THE Oklahoma Bar JOURNAL
Volume 81 ◆ No. 5 ◆ February 13, 2010

Indian Law

DEFENDING FORECLOSURES IN OKLAHOMA

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Don't miss this year's opportunity to visit with members of your Okla. Legislature as part of the OBA Day at the Capitol to get up-to-speed on the OBA legislative agenda. Register and meet at the Oklahoma Bar Center for the day's briefing at 10:30 a.m. Lunch will be provided at noon. After lunch, head to the Capitol to visit with the legislators and attend a reception at the bar center at 5 p.m.

Tuesday, March 2, 2010

10:30 - 11 a.m.	Registration
11 - 11:10 a.m.	Welcome — Allen M. Smallwood, President, Oklahoma Bar Association
11:10 - 11:25 a.m.	Comments Re: Funding for the Courts — Chief Justice James E. Edmondson, Oklahoma Supreme Court
11:25 - 11:40 a.m.	Legislation of Interest — Duchess Bartmess, Chairperson, Legislative Monitoring Committee
11:40 - 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 - 12:25 p.m.	Oklahoma Lawyers Association — Thad Balkman
12:25 - 12:35 p.m.	Legal Aid — Status of Funding — Laura McConnell-Corbyn, LASO, Board Member Liaison OCBA
12:35 - 12:45 p.m.	Bills on OBA Legislative Agenda — John Morris Williams
12:45 - 1 p.m.	Legislative Process and Tips on Visiting with Legislators — Rep. Scott Inman
1 - 5 p.m.	Meet with Legislators
5 - 7 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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OKLAHOMA
LAWYERS ASSOCIATION

Theme:
Indian Law
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Oklahoma and its Native American Heritage

By Allen Smallwood

I remember a cartoon in The New Yorker magazine some 15 to 20 years ago. The cartoon showed what were clearly two Native Americans on the East Coast of the United States with fishing lines in the water. On the horizon were what appeared to be several multi-masted 17th century sailing ships approaching from the east. The fishermen had sardonic looks on their faces with one commenting, "I see trouble coming." This comical and superficial cartoon understates the cataclysmic clash of civilizations which this continent is still attempting to resolve. Nowhere, perhaps, can the end result of this collision be more readily apparent than in the state of Oklahoma.

If my memory of history is correct, "Oklahoma" has been translated from the Choctaw Indian words meaning "red people" – "ukla" meaning "people" and "humá" meaning "red." Many non-Native Americans interpret that to refer to the forced settlement of this area of the country some 150 years ago by what the non-native culture has described as the "Five Civilized Tribes." However, I submit to you that the "Land of the Red Man" should more accurately refer to this entire part of the southern plains of the North American continent, which was populated by indigenous peoples long before any of us of European or African descent ever laid eyes on this beautiful prairie.

President Smallwood practices in Tulsa.
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A fleeting glance at a current map of our state will reflect the overwhelming influence of Native American culture as reflected in the numerous Native American names for towns and counties. These reflect not only the language of the Native American tribes who were forced to come to this state, but those who traversed the tallgrass prairie of the state of Oklahoma for centuries if not millennia. These would include the southern Cheyenne, the Ponca, the Comanche, the Kiowa, as well as all the other groups comprising the population of this country prior to its discovery by Europeans in the 16th century.

I have in my office a map dated 1887 that I found in an antique store several years ago. It is a beautiful multi-colored map reflecting the assignments of areas of the state to various Indian tribes, invariably reflecting treaty agreements between the United States government and those tribes. Interestingly, almost the only town by name listed on this map is my hometown of Tulsa. The central part of the state, including Oklahoma City and Guthrie, is unmarked as the date of the map was two years before the run of 1889.

A fleeting glance at a current map of our state will reflect the overwhelming influence of Native American culture…

One can't help but contrast this map with that of a current state map with the sobering thought that the only "sovereign Indian territory" – other than reservations – left to

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EVENTS CALENDAR

FEBRUARY 2010

15 **OBA Closed** – Presidents Day

16 **OBA Civil Procedure Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229

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

OBA Professionalism Committee Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Sharisse O'Carroll (918) 584-4192

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 Solo and Small Firm Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: B. Christopher Henthorn (405) 350-1297

OBA Government and Administrative Law Practice Section Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jami Fenner (405) 844-9900

19 **OBA Board of Governors Meeting;** 9 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

22–25 **OBA Bar Examinations;** Oklahoma Bar Center, Oklahoma City; Contact: Oklahoma Board of Bar Examiners (405) 416-7075

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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Indian
LAW

Tribal Sovereignty vs. State Court Jurisdiction:

Whatever Happened to Federal Indian Law?

By Klint A. Cowan

In three recent decisions, the Oklahoma Supreme Court ruled that state courts have jurisdiction over tort actions arising at tribal casinos.[1] The court reached this conclusion even though 1) state courts had no such jurisdiction[2] prior to the adoption of the Model Tribal Gaming Compact,[3] and 2) the compact specifically prohibits any expansion of state court jurisdiction.[4] What's more, the court declined to consider affidavits from Gov. Brad Henry and Treasurer Scott Meacham explaining that the negotiating parties intended the compact to give exclusive jurisdiction to tribal courts.[5] Rather than clarifying the situation, the Supreme Court decisions have created the potential for compact disputes with each of the 32 gaming tribes in Oklahoma. These disputes will likely play out in myriad negotiations, arbitrations, tribal-court actions, state-court actions and federal-court actions over the next several years. If tribes resolve the disputes by removing compact games from their gaming facilities, the result could be a severe decline in the state's exclusivity fees.[6]

LEGAL FRAMEWORK OF TRIBAL GOVERNMENT GAMING

Indian gaming derives from tribal governments' inherent authority over their territory. In 1987, the U.S. Supreme Court upheld the tribes' authority to authorize, regulate and conduct gaming within their jurisdictions.[7] The next year, Congress passed the Indian Gaming Regulatory Act (IGRA),[8] which limited tribal gaming to traditional games (Class I games) and bingo and games similar to bingo (Class II games).[9] Before engaging in slot machine and other Las Vegas style gaming (Class III games), IGRA requires tribes to negotiate a compact with the state in which the gaming will take place.[10] Each state-tribal gaming compact must be approved by the Secretary of the Interior.[11] During 2003 and 2004, Oklahoma's Executive Branch and representatives of several Indian tribes negotiated the terms and provisions of what would become the Model Tribal Gaming Compact.[12] The compact authorized the play of certain Class III games, and provided that nothing in its terms would alter state or tribal courts' civil jurisdiction.[13] Oklahoma voters also approved the compact on Nov. 2, 2004, as State Question No. 712.[14]

As governments, tribes possess sovereign immunity from civil actions, including tort actions.[15] Where tribes have waived immunity for such actions arising in their jurisdictions, tribal law applies and tribal courts have exclusive jurisdiction, unless the state has acquired jurisdiction through a Congressional authorization.[16] In the compact, the tribes agreed to a limited waiver of sovereign immunity for tort and prize claims, provided that the claimant first exhausts a tribal administrative process.[17] If the tribal administrative process is not completed or the time limit has elapsed, the tribe's waiver of sovereign immunity is not effective.[18] The limited waiver extends only to suits in a "court of competent jurisdiction," which — if read in isolation and not in conjunction with the compact's limitation on the expansion of state court jurisdiction — raises the question whether state courts can be courts of competent jurisdiction for tort claims against tribal casinos.[19]

STATE COURT JURISDICTION BEFORE THE COMPACT

Before the compact, Oklahoma courts lacked jurisdiction over civil actions arising in Indian country[20] against Indians or Indian tribes.[21] This lack of jurisdiction is not a matter of tribal sovereign immunity from suit, but a fundamental gap in the state's jurisdictional competence created by federal law.[22] The gap derives from the Indian Commerce Clause of the U.S. Constitution, which gives Congress plenary authority over Indian tribes and Indian country.[23] The Indian Commerce Clause divests the states of "virtually all authority over Indian commerce and Indian tribes."[24]

In fact, Congress conditioned Oklahoma's entry into the union on a disclaimer of jurisdiction over Indian country,[25] and the state constitution contains the requisite disclaimer.[26] Other states' courts considering federal enabling act disclaimers similar to Oklahoma's have found that the disclaimer prevents the state from exercising jurisdiction over civil actions against Indians arising in Indian country.[27] Federal courts have recognized that Oklahoma courts lack jurisdiction over such actions.[28]

Congress has provided a method, known as Public Law 280, for states to assume jurisdiction over civil actions against Indians arising in Indian country, but the method requires consent from the Indian tribe over whose Indian country the state is adopting jurisdiction.[29] And the tribal consent entails more than a mere passage of a tribal council resolution. A majority of the voting tribal members within the affected area must approve the state's assumption of jurisdiction in a special election conducted by the Secretary of the Interior.[30] The procedure also requires the state's constitutional disclaimer to be repealed,[31] and legislative action specifically defining the scope of jurisdiction to be acquired.[32] Oklahoma has never attempted to gain jurisdiction under this process, nor has any Oklahoma tribe consented to such acquisition.[33]

RECENT OKLAHOMA SUPREME COURT DECISIONS

Under federal law, then, it was clear at the time the compact language was drafted that the state courts lacked jurisdiction over tort claims arising in Indian country against tribes. While the compact contains a limited waiver of tribal sovereign immunity for tort actions against tribal gaming facilities[34] in "a court of competent jurisdiction,"[35] it also unequivocally provides that nothing in the compact expands the state courts' jurisdiction. "This Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction."[36] But if state courts lacked jurisdiction over tort actions against tribes before the compact and the compact did not alter state court's jurisdiction, how did the state acquire jurisdiction?

The first time the Oklahoma Supreme Court considered that question, it found that the state had *not* acquired jurisdiction. In *Muscogee (Creek) Nation Gaming Comm'n v. Fitzgerald*,[37] a district court had asserted jurisdiction over a casino patron's tort action against the Muscogee (Creek) Nation. The Nation sought a writ of prohibition from the Supreme Court arguing that the Nation's courts had exclusive jurisdiction. By a vote of 6 – 3, the Supreme Court granted the writ, finding that the Nation's judiciary had "exclusive jurisdiction over plaintiff's claim."[38] Although the court issued no written opinion, the writ suggested the court would uphold the status quo of tribal courts exercising exclusive jurisdiction over civil actions arising in Indian country against Indian tribes.

After *Fitzgerald*, three similar cases reached the Supreme Court: *Cossey v. Cherokee Nation Enterprises LLC*, *Griffith v. Choctaw Casino of Pocola*, and *Dye v. Choctaw Casino of Pocola*.[39] Each involved personal-injury actions against tribes arising at tribal casinos. *Cossey* was decided first in January 2009. It involved a slip-

and-fall claim by a patron of the Cherokee Casino in Roland, Okla. The state district court found that it had jurisdiction over the claim as a "court of competent jurisdiction" under Part 6 of the compact, and certified the question for appeal.[40] The Supreme Court issued a fragmented decision that included: 1) a plurality opinion by four justices affirming the district court and also finding that the Cherokee Nation courts lacked jurisdiction over tort actions by non-Indians against the Nation; 2) a concurrence by two justices (who also joined the plurality) who would have extended the plurality opinion to all compact tribes; 3) a special concurrence by one justice finding that the state courts have concurrent jurisdiction with the Nation's courts; 4) a concurrence in part and dissent in part by two justices who would have remanded for a determination of whether state court jurisdiction would infringe tribal sovereignty, and 5) a dissent by two justices.

As an initial matter, the plurality found — without analysis — that the Cherokee Nation itself was not "entitled to sovereign immunity from suit" because it was conducting a "non-tribal business."[41] This holding was unnecessary because the compact contains a limited waiver of sovereign immunity allowing tribal gaming facilities to be sued for tort claims in limited circumstances.[42] The holding also violates established federal law providing that Indian tribes' immunity from suit extends to commercial activities.[43] Further, the court's suggestion that gaming is a "non-tribal business" unrelated to the activity of furthering tribal self-government, contradicts Congress' stated purpose in passing IGRA.[44] The statement also raises the question whether Oklahoma loses its immunity defense by offering a state lottery.

The plurality's central holding was that the state district court had jurisdiction over the tort action. Surprisingly, this result did not depend on the compact itself.[45] Perhaps recognizing that Part 9 of the compact — which prevents the compact from altering the state's pre-existing civil-adjudicatory jurisdiction — requires some basis for asserting jurisdiction over tort claims that predates the compact, the plurality resurrected and extended its 1994 decision in *Lewis v. Sac and Fox Tribe Housing Authority*.[46]

Lewis involved an action for specific performance by purchasers of a Sac and Fox Tribe Housing Authority mutual help home to convey title to the mineral estate. The housing authority asserted that the state court lacked jurisdiction because the home was located in Indian country over which the state lacked jurisdiction. The court acknowledged that Oklahoma courts had not acquired jurisdiction through the Public Law 280 process. But the court found Public Law 280 does not bar the state from asserting such jurisdiction. Relying on federal jurisprudence involving state-court adjudication of federal-law claims, the court held that state courts have concurrent jurisdiction with federal courts over "*any* federal-law claim not explicitly withdrawn from their authority by some congressional enactment, so long as state judicature does not infringe on tribal self-government."[47] The court rejected the need to comply with Public Law 280 as a process necessary for the state's acquisition of jurisdiction and created a general rule, not found in federal Indian law or the law of any other state, that Oklahoma has jurisdiction over civil actions arising in Indian country — *unless* such jurisdiction has been explicitly withdrawn by Congress or infringes on tribal self-government.[48]

Several elements distinguish *Lewis* from tort actions arising in Indian country against a tribe. First, according to the *Lewis* court, the land at issue was *not* Indian country.[49] Second, *Lewis* involved an action against a state chartered housing authority — not a tribal entity. Third, the facts at issue in *Lewis* clearly demonstrated that state law governed the dispute.[50] Further, by the time the compact language prohibiting the alteration of state court jurisdiction was drafted, the *Lewis* test seemed to be a dead letter. Every subsequent state court decision that relied on *Lewis* to find state court jurisdiction over a tribal defendant had been overruled or reversed as a violation of federal Indian law.[51] The court had not applied the *Lewis* test in any other actions against Indian tribes, nor had any other state court relied on *Lewis* to create jurisdiction over civil actions arising in Indian country.

Even so, the *Cossey* plurality relied on *Lewis* to establish the pre-existing jurisdiction necessary to avoid the compact's plain prohibition against any expansion of state civil-adjudicatory jurisdiction.[52] Though the plurality did not expressly apply the *Lewis* two-part test, implicit in its decision was a finding that the exercise of state court jurisdiction does not infringe on tribal government. This finding contradicts statements by the U.S. Supreme Court suggesting that state courts' exercise of jurisdiction

over civil actions arising in Indian country against tribes impermissibly intrudes on tribal self-governance.[53] Justice Kauger recognized this point and explained that if *Lewis* serves as the basis for the plurality's decision, more factual development at the trial court would be necessary to determine whether the test's second prong ousts state court jurisdiction.[54]

In dicta, the plurality also found that the Cherokee Nation courts lack jurisdiction over Cossey's action. Applying federal common law governing tribal civil jurisdiction over non-Indians — which had never been applied to a case in which a non-Indian had sued the tribe itself — the plurality found that the Nation lacked authority to regulate Cossey's gaming activities in Indian country, and, therefore, lacked jurisdiction over Cossey's claim.[55] Thus, according to the plurality, state courts have *exclusive* jurisdiction over tort actions such as Cossey's.

> "...the rift between the plurality and concurring decision left serious doubt as to how the state courts had acquired such jurisdiction."

In his concurrence, Justice Colbert rejected the plurality's reliance on *Lewis*. Instead, he reasoned that the phrase "court of competent jurisdiction" contained in the compact's limited waiver of immunity must give state courts jurisdiction because otherwise it would be redundant. If the limited waiver had identified no court, it would plainly have not given state courts jurisdiction, but by referencing "a court of competent jurisdiction" the drafters must have intended to give state courts jurisdiction.[56] The concurrence also treated state law as the default background law, and found that "by not choosing between state law and tribal law, the parties brought patron tort claims under the jurisdiction of state courts."[57] The concurrence did not read the limited waiver *in pari materia* with Part 9's prohibition on state court jurisdiction. Nor did the concurrence explain why tribal law should not be the default, given that the claims arise within the tribes' Indian country — territory over which Oklahoma has constitutionally disclaimed jurisdiction.

