."

So it appears that the court was not unanimous on the central issue of individual gun rights, but instead divided 5-4.[4] But as Justice Brennan is reputed to have said when lecturing his clerks about which was the most important Supreme Court rule, "With five votes, you can do anything,"[5] and the "anything" in this case is that gun ownership is now an individual right.

### GIVING THEM *HELLER*

The case was carefully assembled. It was the idea of and financed by Robert Levy, a wealthy attorney and senior fellow at the Cato Institute,

who says that he does not own a gun but was concerned about gun ownership as a matter of individual freedom. He and Clark M. Neily III hired Alan Gura, a 37-year-old lawyer, to prosecute the case. They eschewed raising the Second Amendment question as a defense in a criminal case. That had been the sort of case presented by *United States v. Miller*, 307 U.S. 174 (1939), the first Supreme Court case to address the Second Amendment. Controversy continues about what *Miller* actually says.

Jack Miller and Frank Layton were charged with unlawfully transporting a sawed-off shotgun in interstate commerce in violation of the National Firearms Act, 26 U.S.C.A. §1132 *et seq.* (NFA), without having registered the firearm, and without having in their possession a stamp-affixed written order for the firearm. They moved the weapon from Claremore, Okla. to Siloam Springs, Ark.

The defendants raised two claims: the federal act usurps the authority of state governments and violates the Second Amendment.

The district court ruled that the NFA violated the Second Amendment and dismissed the indictment. When Miller and Layton were released after dismissal, they disappeared, but the government appealed. No one argued the case for the defendants before the Supreme Court. Justice Reynolds focused on whether the possession of a sawed-off shotgun aided a militia purpose:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

*Miller*, 307 U.S. at 178.

Debate continued about whether *Miller* identified a collective right to the exclusion of an individual right, but the court's opinion, in the absence of advocacy for the individuals, discussed only a collective right. There the question rested without further signal from the Supreme Court.[6]

Much later, in a decision in a criminal case, *United States v. Emerson*, 270 F.3d 203 (5th Cir., 2001), an indictment was dismissed on Second Amendment grounds with an extended discussion of the individual right involved. The government petitioned, but the Supreme Court denied certiorari.[7] 122 S. Ct. 2362 (2002)

For their challenge in *Heller*,[8] Levy and Gura selected Washington, D.C. and specifically its Firearms Control Regulations Act of 1975 (FCRA), a local law enacted pursuant to District of Columbia home rule, which prohibited residents from ownership of handguns and required that shotguns and rifles be kept "unloaded and disassembled or bound by a trigger lock." Exceptions included weapons grandfathered in by registration prior to 1975 and those possessed by active and retired law enforcement officers.

As a federal enclave, Washington D.C. was selected for litigation because it would permit no question of "selective incorporation" through the due process clause of the 14th Amendment to cloud the court's decision. With the District of Columbia, the issue arose as a straight federal rights issue.

The *Wall Street Journal* reports that Levy selected six plaintiffs, including Dick Heller, a special police officer of the District of Columbia.[9] "When we started this suit, he was guarding — with a gun — the Federal Judicial Center on Capitol Hill. But Mr. Heller was not allowed to have a gun in his own home for self-defense." Because Heller was the only plaintiff who had applied for a gun permit, the Court of Appeals upheld only his standing and ruled the others did not have standing. The Supreme Court limited its question on appeal to the Second Amendment and did not deal with the standing issue for the remaining five plaintiffs.[10]

## THE *HELLER* DECISION FROM THE MAJORITY VIEW

### *Right of the People*

Justice Scalia, writing for a five-member majority, first points out the dichotomy of the parties' advocacy of a collective right associated with the militia versus an individual right unconnected with militia service. Scalia describes the language of the amendment and "its prefatory clause and its operative clause" suggesting that it could be rewritten as "Because [a] well regulated Militia is necessary to the security of a free State, the right of the people

to keep and bear Arms shall not be infringed." In so doing Scalia relies upon the amicus "Brief for Professors of Linguistics and English as Amici Curiae." *Heller*, 128 S.Ct. at 2789.

Scalia characterizes this prefatory and operative structure as unique in the Constitution. He claims that logic requires that there be some connection between the two clauses, but he says that otherwise, a prefatory clause does not limit the operative clause. *Heller, id*.

Scalia says that the operative clause should be analyzed first and then the prefatory clause second to make sure there is nothing in the interpretation of the operative clause that is inconsistent with the meaning of the prefatory clause. *Heller*, 128 S.Ct. at 2789-90.

Although the phrase "right of the people" in the operative clause sounds like a collective term, Scalia compares it to two references in the First and Fourth Amendments and one in the Ninth Amendment[11] and concludes these others are individual rights. Scalia explains away other obvious collective references to "the people" in the Constitution (Preamble, Article II and the 10th Amendment) as a reservation of powers and not rights.[12] These collective terms refer to all persons in a political set, not a select group of people designated as a "militia." *Heller*, 128 S.Ct. at 2790-91. Scalia concludes there is a strong presumption of an individual right.

*Keep and Bear Arms*

Relying on various dictionaries and interpretations, Scalia contends that the term "arms" was not fixed by the type of weapons available at the time of the amendments. Instead, he says, "The term was applied, then as now, to weapons that were not specifically designed for military use and were not employed in a military capacity…. the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 128 S.Ct. at 2791-92.

At first glance, this would seem a curious interpretation for items intended to be used by a militia, clearly a military organization. Scalia suggests that a proposed interpretation that these "arms" are only limited to "muskets" from the 18th century borders on the frivolous.[13]

Scalia then continues, "The most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons.'" Scalia indicates that "…there are a few examples, all of which favor viewing the right to 'keep Arms' as an individual right unconnected with militia service." *Heller*, 128 S.Ct. at 2792. "At the time of the founding, as now, to 'bear' meant to 'carry.'" *Heller*, 128 S.Ct. at 2793.

Finally analyzing the operative clause as a whole, Scalia concludes:

> Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it shall not be infringed. As we said in *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), [t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed . . . ."

*Heller*, 128 S.Ct. at 2797-98.

Before leaving the operative clause, Scalia offers a summary of the right as identified to this point:

> There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not, see, *e.g. United States v. Williams*, 553 U.S. ___, 128 S.Ct. 1830 (2008). Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose.

*Heller*, 128 S.Ct. at 2797-98.

*The Prefatory Clause*

Scalia then looks to the prefatory clause to be sure that the interpretation of the operative clause is not inconsistent with the prefatory

> Scalia points out that the existence of well-regulated militias was intended to discourage the federal government from removing weapons from the citizenry and imposing control by standing armies.

clause, A well regulated Militia, being necessary to the security of a free State…."

The District of Columbia contended that "[m]ilitias are the state- and congressionally-regulated military forces described in the Militia Clauses." While Scalia interpreted the phrase "of the people" as consonant with its other appearances in the Constitution, here Scalia says that the District's interpretation is too narrow, that they are referring to "the organized militia" which he says the Constitution assumed was "already in existence" as opposed to the army and navy that the Constitution authorized Congress to create, and the militia might be different still from a "well regulated militia." *Heller*, 128 S.Ct. at 2799-800.

*Security of a Free State*

Again, although Scalia acknowledges other references in the Constitution to "state" as suggesting the individual states, here "state" means the "free polity" not the security of the several states. "It is true that the term 'State' elsewhere in the Constitution refers to individual States, but the phrase 'security of a free state' and close variations seem to have been terms of art in 18th-century political discourse, meaning a 'free country' or free polity. " *Heller*, 128 S.Ct. at 2800.

*The Relationship Between the Operative Clause and the Prefatory Clause*

Scalia points out that the existence of well-regulated militias was intended to discourage the federal government from removing weapons from the citizenry and imposing control by standing armies. *Heller,* 128 S.Ct. at 2801. He contends that historical context underlies the relationship between the prefatory and operative clauses. Besides, this was not a right created by the Constitution because it "was a right inherited from our English ancestors…" *Heller*, 128 S.Ct. at 2801-02.

**THE SECOND AMENDMENT AND THE ABLATIVE ABSOLUTE** (Latin for Constitutional Occasions)

It may be interesting to some to take a look at a grammatical analysis of the Second Amendment not found in Justice Scalia's majority opinion.[14] The explanation for its omission may be that it is Latin grammar, as familiar to many of the Founders as it may be unfamiliar to our modern citizenry.[15]

The Second Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The form of this sentence has magnified the confusion about its meaning. What Scalia calls the prefatory clause is a grammatical construction alien to modern English, but common in Latin, *the ablative absolute*:

> One of the most common uses of present and perfect participles in Latin is a construction called the Ablative Absolute. The ablatives of a participle and a noun (or pronoun) are used to form a substitute for a subordinate clause defining the circumstances or situation in which the action of the main verb occurs. **The ablatives are only loosely connected grammatically to the remainder of the sentence, hence its name absolute.** (emphasis added)

*The Latin Library*, www.thelatinlibrary.com/101/AblativeAbsolute.pdf (Retrieved 5-28-09).

The Second Amendment cannot be paraphrased with any certain, specific connection between the two clauses, or as some commentators would describe them "independent subclauses."[16] "The right of the people to keep and bear arms shall not be infringed" is the dominant clause. But the first clause is a form that is absolute, that is only loosely connected to the second, dominant clause of the sentence, and which does not "modify" the second, dominant clause in a precise way that can be expressed in conventional English with a high degree of certainty.

Again *The Latin Library* Web site provides some examples:

An Ablative Absolute with a perfect passive participle was widely used in classical Latin to express the cause or time of an action:

> Hïs verbïs dictïs, Caesar descëdit. With these word having been said, Caesar departs.
>
> Acceptïs litterïs, Caesar descëdit. With the letter having been received, Caesar departs.

Equally common was an Ablative Absolute with a present active participle, the form used in the Second Amendment:

> Leöne adveniente, fëmina discëssit. With the lion approaching, the woman left.

**Note:** The noun (or pronoun) expressed in the Ablative Absolute is never the subject of the sentence.

*The Latin Library*, www.thelatinlibrary.com/ 101/ AblativeAbsolute.pdf[17] (Retrieved 5-28-09)

In the case of the Ablative Absolute, the two independent subphrases do not have an explicit connection between themselves that leaves the one bound in any clear way as a subordinate to the other. Thus Scalia's analysis of the relationship between the operative clause and the prefatory clause exceeds the import of the grammatical structure. While the second, operative clause does "dominate" over the first, "prefatory" phrase, this is only because the second clause IS a clause with a subject and verb, and the first phrase is not a complete clause with a subject and verb. In that sense, Scalia is right about which part of the sentence "dominates" over the other. But it may not be correct for Scalia to say that the first phrase modifies the second, main clause in a precise, specific way, such as the time, condition, or attending circumstances or causation. (see en.wikipedia.org/wiki/Latin_grammar) (retrieved 5-28-09)

Scalia says the first phrase "modifies" the main sentence as a causal dependent clause (because), but it doesn't. The connection, in Latin, is indeterminate and not explicit. Smashing two phrases together in an indeterminate way is bad form in English, but it is perfectly good Latin:

> The ablative absolute is an adverbial modifier of the predicate. It is, however, not grammatically dependent on any word in the sentence: hence its name absolute (absolitus, *i.e.* free or unconnected). A substantive in the ablative absolute very seldom denotes a person or thing elsewhere mentioned in the same clause.

See www.hhhh.org/perseant/libellus/aides/ allgre/allgre.419.html (retrieved 5-28-09)

There can still be differing views, even when one adopts Scalia's technique of adding the word "Because" to the front of the sentence. Adam Freedman, a legal linguist, opined in an Op-Ed for the *New York Times* on Dec. 16, 2007, shortly after the court accepted certiorari, that the addition of the word "because" (and a refusal to overindulge the use of commas) leads, in his opinion, to the protection of a collective right. Even without the context of the Second Amendment, his history and analysis deserves extensive consideration by those who write the laws, those who interpret them, those who obey them, and those who are accused of failing to:

> Refreshing though it is to see punctuation at the center of a national debate, there could scarcely be a worse place to search for the framers' original intent than their use of commas. In the 18th century, punctuation marks were as common as medicinal leeches and just about as scientific. Commas and other marks evolved from a variety of symbols meant to denote pauses in speaking. For centuries, punctuation was as chaotic as individual speech patterns.
>
> The situation was even worse in the law, where a long English tradition held that punctuation marks were not actually part of statutes (and, therefore, courts could not consider punctuation when interpreting them). Not surprisingly, lawmakers took a devil-may-care approach to punctuation. Often, the whole business of punctuation was left to the discretion of scriveners, who liked to show their chops by inserting as many varied marks as possible.
>
> Another problem with trying to find meaning in the Second Amendment's commas is that nobody is certain how many commas it is supposed to have. The version that ended up in the National Archives has three, but that may be a fluke. Legal historians note that some states ratified a two-comma ver-

sion. At least one recent law journal article refers to a four-comma version.

The best way to make sense of the Second Amendment is to take away all the commas (which, I know, means that only outlaws will have commas). Without the distracting commas, one can focus on the grammar of the sentence. Professor [Nelson] Lund is correct that the clause about a well-regulated militia is "absolute," but only in the sense that it is grammatically independent of the main clause, not that it is logically unrelated. To the contrary, absolute clauses typically provide a causal or temporal context for the main clause.

The founders — most of whom were classically educated — would have recognized this rhetorical device as the "ablative absolute" of Latin prose. To take an example from Horace likely to have been familiar to them: "Caesar, being in command of the earth, I fear neither civil war nor death by violence" (ego nec tumultum nec mori per vim metuam, tenente Caesare terras). The main clause flows logically from the absolute clause: "Because Caesar commands the earth, I fear neither civil war nor death by violence."

Likewise, when the justices finish diagramming the Second Amendment, they should end up with something that expresses a causal link, like: "Because a well regulated militia is necessary to the security of a free state, the right of the people to keep and bear Arms shall not be infringed." In other words, the amendment is really about protecting militias, notwithstanding the originalist arguments to the contrary.

"Clause and Effect," Adam Freedman, *New York Times*, (Dec. 16, 2007) www.nytimes.com/2007/12/16/opinion/16freedman.html?_r=2&oref=slogin&oref=slogin (Retrieved 5-28-09)

Freedman suggests that both sides make a tactical mistake when they focus on the commas found in the Second Amendment. It would be the same mistake that focusing on the odd capitalization that "militia" and "state" are capitalized in the original, whereas "people" is not.

Thus, in Latin grammar, with independent sub-clauses, it may not be accurate for Scalia to say that the prefatory clause cannot modulate the operative clause, but only cannot disagree with it.

**THE LEVEL OF SCRUTINY DEBATE**

In his dissenting opinion, Justice Breyer proposes that the court should establish a level of scrutiny by which to measure restrictions on the right that might be imposed by the state. Scalia acknowledges that Breyer suggests "a judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Heller*, 128 S.Ct. at 2821.

Scalia rejects the imposition of any balancing inquiry because any constitutional right left to the sole control of the judiciary is not a constitutional right at all:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government — even the third branch of government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

*Heller*, 128 S.Ct. at 2821.

Thus, Scalia would not apply a rational basis test in balancing Second Amendment rights because it is the same test as if it was not a constitutional right. Indeed, the 10th Circuit, quoting *Heller*, has already observed that a "rational basis" standard for a constitutional right is inappropriate:

> That First Amendment challenges to selective funding would be subject only to rational basis scrutiny seems especially unlikely after *Dist. of Columbia v. Heller*, No. 07-290, 2008 WL 2520816, at 29 n.27 (U.S. June 26, 2008). There the court noted that rational basis scrutiny had been applied only to "constitutional commands that are themselves prohibitions on irrational laws." In contrast, the court said that "[o]bviously the same test could not be used to evaluate

> the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. **If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect**." *Id.* (internal citation omitted). The same goes, we assume, for the Free Exercise and Establishment Clauses. (emphasis added)

*Colorado Christian University v. Weaver*, 534 F.3d 1245, 1255, Ftne 2 (10th Cir., 2008).

Thus, it would appear that the court will not apply a rational basis test to government restrictions on the gun rights newly uncovered in *Heller*.[18] The relationship of the right to the level of scrutiny will require further consideration. The rare speaker who can incite a crowd to riot is still subject to restrictions bounded only by a "compelling governmental interest." Although many gun owners are law-abiding, there is logic for a difference between the regulation of speech and guns.

**WHO OR WHAT KILLS PEOPLE?**

An interesting note from the dissents is the side track that Justice Breyer takes to analyze whether or not gun control laws reduce crime or, as some suggest, contribute to it. Breyer undertakes to analyze a significant number of empirical studies and statistical information presented to the court on the efficacy of gun control laws. See *Heller,* 128 S.Ct. at 2854. (Section A considers the legislative findings of the D.C. Council in adopting the law, then analyzes other studies coming forward to today) The D.C. Council's findings were not inconsistent with its eventual statute, if you accept the view that the D.C. Council took of them. "Handgun restrictions denote a policy decision that handguns … have no legitimate use in the purely urban environment of the District." *Heller*, 128 S.Ct. at 2855.

Some of the statistics mustered by Breyer are eye-opening, at least in regard to the use of weapons and resulting injuries. But that is a problem with empirical studies. While the results are clear, the relationship with the variable (*e.g.*, legal or illegal gun use) is not always clear because Breyer recognized that a crude measure showed that crime increased in D.C.

since the ban took effect in 1976. Some foreign nations with strict gun laws also have higher crime rates. Is this the result of the gun ban or some other unaccounted variable?

Breyer finally concludes, "The upshot is a set of studies and counterstudies that, at most, could leave a judge uncertain about the proper policy conclusion. But from the Respondent's perspective any such uncertainty is not good enough. That is because legislators, not judges, have primary responsibility for drawing policy conclusions from empirical data." *Heller*, 128 S.Ct. at 2860. Breyer then concludes that the evidence is sufficient to say that a judge should defer to legislative decisions.

But there are those who disagree with the exercise of that judgment. Adam Liptak, in an article in the June 29, 2008, *New York Times*, "Gun Laws and Crime: A Complex Relationship," identifies Justice Breyer's post hoc dilemma but then quotes Gary Kleck, a professor at Florida State whose work Breyer cited, as asserting a definitive judgment that the strict gun law did not reduce crime. Liptak also cites some who disagree with Kleck, including the *New England Journal of Medicine*, which compared Washington to its suburbs before and after the gun ban and concluded that the ban was linked to a 25 percent drop in homicides and a 23 percent drop in suicides. Kleck's own urban/suburb study does not agree.

Also affecting measurements of any such effect is the factor that criminals may ignore gun laws and law abiding citizens will consequently be at their mercy. Kleck does identify a form of gun control that seems to provide some benefit: background checks and enforcement of

unlicensed carrying of guns in public places. But even then, as in any statistical analysis, linking the cause and the effect acknowledges they may be subject to error. Although Breyer reaches an indeterminate result, Liptak points out that Scalia acknowledges that gun violence is a serious problem, but "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."

## CONCLUSION

The power of the Supreme Court lies mainly in its ability to persuade. Scalia's opinion is a very powerful argument, and he marshals much logic and factual basis for an individual right to "keep and bear arms." That he may analyze the Second Amendment by resort to the "legislative history" or "historical context" he so often criticizes, suggests that the Second Amendment makes strange constitutional bedfellows.

The breadth and force of the court's decision is even more amazing because the court declared the D.C. law unconstitutional on a facial challenge, showing no deference to its usual jurisprudence that "…a plaintiff can succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all its applications." *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184 (2008) Instead, the court relied upon the conclusion of the D.C. Circuit that there were no material facts in dispute. *Parker v. District of Columbia*, 478 F.3d 370, 401 (D.C. Cir., 2007)

The finding that no material facts were in dispute was contested by the District of Columbia which wanted to present evidence of how swiftly a dissembled rife or shotgun could be reassembled, or how quickly a trigger lock could be removed in times of defense of the household. Scalia's review of permissible gun restrictions suggests that there are some factual distinctions about gun use.[19]

*Heller* may have some potential for being a self-executing decision in a way that authoritative discourse seldom is. As Stalin was so famously said to have commented about the Pope's authority, "How many divisions does the Pope have?"[20] A court opinion that recognizes the individual right to "keep and bear arms" brings along proponents in support of the court who really may constitute armed "divisions" in the military, militia or political sense.

Such revolutionary military action is clearly recognized in Scalia's opinion. Scalia's majority opinion indicates that a major purpose of the Second Amendment was to provide protection for the people to store arms in order to be able to overthrow an oppressive government. The amendment was adopted because "…of fear that the federal government would disarm the people in order to impose rule through a standing army or select militia." *Heller*, 128 S.Ct. at 2801. It "was understood across the political spectrum that the right [to bear arms] helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." *Heller*, 128 S.Ct. at 2801. A constitutional purpose recognized at the founding should still be valid today. Thus, armed insurrection against an "oppressive military force" is still an option acceptable to some members of the court.

So here we are, not at an end, but a beginning. As Scalia acknowledges in response to criticism from Justice Breyer, this is the starting point of a new era and judicial opinions do not chart all possible courses of exceptions when they are not before the court. *Heller*, 128 S.Ct. at 2821, "Justice BREYER chides us for leaving so many applications of the right to keep and bear arms in doubt, and for not providing extensive historical justification for those regulations of the right that we describe as permissible."

Finally, the Supreme Court recently granted certiorari to the Seventh Circuit in *McDonald v. Chicago*. 130 S.Ct. 48 (Sept. 30, 2009) Alan Gura is again counsel of record. The question presented is whether the right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses. The possibility of an additional theory of incorporation could bring about one of the most significant sea changes ever in the Court's jurisprudence if it chooses to reverse *The Slaughter-House Cases*, 83 U.S. (16 Wall) 36 (1873) which gutted the Privileges or Immunities Clause. This would arguably open up incorporation against the States of the First Eight Amendments of the Bill of Rights.

To which can be applied in the words of that great Latin scholar Yogi Berra, *Id imperfectum manet dum confectum erit.* ("It ain't over until it's over")[21] So keep your powder dry.

1. *District of Columbia v. Heller*, 554 U.S. 290, 128 S.Ct. 2783, 171 L.Ed.2d 637 (June 26, 2008), Docket 07-290.

2. Three amicus briefs were filed during the time of consideration of the Petition for Certiorari.

3. "How a Young Lawyer Saved the Second Amendment," *Wall Street Journal*, James Taranto, July 19, 2008, Page A7.

4. There is much in the historical record to suggest the founders intended the Second Amendment to provide a personal right to bear arms. One of the more prolific authors on the subject is Eugene Volokh of the UCLA Law School. *Heller* cites three articles by Volokh; "The Commonplace Second Amendment," 73 N.Y.U.L.Rev. 793 (1998); "State Constitutional Rights to Keep and Bear Arms," 11 Tex. Rev. L. & Politics 191 (2006); "Necessary to the Security of a Free State," 83 Notre Dame L.Rev. 1, 5 (2007) Volokh also has an extended Web article: "Sources on the Second Amendment and Rights to Keep and Bear Arms in State Constitutions," (www.law.ucla.edu/volokh/2amteach/SOURCES.HTM).

In 1998 Volokh gave testimony on the Second Amendment before the Senate Subcommittee of the Constitution (www.law.ucla.edu/volokh/beararms/testimon.htm) (All references retrieved 5-27-09)

5. See, *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice*. Joan Biskupic, Harper Collins, 2005, p. 121.

6. As *The Wall Street Journal, id.*, reported, Alan Dura said, "'We read the case, like a lot of people, to mean that it's an individual right.' But firearm foes claimed that the court had endorsed the collective-rights theory."

7. I once used *Emerson* to argue for dismissal of a gun possession charge based, in part, upon a contention of a Second Amendment individual right. The defendant wanted to carry a handgun in his home and around the curtilage of his house, a circumstance similar to the construction of Heller's complaint made by the D.C. Court of Appeals as characterized by Justice Scalia, *Heller*, 128 S.Ct. at 2788 "… construing his complaint as seeking the right to render a firearm operable and carry it about his home in that condition only when necessary for self-defense." The motion to dismiss was granted.

8. In the district court and on appeal, *Heller* was styled *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir., 2007).

9. The *Wall Street Journal* article, *id.*, identified other plaintiffs as follows:

> "Shelly Parker … is an African-American lady who moved to a part of Capitol Hill that was improving, but apparently not fast enough. [She] would call the police, get the neighbors involved, to try to get the drug dealers off the street. The drug dealers figured out fairly quickly what the source of their problem was and started harassing her, subjecting her to all kinds of threats, vandalism and so on. . . .
>
> "Tom Palmer is a Cato scholar, a gay man who had previously, in California, fended off a hate crime using a firearm that he happened to have on him. He is alive today, or at least avoided serious injury, because he was able to have access to a gun when he needed it…
>
> "Gillian St. Lawrence is a mortgage broker in Georgetown…. [She had] a lawfully registered shotgun, but … had to always keep that shotgun unloaded and disassembled, or bound by trigger lock. There was no exception for home self-defense…. Of course, she asserted the right to have a functional firearm."

There were two other plaintiffs not mentioned in the article, Tracey Ambeau and George Lyon.

10. See "Carefully Plotted Course Propels Gun Case to Top," Adam Liptak, *New York Times*, Dec. 3, 2007. "Mr. Levy called that ruling a Catch-22. 'If you want to apply for a license or permit for a handgun, you have to prove ownership of a handgun,' he said. 'Where do you get one? You can't buy a handgun in Washington, D.C., and federal law says you can't buy a handgun in any state except where you reside.'"

I am not sure the D.C. Circuit's analysis would survive under the Supreme Court's standing decision issued the same day as *Heller*. See *Davis v. Federal Election Com'n*, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) When a law forbids all use of a gun and requires its disassembly, applying for a permit that certainly will be turned down may not be required to show standing.

11. See *Heller,* 128 S.Ct. at 2790:

> The unamended Constitution and the Bill of Rights use the phrase "right of the people" two other times, in the First Amendment's Assembly-and-Petition Clause and in the Fourth Amendment's Search-and-Seizure Clause. The Ninth Amendment uses very similar terminology "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." All three of these instances unambiguously refer to individual rights, not "collective" rights, or rights that may be exercised only through participation in some corporate body.

12. See *Heller*, 128 S.Ct. at 2790:

> Three provisions of the Constitution refer to the people in a context other than "rights"— the famous preamble "We the people," §2 of Article I (providing that "the people" will choose members of the House), and the 10th Amendment (providing that those powers not given the Federal Government remain with "the States" or "the people"). Those provisions arguably refer to "'the people' acting collectively — but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right."

13. For those justices who are originalists and believe that rights are fixed as of the time of the founding, it would appear to be contradictory to join a ruling that "arms" can have a modern meaning, but as Scalia rightfully indicates we do not limit First Amendment free speech to methods of expression existing only at the founding. *Heller*, 128 S.Ct. at 2791-92.

14. I wish to acknowledge that this section was spawned by Vince Liesenfeld in response to my simple question, "Did Scalia get it right?" I also confess that I probably asked for it by preceding my question with the vocative phrase, "Well, Mr. Smarty Pants Big-Shot English Professor…"

Perhaps such incidents are foreseeable when you office with a recovering English teacher turned lawyer. But the purpose of this section is not to suggest that Scalia "got it wrong," merely to identify a different grammatical analysis that perhaps leaves the "individual right" versus the "collective right" debate linguistically unresolved by the text itself. As always, Scalia is "right" because he has five votes and the last word in our constitutional system. Notwithstanding my incrimination of the recovering professor in this analysis, I take full responsibility for any errors or attributions which most likely were caused by my limited ability to research and translate the Latin lesson given to me into understandable text.

15. I might add that this interpretation is no more valid than the interpretations offered in the some 70 briefs submitted in the case.

16. See *The Ablative Absolute*, by William Harris:www.orbilat.com/Languages/Latin/Alternative_Grammars/Harris_Grammar/Latin-Harris_17.html (retrieved 5-27-09)

17. Wikipedia provides other examples in its explanation of the Ablative absolute [Note: the Second Amendment uses the word "being," a participial form of the verb "to be," as correctly explained in technical terms in the indented paragraphs that follow; these indented paragraphs may be an excellent technical comment on the grammatical construction used in the Second Amendment, but they are not easy for people untrained in Latin to understand, including this author]:

> In Latin grammar, the ablative absolute (Latin: ablativus absolutus) is a noun phrase cast in the ablative case. More specifically, it consists of a noun or pronoun and some participle (in the case of sum ["to be"] a zero morpheme often has to be used as the past and present participle do not exist, only the future participle), all in the ablative. It indicates the time, condition, or attending circumstances of an action being described in the main sentence. It takes the place of, and translates, many phrases that would require a subordinate clause in English. The unfamiliarity of this construction makes it sometimes difficult for Latin students to grasp; however, mastery of this construction is needed to write Latin well, and its availability makes Latin prose quite concise. The closest English equivalent is the nominative absolute.
>
> The closest translation to the Latin follows the paradigm, with the noun participle. This construction often sounds awkward in English, however, it is often finessed into some other, more English-like, construction. In the following examples, the first line is the direct translation from Latin, while the second has been construed to sound more at home in English. The usage of present, passive or future participles will determine the verbal idea in the ablative absolute.
>
> urbe capta Aeneas fugit:
>
> The city having been captured, Aeneas fled. (literal)
>
> With the city having been captured, Aeneas fled.
>
> When the city was captured, Aeneas fled.

Source: Wikipedia, en.wikipedia.org/wiki/Ablative_absolute#Ablative_absolute (retrieved 5-28-09).

18. The court has not always shown such delicate sensibilities to individual constitutional rights. To the court, many violations of constitutional rights during a criminal trial can be harmless error. See

*Washington v. Recuenco*, 548 U.S. 212, 219, 126 S.Ct. 2546, 2551 (2006). In *Recuenco*, Justice Thomas wrote:

> We have repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, "'most constitutional errors can be harmless.'" *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S.Ct. 1246 (1991)). "'[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.'" 527 U.S., at 8, 119 S.Ct. 1827 (quoting *Rose v. Clark*, 478 U.S. 570, 579, 106 S.Ct. 3101 (1986)). Only in rare cases has this court held that an error is structural, and thus requires automatic reversal. In such cases, the error "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder, supra*, at 9, 119 S.Ct. 1827 (emphasis omitted).

In *Recuenco*, the defendant was convicted of assault with a deadly weapon which required a one year mandatory sentence. However, at sentencing, the prosecutor sought the imposition of a sentence for assault with a gun, a charge that carries a three year mandatory sentence. With different elements, these were separate crimes.