While five justices in *Cossey* found that state courts have jurisdiction over tort claims against the Cherokee Nation, the rift between the plurality and concurring decision left serious doubt as to how the state courts had acquired such jurisdiction. The court revisited the issue only five months later in *Griffith*, a tort action against the Choctaw Nation. In *Griffith*, five justices joined a per curium opinion finding state courts are "courts of competent jurisdiction" under the Model Tribal Gaming Compact. As such, the *Griffith* decision purports to apply to all compact tribes, not just the Choctaw Nation.[58] Like the *Cossey* plurality, the *Griffith* court referenced *Lewis*,[59] and seemed to assume that state courts had jurisdiction over actions against tribes for tribal activities in Indian country before the compact was entered into. The court characterized Part 9 of the compact as expressing intent "not to 'alter' whatever court has adjudicatory jurisdiction," and as doing "nothing to define a court of competent jurisdiction."[60] In addition to *Lewis*, the court relied on the state constitution as a source of jurisdiction.[61] As Justice Kauger put it, "the majority must assume, without deciding, that courts of the State of Oklahoma are generally courts of competent jurisdiction to adjudicate tort claims against Indian tribes for tribal activity on tribal land."[62] The *Griffith* majority also abandoned the *Cossey* plurality's decision that tribal courts lack jurisdiction over tort claims.[63]

In contrast to the plurality decision in Cossey, the *Griffith* Court found congressional authorization in the IGRA for state courts to acquire jurisdiction over actions against tribes arising in Indian country.[64] Whether Congress intended this result is questionable. IGRA allows a tribe and a state to allocate civil jurisdiction "necessary for the enforcement of civil laws and regulations" that are "directly related to, and necessary for, the licensing and regulation" of gaming activities.[65] No federal court has found that this phrase constitutes a Congressional authorization for states to acquire jurisdiction over tort actions arising from tribal activity in Indian country.[66] Even if IGRA authorizes such acquisition, the Oklahoma compacting parties clearly provided that the compact would not alter preexisting state court jurisdiction.[67]

Essentially, the *Griffith* majority treated the compact as a state law — not as an agreement between two sovereigns — and found that the

phrase "court of competent jurisdiction" in the limited sovereign-immunity wavier includes state courts. The compact itself does not apply state law or refer to state courts.[68] The court based its decision on the compact's failure to say that tribal courts have exclusive jurisdiction or that tribal law applies to tort actions.[69] But, as a matter of federal law, tribal law applies to tort actions arising from tribal activity in Indian country, and tribal courts have exclusive jurisdiction over such actions. The underlying legal framework provides no room for state law or state court jurisdiction in Indian country. It would have been redundant for the compact to refer specifically to tribal law or tribal court.

Rather than clarifying which courts have jurisdiction over tort actions against tribal casinos, the Supreme Court has created a situation that will likely be litigated for years to come. The court's major premise in *Cossey* and *Griffith* is that state courts had jurisdiction over tort actions arising in Indian country against Indian tribes *before* the compact. That assumption appears to be in direct conflict with controlling federal law. As a result, each time another tribe faces a tort action in state court a new challenge to the state court's jurisdiction will begin. Indeed, these post-*Griffith* jurisdictional battles have already begun. The Choctaw and Chickasaw Nations initiated a compact dispute with the state arising from the *Griffith* decision.[70] The state and the two tribes proceeded to arbitration under Part 12 of the compact. The arbitrator ruled that state courts lack jurisdiction over tort actions such as those at issue in *Cossey, Griffith* and *Dye*.[71] The Choctaw Nation is now seeking a reversal of the *Griffith* and *Dye* decisions based on the arbitration award.[72] Meanwhile, the Comanche Nation has removed a state tort action to federal court,[73] on the theory that federal law prevents the state courts from exercising jurisdiction and creates a federal question sufficient for removal. Tribes are also exploring non-litigation remedies to keep state courts out of Indian country. These options include removing compact games from their facilities and stopping the exclusivity fee payments to the state — which could significantly affect the state's revenues.

CONCLUSION

The Supreme Court's recent decisions provide some lessons for tribes, the state and attorneys. Attorneys representing tort claimants should continue to follow the tribal administrative process. Nothing in these decisions abrogates the compact requirement to adhere to the administrative steps. Without exhausting the administrative remedies, the tribal waiver of sovereign immunity is not effective.[74] Until this area of law becomes more settled, plaintiffs' counsel should also consider the drawbacks to filing in state court. Filing in tribal court could save the plaintiff time and expenses associated with dispositive challenges to state court jurisdiction. Despite the decisions in *Cossey* and *Griffith*, tribes are likely to vigorously challenge any attempt by a state court to assert jurisdiction over these types of cases.

Tribes should require that any insurance policy reserve for the tribe the sole right to assign counsel to defend any suit against the tribe and, in cases where an insurance defense attorney is defending the tribe, that the insurer's counsel coordinate efforts with the tribe's Indian law counsel on matters relating to jurisdiction, sovereignty and sovereign immunity. *Cossey* and *Griffith* demonstrate that important sovereignty issues arise in seemingly routine tort and prize claims, and tribes need to be in the best position to resolve those issues without threatening their governmental interests. Tribes also should include clauses in their insurance policies prohibiting insurance counsel from raising tribal sovereign immunity for insurable claims absent express tribal consent.[75]

The state government should recognize that these decisions may result in a decrease in compact games, and, therefore, a decrease in state revenues. So far, however, the state appears to recognize the problems raised by these recent Supreme Court decisions and the state executive branch has cooperated with several tribes in attempting to restore the original understanding of the compact negotiators: that tort actions against tribal casinos would not be heard in state courts.

1. *Cossey v. Cherokee Nation Enterprises LLC*, 2009 OK 6, 212 P.3d 447 (Jan. 20, 2009); *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51, __ P.3d __ (opinions filed June 30, 2009, but not yet released for publication); *Dye v. Choctaw Casino of Pocola*, 2009 OK 52, __ P.3d __ (opinions filed June 30, 2009, but not yet released for publication).

2. *See Williams v. Lee*, 358 U.S. 217 (1959)

3. *See* 3A O.S. §281 (Compact).

4. Compact pt. 9.

5. *See* Application of Scott Meacham for Leave to File Statement, *Dye v. Choctaw Choctaw Casino of Pocola*, No. 104,737 (Okla. filed May 15, 2008); Brief of Amici Curiae Brad Henry and Scott Meacham 1–6, *Cossey v. Cherokee Nation Enters. LLC*, No. 105,300 (Okla. filed March 9, 2009); *Griffith*, 2009 OK ¶ 3 (Kauger, J. concurring in part dissenting in part).

6. The state receives between 4 and 10 percent of the adjusted gross revenues from tribal gaming operations. Compact pt. 11(A)(2).

7. *California v. Cabazon Band of Mission Indians*, 480 U. S. 202 (1987).

8. Pub. L. No. 100-497, 102 Stat. 2467 (Oct. 17, 1998) (codified at 18 U.S.C. §§1166–1168, 25 U.S.C. §§2701–2721).

9. 25 U.S.C. §2710(a).
10. 25 U.S.C. §2710(d).
11. *Id.*
12. Affidavit of Scott Meacham, *supra* n. 5.
13. Compact pts. 4, 9.
14. Legis. Ref. No. 335.
15. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).
16. *See Williams*, 358 U.S. 217; 25 U.S.C. §1322. Federal courts lack diversity jurisdiction over tort actions against tribes because tribes are not citizens of any state for diversity purposes. *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993).
17. Compact pt. 6(A), (C).
18. Compact pt. 6(A)(9).
19. This article discusses tort claims because each of the Supreme Court cases considered a tort claim. The compact also contains a limited waiver of sovereign immunity for prize claims. Compact pt. 6(B), (C). The analysis herein applies to prize claims as well.
20. 18 U.S.C. §1151 (defining Indian country). Indian country includes "Indian lands" on which tribal government gaming facilities may be located. 25 U.S.C. §2703(8).
21. *Williams*, 358 U.S. at 223.
22. Sovereign immunity and jurisdiction are "wholly distinct" concepts that should not be conflated. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 n. 4 (1991).
23. Const. art. I, §8.
24. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996).
25. Okla. Enabling Act §§1, 3, 34 Stat. 267 (1906).
26. Okla. Const. art. I, §3.
27. *See, e.g., Winer v. Penny Enters.*, 674 N.W.2d 9 (N.D. 2004).
28. *See, e.g., Indian Country U.S.A. v. Okla. ex rel Okla. Tax Comm'n*, 829 F.2d 967, 976–81 (10th Cir. 1987) (holding that state had not acquired civil jurisdiction over Indians in the Creek Nation's Indian country); *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1446 (D.C. Cir. 1988) (noting that "under current law, Oklahoma has no jurisdiction over Indians" in Indian country).
29. See Act of Aug. 15, 1953, 67 Stat. 588 (repealed and reenacted 1968) (codified as amended at 18 U.S.C. §1162, 25 U.S.C. §§1321–26, and 28 U.S.C. §1360) (commonly referred to as Public Law 280). The Supreme Court has even suggested that this method gives states no jurisdiction over tribes themselves, but only over individual Indians. *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976) (noting that "there is notably absent any conferral of state jurisdiction over the tribes themselves").
30. *Kennerly v. District Court*, 400 U.S. 423, 428 (1971); 25 U.S.C. §1326.
31. 25 U.S.C. §1360.
32. 25 U.S.C. §1322; *Kennerly*, 400 U.S. at 427.
33. *See United Keetoowah Band of Cherokee Indians v. Oklahoma ex rel. Moss*, 927 F.2d 1170, 1178 n.17 (10th Cir. 1991).
34. The waiver is limited to suits against the "enterprise," which the compact defines as "the tribe . . . ." Compact pt. 3(13).
35. Compact pt. 6(C).
36. Compact pt. 9.
37. No. 104,726 (Okla. July 2, 2007).
38. *Id.* at 1.
39. *Supra* n. 1. *Dye* involved the same Choctaw casino at issue in *Griffith* and a factually similar tort action. The *Dye* decision contains no independent reasoning but relies on the substance of the *Griffith* decision. *Dye*, 2009 OK at ¶¶ 5–9.
40. Order Denying Motion to Dismiss, *Cossey v. Cherokee Nation Enters. LLC*, No. CJ, 2006-762 (Rogers Co. Dist. Ct. Oct. 23, 2007).
41. 2009 OK 6 ¶ 6.
42. Compact pt. 6(C).
43. *See, e.g., Kiowa Tribe v. Mfg. Techs. Inc.*, 523 U.S. 751, 760 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."); *Native American Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, (10th Cir. 2008) (finding that tribal sovereign immunity shields a tribal business enterprise).
44. IGRA's purpose is "to provide a statutory basis for the operation of gaming by Indian tribes *as a means of promoting . . . strong tribal governments*." 25 U.S.C. §2702(1) (emphasis added).
45. The plurality "disagree[s] that state court jurisdiction over [t]his tort claim is derived totally from the Tribe's consent to suit under the Compact." 2009 OK at ¶ 6 (Watt, J.). It also found, relying on Part 9 of the compact, that the compact contains *no* allocation of jurisdiction under IGRA. Id. at ¶ 13.
46. 1994 OK 20, 896 P.2d 503.
47. *Id.* at ¶ 32, 516.
48. *Id.* at ¶ 12, 508.
49. *Id.* at ¶ 22, 513.
50. *Id.* at ¶ 21, 513. The compact suggests that tribal tort law, not state law, applies to tort claims brought under the compact. *See* compact pt. 6(D)(4). General conflicts-of-law principles suggest the same, given that the negligence and injury giving rise to a tort claim must both occur within tribal jurisdiction.
51. *See Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe*, 1998 OK ¶ 11, 975 P.2d 442, 445.
52. *Cossey*, 2009 OK at ¶ 9, 212 P.3d at 453 (Watt, J.).
53. *See, e.g., Three Affiliated Tribes v. Wold Eng'g PC*, 467 U.S. 138, 148 (1984).
54. *Cossey*, 2009 OK at ¶ 30 (Kauger, J. concurring in part dissenting in part).
55. *Cossey*, 2009 OK at ¶¶ 14–37 (Watt, J.).
56. *Cossey*, 2009 OK at ¶ 9 (Colbert, J. concurring).
57. 2009 OK at ¶ 12 (Colbert, J. concurring).
58. *Griffith*, 2009 OK at ¶ 6 (per curium).
59. *Griffith*, 2009 OK at ¶ 30 (per curium).
60. *Griffith*, 2009 OK ¶ 18 (per curium).
61. *Griffith*, 2009 OK ¶ 18 n. 26 (per curium).
62. *Griffith*, 2009 OK ¶ 10 (Kauger, J. concurring in part dissenting in part).
63. *Griffith*, 2009 OK ¶ 28 (per curium).
64. *Griffith*, 2009 OK ¶ 11 (per curium).
65. 25 U.S.C. §2710(d)(3)(C)(i) and (ii).
66. *But see Doe v. Santa Clara Pueblo*, 154 P.3d 644, 652–55 (N.M. 2007) (finding IGRA authorized state courts to acquire civil jurisdiction over tort actions against tribes through the compacting process). Unlike the Oklahoma compact, the Pueblo's compact included an agreement to apply state tort law and expressly included state courts within the definition of "courts of competent jurisdiction," capable of hearing tort claims. *Id.* at 647, 655.
67. Compact pt. 9.
68. *Griffith*, 2009 OK at ¶¶ 24–27 (per curium).
69. *Griffith*, 2009 OK at ¶ 19 (per curium).
70. *See* Arbitration Award, Class III Gaming Compact Jurisdiction-Related Disputes Jointly Referred to Binding Arbitration by the Choctaw Nation of Oklahoma, the Chickasaw Nation and the state of Oklahoma Appx. 1 n.1 (Aug. 25, 2009).
71. *Id.* at 19.
72. Motion to Honor Arbitration Award, *Griffith*, No. 104,887 (filed Aug. 27, 2009); Motion to Honor the Arbitration Award, *Dye*, No. 104,737 (filed Aug. 26, 2009).
73. *Muhammad v. Comanche Nation Casino*, No. CIV-09-968-D (W.D. Okla. filed Sept. 1, 2009).
74. Compact pt. 6(A)(9).
75. For a discussion characterizing *Cossey* and *Griffith* as cases that should have been settled rather than litigated on tribal sovereignty grounds, see Posting of Gabe Galandra to Northwest Indian Law and Business Advisor, www.nwindianbusinesslawblog.com (July 6, 2009).

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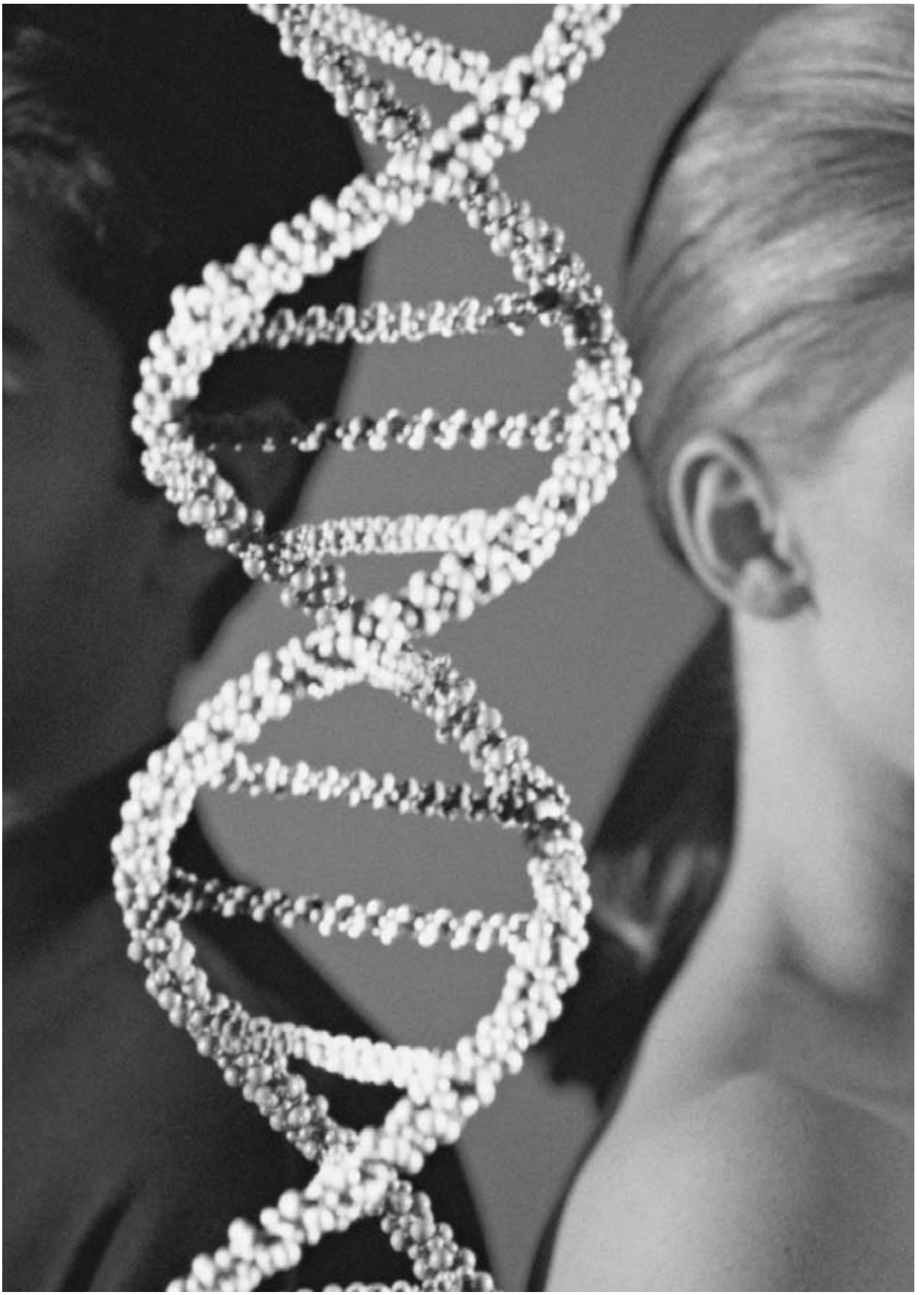
Did You Know That...

- The State of Oklahoma has the second largest American Indian population?
- In Oklahoma, there are over 1 million acres held in trust for the benefit of Indian tribes and over 1 million acres of restricted land held by individual Indians?
- The State of Oklahoma is second in the nation in the amount of revenue generated by Indian gaming?
- Indian Law is currently being taught at all three law schools in Oklahoma and TU and OU offer certificate programs in Indian law?
- The states of Montana, Washington, South Dakota and New Mexico now include Indian Law on their bar exams?