19. An interesting discussion of the court's breezing over of the facial challenge and other criticisms appears in "Another Self-Inflicted Wound?", Daniel Rezneck, *Washington Lawyer*, May 2009, p. 30, the Journal of the bar association of the District of Columbia. Rezneck was counsel and argued *Heller* in the District Court. See *Parker v. District of Columbia*, 311 F.Supp.2d 103 (D.D.C., 2004)

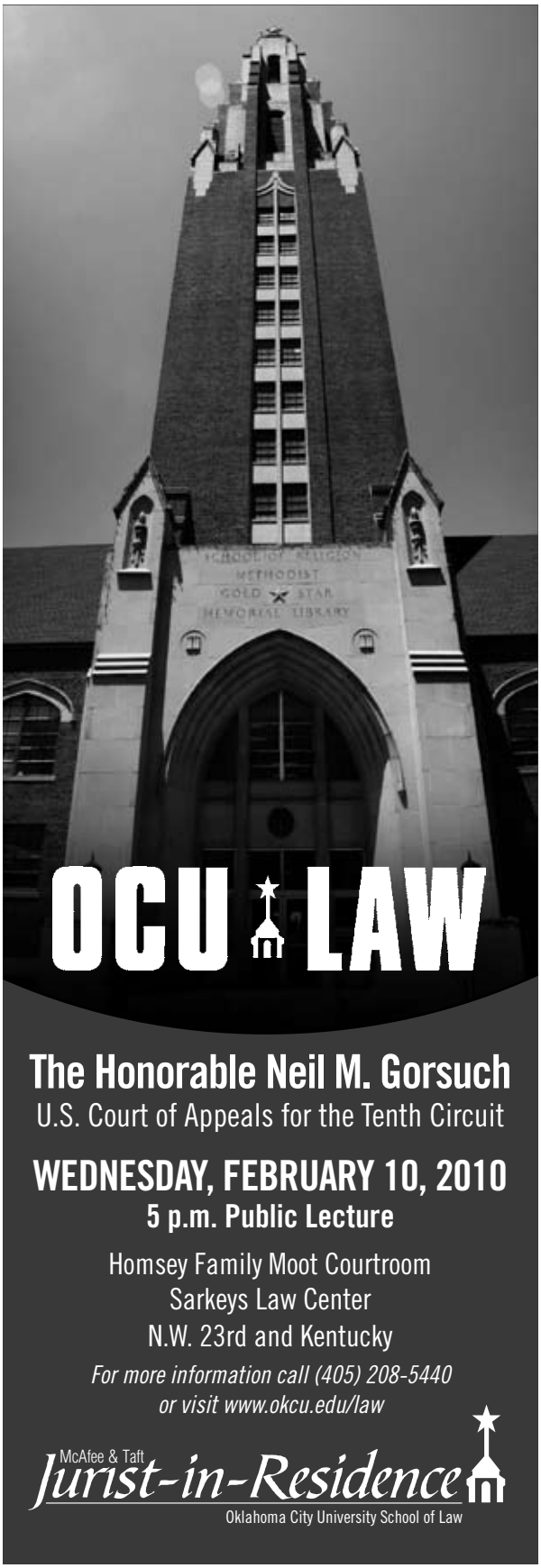
20. This famous reference is to the end of World War II at Potsdam, when FDR suggested that Pius XII should be among those consulted on the fate of post-war Europe. Stalin disagreed. "How many divisions," he asked, "does the Pope have?"

Some references attribute it to Stalin in 1935 while speaking to French Foreign Minister Pierre Laval, as quoted in Winston Churchill's, "The Gathering Storm," Vol. 1, Ch. 8, The Second World War (1948) See www.bartleby.com/66/30/55130.html (Retrieved 5-28-09).

21. The Latin translation is taken from *Latin for All Occasions*, Henry Beard, Villard Books, New York, N.Y., p. 20.

## ABOUT THE AUTHOR

Micheal Salem is a solo practitioner from Norman. His primary interest of practice area is federal constitutional law and civil rights, including First Amendment law. He received a bachelor of science in electrical engineering (1971), a master's in public administration (1975), and a juris doctor (1975) all from the University of Oklahoma. He is the recipient of the Oklahoma Courageous Advocacy Award from the Oklahoma Bar Association (1984) and the 2002 Solo Practitioner of the Year Award from the American Bar Association General Practice, Solo, and Small Firm Section.

# OBA Day at the Capitol

In 2009, nearly 400 attorneys responded to the call and marched to the Capitol to let its position be known on pending legislation. It certainly was one successful day. The OBA is once again calling upon you for your help and attendance this year.

Allow 2010 OBA President Allen M. Smallwood to welcome you and listen to comments from Chief Justice James Edmondson of the Oklahoma Supreme Court.

After a few comments, enjoy a buffet lunch provided by the OBA and gear up to head to the Capitol to meet with your legislators. Can't come for the entire day? Attend whatever you have time for, and remember the reception begins at 5 p.m.

Don't miss this year's opportunity to visit with members of your Oklahoma Legislature as part of the OBA Day at the Capitol to get up-to-speed on the OBA legislative agenda!

**Tuesday, March 2, 2010**

| | |
|---|---|
| 10:30 a.m. | **Registration** |
| 11:00 a.m. -11:10 a.m. | **Welcome** – Allen M. Smallwood, President , Oklahoma Bar Association |
| 11:10 a.m. -11:25 a.m. | **Comments Re: Funding for the Courts** — Chief Justice James E. Edmondson, Oklahoma Supreme Court |
| 11:25 a.m. -11:40 a.m. | **Legislation of Interest Overview –** Duchess Bartmess, Chairperson, Legislative Monitoring Committee |
| 11:40 a.m. -11:55 a.m. | **Oklahoma Association for Justice –** Reggie Whitten, President, Oklahoma Association for Justice |
| 11:55 a.m. -12:10 p.m. | **Break – Lunch Buffet** (Provided, please RSVP to debbieb@okbar.org) |
| 12:10 p.m. -12:25 p.m. | **Oklahoma Lawyers Association** – Thad Balkman |
| 12:25 p.m. -12:35 p.m. | **Legal Aid – Status of Funding** – Laura McConnell-Corbyn, LASO Board Member Liaison OCBA |
| 12:35 p.m. -12:45 p.m. | **Bills on OBA Legislative Agenda –** John Morris Williams |
| 12:45 p.m. - 1:00 p.m. | **Legislative Process and Tips on Visiting with Legislators** – David Braddock |
| 1:00 p.m. - 5:00 p.m. | **Meet with Legislators** |
| 5:00 p.m. - 7:00 p.m. | **Legislative Reception** – Oklahoma Bar Center, Emerson Hall |

**Please RSVP if attending lunch to: debbieb@okbar.org, or call (405) 416-7014**

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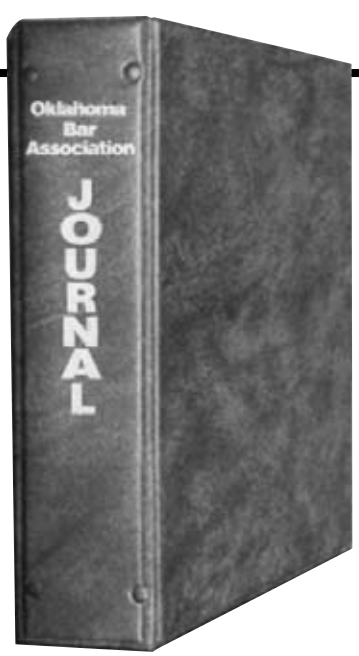


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# Capacity Issues and the Law: Dementia and Beyond

## Wednesday, Feb. 10, 2010
## 1:30 p.m. - Your Computer

Gain a better understanding of the legal and ethical issues of working with clients with diminished capacity, including dementia. Topics will include:

Defining diminished capacity and understanding its impact in the legal representation/legal counseling relationship

Basics of Capacity Assessment

Ethical rules concerning working with clients with diminished capacity

Methods of continuing to represent/advise those with diminished capacity

5 hours MCLE, 2 hours may be applied toward ethics.
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# And We Are Off...

*By John Morris Williams*

I have a friend who always replies "but just by a little" every time I say this. When it comes to providing legal services to those on limited incomes, we are more than off by a little. The fact is that Oklahoma has a large population that lives at or below the poverty level and there are significantly few resources when it comes to providing them legal services.

While Oklahoma has not suffered the severity of the economic downturn that other states have suffered; the economic downturn has affected us. The Oklahoma Legislature is dealing with a huge budget shortfall that will more than likely result in fewer state services and funding for programs that service low income people. The funding to Legal Aid Services of Oklahoma (LASO) is anticipated to be a subject of legislative review when it comes to funding. My crystal ball does not tell me what will happen. However, even if funding remains the same, the unmet legal needs of Oklahomans living in poverty are nowhere near being met. Any loss of funding will only make the problem worse.

As members of the bar, we are encouraged to engage in pro bono activities either by giving our time or our money. During the time I was executive director of LASO, it became very clear to me that lawyers looked at pro bono in a variety of ways. Some thought it aspirational, some thought it a moral obligation, some took it as a professional requirement and some thought it optional. In reality, all of them were right. Of course, we are not legally bound by rule or otherwise to participate in pro bono activities or to give our money to any organization providing low cost or no cost legal services.

*Executive Director John Morris Williams and Executive Assistant Debbie Brink*

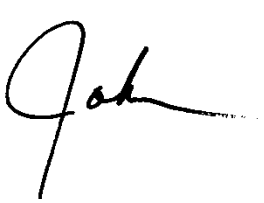
On the other hand, I would suggest that it is good business to give your time and/or money to provide legal services to those who cannot afford them. We all live in some community. All of us who make our livelihood from the legal system do so because there is a legal system. Even if you do not have a giving heart, allowing all of our citizens the ability to participate in our legal system is good business. It ensures that the rule of law rather than the rule of might guides our society. It protects families and property from abuse and theft. It provides a process to settle disputes that make even affluent neighborhoods a bit safer.

When I was at Legal Aid, and it is still true today, the top priority was to ensure the safety and protect the lives of the clients. I was surprised the number of ways that lawyers can actually impact the life expectancy of clients. One significant way is to ensure that people have a stable and safe place to live. Families that have no place to live do not survive well. They don't have a place to receive mail, to get calls from health care providers, to get call backs on job interviews or an address to enroll their children in school; to name just a few

problems that arise when you lose your home.

On Feb. 19, the Oklahoma Bar Association is presenting a day-long CLE on mortgage foreclosure. The program will offer eight free hours of CLE. The price of admission is to volunteer your time to LASO. There will be a nationally recognized speaker who will provide over 1,000 pages of valuable materials on mortgage foreclosure defense. Watch for more details!

OBA and LASO are partnering on this project, and so far the House Counsel Section has made a sizeable contribution. There will be door prizes and free lunch. Please mark your calendar and come be part of this event. With this program, attendees will be off to a good start this year with their CLE requirements and in making a difference in the lives of our fellow Oklahomans who desperately need your help. Being part of this program is good business for all of us.



*To contact Executive Director Williams, e-mail him at johnw@okbar.org*

## Duties of the OBA Executive Director

*OBA Bylaws, Article IV, Section 4:*

(a). The Executive Director shall keep the roster of the members of the Association and of the House of Delegates entitled to vote therein. He or she shall record and be the custodian of the minutes, journal and records of the Association and of the House of Delegates and of the Board of Governors.

(b). The Executive Director shall act as Treasurer, and be the custodian of the funds of the Association. No funds shall be withdrawn except in the manner approved by the Board of Governors.

(1) The expenditures of the Association shall be in accordance with the provisions of the Rules Creating and Controlling the Oklahoma Bar Association as promulgated by the Oklahoma Supreme Court.

(2) The Executive Director shall maintain at all times a fidelity bond executed by a surety company as surety, the amount thereof and the surety to be approved by the Board of Governors.

(c). He shall supervise the office of the Association and its personnel and shall see that the work of the Association properly is performed. He or she shall also perform such other duties as the House of Delegates, the Board of Governors or the President of the Association may direct.

*Rules Creating and Controlling the OBA, Article VI, Section 4:*

The Executive Director shall perform such duties and services as may be required by these Rules or the Bylaws and as may be directed by the Board of Governors or the President of the Association. He shall also keep a complete and accurate list of the members of the Association; notify delinquent members and certify the names of delinquent members to the Supreme Court as required by these Rules; certify to the Supreme Court records and other matters as provided by these rules.

# NOTICE
# RE: POSTJUDGMENT AND PREJUDGMENT INTEREST

**PLEASE NOTE THAT DIFFERENT INTEREST RATES ARE SET FORTH BELOW FOR POSTJUDGMENT VERSUS PREJUDGMENT INTEREST DUE TO THE 2009 AMENDMENT OF 12 O.S. §727.1 (I)**

**POSTJUDGMENT INTEREST:** The State Treasurer has certified to the Administrative Director of the Courts that the prime interest rate as listed in the first edition of the Wall Street Journal published for calendar year 2010 is 3.25 percent. In accordance with 12 O.S. §727.1 (I), the postjudgment interest rate shall be the prime interest rate plus two (2%) percentage points, which equals 5.25 percent.

**PREJUDGMENT INTEREST:** In accordance with 12 O.S. §727.1 (I) and (K), the prejudgment interest rate applicable to actions filed on or after January 1, 2010, shall be "a rate equal to the average United States Treasury Bill rate of the preceding calendar year." The State Treasurer has certified to the Administrative Director of the Courts that the average United States Treasury Bill rate of the preceding calendar year is 0.14 percent.

These interest rates will be in effect from January 1, 2010 until the first regular business day of January, 2011.

Interest rates listed below for each year prior to the current year were calculated in accordance with the statute in effect for that year.

Interest Rates since January 1, 2010, are as follows:

| Year | Postjudgment Interest Rate | Prejudgment Interest Rate |
|---|---|---|
| 2010 | 5.25% | 0.14% |

Interest rates from November 1, 1986, through December 31, 2009, are as follows:

| | | | |
|---|---|---|---|
| 1986 11.65% | 1992 9.58% | 1998 9.22% | 2004 5.01% |
| 1987 10.03% | 1993 7.42% | 1999 8.87% | 2005 7.25% |
| 1988 9.95% | 1994 6.99% | 2000 8.73% | 2006 9.25% |
| 1989 10.92% | 1995 8.31% | 2001 9.95% | 2007 10.25% |
| 1990 12.35% | 1996 9.55% | 2002 7.48% | 2008 9.25% |
| 1991 11.71% | 1997 9.15% | 2003 5.63% | 2009 5.25% |

/s/ Michael D. Evans
Administrative Director of the Courts

# 2009 in Review: Looking Back and Looking Forward

*By Jim Calloway, Director, OBA Management Assistance Program*

Has it really been over 10 years since we were all concerned about Y2K and the number of computer network crashes that the new year would bring? Now we've got 10 years of writing 2000-something as the date under our belts. 2010 seems like a new decade even though some debate whether we've got another year left in the first decade of the 21st Century.

So many things happened in 2009 in technology that a "year in review" piece seemed like a good idea. But looking toward the future is much more interesting and many of the developments of 2009 seem to be setting the stage for even more major changes. So, I will cover some new products and developments that are potential "game-changers" in the way we all use technology.

**BUSINESS KEEPS GOING DIGITAL**

Smart businesses have been converting to digital operations for several years. In some cases, the poor economy has accelerated that trend rather than impeded it. Computers are pervasive in most types of businesses. A business without a Web page is now an anachronism. Improvements in speech and handwriting recognition technology are becoming more prevalent and will aid the non-keyboarding crowd.

My message to lawyers is that, with rare exceptions, the so-called paperless office is no longer optional. If you missed my article on the paperless office last fall I would encourage you to read it: "The Paperless Office as a Risk Management Enterprise," *Oklahoma Bar Journal*, Sept. 5, 2009 - Vol. 80; No. 23. www.okbar.org/members/map/articles/2009/sept-paperless-office.htm or tiny.cc/1zK7f.

As business operations become more digital, they will expect to be furnished digital copies of pleadings and attorney bills. Lawyers do not want to be the final remaining business contact insisting on sending paper and forcing the client to scan documents into their digital business records.