American Indian tribes in Oklahoma are an important and vital part of Oklahoma, its social fabric and economy. As home to 38 federally recognized Indian tribes, Indian tribal governments are a driving force in Oklahoma by providing jobs, economic development and infrastructure. As a result, Oklahoma lawyers have a growing need for knowledge of Indian law if they are to provide competent representation to their clients, Indians and non-Indians alike.

If you are interested in helping the Indian Law Section in getting Indian Law on the bar exam, please contact our Secretary at chrissi-nimmo@cherokee.org and view our White Paper at http://www.okbar.org/members/sections/indian08.htm.

If you are interested in joining the Indian Law Section, go to http://www.okbar.org/members/sections/sectiondues.pdf



Indian
LAW

Indian Identity

By Teresa A. Rendon

Answering the question, "Who is an Indian?" is not easy. Indeed, the response could be yet another question, "Who wants to know?" Is it a casual observer trying to determine if an individual is Indian solely by his physical characteristics? Is it the admitting clerk at the Indian hospital figuring out whether the patient is eligible for services? Is it a tribal employee checking to see if an applicant is eligible for enrollment? Or is it a judge wondering whether the ICWA (Indian Child Welfare Act) applies to a custody case? The answers are as varied as the questions and arise as much from political needs as from a maze of legal, sociological and historical sources.

RACIAL DEFINITION OF INDIAN IDENTITY

During the time of contact[1] in the 16th century, the prevailing belief was *monogenesis*, that idea that all humans shared a common ancestor.[2] Clearly, the Indians were humans who shared the same roots as Europeans, reasoned Pope Paul III. Because Indians were human, the question about whether they had souls was answered in the affirmative, thus justifying missionaries' attempts to offer them salvation.[3] The notion of Indians belonging to a distinct and separate red race was espoused by the 18th century naturalist Carolus Linneaus who divided the world's people into white (Europeans), yellow (Asians), black (Africans) and red (Indians). Additionally, the term *redskin*, still popular (and much maligned) today as a sports team mascot,[5] reflected the first impressions of Euro-Americans as they saw members of certain tribes with their red war paint on their bodies.[6]

Advancement in DNA research has changed notions of race forever. Race is no longer considered biologically determined. The Human Genome Project has mapped human DNA and confirmed that there are no "pure, distinct races."[7] It has demonstrated that there is as much genetic diversity within what were traditionally called racial groups as there are from group to group. Although scientifically unsupported, race is still a powerful concept that packs a hefty political and social punch. It is a lens through which we view, identify and categorize human beings both physically and culturally.

Skin color and facial features are often racial characteristics used to determine at a glance whether a person is identified as Indian.[8] Whether a person appears to the casual observer to be Indian can depend on a vast array of apparent physical features: skin color, "straight hair, flat feet, fingerprint whorls, broad noses, Mongolian spots, Asian eyes, earlobes connected at the base, and shovel-shaped incisors."[9]

IDENTITY AS A CULTURAL NOTION

This was the identity imposed on Indians from outsiders. Columbus called them *indios* and perceived no tribal differences, but to Indians, there was no notion of pan-Indianism. Tribal identity

was paramount. Each tribe had a name for its own people such as the Cherokee *aniyunwiya* and the Navajo *dine*, its own distinct language, customs and ways of life. They did not see themselves as *Indians*, and viewed other Indian tribes as different from themselves as the Spanish viewed the French and the English.[10]

Take the Cherokees, for example. Since the days of the American Revolution, Cherokees have intermarried with whites.[11] When the Cherokees spoke of "full bloods" it was not so much a question of biology but of culture and language. "Full blood" was used to describe the person who participated fully in the culture, shared the Cherokee world view and spoke the language.[12] Being a biological full blood was not always a predictor of how assimilated a Cherokee was, either. The issue of whether Cherokees would cooperate with the federal government and remove themselves to Indian Territory was strongly opposed by many full-blood traditionalists while assimilated Cherokees were expected to lean toward accepting removal as an inevitability. John Ross, a mixed blood leader of the Cherokees fought removal[13] until the end, while Stand Watie and the Ridges who were full bloods cooperated with the federal government and signed a treaty ceding Cherokee lands and agreeing to removal.

In a 21st century blurring of tribal/racial lines, the Cherokee Nation voted to remove the Freedmen, former slaves of the Cherokees who had been members since the Treaty of 1866.[14] Marilyn Vann, president of the Descendants of Freedmen of the Five Civilized Tribes, wondered, "Is the Cherokee Nation a race or a nation?"[15] Principal Chief of the Cherokee Nation Chad Smith explained the vote by announcing that Cherokees voters must have felt that "an Indian nation should be composed of Indians."[16] Thus we return to the initial question, "Who is Indian?"

SELF-DETERMINED INDIAN IDENTITY

The 2009 Sovereignty Symposium featured a presentation on trafficking in tribal memberships. It was shocking to hear about the cynical scheme of the so-called Chief Thunderbird. Mr. Malcolm Webber, alias Grand Chief Thunderbird IV of the Kaweah Nation, created an entire tribe for himself.[17] Christening his newborn tribe the Kaweah, Webber anointed himself chief complete with an indigenous-sounding name (Thunderbird). This was done in spite of the Bureau of Indian Affairs' (BIA) 1984 ruling that the Kaweah group had no historical link to any American Indian tribe and that Webber was not even an Indian.[18]

Webber proceeded to establish a flourishing business enterprise selling tribal memberships to unwitting undocumented aliens. These aliens, often recruited through their Spanish-language churches, clung to the desperate hope that purchasing tribal affiliation would buy them a chance to stay legally in the United States. When the federal agents seized tribal records, it was discovered that 13,142 people had already enrolled and an additional 2,000 to 3,000 applications were yet to be processed.[19] The Assistant U.S. Attorney from the state of Kansas, proudly announced in his Symposium presentation that "Chief Thunderbird," having been found guilty of six federal charges, is now a long-term guest of the federal government at Ft. Leavenworth, Kan.

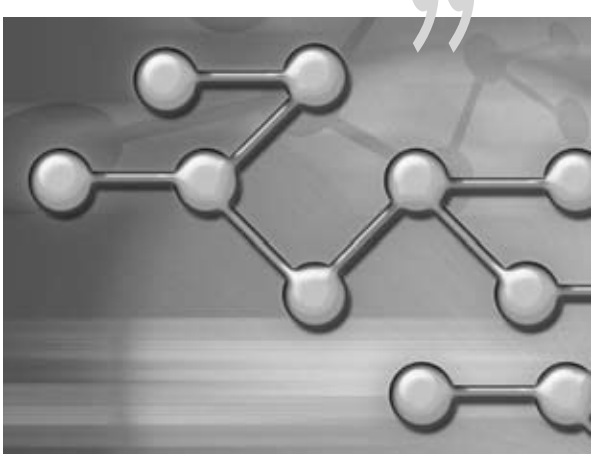
LEGAL DEFINITION OF INDIAN IDENTITY

Imagine asking a white person, "How much white blood do you have in you?" It sounds ludicrous, doesn't? How odd would it be to ask an African-American person, "How black are you?" As uncomfortable as these questions may seem, Indians[20] are often in situations both in social and governmental contexts in which they must answer a question about the degree of Indian blood coursing through their veins. Although historically, there were names for degrees of blackness, such as *quadroon* (1/4 black) and *octoroon* (1/8th), the one drop rule simplified black identity, as least as seen from an outsider point of view. If a person had one drop of black blood, she was black, no more discussion was necessary. Indian-ness is variously defined, infinitesimally fractionalized and complex. Currently, blood quantum, as recorded among citizens of the Cherokee Nation, runs the gamut from full-blood to 1/2048th, a mere eyedropper full.[21]

Indian identity, as determined by the BIA requires a certificate of degree of Indian blood card which has been authenticated by the BIA and the tribe to which the person belongs.[22] All 38 of the federally recognized tribes of Oklahoma have their own regulations defining tribal membership. The rules focus on three main areas: **descendancy, blood quantum** and **dual enrollment**. All 38 of the Oklahoma tribes require that the prospective member trace her

direct descendancy to a tribal member who is listed on the official rolls of the tribe. This can be the Dawes Roll, tribal census rolls, tribal town roll or other official tribal roll. Additionally, 15[23] of Oklahoma's 38 federally recognized tribes require a minimum blood quantum which ranges from 1/2[24] to 1/16.[25] The largest number of the Oklahoma tribes requiring a specific blood quantum is six which establish a threshold of 1/4[26] and five which set 1/8 as their standard.[27] Some tribes expressly prohibit dual enrollment. In other words, these tribes will not admit anyone, even if the person otherwise qualifies, if that person is already enrolled in another tribe.

> "Since the tribes are asserting their rights as tribes and not as individuals, Indian identity in this federal act is framed differently than that of the ICWA."



The Cherokee Nation, for example, is one of the more expansive of tribes in terms of numbers of people recognized as tribal members. The tribe simply requires that its members be direct lineal descendants of an enrolled tribal member. Although blood quantum is irrelevant for Cherokee tribal membership and not recorded on the tribal card, it is duly recorded on the BIA's certificate of degree of Indian blood card. Questions of percent of Indian blood do come into play, however, when tribal members seek benefits such as "healthcare, housing and food commodities" in which case, a biological standard, usually one-quarter or more Indian blood is required.[28]

TRIBAL IDENTITY

Determinations of tribal membership are under the jurisdiction of each tribe, but the federal government exercises control over which groups are recognized as tribes. During the '60s and '70s, with the "increased politicization of Indian identity," Indians began to "make demands upon the federal government in myriad ways."[29] As Indians sued for land and water rights, staged sit-ins and testified before Congress, the BIA realized that with the renewed interest in Indian rights surfaced demands for recognition from unrecognized tribes. For this purpose, the Branch of Acknowledgment and Research (BAR) was established in 1978. Some scholars summarize the BAR's mission as one of "cash and color," a question of Indian racial identity and Indian gaming.[30] More plainly put, without federal recognition, a tribe will be unable to open a casino.

Tribes, such as the Lumbees of North Carolina, have learned all too well the burdensome evidenciary requirements required by the BAR. In spite of their years of attempts to qualify for federal recognition, the Lumbees have yet to achieve official status. Having forsaken the bureaucratic path to tribal identity, the Lumbees have taken their cause to Congress in the form of the Lumbee Recognition Act.[31] At the writing of this article, this act had passed the House of Representatives and was in the Committee on Indian Affairs of the U.S. Senate. If passed by the Senate, this act will recognize that the state of North Carolina has recognized that the Lumbee Indians have been an Indian tribe since 1885 and that the Lumbees have "remained a distinct Indian community since the time of contact with white settlers."[32] Finally and most significantly, the act, if passed, will side-step the requirements of the Department of Interior and bring an end to the Lumbees' decades-long struggle for recognition by declaring that the Lumbee Indians should be "entitled to full Federal recognition of their status as an Indian tribe."[33]

INDIAN IDENTITY FOR INDIAN CHILD WELFARE ACT

An "Indian child" for purposes of the Indian Child Welfare Act[34] (ICWA) is defined as "an unmarried child under eighteen who is a member of a federally recognized Indian tribe or eligible for membership in a federally recog-

nized tribe and the natural child of a member of an Indian tribe."[35] One purpose of ICWA was to stem the tide of "wholesale removal of Native American children from their families and tribes by state social services agencies and courts,"[36] a practice commonplace prior to the law's enactment in 1978. Although 19th century abuses in the federal government's boarding schools were well known, it is astonishing that even as late as 1971, the Bureau of Indian affairs was removing 17 percent of school-age Indian children from their native homes and placing them in BIA boarding schools that were not being held responsible to the maintenance of the children's tribal connections, language and culture.[37] The tribe can intervene on behalf of Indian children subject to child custody proceedings (other than divorce), such as guardianship, foster care placement and adoption, to ensure that placement remains in the tribe when possible.

INDIAN IDENTITY IN THE NATIVE AMERICAN GRAVES PROTECTION ACT (NAGPRA)

How would you like to have your ancestors' remains on display at the Smithsonian? Do you believe that there could be a scientific justification for ransacking native graves? If you do, you are in good company because prior to the enactment of NAGPRA, some leading museums would have agreed with you. According to noted professor, attorney and author Jace Weaver,[38] museums looted graves and gathered thousands of human skeletons to be stored for display. The practice was so prevalent that it was "grimly joked that the Smithsonian Institution in Washington had more dead Indians than there were live Indians."[39]

NAGPRA has opened the doors for the culturally affiliated Indian tribes and native Hawaiian organizations to claim their cultural items, such as human remains, funerary objects, sacred artifacts and objects of cultural patrimony.[40] Since the tribes are asserting their rights as tribes and not as individuals, Indian identity in this federal act is framed differently than that of the ICWA. The act's focus is on "cultural affiliation," which is defined as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe… and an identifiable earlier group."[41] This definition takes into account that a contemporary tribe may have to prove that it is culturally, geographically or historically linked to an ancient tribe which may have no living direct descendants.

A notable exercise of NAGPRA was in the case of the Kennewick Man, known respectfully as the Ancient One by Natives.[42] Discovered by accident in 1996, the skeleton of this ancient human determined to be over 9,000 years old caused a furor among anthropologists, indigenous peoples and the federal government. Five Indian tribes, the Nez Perce, Umatilla, Yakama, Wanapum and Colville claimed that the remains were theirs and should be given a traditional burial instead of becoming subject of a scientific inquiry. Of all the tribes, the Umatilla was the one that filed suit under NAGPRA claiming that the tribe shared a cultural relationship with the ancient remains. The 9th Circuit U.S. Court of Appeals ruled in its February 2004 decision that the tribe had not proven the existence of such a cultural link as required by the act.[43] The remains were turned over to a team of scientists in July 2005 to conduct detailed measurements and determine, among other things, cause of death.[44]

INDIAN IDENTITY IN THE INDIAN ARTS AND CRAFTS ACT OF 1990

Imagine the unwary tourist from New England who is heading west on Highway 40 on her way to California. She pulls into a truck stop/souvenir stand and selects some "Indian artifacts" to take home as gifts for friends and relatives. To her chagrin, when Uncle Melvin unwraps the gift and turns it upside down, he discovers that it has a shiny little sticker on it that reads "Made in China." This act was enacted with a two-fold purpose: that of protecting the consumer from purchasing fake Indian art and promoting tribal economic development by eliminating unfair competition.[45] *Indian*, as applied to the act, denotes a person who is a member of an Indian tribe, whether it be state or federally recognized.[46] Allowing for the fact that some well known Indian artists may be culturally part of the tribe, but not legally members, the act also permits tribes, at their discretion, to certify nonmembers as Indian artisans.[47]

INDIAN IDENTITY IN EDUCATION LAW

Of the plethora of laws pertaining to the education of Indians, the sections of the Elementary and Secondary Education Act of 1965 (ESEA),[48] which provide for services for Indian students in a public school setting are being examined in this article. One of the goals of the law is to meet

the educational needs of "low-achieving children in our Nations' highest poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance."[49] ESEA's definition of "Indian" is an individual who is "a member of an Indian tribe or band, as membership is defined by the tribe or band."[50] It adopts an expansive view of who is "Indian" as it encompasses members of state recognized tribes as well as those recognized by the federal government.

CONCLUSION

Even this short journey into Indian identity has required us to step off onto shifting tectonic plates of varying disciplines and definitions. Each statute defines Indian in the way that suits its particular purpose. Framed by the all-embracing scientific fact that there are "no pure, distinct races," the amazing diversity of answers to "Who is an Indian?" is a tantalizing mystery. Maybe the real answer lies not in "Who wants to know?" but in "Why do we need to know?"

Author's Note: The author wishes to thank OCU law student Natalia Jacobsen for assisting with the research for this article.

1. *Contact* refers to the time when Europeans encountered Indians in the Americas in the late 15th and early 16th century.
2. Sturm, 44.
3. Sturm, 44-5.
4. Sturn, 44-5.
5. The issue of sports team mascots is covered in many scholarly works. Devon Mihesuah covers this controversial topic very clearly and succinctly in her work. Mihesuah, Devon A., *American Indians: Stereotypes and Realities*. 1957 Atlanta: Clarity Press.
6. Sturm, 44.
7. Schaefer, Richard T. *Racial and Ethnic Groups*, 11th edition. Upper Saddle River, NJ: Prentice Hall, 2007, 12-13.
8. Sturm, Circe. *Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma*. Berkley: Univ. of California Press, 2002, 14.
9. Sturm, 4.
10. Sturm, 30.
11. Strickland, Rennard. *Fire and the Spirits: Cherokee Law from Clan to Court*, 49. Norman, OK: University of Oklahoma Press, 1975.
12. Strickland.
13. Sturm.
14. Thornton, Tony. "Tribal members' fate discussed" *The Oklahoman*, March 15, 2006, 15A.
15. Thornton.
16. Thornton.
17. Hegeman, Roxana. "Fraud trial begins for disputed Indian chief," *USA Today*, www.usatoday.com/news/nation/2008-08-05-2588347752_x.htm.
18. Hegeman.
19. Hegeman.
20. I have intentionally chosen to use the terms "Indian" or "American Indian" in this article rather than the term "Native American." The University of Oklahoma Press, a prolific publisher of works on Indian history, philosophy, law and literature uses the term "American Indian" or, if known, the name of the Indian nation to which the person belongs. Weaver, Jace. *Other Words: American Indian Literature, Law, and Culture*. Norman, OK: University of Oklahoma press, xiii.