Law firms hosting online repositories of client documents for clients to download will become a standard tool for law firms within the next few years. (Remember that you heard that here first when it happens.) I know the idea of posting client documents, particularly those containing sensitive or confidential information, online sounds dangerous and irresponsible to many of you reading this. I applaud your valid concern for protecting your client confidences. You should be very concerned about this issue.

But sending documents that are not password protected or encrypted to clients as e-mail attachments represents a greater potential breach of confidentiality than even the most basic password-protected online document repository. The Arizona Bar's Committee on the Rules of Professional Conduct recently issued Ethics Opinion 09-04: "Confidentiality; Maintaining Client Files; Electronic Storage; Internet" discussing online client document repositories. It is currently online at tinyurl.com/ydfj6r9.

To avoid misunderstanding, I am not saying that you have to do this or that many law firms are doing it now. My point is that at some point you need to be ready to respond when a business client informs you that they are tired of scanning all of the paper you send them and requests you start sending them digitally. There are many possible responses, but "No" will not be a smart one.

**SOCIAL NETWORKING HITS THE MAINSTREAM**

It would be impossible to do a review of 2009 without mentioning social networking. For

most lawyers, this was the year they first heard of Twitter and first heard the idea that something like Facebook might be used for business. The use of online social media, which had been growing steadily, literally exploded in use and popularity. You no longer had to be a techno-geek to admit you had a Facebook page or posted to Twitter. In the short term, this generated many discussions about how lawyers could use social media to their advantage in marketing and communication with clients. This, of course, caused me to write "Can a Lawyer Really Use Twitter to Market a Law Practice?" *Oklahoma Bar Journal*, Oct. 10, 2009 - Vol. 80; No. 26. www.okbar.org/members/map/articles/2009/oct-twitter-market-law-practice.htm or tiny.cc/FAmVW.

The long-term implications of people posting all sorts of personal information online brings a significant impact for our society and the legal profession. (In fact, some of us have noted a "generation gap" between those who are concerned about this and younger people who cannot figure out why their elders are worried about personal information being online and freely available). People are hearing from all sorts of long-lost college and high school friends via social networks, which could be a good thing or bad thing depending on the friends.

Already family lawyers are reviewing online postings where child custody is an issue. Breaking up may still be hard to do, but announcing it by changing one's status on Facebook gets the word out to everyone quickly, perhaps more quickly than one intended.

See this recent blog post on Social Networking and Cross Examination from a North Carolina lawyer, www.encdivorce.blogspot.com/2010/01/social-networking-and-cross-examination.html or tinyurl.com/yk6wd9l.

The increasing use of social networking sites has resulted in "unfriend" being chosen as Oxford Dictionary's 2009 Word of the Year. (Unfriend – verb – To remove someone as a "friend" on a social networking site such as Facebook).

As I have noted in this space before, the most valuable aspect of Twitter to me personally is the fact that my colleagues collectively read many more articles than I possibly could and post the links to the best ones for me to read.

And, of course, let's not forget our very own private social network, Oklahoma Bar Circle. It should see greater participation this coming year.

**MOBILE PHONES KEEP GETTING SMARTER**

Remember when you could never lose your phone as it was connected to a wall? Now many are predicting the eventual death of the land line, for homes at least.

Every year or so we change the label for the phones we carry. First they were cell phones. When they became digital, they were called mobile phones. Soon, they synchronized with our computers and were called smart phones. 2009 saw the rise of a new label, the "app phone." Thinking of the phone as a small portable computer that is enhanced by the installation of many additional software packages is a different way of viewing phones for all of us.

Apple's iPhone has been a trailblazer in the app phone market with many lawyers switching to the iPhone. The iPhone is great. One of the real drivers for its sales has been the hundreds of thousands of downloadable apps. Apple recently announced more than 3 billion apps have been downloaded from its App Store.

But the iPhone is far from the only app phone. Several phones based on the Android operating system have been released, including the popular Droid phone from Verizon and the just-released Nexus One from Google. Since many are complaining about the iPhone being handcuffed to AT&T, the Nexus One will be available in a version that can be used with more than one carrier, if you are willing to pay a premium purchase price.

Some colleagues of mine, Sharon Nelson and John Simek, made a bit of a splash this year with their recent assertion that iPhones are too insecure for law firm use. See "Parting the Curtains on the iPhone's Security Problems," *Law Practice* magazine, online at tinyurl.com/yj76q74. This article prompted one law firm to ban iPhones, according to an article in the *ABA Journal*.

While I cannot argue with Sharon and John's expertise, I also cannot jump on the "Ban the iPhone" bandwagon either. Nor would committed iPhone users listen to me if I did! Be aware that these security flaws involve someone with technical expertise finding or stealing your iPhone with the goal of stealing the information it contains. So, one needs to make certain that one is knowledgeable on the emergency feature

that can remotely erase the data on an iPhone if it is lost or stolen and the "Find My iPhone" feature that enables users to view the location of their lost or stolen iPhone on a map. Of course, a professional criminal knows to pop out the SIM card to defeat these measures, so take action quickly if it is lost or stolen.

And surely every lawyer with an iPhone has set a PIN, so that anyone who finds it cannot have instant access to all the information on it.

I cannot argue with the assertion that a properly-configured Blackberry is generally more secure than an iPhone if lost or stolen. So try hard not to lose yours if you have one.

## CLOUD COMPUTING FOR LAWYERS

Cloud computing for the legal profession was another hot topic with some legal professionals turning to online case management software to run their practices. Two contenders in this new market, Clio and RocketMatter, are battling for market share while legal ethics authorities and technologists are still debating this approach.

Generally speaking, cloud computing refers to storing both data and the applications used to work with the data off-site on someone else's server. Users typically use a Web browser to do their daily work. To learn more about cloud computing, read the two pieces linked below.

*Forbes* magazine noted this trend in its article, "Cloud Computing Grows Up," www.forbes.com/2009/12/21/cloud-computing-ibm-technology-cio-network-telford.html or tinyurl.com/yadoxm4.

Putting all confidential client data in the cloud is an even more startling idea to lawyers than a simple password-protected document repository. On our *Digital Edge* podcast, Sharon Nelson and I interviewed two experts, with Erik Mazzone playing the role of the cloud champion and Ben Schorr taking the role of the cloud curmudgeon. My blog post on the topic with a link to the podcast can be found at www.jimcalloway.typepad.com/lawpracticetips/2010/01/cloud-computing-podcast.html or tinyurl.com/yctonfz.

## TABLETS AND E-BOOK READERS

This may not be an obvious game-changer to many, but tablet computers and e-book readers represent one of the technology trends with far-reaching implications. One of the information recording tools long associated with our profession is the legal pad. Despite the increasing use of computers in law offices, the humble legal pad is still used daily in many law practices.

The idea of carrying something about the size of a legal pad but a bit thicker, with full computing capability and Internet access may be appealing to many lawyers. You can write on the tablets with a stylus just like you would on a legal pad and save your hand-written notes.

I know many lawyers love to read. When I mention e-book readers, I prepare myself for the inevitable response that reading something on screen would not be as pleasurable and satisfying as holding a "real" book. But in the same way that iPods and other mp3 players allow you to carry your entire music collection with you, the e-book readers allow you to carry dozens of books as well as current magazines and newspapers.

## REMOTE ACCESS/ TELECOMMUTING

Remote access to the office network from the road or the homestead is becoming a staple of modern business environment. This is a powerful concept and since most lawyers and law firm staff have home computers, the possibility exists to grant many remote access privileges. But many offices have not yet considered all of the implications of these tools.

Suppose your trusted legal assistant calls in from home in the morning and tells you she is deathly ill. You both recognize that this is a serious problem as you were up late revising the brief that is due today. Your technical skills do not include formatting a federal brief correctly within a tight time frame and you have a fully-scheduled day as well.

The assistant performs above and beyond the call of duty, spending the day at home hacking, coughing and revising the brief. You return to the office at 3:15 p.m. to print and review the perfect brief, make copies and send the runner off to file it with the court clerk.

You are pleased and tell the legal assistant it would be unfair to charge her with a day of sick leave given the fact that she worked all day. All is well. Then next week your partner walks in with a perplexed look. His secretary has just informed him that she is home with a sick child, but will be working from home under the firm's new policy for telecommuting and that he can ask you about that.

**MISCELLANEOUS**

2009 was obviously not a good year for many major law firms. Law Shucks reported that 12,196 people were laid off by major firms in 2009, of which 4,633 were lawyers and 7,563 were staff, while noting that due to underreporting the true number was likely even higher. www.lawshucks.com/2010/01/the-year-in-law-firm-layoffs-2009/

Windows 7 was launched, with the unofficial marketing slogan of "Hey, it's gotta be better than Vista." It looks like lawyers who have stuck with Windows XP may not be moving as long as Microsoft continues to support XP, but many Vista users are upgrading now.

PC vs. Mac wars moved into heavy-duty prime time television commercial space. The Mac vs. PC TV commercials have become iconic.

Let me conclude this month with a list of podcasts and articles that are generally related to this month's topic. The online version of this column on www.okbar.org will, of course, provide clickable links to all of these resources.

Kennedy-Mighell Report Podcast *Looking Back: Legal Technology in 2009,* www.legaltalknetwork.com/podcasts/kennedy-mighell-report/2009/12/looking-back-legal-technology-in-2009/

I have to agree with Tom Mighell that 2009 seemed to be the year that judges recognized that electronic discovery was just too expensive and lawyers had to cooperate more on these issues, whether they wanted to or not.

My favorite personal technology columnist is *New York Times* columnist David Pogue. This year I strongly recommend you read his 5th Annual Pogie Awards for the Year's Best Tech Ideas. We both see 2009 as a year of big ideas. www.nytimes.com/2009/12/31/technology/personaltech/31pogue.html?_r=1&em

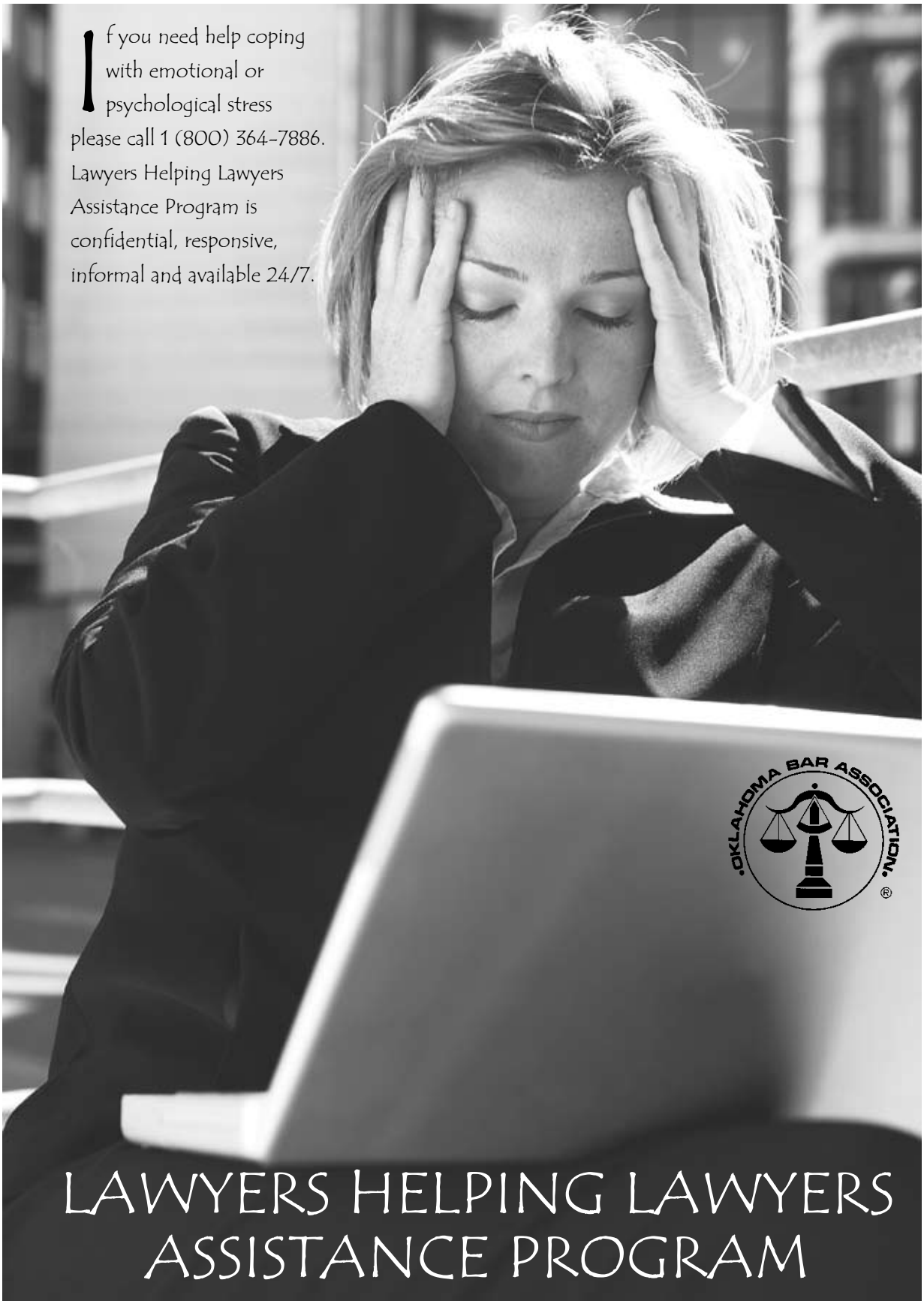
One of my favorite end-of-the-year resources is the Lifehacker Best of 2009. Lifehacker is one of the most valuable resources that is online. The large number of posts each day makes it difficult for busy people to read all of Lifehacker during the year, making their end-of-the year review required reading to catch up. www.lifehacker.com/tag/bestof2009/

As new things emerge, they replace old things. At the end of the year, I ran across a surprising number of articles about products that were deemed on the way out. Here are links to a couple of them:

10 things Not to Buy from S*mart Money,* www.finance.yahoo.com/family-home/article/108504/10-things-not-to-buy-in-2010

12 Things That Became Obsolete This Decade, www.huffingtonpost.com/2009/12/26/obsolete-things-that-expi_n_402674.html?

And finally, from MSNBC, 12 things computer users should fear in 2010, www.redtape.msnbc.com/2009/12/about-once-a-year-computer-security-news-leaps-out-of-the-technology-section-and-onto-the-front-page-and-the-top-of-network.html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# Contingency Fee Agreement Checklist

*By Gina Hendryx, OBA General Counsel*

The new year invariably brings with it the resolutions to do better, do more, do less or a combination of the three. Many practitioners resolve to review and update forms, contracts and procedures to start off the new year. For those who employ the contingency fee in their practices, your inspection should confirm that your fee agreements contain the following. If not, some redrafting might be in order.

**Is my contingency fee agreement in writing?** Oklahoma Rule of Professional Conduct (ORPC) 1.5(c) states that a fee agreement which is contingent upon the outcome of the matter **shall** be in writing. While other types of fee agreements *should* be in writing, the ethical rules are clear that the contingency fee must be in writing. The Oklahoma Supreme Court has held failure to reduce a contingency fee agreement to writing is a factor in determining discipline. *See State ex rel. Oklahoma Bar Association v. Mayes*, 1999 OK 9, 977 P.2d 1073.

Too many times the OBA General Counsel's office reviews complaints from clients stating that he did not agree to or did not understand the attorney fee percentage. Putting the agreement in writing and providing your client with a copy of same would reduce the risk of this type of grievance considerably. Having your contingency fee agreement in writing not only complies with the rules, but also protects you from the client with the poor memory.