    Indian author Devon Mihesuah has another view: "Although it is preferable to refer to Indigenous people of this country by their specific tribal names, for the sake of space I opt for "Indigenes" or "Natives" instead of "Native Americans"... [M]y family and most friends and "Indians" I know say "Indians." *Indigenous American Women: Decolonization, Empowerment, Activism*. Lincoln, NE: Univ. of Nebraska Press, 2003.
21. Sturm, 2.
22. Sturm, 3-4.
23. Absentee-Shawnee, Caddo, Cheyenne and Arapaho, Comanche Fort Sill Apache, Iowa, Kialegee, Kiowa, Muscogee (Creek), Otoe-Missouria, Pawnee, Ponca, Sac & Fox, and United Ketoowah Band Cherokee, and Wichita.
24. Kialegee.
25. Caddo, and Fort Sill Apache, Iowa.
26. Absentee-Shawnee, Cheyenne and Arapaho, Kiowa, Muscogee, Otoe-Missouria, United Keetoowah Band Cherokee.
27. Comanche, Pawnee, Ponca, Sac & Fox and Wichita.
28. Sturm, 4.
29. Cramer, Rene Ann. *Cash, Color, and Colonialism: The Politics of Tribal Acknowledgment*, 16. Norman: University of Oklahoma Press, 2005, 7.
30. Cramer, xv.
31. 111th Congress, 1st Session, House of Representatives, Report 111-103 "Lumbee Recognition Act."
32. Lumbee Recognition Act, 1.
33. Lumbee, 2.
34. 25 U.S.C. §1901-63.
35. 25 U.S.C. §1903(1).
36. Jones, B. J., Tilden, Mark & Gaines-Stoner, Kelly. *The Indian Child Welfare Act Handbook*, second edition. Chicago: ABA Publications, 2008, 2.
37. Jones *et al.*, 2.
38. *Other Words: American Indian Literature, Law, and Culture*, Norman: Univ. of Oklahoma Press, 2001, 158.
39. Weaver, 158.
40. 25 USC §3001, 43 CFR §10.
41. 25 USC §3001.
42. Weaver, 162.
43. *Bonnichsen, et al. v. United States, et al.*, no. 02-35994 (9th Cir. Feb. 4, 2004).
44. Adler, Jerry. "A 9,000-Year-Old Secret." *Newsweek* July 25, 2005, vol. 146, issue 4, p. 52.
45. 25 USC §1159, 25 CFR § 309.
46. 25 USC §1159.
47. 25 CFR §309.4.
48. 20 USC Chapter 70.
49. 20 USC §6301.
50. 20 USC §7491 (3).

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NOTICE OF INVITATION TO SUBMIT OFFERS TO CONTRACT

THE OKLAHOMA INDIGENT DEFENSE SYSTEM BOARD OF DIRECTORS gives notice that it will entertain sealed Offers to Contract ("Offers") to provide non-capital trial level defense representation during Fiscal Year 2011 pursuant to 22 O.S. 2001, §1355.8. The Board invites Offers from attorneys interested in providing such legal services to indigent persons during Fiscal Year 2011 (July 1, 2010 through June 30, 2011) in the following counties: **100% of the Oklahoma Indigent Defense System caseloads in Craig, Delaware, Logan, Mayes, Nowata and Rogers Counties, Oklahoma.**

Offer-to-Contract packets will contain the forms and instructions for submitting Offers for the Board's consideration. Contracts awarded will cover the defense representation in the OIDS non-capital felony, juvenile, misdemeanor, traffic, youthful offender and wildlife cases in the above counties during FY-2011 (July 1, 2010 through June 30, 2011). Offers may be submitted for partial or complete coverage of the open caseload in any one or more of the above counties. Sealed Offers will be accepted at the OIDS offices Monday through Friday, between 8:00 a.m. and 5:00 p.m. **The deadline for submitting sealed Offers is 5:00 PM, Thursday, March 11, 2010.**

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

FY-2011 OFFER TO CONTRACT	TIME RECEIVED:
_____ COUNTY / COUNTIES	DATE RECEIVED:

The Offeror shall clearly indicate the county or counties covered by the sealed Offer; however, the Offeror shall leave the areas for noting the time and date received blank. Sealed Offers may be delivered by hand, by mail or by courier. Offers sent via facsimile or in unmarked or unsealed envelopes will be rejected. Sealed Offers may be placed in a protective cover envelope (or box) and, if mailed, addressed to OIDS, FY-2011 OFFER TO CONTRACT, Box 926, Norman, OK 73070-0926. Sealed Offers delivered by hand or courier may likewise be placed in a protective cover envelope (or box) and delivered during the above-stated hours to OIDS, at 1070 Griffin Drive, Norman, OK 73071. **Please note that the Griffin Drive address is NOT a mailing address; it is a parcel delivery address only**. Protective cover envelopes (or boxes) are recommended for sealed Offers that are mailed to avoid damage to the sealed Offer envelope. **ALL OFFERS, INCLUDING THOSE SENT BY MAIL, MUST BE PHYSICALLY RECEIVED BY OIDS NO LATER THAN 5:00 PM, THURSDAY, MARCH 11, 2010 TO BE CONSIDERED TIMELY SUBMITTED.**

Sealed Offers will be opened at the OIDS Norman Offices on Friday, March 12, 2010, beginning at 9:00 AM, and reviewed by the Executive Director or his designee for conformity with the instructions and statutory qualifications set forth in this notice. Non-conforming Offers will be rejected on Friday, March 12, 2010, with notification forwarded to the Offeror. Each rejected Offer shall be maintained by OIDS with a copy of the rejection statement.

Copies of qualified Offers will be presented for the Board's consideration at its meeting on **Friday, March 26, 2010**, at Griffin Memorial Hospital, Patient Activity Center (Building 40), 900 East Main, Norman, Oklahoma 73071.

NOTICE OF INVITATION TO SUBMIT OFFERS TO CONTRACT

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

FY-2011 Offer-to-Contract packets may be requested by facsimile, by mail, or in person, using the form below. Offer-to-Contract packets will include a copy of this Notice, required forms, a checklist, sample contract, and OIDS appointment statistics for FY-2005, FY-2006, FY-2007, FY-2008 and FY-2010 together with a 5-year contract history for each county listed above. The request form below may be mailed to OIDS OFFER-TO-CONTRACT PACKET REQUEST, Box 926, Norman, OK 73070-0926, or hand delivered to OIDS at 1070 Griffin Drive, Norman, OK 73071 or submitted by facsimile to OIDS at (405) 801-2661.

* * * * * * * * * * * *

REQUEST FOR OIDS FY-2011 OFFER-TO-CONTRACT PACKET

Name:_____ OBA #:_____

Street Address: _____ Phone: _____

City, State, Zip: _____ Fax: _____

County / Counties of Interest:_____

_____

_____

_____

_____

_____

CASINO

Indian
LAW

Practicing before a Tribal Gaming Regulatory Body

Tips and Suggestions for the Legal Practitioner in Oklahoma

By Robin C. Lash and O. Joseph Williams

In November 2004, the State-Tribal Gaming Act[1] was approved by referendum vote and established the way for Indian tribes in Oklahoma to enter into a model tribal-state gaming compact with the state of Oklahoma for the play of certain Class III games, as defined by the Indian Gaming Regulatory Act (IGRA).[2] Since then, tribal gaming in Oklahoma has flourished and has been a boon to the local economies in which casinos and resorts are situated and has made Oklahoma a travel destination for people seeking gaming entertainment. Despite the seemingly easy development of tribal casino gambling in Oklahoma, however, many people are not aware that Indian gaming is a heavily regulated industry and must comply with various federal and tribal laws and regulations. Although tribal gaming is primarily a matter of federal law, the tribes have the responsibility of being the primary regulators of gaming within their jurisdiction.

This article only touches on certain issues involved in gaming regulation and is not meant to be all-inclusive. The main purpose of this article is to provide the legal practitioner with a general background of federal Indian law principles that apply in the area of tribal gaming, as well as to provide some practical advice and information regarding the hearings and appeals process before a tribal gaming regulatory body.

LEGAL AUTHORITY

In 1988, Congress enacted the IGRA as a comprehensive scheme for regulating gaming activities on Indian lands. The IGRA was the product of several years of discussions and negotiations between Indian tribes, the states, the gaming industry, the administration and Congress, in an attempt to formulate a system for regulating gaming on tribal lands. One of the principal goals for the enactment of IGRA was to provide

a statutory basis for operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments.

The IGRA divides Indian gaming activities into three classes. First, Class I gaming consists of social games for prizes of minimal value or traditional forms of Indian gaming.[3] Class I games are not subject to the IGRA and are within the exclusive jurisdiction of the tribes.[4] Second, Class II gaming consists of bingo, pull-tabs, lotto, other games similar to bingo and certain non-banking card games.[5] Class II games are within the jurisdiction of the tribes, yet are subject to the IGRA and some federal oversight by the National Indian Gaming Commission (NIGC).[6] Class III gaming consists of all forms of gaming that are not included within Class I or Class II and includes, but is not limited to, banking card games, traditional casino games such as roulette and craps, slot machines, pari-mutuel wagering on horse and dog races and jai alai, and lotteries.[7]

Under the IGRA, an Indian tribe will be able to conduct Class III gaming on tribal lands if such activities are:

(A) authorized by an ordinance or resolution that —
  (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands
  (ii) meets the requirements of subsection (b), and
  (iii) is approved by the chairman,
(B) located in a state that permits such gaming for any purpose by any person, organization, or entity, and
(C) conducted in conformance with a tribal-state compact entered into by the Indian tribe and the state . . . .[8]

Tribes have always had the sovereign right to conduct economic development activities, including gaming, on land within their jurisdiction. However, the IGRA is the statutory basis in federal law providing for the authorization of certain tribal gaming on Indian lands without regard to any limitations under state law. The NIGC is the federal regulatory agency established by the IGRA responsible for enforcing federal regulations located in Title 25 of the Code of Federal Regulations; however, it is the tribal regulatory agencies that serve as the first line of defense in gaming regulation at the tribal level.

Pursuant to the IGRA, tribal governments are designated as the primary regulators for Class I and Class II gaming on Indian lands, and tribes shall regulate concurrently with the state all Class III gaming on Indian lands.[9] Each tribal government in turn places the important and essential responsibility for the regulation of gaming in the hands of its Tribal Gaming Agency (TGA) or gaming commission. The establishment of each tribal gaming commission and the delegation of power to regulate gaming activities within the jurisdiction of the tribe, along with other regulatory powers entrusted to the gaming commissions, is outlined in each tribe's gaming ordinance submitted by the tribe for approval to the chairman of the NIGC.

Each gaming ordinance establishes the tribe's TGA or gaming commission and outlines the number of gaming commissioners for each commission, commissioner titles and duties, commission meeting requirements, licensing procedures, parameters for preliminary determination, hearings, final determinations, sanctions and reports. In addition to listing comprehensive gaming license requirements for employees and vendors, the ordinance also lists guidelines for tribal-state compacts and management contracts. The ordinance is a critical component of the tribal gaming regulatory regime.

GAMING REGULATION

Currently, there are 38 federally-recognized Indian tribes in Oklahoma. Three Oklahoma tribes have no gaming at all while the remaining Oklahoma tribes may have one or several gaming locations on Indian land[10] within their jurisdiction. Because tribal gaming on Indian land involves significant federal and tribal legal restrictions, the regulatory side of tribal gaming is usually (and should be) separate from the management and operating side. IGRA does not require that an Indian tribe establish a separate regulatory body to regulate tribal gaming; however, many tribes in Oklahoma have already established within their tribal laws a tribal gaming regulatory agency or authority that serves as the regulatory arm for the tribe's gaming operations. These agencies or authorities are often designated as the tribe's gaming commission or, if the regulatory authority rests with a single individual, the gaming commissioner. The purpose of the tribe's regulatory agency is to regulate, monitor and enforce the laws for gaming

activity for the tribe in order to ensure compliance with tribal gaming laws and the IGRA.

The duties of each gaming commission are established in each tribe's ordinance and may include the duty to promulgate regulations necessary to administer the provisions of the gaming ordinance. Other examples of a gaming commission's duties are:

- processing all license applications and issuing licenses;
- determining licensing fees;
- supervising the collection of fees and taxes and auditing all returns;
- reviewing all records, documents and financial accountabilities of licensees or enforcement of any provisions of the gaming ordinance;
- reviewing for approval or denial any application or licensee, and to limit conditions to suspend or restrict any license;
- proposing fines and penalties;
- monitoring and planning for the protection of public safety and the physical security of patrons;
- reviewing and approving floor plans and surveillance systems for each gaming facility;
- maintaining a list of patrons barred from the gaming facility;
- approving the rules of each game;
- commencing civil or criminal action necessary to enforce the provisions of the gaming ordinance;
- retaining legal counsel or other professional services, including investigative services, to assist the commission with respect to any of the issues over which the commission exercises jurisdiction, and;
- preparing and submitting an annual operating budget.

Practicing Before a Tribal Gaming Commission

For some tribes, the tribal gaming commission is the designated tribal entity for making determinations regarding tort or prize claims made by casino patrons. Another critical role of the gaming commission is to issue rulings or determinations about the ability for an individual or entity to conduct gaming-related business with the tribe's gaming operation. Such decisions may be in the form of approving, denying or withdrawing approval for gaming licenses or such decisions may involve the investigation and enforcement against a licensed individual or entity for violations of the gaming laws.

As with anything else, the first step a party should take is to determine the applicable rules. Appearing before a tribal gaming commission is usually considered an administrative process, and most gaming commissions have their own procedural rules that govern the hearings and appeals process. A party should also determine if the tribe has a general administrative procedure code of laws that may supplement any specific rules promulgated by the gaming commission.

> **"In some instances, a party may have their initial hearing before a designated representative of the gaming commission instead of the full panel of commissioners."**

Some tribes may designate their general administrative procedure code as the supplementing rules for any tort or prize claim procedure. A party should also make sure the authority being exercised by the gaming commission is within the scope of authority outlined under tribal law. Since the gaming commission is established under tribal law, any attempt by the gaming commission to take enforcement action outside the delegated scope of authority may be subject to legal challenge in a tribal court. Another basis for a possible legal challenge would be if the gaming commission takes action in a manner that is not in accordance with a party's due process rights as established in tribal law.

A party should not assume that substantive and procedural rules applicable for one tribal gaming commission will be the same for the tribal gaming commission of another tribe. While most procedural rules will likely be similar, the specific deadlines and scope of the

hearing and appeals may differ slightly enough that the party may be time barred for asserting certain claims that could otherwise be brought.

The Hearing Process and Judicial Review

In some instances, a party may have their initial hearing before a designated representative of the gaming commission instead of the full panel of commissioners. In most cases, the designated representative is referred to as the executive director (or some other similar title) of the gaming commission. A party who is aggrieved by a final decision of the executive director may seek a hearing before the gaming commission for review of that initial decision. The party should be prepared to pay a filing fee, to submit the proper review request (petition for review or appeal), and to submit all these requirements to the proper party and within the timeframe specified under tribal law. The party may be required to provide in their petition for review or appeal the reason(s) for the appeal and the specific relief requested. Most of the administrative review proceedings can be conducted informally; however, a party should not take the matter lightly and assume that the gaming commission will excuse all deficiencies with the appeal application.

Depending on the complexity of the issues, there may be a need to develop and submit for review an administrative record consisting of various forms of documentation and evidentiary materials necessary for a proper understanding of the issues. Also, the administrative rules may provide for some form of discovery to be conducted for any significant factual issues that need to be determined and considered by the gaming commission.

Most hearings in the appeals process are conducted in a manner less formal than court proceedings; however, the rules applicable to the hearing will likely allow for witnesses to be called to testify and for other evidentiary material to be submitted necessary for the party to be able to present fully his or her case to the gaming commission. If the procedural rules do not provide specific rules of evidence (or incorporate the federal or state rules of evidence) then adherence to general rules of evidence will likely apply. Most often the party will be given wide latitude in presenting his or her case to the gaming commission in order to make sure the due process rights of the party are fully taken into consideration.

The option of having the decision of the gaming commission reviewed by the tribal court or other adjudicatory authority will depend on the laws of the tribe. Some tribal gaming ordinances will provide for judicial review of a gaming commission decision while other tribal gaming ordinances may provide for the decision of the gaming commission to be final with no avenue of judicial review. The rules of procedure that govern the method and timeframe for seeking judicial review will be based on tribal law. The aggrieved party may also

The following is a current list of addresses for tribal gaming commissions (also, OTGRA members) in Oklahoma:

Absentee Shawnee Tribe
15700 E. Hwy 9
Norman, OK 73026
(405) 360-9270

Cherokee Nation
P.O. Box 627
Tahlequah, OK 74465
(918) 453-5769

Cheyenne & Arapaho Tribes
P.O. Box 149
Concho, OK 73022
(405) 422-7752

Chickasaw Nation
PMB 228
Ada, OK 74820
(580) 310-0570

Choctaw Nation
3811 Choctaw Rd.
Durant, OK 74701
(580) 924-8112

Citizen Potawatomi Nation
1601 S. Gordon Cooper Drive
Shawnee, OK 74801
(405) 878-4838

Comanche Nation
1915 E. Gore Blvd.
Lawton, OK 73501
(580) 595-3300

Delaware Nation
P.O. Box 806
Anadarko, OK 73005
(405) 247-2292

Eastern Shawnee Tribe
P.O. Box 350
Seneca, MO 64865
(918) 666-2435

Ft. Sill Apache Tribe
P.O. Box 1377
Lawton, OK 73501
(580) 919-5062

Iowa Tribe
RR1 Box 721
Perkins, OK 74059
(405) 547-2402

Kaw Nation
P.O. Box 141
Newkirk, OK 74647
(580) 362-2797

Kickapoo Tribe
25230 E. Hwy 62
Harrah, OK 73045
(405) 964-7322

Kiowa Tribe
2439 Ponderosa Drive
Chickasha, OK 73018
(405) 222-0072

Miami Tribe
202 S. 8 Tribes Trail
Miami, OK 74354
(918) 541-1357

Modoc Tribe
418 G. Street SE
Miami, OK 74354
(918) 542-1190

Muscogee (Creek) Nation
P.O. Box 580
Okmulgee, OK 74447
(918) 299-0870

Osage Nation
612 Leahy
Pawhuska, OK 74056
(918) 287-5399

Otoe-Missouria
1916 Lake Road
Ponca City, OK 74604
(580) 762-4442

Ottawa Tribe
P.O. Box 1185
Miami, OK 74354
(918) 541-9463

Pawnee Nation
P.O. Box 514
Pawnee, OK 74058
(918) 762-3624

Peoria Tribe
8508 S. Hwy 69A
Miami, OK 74354
(918) 542-7140

Quapaw Tribe
P.O. Box 405
Quapaw, OK 74363
(918) 919-6031

have to refer to the tribal code for general rules of civil procedure that may govern the judicial review proceedings after the administrative remedies are fully exhausted. These general rules of civil procedure may provide supplemental information that is necessary for the party to fully take advantage of his or her rights of judicial review.