> "Take the time to go over the contract in your office with your client. Get a signature on the agreement and provide a copy of the signed agreement to the client."

**Does my contingency fee agreement have a place for a client's signature?** Prior to 2008, the ORPC only required the agreement be in writing. The 2008 amendments require the agreement be signed by the client. In years past, lawyers would "confirm" the agreement in writing by sending a letter to the client outlining the fee agreement. Unfortunately, disgruntled clients still complained that they did not receive a copy of the letter, that they did not agree to the percentages, etc. By having the client sign the contract, you alleviate most of these arguments. Take the time to go over the contract in your office with your client. Get a signature on the agreement and provide a copy of the signed agreement to the client. If the client wants to "think about it," docket a follow up e-mail or phone call. Do not begin a representation without a written, signed contract.

**Does my contingency fee agreement state the method to determine the fee?** Your fee agreement should state the method by which the fee is to be assessed. This should include the percentages that accrue to the lawyer at the various stages of litigation. What percent will be charged if the case is settled? Goes to trial? Is appealed? The contract should be clear and state triggering events for increases in percentages. For example: What fee is imposed if the case is settled during trial? Remember that ambiguities in contracts are usually

resolved against the lawyer who drafted it. Anticipate that certain types of cases may be resolved through a structured settlement and have a fee agreement that addresses same. Also, the agreement should state whether or not the attorney agrees to take on the appeal and, if so, what percentage applies.

**Does my contingency fee agreement state the method by which expenses will be deducted from the recovery?** The fee agreement should clearly inform the client whether expenses will be deducted before or after the attorney fee is calculated. Stated another way, are costs of litigation deducted from the "gross" or "net" recovery? If this issue is not addressed in the contract, the client can successfully argue that reimbursement of costs should be deducted before the attorney fee is taken.

**Does my contingency fee agreement inform the client of the expense reimbursement policy in the event of no recovery?** It is proper to inform a prospective client that in the event of no recovery, the client is not responsible for attorney fees or costs advanced. However, if you intend to seek reimbursement from the client for those advanced costs, you must notify the client of same and have it in your fee agreement. If the client is not the prevailing party, the client will be responsible for the advanced

costs of litigation. If you intend to charge the client for advance costs, it is recommended that you keep the client informed of the costs being incurred. A monthly recap and a candid discussion about the costs of litigation should be utilized when employing this type of agreement.

**Do I provide a settlement statement at the conclusion of contingency fee matters?** Your answer should be "yes," and the statement should include a financial break down of the amount received, attorney's fee charged, expenses deducted, with net to the client. If lien holders are paid from the proceeds, these payments should also be reflected on the statement. If no recovery is obtained, a statement should be provided to the client indicating any costs to be reimbursed.

Contingency fees must be reasonable and must be earned just as any other fee charged by a lawyer. These types of fees are still prohibited in domestic relations matters and in criminal defense representations. This prohibition does not preclude the use of a contingency fee contract in connection with the recovery of post-judgment balances due under support, alimony or other financial orders.

## FINAL RECOMMENDATION

Take this new year opportunity to review your client contracts. Make sure your contingency fee agreements encompass the above requirements. Most importantly, put the terms in clear English and explain to the client what is expected at every stage of litigation.

# December Meeting Summary

*The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Dec. 11, 2009.*

**REPORT OF THE PRESIDENT**

President Parsley reported he attended the 2009 Annual Meeting and all related events, November board meeting, Texas County Bar Association meeting and Judicial Conference reception.

**REPORT OF THE VICE PRESIDENT**

Vice President Thomas reported she attended the 2009 Annual Meeting and all related events, November board meeting and Washington County Bar Association meeting.

**REPORT OF THE PRESIDENT-ELECT**

President-Elect Smallwood reported that he completed final preparations for presentation of the OBA 2010 budget to the Oklahoma Supreme Court and made final appointments to standing committees. He is finalizing arrangements for attending the February 2010 ABA meeting in Orlando, Fla.

**REPORT OF THE PAST PRESIDENT**

Past President Conger reported he attended the Annual Meeting and all related events and the November Board of Governors meeting.

**REPORT OF THE EXECUTIVE DIRECTOR**

Executive Director Williams reported he attended the General Assembly and House of Delegates meetings at the OBA Annual Meeting, Oklahoma County Bar Association holiday event and monthly staff celebration. He also attended meetings with Legal Aid Services to plan the Feb. 19, 2010, foreclosure seminar, with the construction company, with the designer and with OBA directors. He also presented the 2010 budget to the Oklahoma Supreme Court.

**BOARD MEMBER REPORTS**

**Governor Brown** reported he attended the OBA Annual Meeting, General Assembly and House of Delegates, ABA planning meeting in San Francisco, OBA Bench and Bar Committee meeting, Legal Aid Services of Oklahoma board meeting and LASO Budget and Audit Committee meeting. He presented the draft of the revised Code of Judicial Conduct at the Oklahoma Judicial Conference, served as a USA delegation member to the World Justice Forum in Vienna, Austria, and spoke at the National Appellate Judges meeting in Orlando, Fla. **Governor Carter** reported she attended the OBA Annual Meeting, November Board of Governors meeting, November Tulsa County Bar Association Board of Directors meeting, OBA Law-related Education December meeting via teleconference and a CLE program provided by General Counsel Hendryx at the Tulsa County Bar Association. She also hosted the New Mexico bar president at the Annual Meeting and served in the House of Delegates. **Governor Chesnut** reported he attended the November Board of Governors meeting, Annual Meeting and related events, served in the House of Delegates and hosted the Arkansas bar president and her husband at the Annual Meeting. **Governor Christensen** reported she attended the OBA 2009 Annual Meeting, November board meeting, OBA Bench and Bar Committee meeting, Women in Law Committee meeting, Oklahoma County Bar Association meeting, Oklahoma Hall of Fame induction ceremonies for Vice Chief Justice Steven Taylor, Oklahoma County Bar Association Christmas party and Judicial Conference reception. She was also a presenter at the Oklahoma Judicial Conference. **Governor Dirickson** reported she attended the OBA Annual Meeting, winter Judicial Conference, November board meeting, Women in Law Committee meeting, Clients' Security Fund Committee meeting and the Custer County Bar Association monthly meeting. **Governor Dobbs** reported he attended the annual convention. He also spoke at the Lincoln Symposium and was a guest speaker at Judge Barbara Swinton's OCU law school class on professionalism and ethics in alternative dispute resolution. **Governor Hixson** reported he

attended the Annual Meeting and related events, Credentials Committee meeting and November board meeting. **Governor McCombs** reported he attended the bar convention and social event, November board meeting and McCurtain County Bar luncheon. **Governor Moudy** reported she attended the Annual Meeting, November Board of Governors meeting, board dinner and Law Day Committee meeting as its board liaison. She hosted the Missouri bar president during the Annual Meeting. **Governor Reheard** reported she attended the Annual Meeting, November board meeting, Women in Law Committee meeting, General Practice Solo and Small Firm Section meeting, Oklahoma Hall of Fame induction ceremonies for Vice Chief Justice Steven Taylor and Pittsburg County Bar Association Christmas party. She also attended the Oklahoma Judicial Conference reception and the presentation by Bench and Bar Committee to the judicial conference. **Governor Stockwell** reported she attended the Board of Governors social evening, November board meeting, Annual Meeting and related events, Cleveland County Bar Association CLE luncheon, Cleveland County Bar Association executive meeting, Women in Law Committee meeting, Lawyers Helping Lawyers CLE and Cleveland County guardian *ad litem* meeting. **Governor Stuart** reported he attended the Annual Meeting and related events, Board of Editors meeting and assisted in preparing the December bar journal issue.

**REPORT OF THE SUPREME COURT LIAISON**

Vice Chief Justice Taylor reported the OBA 2010 budget was presented to the court by President-Elect Smallwood and Executive Director Williams, and the budget was approved. He said work on developing a case management system is ongoing, and a request for proposal will go out early next year.

**COMMITTEE LIAISON REPORTS**

Governor Carter reported the Law-related Education Department's We the People competition is coming up. Governor Brown reported the Bench and Bar Committee will bring a resolution to the Board of Governors soon.

**REPORT OF THE GENERAL COUNSEL**

General Counsel Hendryx reported that as of Dec. 18, the department will have addressed the majority of the backlog of investigations within the General Counsel's office. She reported that she gave a CLE presentation to the immigration lawyers group, Creek County Bar Association, Mayes County Bar Association, Tulsa County Bar Association, Chickasaw Nation Bar Association and Mineral Law Section at the Annual Meeting. She also participated on a panel at the Plenary Session during the Annual Meeting, on an ethics panel sponsored by the OU Honor Council, spoke at a TU professional responsibility class and attended the Clients' Security Fund Committee meeting. A written status report of the Professional Responsibility Commission and OBA disciplinary matters for November 2009 was submitted for the board's review.

**POLICY TO DEFINE CLIENTS' SECURITY FUND INCOME**

President Parsley reviewed the different ways income from the fund could be determined. He proposed a policy that stipulates that income shall not include gains made from the sale of securities or fixed income assets other than interest earned on certificates of deposit. The board approved the income definition policy.

**CLIENTS' SECURITY FUND INVESTMENT POLICY**

President Parsley reviewed the pros and cons of investing in the market instead of conservative investment options. Clients' Security Fund Chairperson Micheal Salem was introduced and asked to give his opinion. He advocated for more protected investments. The board voted to appoint a new Investment Committee, which will be asked to review the methodology of allocating CSF assets and to make a recommendation at the February Board of Governors meeting.

**CLIENTS' SECURITY FUND REPORT**

Chairperson Micheal Salem reported the Clients' Security Fund Committee held four meetings. He said the committee could not accomplish its work without the help of the Office of the General Counsel, which serves as its investigative arm. He expressed appreciation to General Counsel Hendryx and staff member Manni Arzola for their assistance. He reviewed the committee recommendation to reimburse 16 clients for the amount of $121,870.07, prorated at a rate of 86 percent for a total of $104,235.47. The board approved the recommendation and the distribution of a news release.

**AMENDMENTS TO MINERAL LAW SECTION BYLAWS**

Mineral Law Section Chairperson Chris Tytanic reviewed the proposed amendments to

the section's bylaws that include changing the section name to the Energy and Natural Resources Law Section and allowing associate members. He also shared plans to increase section member benefits. The board approved the bylaws amendments.

**AMENDMENT TO LAW OFFICE MANAGEMENT AND TECHNOLOGY SECTION BYLAWS**

Executive Director Williams reported section Chairperson Alan Gabriel Bass was not able to attend the board meeting but asked the board to approve its bylaws amendment to allow associate members. The board approved the section bylaws amendment.

**POLICY PROPOSED TO ALLOW ANNUAL CARRY-OVER OF WOMEN IN LAW COMMITTEE FUND BALANCE**

As Women in Law Committee chairperson, Governor Reheard reported the committee traditionally has money remaining following its annual events, and she asked the board to approve a policy to allow the committee to carry-over its surplus funds every year. The board approved the policy allowing the annual carryover of funds.

**SOUTHERN CONFERENCE OF BAR PRESIDENTS 2013 MEETING TASK FORCE**

The board approved President Parsley's appointments of Deborah Reheard, Eufaula, as task force chairperson and Melissa DeLacerda, Stillwater, as vice-chairperson.

**BOARD OF EDITORS REAPPOINTMENT**

The board voted to reappoint P. Scott Buhlinger, Bartlesville, to the Board of Editors with a term ending Dec. 31, 2011.

**APPOINTMENTS**

The board approved President-Elect Smallwood's recommendations:

Board of Editors Chairperson - reappoint Melissa DeLacerda, Stillwater, for a one-year term expiring 12/31/10.

Board of Editors Associate Editors – appoint Thomas E. Kennedy, Enid, from Supreme Court Judicial District 4; Sandee Coogan, Norman, from District 5; and Dietmar Caudle, Lawton, from District 9, each for a three-year term expiring 12/31/12.

MCLE Commission Chairperson – reappoint Margaret Hamlett, Tulsa, for a one-year term expiring 12/31/10.

MCLE Commission Members – reappoint Richard J. Phillips, Clinton; Richard D. Ogden, Oklahoma City; and appoint Ted P. Gibson, Tulsa, each for a three-year term expiring 12/31/12.

Professional Responsibility Commission - appoint Jon K. Parsley, Guymon, for a three-year term expiring 12/31/12.

Oklahoma Indian Legal Services – reappoint Leslie Guajardo, Oklahoma City, to a three-year term expiring 12/31/12.

Clients' Security Fund Chairperson and Vice Chairperson – reappoint Micheal Salem, Norman, as chairperson and William Brett Willis, Oklahoma City, as vice chairperson, each for a one-year term expiring 12/31/10.

Clients' Security Fund – reappoint attorney members Daniel T. Sprouse, Pauls Valley; Dietmar Caudle, Lawton; and William Brett Willis, Oklahoma City; appoint attorney Mike Mordy, Ardmore; appoint lay member Wayne McEndree, Norman, each for a three-year term expiring 12/31/12.

Child Death Review Board – to submit the names of Jennifer King, El Reno; Teressa H. Williams, Lawton; and John D. Russell, Tulsa, to the Commission on Children and Youth, for a term expiring 12/31/11.

**COMMITTEE LEADERSHIP AND BOARD LIAISONS**

President-Elect Smallwood reported he appointed chairpersons and vice chairpersons for all OBA committees, in addition to assigning a board member to each committee to serve as a liaison. A list was provided, and it was noted the Mentor Committee has been sunset.

**APPOINTMENTS**

President-Elect Smallwood reported he made the following appointments and reappointments:

Board of Medicolegal Investigations – reappoint Shanda McKenney, Oklahoma City, to a one-year term expiring 12/31/10.

Legal Ethics Advisory Panel Coordinator/Chairperson – reappoint James A. Drummond, Norman, to a one-year term expiring 12/31/10.

Legal Ethics Advisory Panel – Oklahoma City Panel - reappoint Steven Dobbs, Oklahoma City, for a three-year term expiring 12/31/12.

Legal Ethics Advisory Panel - Tulsa Panel - reappoints Sharisse O'Carroll, Tulsa; Leonard I. Pataki, Tulsa; and Luke Gaither, Henryetta; each for a three-year term expiring 12/31/12.

Audit Committee Chairperson – reappoint James T. Stuart, Shawnee, for a one-year term expiring 12/31/10.

Audit Committee – appoint Glenn Devoll, Enid, and Susan Shields, Oklahoma City, each for a three-year term expiring 12/31/12.

**WEB SITE INFORMATION REPORT**

Web Services Coordinator Morgan Estes reviewed the task list that has been his directive since he was hired earlier this year. He summarized the improvements that have been made to www.okbar.org, which have resulted in increased site usage. He reviewed future goals, which all focus on enhanced usability.

**EXECUTIVE SESSION**

The board went into executive session, met and voted to come out of executive session.

**AVVO REQUEST FOR MEMBER INFORMATION**

The board approved a request from Avvo, a company that offers free online lawyer searches in 30+ states and lawyer reviews, to acquire member names, bar numbers, dates of admission and current bar status. General Counsel Hendryx will respond to the company's letter, dated Dec. 2, 2009, allowing the company to purchase the information at 15 cents per name. She will include in the letter that the OBA is making the information available willingly and not because of requirements of the Open Records Act, from which the OBA is exempt.


White Collar Crime:
2010 Annual Update and Trends
Webcast

Thursday, Jan. 21, 2010

10:00 a.m. - Your Computer

Covering:

Healthcare Fraud Trends
Immigration Issues
Mortgage Fraud
Response to Law Enforcement Contact
Department of Justice Hot Topics and Deferred Prosecution

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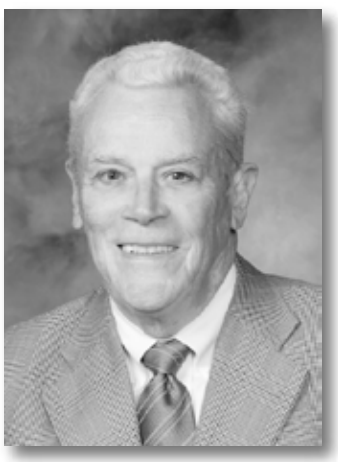
# What Is the Oklahoma Bar Foundation (And Who Are You?)

*By Phil Frazier*



*Phil Frazier*
*2010 OBF President*

As embarrassing as it is, I asked, "What the heck is the Oklahoma Bar Foundation and how do you [I] fit in?" I must plead guilty to this curiosity several years ago. As I pondered whether or not to make such an admission in this, my inaugural article, I considered how frequently Oklahoma lawyers ask this same question when the Oklahoma Bar Foundation is mentioned.

All Oklahoma lawyers are members of the foundation. This is automatic without payment of dues or any obligation other than to be a member of the Oklahoma Bar Association. We know that when we do not participate in an event or activity, no matter how meritorious it may be, we take it for granted or, worse yet, simply forget or ignore its existence.

Curiosity leads to becoming aware of all of the good the foundation does for the promotion of justice and enhancement of availability of the legal process for those less fortunate or needy of legal services.

Oklahoma lawyers, through their generosity and concern for fellow citizens, have enabled the Oklahoma Bar Foundation to fulfill its stated mission, *to promote justice, advance legal education and fund critical legal services.*

Lawyers who have become Fellows, or Sustaining Fellows, or better yet, Benefactor Fellows, have enabled the foundation to accomplish its mission — up to now. Now we need everyone's Fellow participation more than ever. As the downturn in the economy lingers on, the needs of the organizations we have previously assisted have greatly increased and continue to do so.

Some of the larger organizations who depend greatly upon the grants of the Oklahoma Bar Foundation include Legal Aid Services of Oklahoma, Domestic Violence Intervention Service Programs, Oklahoma High School Mock Trial Program, CAAVA and CASA Advocacy Programs, Oklahoma Lawyers for Children, Tulsa Lawyers for Children, and many other programs throughout the state. All of the programs previously sponsored, at least in part, by the Oklahoma Bar Foundation will have even greater needs this year. Accordingly, the Oklahoma Bar Foundation has even greater needs for more of the lawyers of Oklahoma to develop a curiosity about the fellowship and to satisfy that curiosity by becoming a Fellow member.

Think of your foundation as a team made up of all Oklahoma lawyers. You now know the team's mission. Do you want to be a player and help your team or just sit on the bench? The more players we have, the better we can perform the team mission.

Richard Riggs, Oklahoma Bar Foundation's immediate past president, gave generously of his time and leadership skills during the past year to ensure the fulfillment of the mission of the foundation. He took on and

successfully met the challenge presented by Past President Renee DeMoss. Rick successfully completed his stated goals, in spite of the economic downturn, which challenged all benefactor foundations. I am delighted that he will remain on the executive committee and as a member of the board during my term as president.

Other members of the 2010 Executive Committee are: John D. Munkacsy, Lawton; Judge Shon T. Erwin, Lawton; and Susan S. Shields, Oklahoma City. Your members of the Board of Trustees are: Richard Riggs, Judge Shon Erwin, Phil Frazier, Deirdre Dexter, Luke Gaither, John Munkacsy, Brooke Murphy, Judge Millie Otey, Susan Shields, Kevin Donelson, Leonard Logan, Robert Farris, Jack Brown, Judge Valerie Couch, Cathy Christensen, Stephen Beam, Will Farrior, Dennis A. Smith, Dietmar Caudle, Jack Dawson, Mike Mordy, Deborah Reheard, Linda Thomas, Allen Smallwood and John Morris Williams.

We are extremely fortunate to have Nancy Norsworthy as our foundation director of administration, assisted by Tommie Lemaster and Ronda Hellman.

Now that your curiosity has been satisfied as to what the Oklahoma Bar Foundation is and what our "team mission" is, the questions is: **Will you be a player and join other Oklahoma lawyers who are making a difference as Fellows of the foundation?** I urge you to call the foundation at (405) 416-7070. Please feel free to call me concerning any questions you may have about the foundation at (918) 744-7200 or my cell (918) 625-2170.

You, the lawyers of Oklahoma, and our system of justice will benefit from your becoming a Fellow.

Best wishes for a healthy and prosperous 2010.

*From left: Tommie Lemaster, Ronda Hellman and OBF Director of Administration Nancy Norsworthy*

# Fellow Enrollment Form

❍ Attorney ❍ Non-Attorney

Name: _____
*(name, as it should appear on your OBF Fellow Plaque)* *County*

Firm or other affiliation: _____

Mailing & Delivery Address: _____

City/State/Zip: _____

Phone: _____ Fax: _____ E-Mail Address: _____

__ I want to be an OBF Fellow **now** – Bill Me Later!

__ Total amount enclosed, $1,000

__ $100 enclosed & bill annually

__ *New Lawyer 1st Year*, $25 enclosed & bill as stated

__ *New Lawyer within 3 Years*, $50 enclosed & bill as stated

__ I want to be recognized as a ***Sustaining Fellow*** & will continue my annual gift of ***at least $100*** – *(initial pledge should be complete)*

__ I want to be recognized at the leadership level of ***Benefactor Fellow*** & will annually contribute ***at least $300*** – *(initial pledge should be complete)*

***Lawyers Transforming Lives through education, citizenship and justice for all. Join the OBF Fellows today!***

**Signature & Date:** _____ **OBA Bar #:** _____

Make checks payable to:
Oklahoma Bar Foundation • P O Box 53036 • Oklahoma City OK 73152-3036 • (405) 416-7070

**OBF SPONSOR:** _____

❍ ***I/we wish to arrange a time to discuss possible cy pres distribution to the Oklahoma Bar Foundation and my contact information is listed above.***

***Many thanks for your support & generosity!***

# Foreclosure Defense in Oklahoma

*By Cindy Goble*

*"If a free society cannot help the many who are poor, it cannot save the few who are rich."*
*John F. Kennedy*

Tough economic times have caused many people great hardship these days. While Oklahoma has not been devastated to the extent of other states, foreclosures remain a troubling consequence to many Oklahomans. Prevention of homelessness is a worthy goal and the need for pro bono assistance is great. Unfortunately, the most vulnerable in our society are generally the least protected. Often, low-income and senior citizens go without representation when faced with a foreclosure situation.

While many people turn to Legal Aid for assistance, there are a limited number of attorneys available, so the demand greatly outweighs the ability of Legal Aid to serve everyone. Now more than ever, there is an urgent need for pro bono attorneys to step up and assist the low-income and senior citizens that Legal Aid would otherwise be unable to serve.

As with any case, the facts vary, but one common thread is that without legal expertise, people will lose their homes. The number of mortgage rescue scams has increased and are becoming more sophisticated. One recent case involved an elderly couple, Betty and Charles Brown, who had lived in their home for several years, until Charles, the wage earner in the family, was laid off from his job. The Browns were unable to pay their mortgage payments and before Charles was able to find other employment, the mortgage company filed a foreclosure action.

**FREE SEMINAR**
**February 19**
**Oklahoma Bar Center**
**Put in 20 hours of pro bono work and get 8 hours of CLE FREE!**
**Register at tinyurl.com/ybu8lye**

Desperate to save their home, the couple fell victim to a mortgage rescue scam. The mortgage rescue company assured the couple that they would take care of everything and prevent them from losing their home. The company waited until the home was foreclosed, and then bought the home at the sheriff's sale. The Browns were assured that if they made their payments, they would retain ownership of their home. After paying this company for over four years, the Browns learned that their home had been placed in receivership. Even worse, they were told that they had no ownership interest in the home and that the home

would be subject to a potential sheriff's sale.

Some foreclosure cases arise due to the vulnerable condition of the owner. Shirley Smith was mentally disabled and lived alone in her home after the death of her husband. She and her husband had resided in the home for many years, and the mortgage had been fully paid. Her husband had always taken care of paying the bills. After his death, Shirley isolated herself from her family and had been living in the home without utilities and many times without food. She also failed to pay her property taxes.

A company paid the past due taxes on her home, amounting to less than $400. The company then filed a foreclosure action. Shirley's daughter discovered her mother's situation, but not before the home had been foreclosed upon and the company had filed an action to evict Shirley from the home.

In recognizing that many similar cases exist, specialized training in foreclosure defense would enable more attorneys to effectively practice in that area. Many times, foreclosure defendants have valid defenses to foreclosure actions, and in some cases, attorneys fees may be awarded.

**FREE SEMINAR**

The Oklahoma Bar Association, Legal Aid Services of Oklahoma Inc. and the OBA House Counsel Section are offering a one-day seminar Feb. 19, 2010, featuring nationally recognized foreclosure defense expert April Charney of Jacksonville Area Legal Aid Inc. in Florida. The seminar is approved for eight hours CLE credit and will be offered free of charge; however, attendees must commit to 20 hours of pro bono work (not confined to foreclosure defense) within the next 12 months. For more information, you may contact Cindy Goble at cindy.goble@laok.org or (405) 488-6823.

*Author's Note: The client names in this article have been changed to protect their privacy.*

*Ms. Goble is the pro bono coordinator at Legal Aid Services of Oklahoma.*

# Oklahoma Bar Journal Editorial Calendar

## 2010

- February: **Indian Law**
  Editor: Leslie Taylor
  leslietaylorjd@gmail.com
  Deadline: Oct. 1, 2009

- March: **Workers' Compensation**
  Editor: Emily Duensing
  emily.duensing@oscn.net
  Deadline: Jan. 1, 2010

- April: **Law Day**
  Editor: Carol Manning

- May: **Commercial Law**
  Editor: Jim Stuart
  jtstuart@swbell.net
  Deadline: Jan. 1, 2010

- August: **Oklahoma Legal History**
  Editor: Melissa DeLacerda
  melissde@aol.com
  Deadline: May 1, 2010

- September: **Bar Convention**
  Editor: Carol Manning

- October: **Probate**
  Editor: Scott Buhlinger
  scott@bwrlawoffice.com
  Deadline: May 1, 2010

- November: **Technology & Law Practice Management**
  Editor: January Windrix
  janwindrix@yahoo.com
  Deadline: Aug. 1, 2010

- December: **Ethics & Professional Responsibility**
  Editor: Pandee Ramirez
  pandee@sbcglobal.net
  Deadline: Aug. 1, 2010

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

# Letter from the YLD Chair

*By Molly Aspan*

*Molly Aspan*
*2010 YLD Chair*

The Young Lawyers Division welcomes you to the start of another year. I am honored to be the new chair of the YLD and am looking forward to an exciting year. I thought I would start off the year by answering some of the questions that I am often asked about the YLD.

**Who is a 'Young Lawyer'?**

One of the first questions I am asked about the YLD is about who is a member. Although the term "young" is in the division name, the YLD actually encompasses **anyone who has been in practice for fewer than 10 years** — regardless of age. Additionally, unlike some states, you do not have to sign up or pay any dues to be a member of the YLD. If you have been in practice for fewer than 10 years, you are automatically a member of the YLD.

**Why Should I Be Involved?**

Another question I am often asked by new attorneys (and sometimes more seasoned attorneys) is, "Why should I be involved in the YLD?" If you ask this question of every past YLD chair, you will probably get a variety of answers, as there are many reasons to be involved in the YLD. Thus, I will not mention every reason (and I'm sure that there are some I am missing), but here are a few benefits that the YLD offers (in no particular order).

**Meet Attorneys in Different Practice Areas:** First, the YLD offers an opportunity for new attorneys to meet peers as well as more experienced attorneys who have varied practices — often an invaluable resource when questions arise in different legal areas. There have been many instances in my practice when I am asked a question about an unfamiliar area of the law. Although I work at Hall Estill, a larger firm, and can ask any number of my co-workers, sometimes it is nice to be able to ask someone the "dumb" questions that I don't want to ask my co-workers — or sometimes the question may come from one of them! Conversely, I have had many attorneys who I know through my involvement in the YLD call me to ask questions they may have about a labor and employment law issue. By being involved in the YLD, you can make and nurture these relationships that will help you both as a new attorney, and with a growing and thriving practice.

**Meet Attorneys from across the State:** Next, the YLD offers an opportunity to meet attorneys all across Oklahoma. While many of us practice in either Tulsa or Oklahoma City, there are just as many members of the YLD practicing in other parts of the state. Not being a native Oklahoman, it has been helpful to me to develop and foster these relationships. There have been countless times when I have called on someone who I have met through my involvement in the YLD to ask about another attorney or judge in their geographic area. Additionally, there have been instances when I have referred work to other members of the YLD who are in other parts of the state, and there have been instances when other member of the YLD have referred work to me in Tulsa. By being involved in the YLD, you have this opportunity to develop a statewide network of friends.

**Volunteer for Your Community:** Finally, the YLD satisfies that "feel good" part for each of us, as it offers an opportunity to give back to the community. One of the purposes of the YLD is to promote "involvement in public service activities." The

YLD is the often referred to as the public service arm of the OBA, and involvement in the YLD often encompasses public service activities. The YLD provides gifts for Oklahoma law school graduates, makes and distributes "bar exam survival kits" for takers of the Oklahoma bar exam, provides and maintains an "Oklahoma Volunteer Handbook," and information about organ and tissue donation under Oklahoma law. Additionally, if you keep reading, you will learn about an opportunity to be involved in a new YLD community service project this year that will take place in conjunction with OBA Law Week on Saturday, May 1.

**How Should I Get Involved?**

Now that you know why you should be involved in the YLD, the next obvious question is, "How do I get involved in the YLD?" Again, there are many answers to this question, and, again, I will mention but a handful of the ways.

The YLD is governed by a Board of Directors, which consists of 20 directors elected throughout the state, as well as six ex officio members. Elections were just held last fall, and we are pleased that the Board of Directors is starting off the year with a full slate. However, this does not mean that there are still not opportunities for others to become involved. Our board meetings are not closed meetings, but are open for any members of the YLD to attend. Our midyear meeting is held in conjunction with the OBA Solo and Small Firm Conference in June, and our annual meeting is held in conjunction with the OBA Annual Meeting in November. Other meetings are typically held on Saturday mornings, and dates of all the meetings are posted on the OBA and YLD Web site. We would like to take this opportunity to invite you to any of our meetings, and we would like to challenge you to attend at least one of our meetings this year. This is the easiest way to learn what the YLD is doing and how you can be involved.

> "...the YLD offers an opportunity to meet attorneys all across Oklahoma."

The YLD has several standing committees, including Community Service, CLE, Disaster Legal Assistance, Gift of Life, Hospitality, Law Schools, Membership, New Attorney Orientation and Wills for Heroes. Each of these committees is chaired and consists of members of the YLD. By being involved in a YLD committee, you have the opportunity to develop and organize new and existing programs and events, as well as to work with the committee and the Board of Directors. A complete list of all YLD committees is available on the YLD Web site at www.okbar.org/yld.

The YLD also has liaisons to each of the OBA committees. These liaisons attend and participate in OBA committees, then coordinate with and report to the YLD Board of Directors about what the committee is doing. By serving as a YLD liaison, you would have the opportunity to meet other attorneys through your involvement with your committee and the YLD Board of Directors, as well as learn more about the operations of the OBA. A complete list of the OBA committees and current YLD liaisons is available on the OBA Web site.