The hearing and appeals process is an administrative review process that must be fully exhausted before a party may seek any applicable judicial review in the tribal court. For tort and prize claims that arise under Part 6 of a Tribal-State Gaming Compact,[11] some tribes have promulgated specific rules of administrative procedure that must be completed before a claimant has the right to take the matter to court. Claimants and the attorneys who represent tort or prize claimants should be aware of the time limitations that apply under the gaming compact for such claims to be asserted. An attorney who attempts to first file an action in court for his or her client without fully exhausting administrative remedies may find the lawsuit dismissed for lack of jurisdiction and, while the action was pending in court, that certain administrative deadlines have passed, all to the detriment of the client.

Oklahoma Tribal Gaming Regulators Association

Indian gaming is a billion-dollar industry in gross gaming revenues across the country and serves to provide economic stimulus and independence for Indian governments and Indian people. The role of the tribal gaming regulator is that of a watchdog with two primary goals: to protect the assets of the tribes and to protect the integrity of gaming. It becomes clear that tribes will spend significant amounts of money to fund the regulation of the gaming industry.

With so much at stake, it is imperative that gaming regulators keep up with every issue and any proposed changes in the law and in the industry which may impact gaming. It is imperative that gaming regulatory bodies maintain on their staff the most qualified personnel for the important compliance, audit, licensing and, in some cases, surveillance positions which are overseen by gaming commissions. Training for regulatory staff is accomplished though in-house training or sending commission personnel to

professional training seminars held throughout the country. As a result of the need for quality training and establishing valuable networking opportunities, professional regulatory organizations have been formed to meet the needs of gaming regulators – both at the national and state level.

In the early 1990s, the National Tribal Gaming Commissioners/Regulators (NTGC/R) was formed as a non-profit organization with the goals to promote cooperative relationships among the commissioners/regulator, to promote exchange of thoughts, information and ideas which foster regulatory standards and enforcement that lead to consistent regulatory practices, and to promote educational seminars for commissioner/regulator training. Today the NTGC/R is comprised of 64 member tribes across the country, and non-tribal affiliate membership is available for gaming related businesses.

In December 2005, the Oklahoma Tribal Gaming Regulators Association (OTGRA) was formed in response to the desire of Oklahoma gaming regulators to create a cohesive organization for the benefit of Indian gaming in Oklahoma. The OTGRA was formally established as a non-profit organization under the Miami Tribe of Oklahoma Non-Profit Act. The purpose and goals of the OTGRA are as follows:

- to promote and encourage the highest standards of ethics for tribal gaming regulation in Oklahoma;
- to facilitate communication among Oklahoma tribal gaming regulators through networking opportunities;
- to provide affordable training in Oklahoma for Oklahoma tribal regulators and casino management;
- to create a wider recognition of the importance of regulation in tribal gaming as it pertains to meeting tribal, state and federal regulation requirements specifically for the protection of the Oklahoma tribal gaming industry and to promote and perpetuate the integrity of Oklahoma tribal gaming, and;
- to conduct and promote other activities that enhance the growth and success of tribal gaming regulation for the economic benefit of tribal governments in Oklahoma.

The OTGRA is comprised of 30 member tribes, seven associate non-tribal members in the form of gaming-related businesses, and three individual associate members. The OTGRA holds bi-monthly meetings across the state apprising membership of important information on issues related to gaming. The OTGRA is the second largest regulatory organization behind the NTGC/R, and the growth and success of the OTGRA is a prime example of the hard work and dedication Oklahoma regulators commit to the industry of gaming in Oklahoma. For additional information about OTGRA and regulatory news, legislative updates, meeting information, training information and links to other gaming-related sites, please visit the official OTGRA Web site at www.otgra.com.

Sac and Fox Tribe
P.O. Box 1086
Shawnee, OK 74802
(405) 273-1588

Seminole Nation
P.O. Box 631
Seminole, OK 74818
(405) 382-0046

Seneca-Cayuga Tribe
P.O. Box 451117
Grove, OK 74344
(918) 787-9703

Thlopthlocco Tribe
P.O. Box 70
Okemah, OK 74859
(918) 560-6199

Tonkawa Tribe
P.O. Box 467
Tonkawa, OK 74653
(580) 628-2066

United Keetoowah Tribe
P.O. Box 746
Tahlequah, OK 74464
(918) 207-7551

Wyandotte Tribe
64700 E. Hwy 60
Wyandotte, OK 74370
(918) 678-2107

CONCLUSION

A party who is facing a hearing or appeal before a tribal gaming commission should contact the appropriate gaming commission for any information regarding procedural rules and regulations applicable to the hearings and appeal process.

Appearing before a tribal gaming regulatory body is not much different than appearing before a non-tribal administrative body. However, a party must understand and appreciate that not all Indian tribes follow the same rules and regulations. Each tribe and each tribal gaming commission will have their own rules and regulations that govern the process. Hopefully, the information

provided in this article will assist the practitioner with some basic considerations when practicing before a particular tribal gaming regulatory body on behalf of his or her client.

1. 3A O.S. §261, *et seq*.
2. 25 U.S.C. §2701-§2721.
3. 25 U.S.C. §2703(6).
4. Id. §2710(a)(1).
5. Id. §2703(7).
6. Id. §2710(a)(2). The NIGC is an agency of the federal government, created pursuant to and under the IGRA.
7. *Id*. §2703(8).
8. *Id*. §2710(d)(1).
9. *Id*. §2710(d)(5).
10. Under the IGRA, tribal gaming may only be conducted on "Indian land," which is defined as:

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. §2703(4).

11. The provisions of the model Tribal-State Gaming Compact can be found at 3A O.S. §281. Tribal gaming compacts can be found at the NIGC's Web site at www.nigc.gov. The tort and prize claim provisions are in Part 6 of the compact.
12. Most hearing and appeals procedural rules allow a party to obtain legal counsel to represent the party during the process. An attorney considering representing a party before a tribal gaming commission and during any judicial review process should first determine if that attorney is required by tribal law to first be admitted to practice before the tribal court and subject to all regulatory authority of the tribe, including any attorney's fees limitations that may apply under tribal law.

ABOUT THE AUTHORS

Robin C. Lash graduated from the OU College of Law in 2003 with a certificate of specialization in Indian law. She joined the Miami Nation legal staff in 2004 and holds the position of lead in-house counsel for the Miami Nation, its 38 federal programs and its many businesses. She was appointed to the Miami Nation Gaming Commission in 2004 and is the hands-on commissioner overseeing the implementation of rules and regulations for the tribe's casino.

O. Joseph Williams is a member of the Mississippi Band of Choctaw Indians from Choctaw, Miss. He is managing attorney and member with the law firm of Pitchlynn & Williams PLLC, headquartered in Norman. He practices in general litigation, business law, employment law, gaming, tribal taxation, Indian child welfare, tribal economic development and tribal code development. He serves on the board for Oklahoma Indian Legal Services and is the immediate past chairperson for the OBA Indian Law Section.

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Tribal Water Rights: The Necessity of Government-to-Government Cooperation

By L. Susan Work

THE WINTERS DOCTRINE

The numerous federally recognized Indian tribes located within Oklahoma possess substantial sovereign and proprietary interests in water in most major watersheds throughout the state. Tribal water rights have been recognized by the federal government for more than a century. The Indian reserved water rights doctrine, also known as the "Winters doctrine," was established by the Supreme Court in its 1908 decision in *Winters v. United States*.[1] Under this doctrine, the right to use a sufficient quantity of water to fulfill the purposes of the reservation is implicitly reserved to the tribe when the United States sets aside land from the public domain for the tribe's use and benefit.

In 1963, the Supreme Court issued a decision that refutes any assumption that the state of Oklahoma automatically acquired ownership and control over all water resources in Oklahoma. In that decision, *Arizona v. California*, the court applied the Winters doctrine to Indian reservations established by executive order in Arizona Territory and in California, notwithstanding the absence of any express reservation of the water in the executive order. The court found that enough water from the Colorado River was reserved to irrigate all of the practicably irrigable acreage on the reservations, for future, as well as present, needs.[2] In reaching this conclusion, the court expressly rejected Arizona's contention of the applicability of "the doctrine that lands underlying navigable waters within territory acquired by the Government are held in trust for future States and that title to such lands is automatically vested in the States upon admission to the Union."[3] The court found that Indian water rights vested at the time the reservations were created and were "present perfected rights" entitled to a priority.[4]

Oklahoma currently implements a dual system of riparian rights (which establish landowners' water rights to surface waters flowing through or abutting their lands and to underlying groundwater) and appropriative rights (which, when water resources are scarce, affords a priority to claimants of water according to those making such claims first in time).[5]

However, the application of the Winters doctrine is not restricted by the principles involving appropriative water rights and riparian water rights. Unlike appropriation rights, Indian reserved water rights are not based on beneficial actual use, and cannot be lost by non-use.[6] Additionally, the priority date for Indian reserved water rights, even such rights not in use, is the date of the reservation of water rights.[7] Thus, Indian reserved water rights will be, in many if not most cases, senior to later non-Indian water rights, if any, that may have been established under the appropriations doctrine. In other words, tribal water rights in Oklahoma, which were established before statehood in 1907, include, at a minimum, the amount of water necessary for present and future needs, regardless of any past tribal non-use or non-Indian use. These rights will have a priority date senior to all (or nearly all) other claimants.

TRIBAL WATER RIGHTS IN OKLAHOMA

The Winters doctrine, which was originally developed with regard to reservation lands held in trust by the United States on behalf of tribes in the West, establishes the basic principles governing tribal water rights in Oklahoma. Tribal water claims under the Winters doctrine are strengthened and in some cases may be expanded by the unique histories of certain tribes in Oklahoma, such as the so-called "Five Civilized Tribes" (Cherokee, Choctaw, Chickasaw, Muscogee (Creek) and Seminole Nations) – now more popularly referred to as the "Five Tribes."

In the 1830s, the United States deeded most lands in the former Indian Territory in fee title to the Five Tribes in an area called "Indian Territory," even though there was no organized territory or territorial government there. The treaties guaranteed the Five Tribes a permanent home "forever" that would never be placed under jurisdiction of a state or territory, and that would be subject to the Five Tribe's right to self governance.[8] In their 1866 treaties following the Civil War, the Five Tribes ceded the western portion of their lands in Indian Territory, much of which was set aside by the United States for tribes now occupying what is now western and north central Oklahoma. These treaties did not withdraw prior treaties' protections of tribal self-government and promises that no state or territory would be formed. They expressly reaffirmed prior treaties not inconsistent with them, and stated that they were not to be construed as a relinquishment by the Five Tribes of any claims or demands under the guarantees of former treaties. Thus, after the Civil War, the Five Tribes continued to own fee title to lands in what is now eastern Oklahoma in an area still called "Indian Territory," but which never became subject to a non-Indian organized territorial government.

When the Five Tribes were again forced to give up their fee ownership of their reduced domains in the early 1900s before statehood, they did not deed the lands back to the United States or to the state of Oklahoma, and those lands did not become part of the public domain. Instead, tribal lands were conveyed directly to individual Indian allottees. There is nothing in Five Tribes allotment legislation, much of which applied uniformly to the Five Tribes as a group, demonstrating any intent that the future state of Oklahoma would somehow automatically acquire the Five Tribes water rights. In fact, in 1960 the United States Supreme Court recognized that there was no automatic state acquisition of tribal water rights in *U.S. v. Grand River Dam Authority*. In making that decision, the court considered the only provision that addressed Five Tribes' water in the Five Tribes' allotment legislation: a provision in a 1906 federal law concerning use of water by light and power companies. The court found that this provision did not convey water rights to light and power companies or to the state of Oklahoma, and that the Grand River Dam Authority, a state agency, had no vested interest in the flow of the waters of the Grand River.[9]

In 1970, the Supreme Court ruled in *Choctaw Nation v. Oklahoma*, that the Choctaw, Chickasaw and Cherokee Nations obtained, through their removal treaties, all of the right to the Arkansas riverbed within their respective limits, subject to the U.S.' navigational easement on navigable waters.[10] The court found that it was significant that Congress deeded lands to the three tribes in fee patent, rather than reserving land in the public domain for their beneficial use, and noted there was no express exclusion of the beds of the Arkansas River by the U.S. in the deeds. The court also emphasized that treaties granted the three tribes "virtually complete sovereignty over their new lands," and found it particularly significant that the treaties guaranteed the Five Tribes' new lands would never become part of a territory or state, noting:

> In light of this promise, it is only by the purest of legal fictions that there can be found even a semblance of an understanding (on which Oklahoma necessarily places principal reliance), that the U.S. retained title in order to grant it to some future State.[11]

In his concurring opinion Justice Douglas added: "So it is reasonable to infer that the U.S. did not have a plan to hold this river bed in trust for a future state." This same reasoning in the riverbed cases applies to the Five Tribes' water rights. Congress intended to convey the right and power to use and regulate all, and not merely a portion, of the water resources within the boundaries of their respective territorial limits. There could not have been a Congressional plan to hold water in trust for a future state, in light of the treaty promise that there would never be a state. The establishment of Oklahoma did not alter this. There was nothing in the admission of Oklahoma that required or permitted a divesting of the Five Tribes' ownership of water resources. To the contrary, the Oklahoma Constitution contains a state disclaimer consistent with a requirement in the Oklahoma Enabling Act that nothing contained in the state constitution was to be construed to limit or impair the rights of person or property pertaining to the Indians.[12]

In 1976 in *New Mexico v. Aamodt*, the 10th Circuit considered similar provisions in the New Mexico Enabling Act, and found that the United States did not relinquish jurisdiction and control over the Pueblos (who, like the Five Tribes, also historically owned their lands in fee), and did not place control of their waters or their water rights under New Mexico law. The 10th Circuit implicitly recognized that Pueblos had greater rights than reserved water rights, noting that Pueblo fee title was logically inconsistent with reserved water rights concepts.[13] The *Aamodt* case lead to a tribal/state settlement agreement involving water rights of some of the Pueblos and ongoing negotiations concerning the rights of others.

As recently as 2002, Congress has expressed the intent to protect the Five Tribes' water rights. In the Choctaw Nation, Chickasaw Nation and Cherokee Nation Claims Settlement Act, which included appropriations for monetary damages for the alleged use and mismanagement of tribal resources in the Arkansas Riverbed, the tribes "*reserved any and all right, title, or interest that each Nation may have in and to the water flowing in the Arkansas River and tributaries.*" The act further expressly protected tribal rights by stating that act was not to be construed to extinguish or convey any water rights of the Indian Nations in the Arkansas River or in any other stream. Even more recently, in *State v. Tyson*, the District Court for the Northern District of Oklahoma dismissed certain damages claims against poultry companies for water pollution, finding that that the Cherokee Nation, which could not be sued because of its sovereign immunity, was a necessary party to those claims because it has an "arguable, non-frivolous claim it owns much of the surplus water within its historic boundaries."[14] The Cherokee Nation subsequently attempted to intervene as a plaintiff-intervenor, seeking to restore damages claims against the poultry companies.

THE NECESSITY OF TRIBAL-FEDERAL-STATE COOPERATION IN PROTECTION OF WATER RESOURCES IN OKLAHOMA

Apparently acknowledging the legal validity of tribal water claims, the 1995 Update of the Oklahoma Comprehensive Water Plan issued by the Planning Division of the Oklahoma Water Resources Board (OWRB) stated that "recognition of tribal sovereignty will be a key element in addressing future Native American water rights claims."[15] The plan recommended that the Oklahoma Water Law Advisory Committee and selected tribal representatives should explore Indian water rights and quality issues in Oklahoma, including the potential formation of a permanent committee consisting of local, state, federal and Indian representatives to address appropriate water rights issues; the development of a mutually acceptable negotiation system to fairly resolve current and future water rights issues; and identification of water resource projects warranting cooperative action.[16]

The state has implicitly recognized tribal water rights in several interstate water compacts approved by state and federal legislation in the '60s and '70s, by including compact provisions that nothing in such compacts shall be deemed to "impair or affect the powers, rights or obligations of the United States, or those claiming under its authority, in, over and to" the affected waters,[17] and that nothing in such compacts shall be construed as "[a]ffecting the obligations of the United States to the Indian Tribes."[18] More recently, the Oklahoma Legislature included similar language in its 2009 amendment of 82 O.S. 2001, §105.12, which

> **"The state has implicitly recognized tribal water rights in several interstate water compacts approved by state and federal legislation in the '60s and '70s..."**

primarily concerns permits for out-of state water sales.[19]

It is becoming increasingly important for the state of Oklahoma to not only acknowledge tribal water rights, but also to actively work with tribes to protect this critical natural resource. In 2007, the state of Oklahoma initiated a four-year process for development of a 2011 update of its Comprehensive Water Plan, which professes to be a "long-range planning document to help Oklahoma protect and enhance the beneficial use of the state's surface and groundwater resources."[20] The plan's ultimate objective is to complete a comprehensive assessment of existing surface and groundwater supplies in the state, together with future demand projections on all surface and groundwater resources.