**Statewide Community Service Project**

Finally, the YLD is emphasizing its public service purpose this year and starting a new community service project that will take place on Saturday, May 1. While details of this project are in the final stages and we are looking forward to a great event, we are not rolling it out until next month. Thus, mark the date on your calendar and be sure to read the "Letter from the YLD Chair" in your February bar journal. We are very excited about this project and hope to have volunteers from throughout Oklahoma involved. This project will provide an easy way for you to meet other attorneys, be involved in the YLD and give back to your community.

If you want to be involved in the YLD or have any questions or ideas, please do not hesitate to contact me at maspan@hallestill.com or (918) 594-0595. I am looking forward to working with many of you this year and excited about what lies ahead.

**SAVE THE DATE:**

**STATEWIDE COMMUNITY SERVICE PROJECT**

***Saturday, May 1***

# Calendar

## January

18 **OBA Closed** – Martin Luther King Jr. Day

20 **Oklahoma Council of Administrative Hearing Officials;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212

**Ruth Bader Ginsburg American Inn of Court;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donald Lynn Babb (405) 235-1611

21 **OBA Law-related Education Committee 2010 Supreme Court Teacher and School of the Year Judging;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jack G. Clark Jr. (405) 232-4271

22 **Oklahoma Bar Foundation Trustee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070

**OBA Law Day Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Tina Izadi (405) 521-4274

**OBA Solo and Small Firm Planning Committee Meeting;** 11 a.m.; Quapaw, Okla.; Contact: Jim Calloway (405) 416-7051

23 **OBA Law-related Education We the People State Finals;** 10 a.m.; Oklahoma History Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

25 **OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Andrea Braeutigam (405) 640-2819

27 **Luther L. Bohanon American Inn of Court:** 5:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Mary A. Roberts (405) 943-6472

28 **OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211

29 **OBA Lawyers Helping Lawyers Assistance Program Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Tom Riesen (405) 854-8444

## February

2 **OBA Law-related Education Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Jack G. Clark Jr. (405) 232-4271

4 **OBA Legal Intern Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: H. Terrell Monks (405) 733-8686

12 **OBA Board of Editors Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Carol Manning (405) 416-7016

**OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kimberly K. Hays (918) 592-2800

15 **OBA Closed** – President's Day

17 **OBA Law-related Education Close-Up;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

**OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211

18 **OBA Law-related Education Close-Up;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

**OBA Access to Justice Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade A. McClure (580) 248-4675

**OBA Law-related Education Close-Up Teachers Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

**OBA Government and Administrative Law Practice Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jamie Fenner (405) 844-9900

19 **OBA, Legal Aid Services of Oklahoma and the OBA House Counsel Section CLE Seminar; Defending Foreclosures in Oklahoma;** 8 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000

**OBA Board of Governors Meeting;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000

20 **OBA Title Examination Standards Committee Meeting;** 9:30 a.m.; Stroud Conference Center, Stroud; Contact: Kraettli Epperson (405) 848-9100

**OBA Young Lawyers Division Board of Directors Meeting;** Tulsa County Bar Center, Tulsa; Contact: Molly Aspan (918) 594-0595

22–26 **OBA Bar Examinations;** Oklahoma Bar Center, Oklahoma City; Contact: Oklahoma Board of Bar Examiners (405) 416-7075

# March

2 **OBA Day at the Capitol;** 10:30 a.m.; State Capitol; Contact: John Morris Williams (405) 416-7000

**OBA High School Mock Trial Finals;** OU Law Center; Bell Courtroom; Norman, Oklahoma; Contact: Judy Spencer (405) 755-1066

11 **OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211

12 **OBA Awards Committee Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: D. Renee Hildebrant (405) 713-1423

**OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kimberly K. Hays (918) 592-2800

15 **OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Andrea Braeutigam (405) 640-2819

16 **OBA Volunteer Night at OETA;** 5:45 p.m.; OETA Studio, Oklahoma City; Contact: Jeff Kelton (405) 416-7018

17 **Oklahoma Council of Administrative Hearing Officials;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212

18 **OBA Access to Justice Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade A. McClure (580) 248-4675

20 **OBA Title Examination Standards Committee Meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Kraettli Epperson (405) 848-9100

25 **OBA Leadership Academy;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027

26 **OBA Board of Governors Meeting;** Weatherford, Oklahoma; Contact: John Morris Williams (405) 416-7000

**OBA Leadership Academy;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027

The Muscogee (Creek) Nation, Department of Violence Against Women, seeks contract attorneys in various areas within the Nation's jurisdictional boundaries to provide legal assistance on an as needed basis, pursuant to funds received from a federal grant. Legal services may include protective orders, divorce, custody and visitation, landlord/tenant or other issues that may arise based on abusive situations.

Candidates should be licensed to practice in the State of Oklahoma and be reasonably located to practice in Tulsa, Creek, Hughes, Okfuskee, Okmulgee, Muskogee, McIntosh, Wagoner, Mayes, Seminole or Rogers Counties. Several attorneys may be selected to provide services as the need arises and based on the location of the clients. Knowledge and experience in dealing with domestic violence, sexual assault, dating violence and stalking is preferred. Candidates should be either licensed to practice in the Muscogee (Creek) Nation Court or willing to become licensed as a condition of contract. Interested candidates should submit a resume and hourly rates or rates for specific services to: Tania Bardin, Coordinator/Victim Advocate, P.O. Box 580, Okmulgee, OK 74447 or to tbardin@muscogeenation-nsn.gov.

## New OBA Board Members Take Oath

Nine new members of the OBA Board of Governors were officially sworn in to their positions in the Supreme Court Courtroom at the State Capitol Jan. 15. The new officers are President Allen Smallwood, Tulsa; President-Elect Deborah Reheard, Eufaula; and Vice President Mack Martin, Oklahoma City.

Sworn in to the OBA Board of Governors to represent their judicial districts for three-year terms were Glenn Devoll, Enid; David Poarch, Norman; Ryland Rivas, Chickasha; and Susan Shields, Oklahoma City.

Also sworn in for one-year terms on the board were Immediate Past President Jon Parsley, Guymon; and Young Lawyers Division Chairperson Molly Aspan, Tulsa.

## OBA Member Resignations

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

David Ashburn Brown
OBA No. 1180
6605 SW 89th Pl.
Portland, OR 97223

Russell Scott Buhite
OBA No. 12230
P.O. Box 1438
Tampa, FL 33601

John V. Butcher
OBA No. 21434
Assistant Federal
Public Defender
111 Lomas Blvd. NW,
Suite 501
Albuquerque, NM 87102

Gregory Evan Gore
OBA No. 3478
60 Oak Shade Road
Gaithersburg, MD 20878

Christopher Walker Goree
OBA No. 16226
1212 Leslie Lane
Norman, OK 73069

Annette Lynn Gunter
OBA No. 18363
10813 NW 116th St.
Yukon, OK 73099

Sonya Kay Legg
OBA No. 17801
170 Lake Forest Drive
Elberton, GA 30635

Jann McCall
OBA No. 13044
512 Pinchot Drive
Asheville, NC 28803

Lauren Elizabeth Mohr
OBA No. 20786
17 Manchester St.
Victoria Park, WA 6100
Australia

John Lowell Robinson
OBA No. 20934
2100 Roosevelt Dr., Ste. C
Arlington, TX 76013

Gordon Henry Rowe III
OBA No. 7790
1200 Pennsylvania NE #2B
Albuquerque, NM
87110-7419

Kay Smith
OBA No. 13252
1005 NW 38th St.
Oklahoma City, OK 73118

Walter A. Smith Jr.
OBA No. 8425
700 7th Street SW, No. 815
Washington, DC 20024

Steven S. Suttle
OBA No. 8779
Suite 300 Attorney General
111 Lomas Blvd. NW
Albuquerque, NM
87102-2368

Mark Lewis Walters
OBA No. 18908
Environment Protection and
Administrative Law Division
P.O. Box 12548
Austin, TX 78711-2548

Deborah Anne Wheeler
OBA No. 9516
P.O. Box 687
Guthrie, OK 73044

## OBA Member Reinstatements

The following OBA member suspended for nonpayment of dues has complied with the requirements for reinstatement, and notice is hereby given of such reinstatement:

William Lee Ford
OBA No. 14951
204 W. Rose Dr.
Midwest City, OK 73110

## Bar Center Holiday Hours

The Oklahoma Bar Center will be closed Monday, Jan. 18 in honor of Martin Luther King Jr. Day. The bar center will also close Monday, Feb. 15 in observance of President's Day.

## OBA Board Approves Section Bylaw Changes

The OBA Board of Governors voted last month to approve the OBA Mineral Law Section's request to change its name to the **Energy and Natural Resources Law Section**. This expands its membership to include other areas of energy and natural resources law such as wind, water and agricultural law. Section membership includes expanded section offering, which includes a quarterly newsletter. The section also plans to charter an OBA/CLE conference to include a course for the general practitioner.

The board also voted to allow associate members in the Energy and Natural Resources Law Section as well as the **Law Office Management and Technology Section**. Associate membership applies to law students, professionals in related fields or those who have demonstrable interest in the activities of the section. Application for associate membership may be made in writing and paying applicable dues. Associate members shall have all the privileges of section members except the privilege of voting and holding office in the section.

Dues for both sections is $20. To join, sign up on My.Okbar or mail a check (payable to the OBA) for the amount of section dues and send to: OBA Membership Department P.O. Box 53036, Oklahoma City, OK 73152. For further information, contact ENRL Section Chair Chris Tytanic at (405) 227-0547 or ctytanic@ou.edu, or LOMT Section Chair Judge Charles Hogshead at (918) 596-5388 or chogshead@gmail.com.

## OBA Member Reinstatements

The following members of the OBA suspended for noncompliance with the Rules for Mandatory Continuing Legal Education have complied with the requirements for reinstatement, and notice is hereby given of such reinstatements:

William Lee Ford
OBA No. 14951
204 W. Rose Dr.
Midwest City, OK 73110

Thomas Christopher Harris
OBA No. 20067
7304 NE 47th Terrace
Kansas City, MO 64117


**Family & Divorce Mediation Training**

OKC • February 4 - 7
Tulsa • February 10 - 13

***Approved for 40 hours of MCLE credit***

This course is lively and highly participatory and will include lecture, group discussion, and simulated mediation exercises
Cost: $625 includes all materials

**The Course for Professional Mediators in Oklahoma**

**This course fulfills the training requirements set forth in the District Court Mediation Act of 1998**

**Contact:**

**The Mediation Institute**
(405) 607-8914
James L. Stovall, Jr.
**13308 N. McArthur**
**Oklahoma City, OK 73142**


## ASSISTANT UNITED STATES ATTORNEY - CRIMINAL DIVISION

The United States Attorney's Office for the Western District of Oklahoma is seeking to fill an attorney vacancy in its Criminal Division. An attorney hired for this position will be assigned to one of four teams handling counter-terrorism and national security, violent crimes, narcotics trafficking, white collar and public corruption, and other federal major crimes. 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 jurisdiction), and have three (3) years or more litigation experience post-J.D. Trial experience preferred. Interested applicants should send their resumes to: Robert J. Troester, First Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Oklahoma, 210 Park Avenue, Suite 400, Oklahoma City, OK 73102. Resumes must be received no later than January 29, 2010, and should reference announcement number 10-WOK-05-A.

# Kudos

Gov. Brad Henry appointed **Bradford L. Benson** as associate district judge for the 3rd Judicial District in Tillman County.

**Sanford Coats** has been sworn in as the new U.S. attorney for the Western District of Oklahoma. He was nominated by President Barack Obama in September and confirmed by the U.S. Senate in December.

**Judge Robert H. Henry**, Chief Judge of the United States Court of Appeals, 10th Circuit, was named the 17th president and CEO of Oklahoma City University by the board of trustees.

**Dr. Stephen Eck** has been named vice president for planned and estate giving at Oklahoma Christian University.

**T. Michael Blake** was honored by Oklahoma Lawyers for Children with its Mona Lambird Service to Children Award at the organization's annual dinner last month.

**Graydon Dean Luthey Jr.** and **Larry G. Ball** have been honored for their community service in Tulsa and Oklahoma City. Mr. Luthey was honored at the Goodwill Appreciation Awards, sponsored by the Islamic Society of Tulsa. The award was "for excellence in exemplary encouragement and protecting our rights." Mr. Ball was awarded the 2009 Inspiration Award at this year's Central Oklahoma Habitat for Humanity Awards Dinner in appreciation for his years of commitment to the growth and development of the organization and his commitment to "truly make a difference in the lives of many of his fellow Oklahomans."

# On The Move

Lester Loving & Davies of Edmond announces **Lisa M. Wilcox** and **Sherman A. Reed** joined the firm as of counsel. Ms. Wilcox practices bankruptcy, securities, employment law and general civil litigation. Mr. Reed practices adoptions, family law and personal injury. Both lawyers graduated from OCU School of Law.

Rosenstein, Fist & Ringold of Tulsa announces **Samanthia S. Marshall** has joined the firm as an associate attorney. Ms. Marshall earned her B.A. from the University of Southern California with majors in broadcast journalism and theatre and earned her law degree from TU. While in law school, she served as editor-in-chief of the *Tulsa Law Review* and was selected for Order of the Curule Chair. She also served as vice president of the Women's Law Caucus and historian of Phi Delta Phi.

Grammer Land & Exploration has opened a new office in Austin, Texas. The new address is 1601 W. 38th St., Austin, Texas, 78731. Grammer Land & Exploration is a privately held oil and gas exploration company with offices in Amarillo, Tulsa and Denver.

**Richard M. Glasgow** announces the opening of his law office at 1141 N. Robinson, Suite 300, Oklahoma City, 73103; (405) 601-5666; rglasgow@richardglasgowlaw.com. He practices in the areas of automobile dealer fraud, debt collection harassment, truth in lending, predatory mortgage lending and related consumer law transactions.

Hall, Estill, Hardwick, Gable, Golden & Nelson PC of Tulsa announces that two new shareholders have been elected: **Genevieve L. Schmook** and **John T. Richer**. Ms. Schmook received her M.B.A. and J.D. from TU. She began her legal career with Hall Estill in 2002 and focuses her practice in the corporate/commercial arena. Mr. Richer earned a J.D. from the University of Kansas School of Law where he served on the *Kansas Law Review*. His practice focuses on bankruptcy, commercial and general litigation.

Hammons, Gowens & Associates of Oklahoma City announces that **Amber L. Hurst** has become a partner in the firm and that the firm has changed its name to Hammons, Gowens, Hurst & Associates. Ms. Hurst received her J.D. from OU in 2006 where she was a member of the *Oklahoma Law Review* and the winner of the 2005 Fenelon Boesche Summer Write-On Competition Award. She practices in the

area of employment and labor law.

GlassWilkin PC of Tulsa announces that **Michael C. Redman** has joined the firm as of counsel. Mr. Redman earned his J.D. from OU and practices commercial litigation, employment law, ERISA litigation, unfair business practices, and false and deceptive advertising.

Fellers Snider of Oklahoma City announces that **Michael S. Young** has joined the firm. Mr. Young is a registered U.S. patent attorney practicing intellectual property law with particular emphasis on patent prosecution and licensing of medical and surgical devices and biotechnology. He earned his J.D. from Creighton University.

Rhodes, Hieronymus, Jones, Tucker and Gable of Tulsa announces that **Rachel M. Lee** has joined the firm as an associate lawyer. She practices civil litigation and insurance defense. She received her J.D. from the TU College of Law where she served as an editor of the *Tulsa Law Review*.

**Robert C. Newark III** announces the opening of his new practice in Oklahoma City. He may be reached at (405) 819-6128 or robnewark@newarkfirm.com. Mr. Newark will primarily focus on bankruptcy, immigration, family law and Social Security disability.

## At The Podium

**Allen B. Pease** recently spoke and presented on two different topics, "A Construction Law Primer for Engineers" and "Project Management Legal Issues," for the annual Black & Veatch Technology and Project Management Training Conference in Overland Park, Kan.

**Andy Lester** spoke at the December CLE seminar sponsored by the OBA's Government and Administrative Law Section, titled "Current Issues in Public Sector Law."

*Compiled by Rosie Sontheimer*

How to place an announcement: 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. Information selected for publication is printed at no cost, subject to editing and printed as space permits. Submit news items **(e-mail strongly preferred)** in writing to:

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**Articles for the March 13 issue must be received by Feb. 15.**


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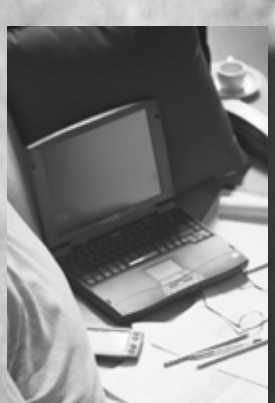
At Home

At Work

And on the Go

**H. A. Bud Carter Jr.** of Oklahoma City died Dec. 10. He was born on June 27, 1931, in West Fork, Ark. He attended OSU where he played basketball. **After graduating, he served as a Captain in the U.S. Air Force during the Korean War.** He then went on to work as an insurance adjuster. He later attended the OCU School of Law and received his J.D. in 1962. Shortly after this, he opened his own firm. He was a devoted member of Mayfair Baptist Church where he served as a deacon, sang in the choir and taught Sunday school and later a member of Newchurch. In his free time, he liked to travel, attend OSU sports events and be with his wife. Memorial contributions may be made to Newchurch, 9201 N. Rockwell, Oklahoma City, 73162.

**Byron E. Harkey Jr.** of Oklahoma City died Dec. 6. He graduated from Classen High School in 1960 and went on to graduate from OSU and OCU School of Law, where he earned his J.D. For years, he worked as an income tax auditor. He was an active member of the OSU Posse and all Cowboy causes. He was very involved in the community as a member of the Sigma Phi Epsilon fraternity, the Masonic Lodge, the Elks Club, the Oklahoma City Gun Club and the NRA. He liked to attend OSU athletic events and hunt in his free time. Memorial donations may be made to the OSU Foundation for athletic scholarships fund, P.O. Box 1749, Stillwater, 74076.

**Charles (Chuck) T. Klein** of Tulsa died Dec. 2. He was born June 23, 1914, in Wichita, Kan. The family moved to Tulsa in 1919, and he graduated from Tulsa Central High School in 1932. He received his B.A. and J.D. from the University of Michigan and then returned to Tulsa to practice law at the Harper, Williams and Boeche Law Firm. **He also joined the Oklahoma Air National Guard. From 1941 to 1946, he served in the U.S. Army Air Corps. He was a combat observer and squadron intelligence officer with the 13th Bomber Command, 13th Air Force in the South and Southwest Pacific Theaters. He was discharged in 1946 as a Lt. Colonel in the USAF Reserve.** He returned home and spent the next 29 years in the oil and gas industry. He served as vice president and director of Cities Service Gas Co. in Oklahoma City. In 1965, he became the president and director of Northwest Pipeline Corp. in Salt Lake City. He retired in 1977 and moved to Wickenburg, Ariz., but returned to Tulsa in 2002. His true joy in life was making new friends and spending time with family. Memorial contributions may be made to the Inverness Village Fund, 3800 W. 71st St., Tulsa, 74132; and the Desert Caballeros Western Museum, 21 N. Frontier St., Wickenburg, Ariz., 85390.

**Patrick David Little** of Norman died Dec. 8. He was born Aug. 6, 1937, in Duncan. He graduated from Kansas University where he earned both a B.A. and a law degree. In law school, he worked on the *Kansas Law Review* and was a member of Phi Delta Phi. He began his career with a Kansas City law firm and also served as city attorney of Bonner Springs, Kan. He went on to become associate general counsel of the Prudential Insurance Co. in Los Angeles and was chosen to participate in the President's Executive Interchange Program in Washington, D.C., where he worked for the Department of Housing and Urban Development as special assistant to the Secretary. He eventually returned to Oklahoma to be close to family and friends and opened Little's Charbroiler Restaurant in Oklahoma City, which he owned and operated for 10 years. Later, he returned to the legal profession and opened a practice in Norman. Memorial donations may be made to First Christian Church, 220 S. Webster, Norman, 73069.

# CLASSIFIED ADS

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OKC ATTORNEY HAS CLIENT INTERESTED IN PURCHASING producing or non-producing, large or small, mineral interests. For information, contact Tim Dowd, 211 N. Robinson, Suite 1300, OKC, OK 73102, (405) 232-3722, (405) 232-3746 — fax, timdowd@eliasbooks.com.

CONSULTING ARBORIST, tree valuations, diagnoses, forensics, hazardous tree assessments, expert witness, depositions, reports, tree inventories, DNA/soil testing, construction damage. Bill Long, ISA Certified Arborist, #SO-1123, OSU Horticulture Alumnus, All of Oklahoma and beyond, (405) 996-0411.

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LUXURY OFFICE SPACE - FIVE OFFICES: One executive corner suite with fireplace ($1,200.00/month); two large offices ($850.00/month); and two small offices ($650.00 each/month). All offices have crown molding and beautiful finishes. A fully furnished reception area, conference room, and complete kitchen are included, as well as a receptionist, high-speed internet, fax, cable television and free parking. Completely secure. Prestigious location at the entrance of Esperanza located at 153rd and North May, one mile north of the Kilpatrick Turnpike and one mile east of the Hefner Parkway. Contact Gregg Renegar at (405) 285-8118.

OFFICE SHARE — NEWLY CONSTRUCTED TOWN CENTER in the Village duplex suite, just off Hefner east of May, west of Penn; two medium private offices available; reception/waiting area; large conference room; coffee bar; bath. Flexible arrangements in sharing overhead of approx. $750 per month per office. Call Joe at (405) 740-1261.

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## LOST WILL

LOST WILL: IF YOU WERE CONTACTED BY AND/OR PREPARED A WILL for Beverly Holmes Lindsay, a Tulsa resident, please contact attorney Gale Allison at The Allison Firm in Tulsa at (918) 492-4500 or gallison@theallisonfirm.com.

## POSITIONS AVAILABLE

TULSA AV RATED FIRM SEEKS ASSOCIATE (3 - 10 years experience) looking for new challenges and affiliating with a growing law firm. Proven experience in the area of employment law and/or business litigation is required. The total compensation package is commensurate with level of experience. Applications will be kept in the strictest confidence. Please send resume to Box "S," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

EMPLOYMENT LITIGATION ASSOCIATE — OKLAHOMA CITY: Associate with 5 years experience in Employment law; Title VII, ADEA needed for Downtown Oklahoma City firm. Trial experience preferred but not required. Billable hours: 2000 annually. Very competitive salary range & bonus potential. Partner track position. Please email Word resume & salary requirements to: tamar@tmsrecruiting.com.

MIDSIZE TULSA LAW FIRM, seeking trial lawyer with 0-5 years experience to handle all phases of personal injury litigation. Salary commensurate with experience. Please send resume, references and writing sample to Box "W," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

LITIGATION PARTNER WANTED for new Oklahoma office (OKC or Tulsa) for a national insurance defense and employment firm. Candidate must have a minimum of 10 years experience in litigation and must demonstrate a high energy level as well as strong client relations skills. Construction defect, professional liability, employment and personal injury defense work necessary. Compensation package will reward skills, experience and existing relationships. Additional information may be found at www.helmsgreene.com. We would also consider a small litigation team. Please direct inquiries to Steve Greene at sgreene@helmsgreene.com or (770) 206-3371.

## POSITIONS AVAILABLE

AV-RATED TULSA LAW FIRM SEEKS ATTORNEY with 1-5 years experience; business, real estate and energy transactions, and general litigation practice. Send resume to tulsalawoffice@sbcglobal.net.

LEGAL CLAIMS CONSULTANT NEEDED: Our client, a major oil and gas company with offices in Bartlesville, is searching for a legal claims consultant to join the claims group. Qualified candidates will be either senior paralegals with legal claims experience or junior attorneys with experience as a claims adjuster or agent. Interviewing to begin immediately. Great opportunity to join a fantastic company! Qualified candidates please apply online at http://eresume.ProvidusGroup.com and reference Job #5181.

SPANISH SPEAKING LEGAL ASSISTANTS IMMEDIATE EMPLOYMENT: Must be fluent in Spanish and must be able to interpret and translate from English to Spanish. Must have 5 years experience in personal injury, $40k plus benefits. Send resume & references to: Legal Research & Management Systems, Inc. P.O. Box 2243, Oklahoma City, OK 73101.

BRIEF WRITER-OKLAHOMA CITY: Litigation/Brief Writer w/5 years experience needed for Downtown Oklahoma City firm. Experience as Clerk for U.S. Judge required. Billable hours: 2000 annually. Very competitive salary range & bonus potential. Partner track position. Please email Word resume & salary requirements to: tamar@tmsrecruiting.com.

AV RATED OKLAHOMA CITY FIRM SEEKS EXPERIENCED CIVIL LITIGATION ASSOCIATE with 5 to 10 years experience in civil litigation. The position is focused on and experience is required in general civil rights and employment litigation. Salary is commensurate with experience. Travel is required. Send resume, writing sample and salary history via email to jodi@czwglaw.com or by mail to: Collins, Zorn & Wagner P.C., Attn: Jodi S. Casey, 429 NE 50th, Second Floor, Oklahoma City, OK 73105.

POSITION AVAILABLE: Shawnee, OK: 2-5 years experience, position requires person with skills in research, writing, trial preparation and trial experience. Please send resumes to Box "Y," Oklahoma Bar Association, P. O. Box 53036, Oklahoma City, OK 73152.

ASSOCIATE WITH 3-7 YEARS DEFENSE LITIGATION EXPERIENCE needed by AV-rated Tulsa firm. Insurance defense a plus. Very busy, fast-paced, expanding office offering competitive salary, health/life insurance, 401k, etc. Send resume and writing sample (10 pg. max) in confidence via email to legalrecruit500@yahoo.com.

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PRESIDENT AND CHIEF EXECUTIVE OFFICER – OKLAHOMA LAWYERS FOR CHILDREN: Oklahoma Lawyers for Children is seeking to fill the position of its president and chief executive officer. Applicant must be a licensed Oklahoma attorney with a minimum of five years of legal experience. Fundraising experience also preferred. The position leads and directs the efforts of the organization, including administration of volunteer programs and leading/developing fundraising initiatives. Before February 15, 2010, please send your resume to Eric Eissenstat by e-mail to eeissenstat@fellerssnider.com or by mail to 100 N. Broadway, Suite 1700, Oklahoma City, OK 73102. Oklahoma Lawyers for Children is a non-profit organization with a mission to use the time, talent and resources of pro bono attorneys and others to represent and assist deprived and abused children in the Oklahoma County juvenile system.

ASSISTANT UNITED STATES TRUSTEE – U.S. DEPARTMENT OF JUSTICE, OKLAHOMA CITY, OK: The United States Trustee Program, the litigating component of the Department of Justice (www.usdoj.gov/ust/) that protects the integrity of the Federal Bankruptcy System, is seeking an experienced attorney with demonstrated leadership & management skills to fill the position of Assistant U.S. Trustee. Applicants must have at least 10 years legal experience in bankruptcy law & litigation, and possess extensive management and supervisory exp. For additional information, qualification requirements, and application procedures, go to www.usajobs.opm.gov. Click on Search jobs and enter vacancy announcement #FY10-1 in the keyword search. Compensation $113,735-$152,900 plus benefits. An EO/Reasonable Accommodation Employer.

AV-RATED SOUTHWEST KANSAS LAW FIRM seeks an attorney with 2-5 years of litigation experience. Attorney would be expected to handle contract, commercial law, business and personal injury litigation. Salary commensurate with experience. Send resume to "Box G," Oklahoma Bar Association, P. O. Box 53036, Oklahoma City, OK 73152.

## POSITIONS AVAILABLE

DOWNTOWN TULSA AV RATED FIRM SEEKS ASSOCIATE with 1 to 3 years experience (civil litigation experience a plus). Firm offers an excellence compensation package. Salary is commensurate with experience. Strong academic record required. Please send resume, references, writing sample and law school transcript to "BOX U," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

OKLAHOMA BASED, MULTI-STATE FIRM SEEKS ASSOCIATES for Oklahoma offices, several locations statewide. Emphasis on Family Law and Child Support Enforcement. Strong work ethic and self motivation skills required. All replies considered confidential. Send resume and salary requirements to: "Box B," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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# Another 'What They Didn't Teach Us!' Story

*By Patrick Thompson*

Practice law even for a little while and you'll soon figure out you didn't learn everything you needed in school.

In 1977, I got a job as an associate in a small Oklahoma City firm where my criminal law experience was appearing at arraignments, entering pleas and Oklahoma City Municipal Court.

I left that firm in 1980 for another that did oil and gas title work.

By 1985, I was a solo practitioner and one of my steady clients hired me to do stand-up drilling opinions on six sections in a county bordering another state. I took a book-puller and an experienced record-checker, and it still took a week to get everything I needed.

We got back to Oklahoma City about 3 o'clock in the afternoon. I let my helpers have the rest of the day off, and I went to the office to look at the mail and listen to phone messages.

There was one from the Federal Public Defender's office that I had been appointed in a criminal case, they wanted to speak to me right away, and I was due in court Monday morning. I returned the call.

A very nice lady answered and advised I needed to come fill out paperwork and get information on the charges my client faced, 197 counts of wire fraud and using telegrams to send and receive drug money. My client spoke only Colombian *and* was eight months pregnant.

I told the lady on the phone about my lack of relevant experience, how I couldn't devote the kind of time a case like this would take and that I didn't want the job. She allowed it wasn't up to her, that only the federal magistrate could let me out of the case. And so I went to see him.

I got there, convinced his secretary I was a lawyer, was due to appear Monday with a client I did not want and would appreciate being let out of the case before the magistrate went home. She, reluctantly it seemed, went to tell him I was there.

I was ushered into his office. I told him pretty much what I've written above, that there was no one in my office to generate income but me and if this case took much time, especially if it went to trial, I'd go broke. He pointed out that I would be paid for my time.

I tried another approach. I explained that I'd worked my way through college. Then, I'd gone to law school during the day and was a janitor nights and weekends. I went on to say I'd done all that so I could lead the kind of life I wanted and not be interfered with against my wishes.

Then he said, "Pat, maybe your client is feeling the same way. Maybe she's feeling someone is trying to take something away from her and she doesn't know what to do about it. I can't think of anyone better suited than you to help her."

I realized the discussion was over. "I appreciate your time," I said, "and I'll see you Monday." "I'll see you there," he said.

Well, I was there Monday. I met my client, the court entered a not guilty plea on her behalf, and I went to work on the case. Turned out she was the girlfriend of a drug kingpin who got his dope from the Sicilian Mafia and sold it out of New York City, Miami and Oklahoma City. He had brought her to America illegally from Colombia via Cuba so their baby could be born here. He had gotten her involved by having her send and receive cash by Western Union. Surveillance had gone on for over a year, including an agent posing as a full-time housemaid.

In the end, my client plead to misprison of a felony, got the minimum, and was sentenced to a facility where she could deliver and keep her baby until it was six months old. I got paid nearly the same hourly rate as I would have doing title opinions. And, I learned some things they didn't teach me in law school.

*Mr. Thompson practices in Perkins.*

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