An assessment of existing and future plans for tribal water supply infrastructure is a necessary and important component of this plan. The OWRB has disseminated information to tribes concerning community meetings, but seems to erroneously believe that tribal interests can be protected simply through input of individual tribal members attending the meetings. The OWRB sent inquiries to tribes regarding projected tribal water *needs* for purposes of the 2011 plan, but has not conferred directly with tribes concerning the nature and extent of tribal water *rights* and how they should be addressed in the state planning system. The OWRB apparently intends to include a chapter concerning Oklahoma tribal water rights legal issues, and has hired a consultant to meet with tribes and to assist in preparation of that chapter.[21] This affords at least some opportunity for tribes to participate more actively in proposing possible institutional structures for resolution of tribal water rights. However, unless the OWRB or another appropriate state entity begins working more directly with tribes on a government-to-government basis, the value of the 2011 plan may be severely compromised.

It is important that the state and tribes in Oklahoma develop a structure for resolution of tribal water rights claims – preferably one that expressly acknowledges the existence of tribal water rights, recognizes the need for cooperative efforts for funding opportunities for protection of water in Oklahoma, and clearly recognizes that each tribe is a separate sovereign entitled to negotiate resolution of its own unique water rights, based on its own unique legal history and goals concerning water use and protection. The development of such a structure would be consistent with a long-standing policy on Indian water rights issues by the United States, as trustee of Indian resources.[22] This policy advocates for the settlement of water rights through negotiations versus the highly volatile alternative of litigating Indian water rights claims.[23] It would also be in line with the consistent support of negotiated settlement of Indian land and water rights disputes by the Western Governors' Association (WGA), of which the Oklahoma governor is a member.[24] In 2006, the WGA described the settlement process as follows:

> Over the past 25 years, more than 21 settlements of Indian land and water rights have been reached in the western states and approved by Congress. The settlements have provided practical solutions, infrastructure and funding, while saving millions of dollars of private and public monies through avoidance of prolonged and costly litigation, and have fostered conservation and sound water management practices and established the basis for cooperative partnerships between Indian and non-Indian communities.[25]

As recognized by the WGA, there are also other advantages to use of negotiated settlements, including the following: the ability to be flexible and to tailor solutions to the unique circumstances of each situation; the ability to promote conservation and sound water management practices; the ability to establish the basis for cooperative partnerships between Indian and non-Indian communities that provide practical solutions to water supply issues for all parties; and the resolution of rights with respect to water marketing — an area often addressed in tribal/state water settlement legislation.[26]

CONCLUSION

Tribes in Oklahoma, at a minimum, possess reserved water rights. They have asserted and continue to assert water rights in various forms, including actual ownership of the water and regulatory authority over it, for many years. The nature and extent of the water rights of each tribe will depend upon their specific treaty provisions, and the manner in which they acquired their tribal lands before statehood. Given the large number of tribes located within Oklahoma, and their potential ownership of vast quantities of surface and groundwater resources, it is imperative that the state initiate meaningful and comprehensive government-to-government discussions with tribal representatives over the impact of these rights and resources on the planning processes currently underway. In this process, the state and the OWRB might do well to utilize the federal executive order on government-to-government consultations, which guides all federal departments and agencies in their dealings with Indian nations.[27] The state and tribes should look to other state processes that handle Indian water rights, including New Mexico, Montana and Idaho, recognizing, of course, that any process created must take into account Oklahoma-specific issues.

1. *Winters v. United States*, 207 U.S. 564 (1908).

2. *Arizona v. California*, 373 U.S. 546, 600 (1963). The continued litigation history of this case is extensive. *See* 376 U.S. 340 (1964) (judgment), 383 U.S. 268 (1966) (amended order), 439 U.S. 419 (1979) (supplemental decree), 460 U.S. 605 (1983) (amended order), 462 U.S. 1146 (1983) (reh. denied), 466 U.S. 144 (1984) (supp. decision), 493 U.S. 886 (1989) (motion to reopen granted), 530 U.S. 392 (2000) (subsequent determination), and 531 U.S. 1 (2000) (supp. decision).

3. *Id.* at 597, discussing *Pollard's Lessee v. Hagan*, 3 How. 212, 11 L. Ed. 565 (1845) (equal footing doctrine); *Shively v. Bowlby*, 152 U.S. 1(1894) (public trust/future states doctrine); *United States v. Holt State Bank*, 270 U.S. 49 (1926) (public trust/future states doctrine).

4. *Arizona v. California*, 373 U.S. at 600.

5. *Franco-American Charolaise Ltd. v. Oklahoma Water Resources Board*, 855 P.2d 568, 574 and note 26 (Okla. 1990).

6. *Cohen's Handbook of Federal Indian Law* (Mathew Bender Newark, NJ, 2005 Ed.) at 1175, §19.03[1].

7. *Cohen's Handbook of Federal Indian Law* at 1179, §19.03[3].

8. See, e.g., Cherokee Treaty of Dec. 29, 1835, 7 Stat. 478 (Proclamation, May 23, 1836) (Treaty of New Echota), *reprinted in 2 Indian Affairs: Laws and Treaties* 140-144 (Charles J. Kappler ed., photo. Reprint 1975 (1904) [hereinafter *Kappler's* 2] at 439-449, Preamble and Article 5; Cherokee Treaty of July 19, 1866, 14 Stat. 799 (Proclamation Aug. 11, 1866), *reprinted in Kappler's* 2 at 942-950, Art. 27.

9. *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960).

10. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). The court discussed *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922), and found that it was not significant that Brewer-Elliot involved portions of the Arkansas River that were non-navigable, in contrast to the *Choctaw Nation* case, which involved portions of the Arkansas River that were navigable. *Id.* at 1335-1336.

11. *Choctaw Nation v. Oklahoma*, 397 U.S. at 635.

12. Enabling Act, act of June 16, 1906, ch. 3335, 34 Stat. 267; Okla. Const., Art. 1, §3.

13. *New Mexico v. Aamodt*, 537 F.2d 1102, 1109, 1111 (10th Cir. 1976) (*Aamodt I*), cert. denied, 429 U.S. 1121 (1977); see also *State ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993 (D. N.M. 1985) (*Aamodt II*).

14. Cherokee, Choctaw and Chickasaw Nation Claims Settlement Act, Pub. Law 107-331, Title VI, 116 Stat. 2834; *State v. Tyson Foods Inc.*, Case No. 4:05-cv-00329-GKF-SAJ (Opinion and Order, July 22, 2009), motion to reconsider denied, Aug. 18, 2009. In its decision, the court implicitly recognized the validity of the Five Tribes water theory, citing Taiawagi Helton, Comment, *Indian Reserved Water Rights in the Dual-System State of Oklahoma*, 33 Tulsa L.J. 979, 993 (1998). See also Work, Susan, *Tribal Water Rights in Eastern Oklahoma – The Inapplicability of General Principles Concerning State Water Interests*, 22nd Annual Sovereignty Symposium (June, 2009).

15. Update of the Oklahoma Comprehensive Water Plan 1995, p. 10 (February 1997).

16. I*d.* at 138.

17. See 82 O.S. §1401 (1965 Arkansas River Basin Compact, Kansas, Oklahoma, Art. XIII); 82 O.S. §1421, (1970 Arkansas River Basin Compact -Arkansas, Oklahoma, Art. XI); 82 O.S. §1431 (1978 Red River Compact - Arkansas, Louisiana, Oklahoma, Texas, §2.07).

18. See 82 O.S. §526.1 (Canadian River Compact, Art. X).

19. See 2009 Sess. Laws, §403, HB 1483 (June 1, 2009), which provides that no permit issued by OWRB shall "[i]mpair or affect the powers, rights, or obligations of the United States, or those claiming under its authority or law, in, over and to water apportioned by interstate compacts."

20. OWRB December 2007 Memorandum #1.

21. Statements of Lindsay Robertson, University of Oklahoma Law Professor, at May 18, 2009 informational meeting in Shawnee, Oklahoma.

22. 55 Fed. Reg. 9223 (1990), Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims (Criteria).

23. *Water Needs and Strategies for a Sustainable Future* (Western Governors' Association, June 2006), p. 18.

24. See Western Governors' Association Resolutions 87-007, 89-011, 92-008, 95-006, 98-029, 01-10 and 07-3.

25. *Water Needs and Strategies for a Sustainable Future* (Western Governors' Association, June 2006), p. 18.

26. *Cohen's Handbook of Federal Indian Law* at 1216, §19.05[2].

27. See Executive Order 13175 of November 6, 2000 (65 Fed. Reg. 67249).

ABOUT THE AUTHOR

Susan Work, a member of the Choctaw Nation, is the author of *The Seminole Nation of Oklahoma: A Legal History* (OU Press 2001). Her practice areas include natural resources, legislative drafting, Indian probate issues, contracts, gaming, housing and Indian child welfare. She served as director of the Cherokee Nation Law and Justice Department and as attorney general for the Muscogee (Creek) and Seminole Nations. She is presently a senior assistant attorney general at the Cherokee Nation.

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Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if David Walter Deal should be reinstated to active membership in the Oklahoma Bar Association.

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Application of the Sex Offender Registration and Notification Act in Oklahoma Indian Country

By Kelly Gaines Stoner and Shandi S. Stoner

In the interest of public safety, the Sex Offender Registration and Notification Act (SORNA), Title 1 of the Adam Walsh Child Protection and Safety Act of 2006[1] sets national minimum standards for sex offender registration and notification. SORNA requires all states, principal U.S. territories, the District of Columbia and Indian tribes to develop and implement these standards which focus on tracking and monitoring convicted sex offenders.[2] Implementing these federal requirements is extremely costly. SORNA has forced tribes to a critical crossroad. Tribes must now find the means and resources to satisfy these federal minimum standards or delegate the power to develop, implement and enforce these federal requirements to the state.

SORNA: REQUIREMENTS IN INDIAN COUNTRY

SORNA requires tribes to develop and implement sex offender registration and notification systems in Indian Country. If no such system is developed within the statutory period, the power to do so is automatically delegated to the state(s).[3] Although SORNA mandates significantly impact tribal sovereignty, SORNA was passed without input from tribes. Tribal delegation of power to the state requires the tribe to provide access to its territory and to provide such other cooperation and assistance as may be needed to enable the state to carry out and enforce the requirements of SORNA.[4] Tribes must be SORNA-compliant by June 26, 2010, unless a timely request for an extension has been made and approved by the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (the SMART office).

SORNA defines a "sex offender" as an individual who was convicted of a sex offense.[5] The term "offense" encompasses a broad range of criminal convictions of a sexual nature under the laws of any United States jurisdiction.[6] SORNA also applies to specified juvenile convictions,[7] which may be of particular concern to tribes that apply a protective, rehabilitative strategy to tribal juvenile proceedings. For example, some tribes seal juvenile records when a juvenile reaches the age of 18, in order to protect the juvenile from future adverse effects stemming from tribal court juvenile proceedings that occurred prior to adulthood. SORNA, however, will require juveniles convicted in

tribal courts of certain sex offenses to comply with the sex offender registry requirements for a specified period of time.

SORNA classifies sex offenders in a three-tiered system: Tier I, Tier II and Tier III.[8] The system is based upon the elements of the sex offense crime that resulted in a conviction and the potential criminal sentence involved in the sex offense crime.[9] This three-tiered system has implications for the required duration of the registration and the required frequency of personal appearances by the sex offender to verify registration information. For example, Tier I offenders must keep the registration current for 15 years, but information about Tier I offenders convicted of offenses other than those against minors may be exempted from public Web site disclosure.[10] Tier II offenders must keep the registration current for 25 years. Tier III offenders must keep the registration current for the life of the sex offender. Tier I offenders must appear in person to provide or verify specified information to the registry each year, while Tier II offenders must appear in person every six months to provide or verify the information in the registry. Tier III offenders must appear in person every three months to provide or verify the information in the registry.

SORNA does not require tribes to utilize the three-tiered system. SORNA requirements for tribes are met if sex offenders who are required to register under the terms of the act are held to the same or more stringent requirements for in-person appearances and public Web site disclosure. Tribal court convictions are automatically initially classified as Tier I convictions under SORNA since the Indian Civil Rights Act of 1968 limits tribal courts to criminal sentences up to one year in duration.[11]

Since SORNA's three-tiered system sets minimum standards for classifications, tribes are free to enact legislation increasing the registration obligations of sex offenders under tribal systems. For example, tribes may pass legislation indicating that all sex offenders shall be Tier III sex offenders or a tribe may require all sex offenders to register for life.

"...tribes are free to enact legislation increasing the registration obligations of sex offenders under tribal systems."

SORNA requires states, tribes and territories to maintain a jurisdiction-wide electronic database of sex offender information that can be electronically transmitted to other jurisdictions.[12] Certain portions of these databases ensure public access to monitor the sex offenders in neighborhoods and communities. Certain portions of the databases are protected sites for law enforcement use. The databases must contain certain information, which includes digital fingerprints, digitized DNA samples and other identifying information set forth in the act.[13]

SORNA sets forth certain enforcement mandates and creates a federal criminal offense for failing to register as a sex offender.[14] The new law imposes a penalty of up to 10 years in federal prison for convicted sex offenders who knowingly fail to register or to update a registration.

For enforcement purposes, SORNA requires the states, the District of Columbia and the five principal U.S. territories to enact laws imposing a maximum term of imprisonment greater than one year for sex offenders who fail to comply with SORNA's registration requirements.[15] However, tribes are specifically excluded from this provision of SORNA because the Indian Civil Rights Act prevents tribes from imposing terms of imprisonment greater than one year.[16] Tribes should consider enacting legislative provisions that provide criminal sanctions for a failure to timely register or meet registry requirements.

Sex offender registration and notification is a civil regulatory power.[17] SORNA requires tribes to comply with registry requirements as to all sex offenders within the tribe's jurisdiction, and anticipates that tribes will criminalize failures to comply with the act. Although SORNA is silent as to whether tribes may criminally enforce failure to register as to non-Indians, tribes should consider maximizing tribal sovereignty to the fullest extent, arguing that the federal mandate to regulate includes the mandate to enforce criminal sanctions against all sex offenders, Indian and non-Indian, who fail to meet the requirements of the act.[18]

IMPLEMENTATION: OVERCOMING CHALLENGES

SORNA may create challenges for tribes in meeting requirements of the act. For instance, implementation of SORNA is expensive for tribes. Federal funding may not be adequate to assist tribes with the costs of hardware, software, training, analysis and processing of electronic date such as DNA samples and fingerprints. Further, SORNA requires tribes to gather and input specific sex offender information into the national databases. For enforcement purposes, tribes should be permitted to access the applicable databases such as the National Crime Information Center, the National Sex Offender Registry and other criminal databases necessary to protect tribal communities. Tribal law enforcement must be able to assess how dangerous a sex offender is, determine whether the sex offender is a fugitive and gather other critical information about the sex offender often at a moment's notice. However, many tribes lack access to these criminal databases and/or lack qualified personnel to input tribal data into certain databases. Tribes, states and federal agencies must work together to ensure that all agencies have input and access capabilities to these database systems.

To assist with some of these concerns, SORNA created the SMART office, which is located within the Office of Justice Programs of the United States Department of Justice.[19] The SMART office administers the standards for the sex offender registration and notification. The SMART office also develops and makes available tools to facilitate full implementation of the act. Thus, the SMART office is a key partner and resource within the federal government for assistance with SORNA compliance. The SMART office has developed several useful resources to assist tribes in complying with SORNA mandates.

Specifically, the SMART office[20] has developed a free registry for tribes to access referred to as Tribe and Territory Sex Offender Registry System (TTSORS). Tribes that have Internet access are permitted to utilize the TTSORS database, which is a registry database that is SORNA compliant.

Tribes in Oklahoma Indian Country may consider entering into a collaborative agreement with state agencies that would allow the tribes to input and access registry information to include criminal database information. The Oklahoma Department of Corrections maintains such a registry. Tribes that wish to tap into that registry instead of utilizing the TTSORS should consider contacting the agency to negotiate a memorandum of understanding.

With respect to DNA collection and storage, Oklahoma tribes should consider utilizing OSBI[21] for storage of the digitized DNA samples from sex offenders. The OSBI is authorized by state statute to analyze and store DNA profiles from individuals convicted of a felony crime in Oklahoma. DNA samples are collected by the DOC (employees or contractors), county sheriffs (employees or contractors) or other peace officers as directed by the court. In addition, there is a $150 court fee that is assessed for each felony conviction.[22] Tribes may submit the DNA samples to the OSBI for analysis and storage in the CODIS database, as long as:

1) The individual was convicted of a felony crime in Oklahoma;
2) The sample is collected from those authorized individuals as listed in 22 O.S. §991a paragraph J;
3) An approved OSBI collection kit is used;[23] and
4) Training is conducted on the proper collection of these samples.[24]

Oklahoma tribes will also need to enact tribal sex offender registry codes that are SORNA compliant. The SMART office has developed a model tribal sex offender registry code, which is available on the SMART Web site.[25] However, the model code will have to be modified to meet the complicated needs of Oklahoma tribes, since jurisdictional issues in Oklahoma created by allotment policy are unique. Additionally, tribes should consider expanding the enforcement jurisdictional provisions of the SMART model tribal sex offender registry to allow tribes to enforce SORNA requirements over all sex offenders including non-Indian sex offenders.

Oklahoma tribes utilizing the courts of federal regulations (CFR courts) should consider meeting with the appropriate area Bureau of Indian Affairs officer to discuss implementing their own tribal sex offender registry code in the CFR court. Once the code is being utilized by the CFR court, the pertinent BIA law

enforcement officers should be mandated to adhere to the tribal code as well for enforcement purposes.

Tribes must be SORNA compliant by June 26, 2010, unless a timely request for an extension has been made to and approved by the SMART office. Therefore, tribes must have submitted a plan to the SMART Office with all necessary accompanying documents well in advance of that date.

CONCLUSION

Even though SORNA was enacted without tribal input and directly impacts tribal sovereignty the purpose of tracking and monitoring convicted sex offenders as they move from jurisdiction to jurisdiction is laudable. Barriers are often put in the path of tribes working to meet the responsibilities of a sovereign government. Many tribes may struggle with the financial burden of SORNA implementation. Tribes may utilize the resources provided by the SMART Office and amend tribal codes to maximize tribal registry enforcement powers that include enforcement power over non-Indians. By focusing on the common purpose of safety, tribes can meet the mandates of the SORNA and provide tribal citizens with safer tribal communities.

1. Sex Offender and Notification Act, Title I of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248, 42 USC Section 16911.
2. 42 USC Section 16901, another stated purpose is response to the vicious attacks by violent predators against Jacob Wetterling, Megan Nicole Kanka, Pam Lychner, Jetseta Gage, Dru Sjodin, Jessica Lunsford, Sarah Lunde, Amie Zyla, Christy Ann Fornoff, Alexandra Nocole Zapp, Polly Klaas, Jimmy Ryce, Carlie Brucia, Amanda Brown, Elizabeth Smart, Molly Bish and Samantha Runnion.
3. 42 USC Section 16911 (10)(H).
4. 42 USC Section 16927.
5. 42 USC Section 16911 (1).
6. 42 USC Section 16911 (8).
7. 42 USC Section 16911 (7- 8).
8. 42 USC Section 16911 (1-4).
9. 42 USC Section 16911 (2-5)
10. 42 USC Section 16915; 42 USC Section 16916.
11. 25 CFR Section 1301-03.
12. See 42 USC Section 16912 (Registry requirements for jurisdictions); 42 USC Section 16918 (Public access to sex offender information through the Internet); 42 USC Section 16919 (National Sex Offender Registry); 42 USC Section 16920 (Dru Sjodin National Sex Offender Public Web site)
13. 42 USC Section16914.
14. 18 USC Section 2250.
15. 42 USC Section 16913.
16. 25 CFR Section 1301-03.
17. *Smith v. Doe*, 538 U.S. 84 (2003).
18. Note that the Department of Justice has not issued any policy statements hold that SORNA overrules Oliphant v. Suquamish Indian Tribe, 43 U.S. 191 (1978) (holding that tribes do not have criminal jurisdiction over non-Indians).
19. 42 USC Section 16945.
20. www.ojp.usdoj.gov/smart/about.htm (site last visited 10/1/09). Note that the SMART Web site contains the final SORNA guidelines and also includes a tab for Indian country resources.
21. Oklahoma State Bureau of Investigation. The OSBI currently provides storage for state criminal DNA samples.
22. 22 O.S. §991.
23. These kits are provided free to the collection agency from the OSBI.
24. This training is typically conducted at the OSBI laboratory in Oklahoma City.
25. www.ojp.usdoj.gov/smart/about.htm (site last visited 10/1/09).

ABOUT THE AUTHORS

Kelly Stoner is the director of the Native American Legal Resource Center at Oklahoma City University School of Law. She has more than 20 years of experience addressing legal issues in Indian country.

Shandi Stoner graduated from Oklahoma City University School of Law in 2009 with a juris doctorate and has been working on issues regarding implementation of the Adam Walsh Act in Indian Country for more than two years. See *Sex Offender Registration and Notification in Indian Country* (2009).

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Indian
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Transfer to Tribal Courts in Oklahoma under the Indian Child Welfare Act and Factors for the Tribal Court's Consideration

By C. Steven Hager

The Indian Child Welfare Act, passed in 1978, offers many protections to Indian tribes and families for child custody proceedings in state court. One of the most important is 25 U.S.C. §1911 (b), which gives the tribe or the parents of an Indian child the ability to transfer state court proceedings to tribal courts.

The law states:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

The Supreme Court has stated that while Section 1911 (b) creates concurrent jurisdiction between the state and tribal courts, there is a preference that the proceeding should be heard in tribal court.[1] The preference for tribal court requires that upon a proper petition to transfer made by either parent, the Indian custodian, or the tribe, the state court must transfer to the tribal court unless either parent objects or good cause exists not to transfer.[2] The presumption that the proceeding should be heard in tribal court requires that the state court transfer the proceeding to the tribal court, absent the objection of either parent or a showing of good cause why the proceeding should not be transferred.[3]

An objection by either parent prevents transfer.[4] The absence of parental objection to a transfer cannot be found unless a parent is given a meaningful opportunity to object, meaning that the parent must be fully informed and represented by counsel.[5]

The Oklahoma Appeals Court has produced what may be the definitive examination of transfer in ICWA cases. In *Adoption of S.W. and C.S.*, 2002 OK CIV APP 26, 41 P.3d 1003 (Okla. App. 2002), the Court of Appeals provides a well-reasoned analysis of transfer and what is good cause to void it. *S.W.* involved two sibling children in two deprived actions in Tulsa County. The children are Cherokee. The Cherokee Nation, which was involved in the case from the beginning, favored a placement with the adoptive family of half-siblings of the two children. The foster parents of the children wished to adopt them and filed an adoption. Shortly thereafter, the Cherokee

Nation filed a motion to transfer in the juvenile court, but not in the adoption proceeding. The adoption proceeding judge consolidated the three actions and held a hearing on the transfer. The adoption judge found against transfer and proceeded with the adoption.

On appeal, the court began by noting that when Indian children resided outside of Indian country, jurisdiction between the tribal and state court was "concurrent but presumptively tribal" and that the standard of review would be for clear and convincing evidence of good cause.[6] The court then found that in order to establish good cause, the court must examine the BIA guidelines, the best interests of the child, and the circumstances of the case.[7] In order to trigger a transfer proceeding, the party requesting transfer must make a timely application for transfer. The transfer must include the facts that support the transfer.[8] After the application is made, the trial court must take oral testimony on the transfer, including tribal experts on Indian culture, with special attention paid to what would be the best interest as an Indian child.[9] The court found that the "best interests" test must be considered, along with a modified forum *non conveniens*.[10]

How to determine "good cause" was the next question the court addressed. The court noted that good cause is both personal and extra-personal.[11] Personal good cause goes to the individual child – the nurture, care and welfare of the child – and "when Indian children are involved, exposure to and cultivation of the social and cultural aspects of Indian life, their Indian culture and Indian heritage."[12] Extra-personal best interests are the means, resources and procedures available to protect the personal best interests of the child, including the forum *non conveniens* arguments of distance, convenience and time.[13] The trial court must engage in a fact-finding process that leads to a clear determination of the child's best interest, including the need to view the case from an Indian perspective. The court notes that the testimony of a qualified expert witness would be beneficial at this stage.[14]

The court also examines the requirements necessary to make a forum *non conveniens* argument under the law. First, it is noted that the ICWA reverses the normal burden of proof in transfer to the party opposing the transfer. The party opposing now bears the responsibility of demonstrating that the transfer would not be proper. This objection must be in writing. Further, oral testimony is required if the party's opposition goes beyond geography or time and into the personal best interests of the child. The party opposing transfer must prove their case by "clear and convincing" evidence.[15] Expert testimony would be advantageous in this attempt.

"Before transfer, it would be preferable if tribes carefully weighed the evidence in the case, the particular services needed by the family and the child in question."

The analysis of the court clearly defines the standards the court expects to be followed in future court cases. Attorneys should understand that in order to propose transfer, they must specify the reasons supporting it – attorneys opposing transfer must understand that they must present clear and convincing evidence, including cultural testimony, that the transfer would not be in the child's best interest, as well as extra-personal reasons. While transfer remains a fact-driven exercise, the court's opinion offers an excellent blueprint for tribes and practitioners to use.

Transfer to tribal court is often done with the tribe's prior approval. However, transfer can only be accepted by the tribal court under 1911 (b), providing an opportunity for tribal court review prior to assumption of the case responsibility.[16] If a tribal court declines jurisdiction over a proceeding transferred from state court, the state court then reassumes jurisdiction over the proceeding.[17] This declination occurs for a variety of reasons, such as the tribe's economic ability to provide services to the child, or an older child's preference to remain in state custody or in a particular location or foster care placement.

Before transfer, it would be preferable if tribes carefully weighed the evidence in the case, the particular services needed by the family and the child in question. Tribal courts, with the support of social workers and court personnel, should carefully consider the following factors:

Economic ability of the tribe to provide services: if a child is likely to need extensive psychiatric or medical assistance, and the tribe is unable or unwilling to provide funding for that care, the court should decline transfer. While tribes have agreements with the state providing for assistance, not all services are transferable. A "means test" of financial liability should be provided to the tribal court so that the judge can render a fully informed decision on case transfer.

Location of parties and placement: Another factor that should be considered by the court is the location of parties and placement of the children. If the court is unable to provide a tribal foster home that can keep the children together (and assuming that the state has done so; this could be a risky assumption to make), the court should consider whether the children's interests are better served by maintaining the state foster care placement over transfer. Similarly, if the parents are seeking transfer, but are located 300 miles away with no reliable transportation, the court may find it easier to maintain a tribal presence in the state proceeding at that location, rather than deal with the attendant issues regarding long-range visitation and court hearings.

Intrinsic factors of tribal culture: While some cases may not appear to be candidates for transfer based on other factors, tribal courts should not shy away from accepting difficult cases, especially if specific cultural factors are in play and would be at risk in state court. Any analysis of transfer by a tribal court judge should include the ability of the tribe to maintain its sovereign and cultural future by maintaining the next generation.

CONCLUSION

In conclusion, transfer of state-initiated juvenile proceedings to tribal courts remains a viable and appropriate option in many cases. Under *S.W. and C.S.*, transfer is clearly favored (absent parental objection). However, the tribal court systems of Oklahoma should carefully weigh the importance of this decision and make a choice in each case that is in the best interests of the parents, the children and the tribe. Just as not all cases or children are best served in the state courts, tribal courts must recognize that many factors may make the tribal court system the less-effective method of dealing with some children and families. The true best interest of a child is served only when tribal court and state courts work to determine the best forum in each case that involves an Indian child.

1. *Mississippi Baand of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597 at 1601 - 1602, 104 L.Ed.2d 29 (1989).

2. *In Re Larissa G.*, 43 Cal. App. 4th 505, 51 Cal. Rptr. 2d 16 (Cal. App. 1st 1996); *Matter of Welfare of B.W.*, 454 N.W. 2d 437 (Minn. App. 1990); *Matter of GLOC and TJM*, 668 P.2d 235 (Mont. 1983); *In the Interest of Armell*, 550 N.E. 2d 1060 (Ill. App. Dist. 1, 1990); *Matter of TS*, 801 P.2d 79 (Mont. 1990); *In Re Bird Head*, 331 N.W.2d 785 (Neb. 1983); *Matter of NL*, 754 P.2d 863 (Okla. 1988); *In Re JRH*, 358 N.W. 2d 311 (Iowa 1984); *Matter of AL*, 442 N.W.2d 233 (S.D. 1989); *In Re Robert T.*, 200 Cal. App.3d 657 (Cal. 1988); *Matter of Wayne R.N.*, 757 P.2d 1333 (N.M. 1988); *Matter of MEM*, 635 P.2d 1313 (Mont. 1981).

3. *In the Interest of Armell*, 550 N.E.2d 1060 (Ill. App. Dist. 1, 1990).

4. *Interest of K.D.*, 630 N.W.2d 492 (S.D. 2001); *In Re Larissa G.*, 43 Cal. App. 4th 505, 51 Cal. Rptr.2d 16 (Cal. App. 1st 1996); *Matter of Adoption of Baby Girl S.*, 690 N.Y.S.2d 907 (NY Surrogate's Ct. 1999). In *K.D.*, the court found that the rejection of transfer remained in place even after the parent's rights were terminated.

The converse is also true: that a request to transfer should trigger the necessary transfer hearing. *Interest of Shawnda G.* 634 N.W.2d 140 (Wis. App. 2001).

But see *Matter of Andrea Lynn M.*, 10 P.3d 191 (N.M. App. 2000), in which the New Mexico Court of Appeals finds that a trial court's transfer to Navajo Court over the objection of the father was proper, based upon the current domicile of the parties and the failure of the father to prove that the child was not residing in Indian country at the time of the case; the court further found that the transfer followed the "congressional intent underlying ICWA."

5. *Matter of GLOC and TJM*, 668 P.2d 235 (Mont. 1983); *Matter of SZ*, 325 N.W.2d 53 (S.D. 1982).

6. *Adoption of S.W. and C.S.*, 2002 OK CIV APP 26, 41 P.3d 1003 at 1008 (Okla. App. 2002).

7. *Adoption of S.W. and C.S.*, 2002 OK CIV APP 26, 41 P.3d 1003 at 1009 (Okla. App. 2002).

8. *Adoption of S.W. and C.S.*, 2002 OK CIV APP 26, 41 P.3d 1003 at 1009 (Okla. App. 2002).

9. *Id.*

10. *Adoption of S.W. and C.S.*, 41 P.3d 1003 at 1010 (Okla. App. 2002).

11. *Id.*

12. *Adoption of S.W. and C.S.*, 41 P.3d 1003 at 1010 (Okla. App. 2002).

13. *Adoption of S.W. and C.S.*, 41 P.3d 1003 at 1011 (Okla. App. 2002).

14. *Adoption of S.W. and C.S.*, 41 P.3d 1003 at 1011 (Okla. App. 2002).

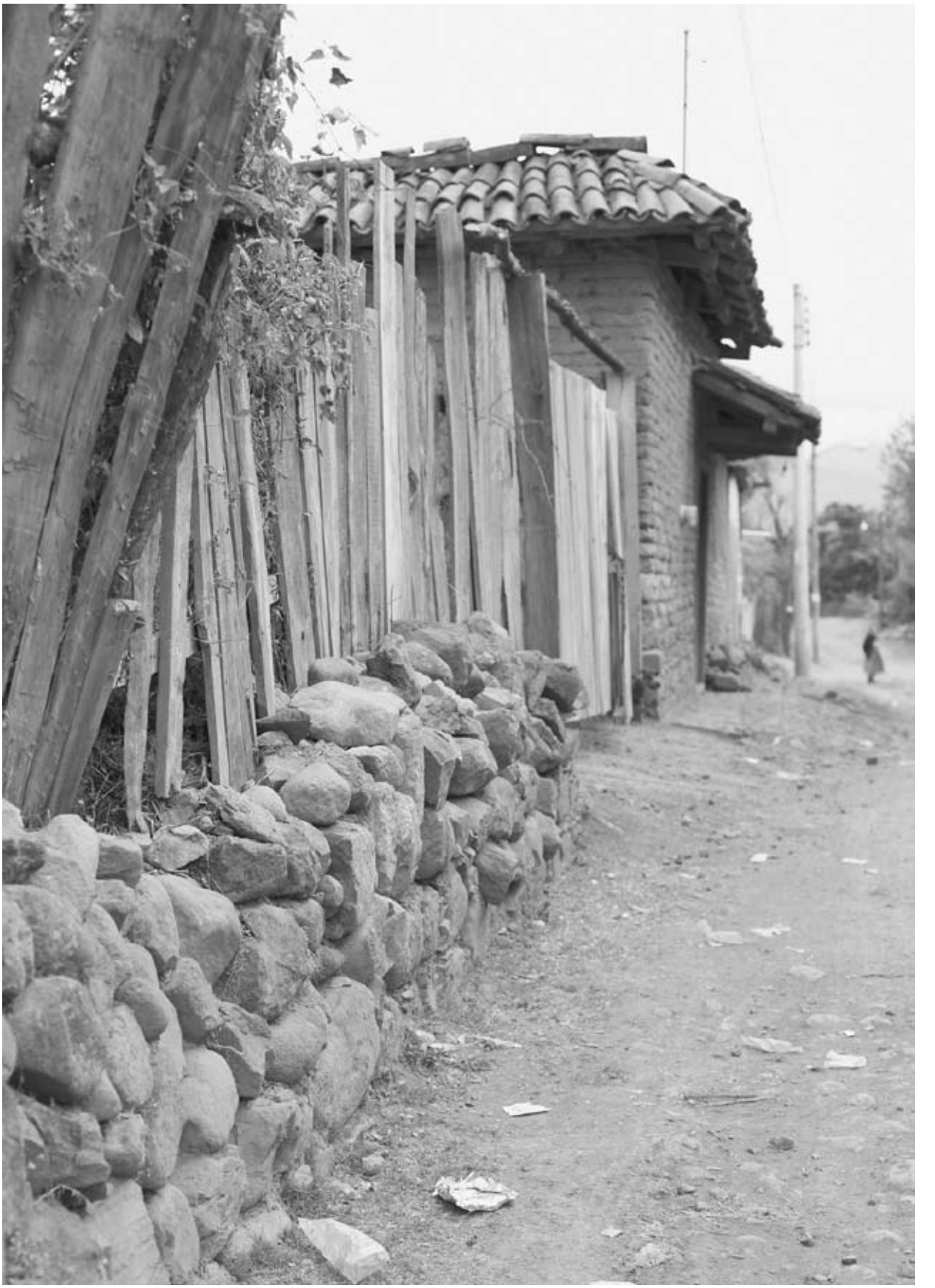
15. *Id.*

16. See *In the Interest of C.Y.*, 925 P.2d 447 (Kan. App. 1996). Oklahoma courts have not addressed this issue.

17. Under 1911 (b) the tribal court has the right to decline the transfer of the case; this right does not extend to the tribe per se. A social worker of, tribal chair, or counsel person does not have the ability to decline transfer; the law provides this exclusively to the tribal court.

ABOUT THE AUTHOR

C. Steven Hager is the director of litigation at Oklahoma Indian Legal Services Inc. He is the author of The Indian Child Welfare Act: Case and Analysis, now in its 14th edition. He is also a contributing author to the Child Fatality Review, published in 2008. He graduated from the University of Oklahoma College of Law in 1987.



Indian
LAW

The Need for Increased Resources in Indian Legal Aid

Oklahoma Indian Legal Services

By Colline Wahkinney Keely

Legal Services Corporation (LSC) funds 137 legal aid offices in the United States, providing basic legal assistance to low-income people with civil legal issues. In Oklahoma, Legal Aid Services of Oklahoma (LASO) provides basic field services to Oklahomans in need. However, there is another legal aid office that provides specialized assistance to Oklahoma's Indian population – Oklahoma Indian Legal Services, also known as OILS.

Founded in 1981, OILS is preparing to celebrate its 29th year of providing free legal services to Oklahoma Indians who are attempting to navigate the myriad of federal, state and tribal laws that impact their daily lives. Indian land titles, Indian probate proceedings and estate planning, Indian child welfare, Indian housing and tax are just a few examples of the types of issues for which OILS provides direct legal representation to low-income Native Americans in Oklahoma. OILS continues service today as one of only five independent legal aid organizations that serve the Native American community in status related legal issues. OILS is a 501(c)(3) organization funded in part by LSC, the state of Oklahoma Legal Services Revolving Fund, the Oklahoma Bar Foundation, the Internal Revenue Service, and tribal and private donations.

OILS CLIENT BASE AND QUALIFICATIONS

OILS clients must first be a member of a federally-recognized Indian tribe and reside within the state of Oklahoma. Further, the applicant must be financially eligible under LSC guidelines and have a meritorious case under the guidelines issues by the OILS Board of Directors.

By way of background, Oklahoma is home to 38 federally recognized Indian tribes and almost 392,000 American Indians, which is almost 10 percent of the state's population.[1] The 2000 census reported that 20 percent of Oklahoma Indian people are below the poverty line compared to less than four percent of the general population.[2] The population below poverty includes 16,487 Indian families.[3] Per capita income among Oklahoma Indians is 70 percent of other citizens, at $12,097 a year.[4] The median Oklahoma Indian family income is $32,627, compared to $40,709 for the general population.[5]

Nationally, the rate of poverty for Indian elders is two and a half times that of non-Indian populations, with nearly one quarter of all American Indians over 65 below the federal poverty level.[6] This compares to less than 10 percent for the general population.[7] American Indian children in poverty is a staggering 31.61 percent, compared to 16.39 percent in the general population.[8]

Indian participants in the labor force have twice the rate of unemployment as non-Indian workers."[9] In 2000, this rate was 12.39 percent, compared to 5.72 percent for the non-Indian population.[10] Nearly one in four non-Indians graduate from college. Only one in nine American Indians do so.[11] While the poverty faced by many Native Americans exacerbates their unique legal problems, it is not the creative force behind those issues.

SPECIALIZED LEGAL SERVICES: INDIAN PROBATE AND ICWA

The legal needs for Native Americans are frequently included with other disadvantaged groups who have special legal needs, such as ethnic and racial minorities, the elderly, veterans and migrant workers. At one level, low-income Native Americans share a need for services provided by LASO and other service providers. However, one must also look at the laws that deal specifically with Indian people in order to understand the scope of the justice gap in Indian country, both in Oklahoma and across the nation. It should be remembered that being an Indian is a political classification, not a racial one. Low-income Native Americans possess a host of legal problems unique to their political status as tribal members.

Nowhere is the complexity of Indian status-related legal issues more evident than in the area of Indian land titles and probates. In June 2006, the American Indian Probate Reform Act (AIPRA) created drastic changes for Indian heirs. Intestate succession laws were changed to create an Indian probate code that contained significant variations from uniform probate codes. As results of those changes, Indian trust lands do not automatically pass to the heirs of a decedent; indeed, the land may be taken from the family and escheat to the Indian decedent's tribe. "Trust lands" come from the Dawes Act of 1887, also called the General Allottment Act. This law authorized the allotment of Indian territory to individual Indians.[12] This land became known as trust land because it was held in trust by the United States for the benefit of the landowner.[13] Trust land cannot be sold without a lengthy Bureau of Indian Affairs (BIA) approval process; it cannot be leased without approval, and it cannot be adversely possessed or encumbered through legal process. Probate of trust land is done by administrative law judges in the Department of Interior; state courts do not have probate jurisdiction over trust land.

Indian landowners often did not prepare wills dealing with their trust land, instead letting their heirs inherit the land as tenants in common, generation after generation. The undivided interests became smaller and more fractionalized with the passing of each owner. The result is hundreds of owners often distantly related and scattered across the nation.

AIPRA was intended to remedy these issues by addressing wills, intestate succession and probate of Indian land under tribal and federal law.[14] While the ostensible intent of AIPRA is to consolidate fractionated interests in Indian trust allotments, the statute has developed into a trap for the unwary. Many of the tribes in the United States are wrestling with the issue of fractionated ownership of Indian allotments, probate backlog and an increasing number of applications for will drafting services. And the consequences of not having a will are far more devastating to individual Indians owning trust allotments than ever before. As a result, Indians who own interests in trust allotments need a will and those already having a will may need to have it reviewed by an attorney with an understanding of AIPRA, which is enormously complicated. The problems are only compounded by the difficulty in accessing tribal members to advise them of the changes in the law.

"Nowhere is the complexity of Indian status-related legal issues more evident than in the area of Indian land titles and probates."

At the same time AIPRA went into effect, the BIA stopped assisting trust land owners with simple will preparation. The result of these separate events was a perfect storm in American Indian probates. At the very time that Indian landowners could lose their land if they fail to properly prepare for the future, the government agency responsible for their interests decided it would cease those services. Consequently, the increase in the need for will drafting services has been overwhelming; hence, the need for additional funds has increased as well.

The citizens of the Five Civilized Tribes have their own specific and unique requirements regarding their interests in tribal allotments. The heirs to restricted property of these allotments must be judicially determined in the district courts of the state of Oklahoma with notice given to the area director of the Bureau of Indian Affairs. One of the major problems in land titles of the allotments of these tribes is that probates are simply never done. Many of the land owners cannot afford to hire attorneys. There are instances where revenues from grazing or oil and gas leases are deposited in accounts held by the BIA and remaining there because entire families, often living in poverty, are unaware that the money is theirs to claim when the heirs are judicially determined. OILS is able to help recover these assets by probating these Indian estates. Some of the uses to which our clients have put these assets include college education, home ownership, health care and consumer purchases.

A similar issue that can trip up the unwary is found in the Indian Child Welfare Act, passed in 1978 to address inequities in the treatment of Indian children in state courts.[15] The law creates a unique combination of factual and legal issues that lead to almost constant appellate court action. For example, in 2009, in addition to the 60 *published* ICWA opinions that have already been issued by courts nationally, there have been 191 *unpublished* decisions.[16] The act is vital to the well-being of Indian people for one simple reason: Indian children are much more likely to be removed from their families. A 2005 study by the General Accounting Office found that while Indian children make up 25 percent of the children in custody in Oklahoma, they are only 10 percent of the general population.[17]

OILS works with the Oklahoma courts to provide assistance and information, as well as direct litigation, in the Indian Child Welfare Act. OILS believes that most errors involving the ICWA result from misunderstandings regarding the law. To that end, OILS works to provide education to attorneys, tribes and social workers, to protect Indian children, tribes and families.[18] OILS also provides guardian ad litems for children in tribal court proceedings.

CONCLUSION

These are just a few of the examples of the unique laws faced by Native Americans which have increased the burdens and responsibilities for Indian Legal Services. Funding increases are needed to adequately address the justice gap in the Native American community. For additional information or to donate, please call (405) 943-6457 or visit www.oilsonline.org.

1. Stella U. Ogunwole, 2002, The American Indian and Alaska Native Population: 2000, U.S. Census Bureau, Census 2000 Brief at Page 5, C2KBR/01 15.
2. U.S. Census Bureau, Census 2000 Demographic Profile Highlights: Oklahoma, American Factfinder, http://factfinder.census.gov.
3. *Id.*
4. *Id.*
5. *Id.*
6. 1990 Census of Population and Housing, Summary Tape File 3, Table P119; Census 2000, Summary File 4, Table PCT142.
7. *Id.*
8. Census 2000, Summary File 4, Table PCT142
9. Census 2000, Summary File 4, Table QT P24
10. *Id.*
11. Census 2000, Summary File 4, Table PCT64.
12. The act also freed ninety million acres, two-thirds of all Indian trust land, for private non-Indian ownership. The consequences of this are still being felt today as tribal sovereignty, jurisdiction, taxation and other issues that are affected by the status of the land within the boundaries of an Indian reservation.
13. Individual Indian allotments held by the Five Civilized Tribes in Oklahoma, as well as the Osage, are called "restricted property." This means that the land is restricted against alienation, and must follow specific protocols to lease, sell, or probate it, including the approval of a state court judge prior to any of these events.
14. Allotments made to members of the "Five Civilized Tribes" and Osage Tribe in Oklahoma are called "Restricted land." These probate cases must be probated in Oklahoma state courts utilizing entirely different laws, found at 25 U.S.C. §373 and §375, as well as non-codified congressional acts. For an Indian person of multiple tribes, two and even three separate probates may be necessary to address the legal issues of probate.
15. See Hager, C. Steven. *The Indian Child Welfare Act: Case and Analysis*, 2009 edition, Oklahoma Indian Legal Services, Oklahoma City, Oklahoma.
16. Because of the high number of cases in the ICWA, Hager publishes his book on CD-ROM and updates it annually so that practitioners can stay on track with the current law.
17. Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States, GAO 05 290 at Page 13, United States Government Accountability Office, April, 2005.
18. Oklahoma also has established a Post-Adjudication Review Board (PARB) that specializes in the Indian Child Welfare Act. The Board includes attorneys and tribal social workers and examines juvenile cases in Oklahoma County, Oklahoma, to assist the Courts in difficult cases.

ABOUT THE AUTHOR

Colline W. Keely has served as executive director of Oklahoma Indian Legal Services since 2001. She is currently the treasurer of the Oklahoma Indian Bar Association and is past chair of the OBA Indian Law Section. She also serves as a steering committee member of the National Association of Indian Legal Services. She graduated from the OU College of Law in 1987. Ms. Keely is a member of the Comanche Nation.

Indian
LAW

Current Issues in Indian Child Welfare Policy

Foster Care Payment Contracts

By Casey Ross-Petherick

The Indian Child Welfare Act (ICWA)[1] sets standards for custody cases involving American Indian children. The legislation was passed by Congress in 1978, during the renaissance of federal Indian policy toward a model that encourages self-determination by tribal governments. The statue sets forth several congressional findings,[2] among which is recognition of the special relationship between American Indian tribes and the United States government. The statute also confirms that state governments often fail to recognize the unique cultural standards of American Indian families. In response to these findings and circumstances, Congress set forth specific procedures for placement of American Indian children when they are removed from their homes.

ICWA was necessary to stop the unwarranted removal of American Indian children from Indian families. In the decades leading up to passage of ICWA, federal policy was not supportive and deferential to native families. Indian children were removed from their homes, not because of abuse or neglect, simply for *being* Indian. These children were placed in boarding schools, where they were taught to dress, speak and behave like non-Indians. The non-Indian teachers prohibited speaking of native languages and practice of traditional Indian religion. Stories of these events have been handed down by the victims, who are now elders in tribal communities. Victim's children, grandchildren and great-grandchildren still feel the results of the federal policy of forced assimilation, as these events are still very much in the forefront of the memory of tribal communities.

Since passage of ICWA, state courts and tribal courts have grappled with compliance, working toward finding workable solutions that protect the best interests of Indian children. State social workers and tribal Indian child welfare workers work across systems to address the unique needs of Indian children.

FOSTER CARE AGREEMENT CHANGES

One mechanism for collaboration between state and tribal agencies is developed under an agreement between the tribes and the state on foster care payments for Indian children. The agreement defines the roles of the state social workers from the Oklahoma Department of Human Services

(OKDHS) and the tribal Indian child welfare workers from several of the 38 federally recognized tribal governments in Oklahoma. These agreements have been in place for several years, and have been rarely modified in substance and form — until now.

The proposed agreement has been delivered to several tribes in Oklahoma. The proposed foster care agreement makes several substantive changes. Nearly every section of the nearly 20-page document is altered in some way. Some changes are technical in nature and have little, if any, substantive effect on service providers. However, some sections are very different than agreements from previous years and warrant serious consideration for tribal governments contemplating signing. A close examination of the major issues is required for meaningful agreement between the parties.

Several sections have been moved from their original locations in the document to other sections. Some of these changes are purely technical to make the document flow better, while others make a bigger impact on the agreement. For example, a change that moves a section regarding tribal child welfare services provision from the "Assurances" section to the "Expectations" section of the agreement changes the relationship from one of collaboration between the state and the tribe, to one of attempted dictation of tribal policies and procedures.

Other changes "water down" the requirements imposed on the state. For example, the section regarding notification by OKDHS to the tribe of allegations involving an Indian child changes the requirement from 24 hours after the removal to "as soon as possible" after the removal. The notification section also changes the requirements for OKDHS regarding compliance with ICWA and the Oklahoma Indian Child Welfare Act (OICWA), by watering down the language "OKDHS *shall conform* with provisions of the ICWA and OICWA," substituting in its place, "OKDHS *shall make every effort to conform* with the provisions of the ICWA and OICWA."

In an altogether new section, the proposed agreement contains a broad records provision, requiring tribes to maintain certain records. The section also permits the wholesale audit and no-notice examination of tribal custody children's records by the U.S. Department of Health and Human Services, OKDHS, the Oklahoma State Auditor and Inspector and any other "appropriate state and federal entities." Although accountability and transparency is important, tribal advocates feel that privacy and tribal sovereignty should not be disregarded, and that there is a possibility for abuse of sensitive records involving Indian children.

The proposed agreement contains a new section for information security, which appears to be standard boilerplate language. However, prospective tribal signatories to the agreement should pay particular attention to additional requirements imposed on the tribe, including an annual audit of information security risk, which must comply with state standards as approved by the Office of State Finance. This new requirement does not appropriate any funding for compliance efforts. This new section also requires compliance with federal information processing standards,[3] and requires that tribes develop continuity and disaster recovery plans in compliance with Oklahoma Information Security Policy.[4] Tribes must also submit annual executive summaries of OKDHS' Information Security Office. These additional requirements impose a heavy burden on tribes, and non-compliance may result in withholding of foster care payments.

> "Indian children were removed from their homes, not because of abuse or neglect, simply for *being* Indian."

Another concerning deletion from the proposed agreement relates to indemnity of the parties. The previous agreements contained an extensive indemnity clause, holding the signatories harmless for revocation, termination or violation of the agreement, and setting forth indemnity for the non-violating party by the violating party. The new agreement is silent as to indemnity of the parties. This erasure could impose liability on tribes for issues arising as a result of revocation, termination or violation of the agreement, even if the violation is committed by OKDHS.

Expected implementation issues are also of concern for tribes contemplating entering into the proposed foster care agreement. The agreement references the OKDHS computer networking system, also known as EKids, and requires

tribes to input information into that system. Additional training will be needed for tribes to meet this requirement, otherwise compliance with this section will be difficult to assure.

Additional issues arise when looking at each line of the previous agreement and comparing it to the proposed agreement, including issues of sovereign immunity, training needs, placement preferences and custody standards. Each issue is important, and tribes should cautiously review the proposed changes before entering into the new agreement.

Tribes working toward entering into a foster care agreement may contact the Oklahoma Indian Child Welfare Association[5] to learn more about the proposed changes. For more information, contact the Native American Legal Resource Center at OCU Law at (405) 208-5017.

1. 25 U.S.C. §1901-1936, 1978.
2. 25 U.S.C. §1901, 1978.
3. FIPS 200.
4. Office of State Finance Core Oklahoma Information security Policy Section 8.0, Business Continuity.
5. The Oklahoma Indian Child Welfare Association serves as the statewide organization for tribal Indian Child Welfare programs in Oklahoma. The Association provides leadership and training on a variety of issues aimed at implementing best practice models for working with American Indian and Alaska Native children. OICWA works on behalf of all 38 federally recognized tribes in Oklahoma. Membership of the Association includes a majority of Oklahoma tribes.

ABOUT THE AUTHOR

Casey Ross-Petherick is the deputy director of the Native American Legal Resource Center at OCU School of Law. Prior to joining the faculty at OCU, she served as the senior legislative officer in the Cherokee Nation's Washington, D.C. office, working on legislative and agency advocacy issues for the Cherokee Nation and its subsidiaries. She is a member of the Cherokee Nation, and she earned her J.D. and M.B.A. from OCU.

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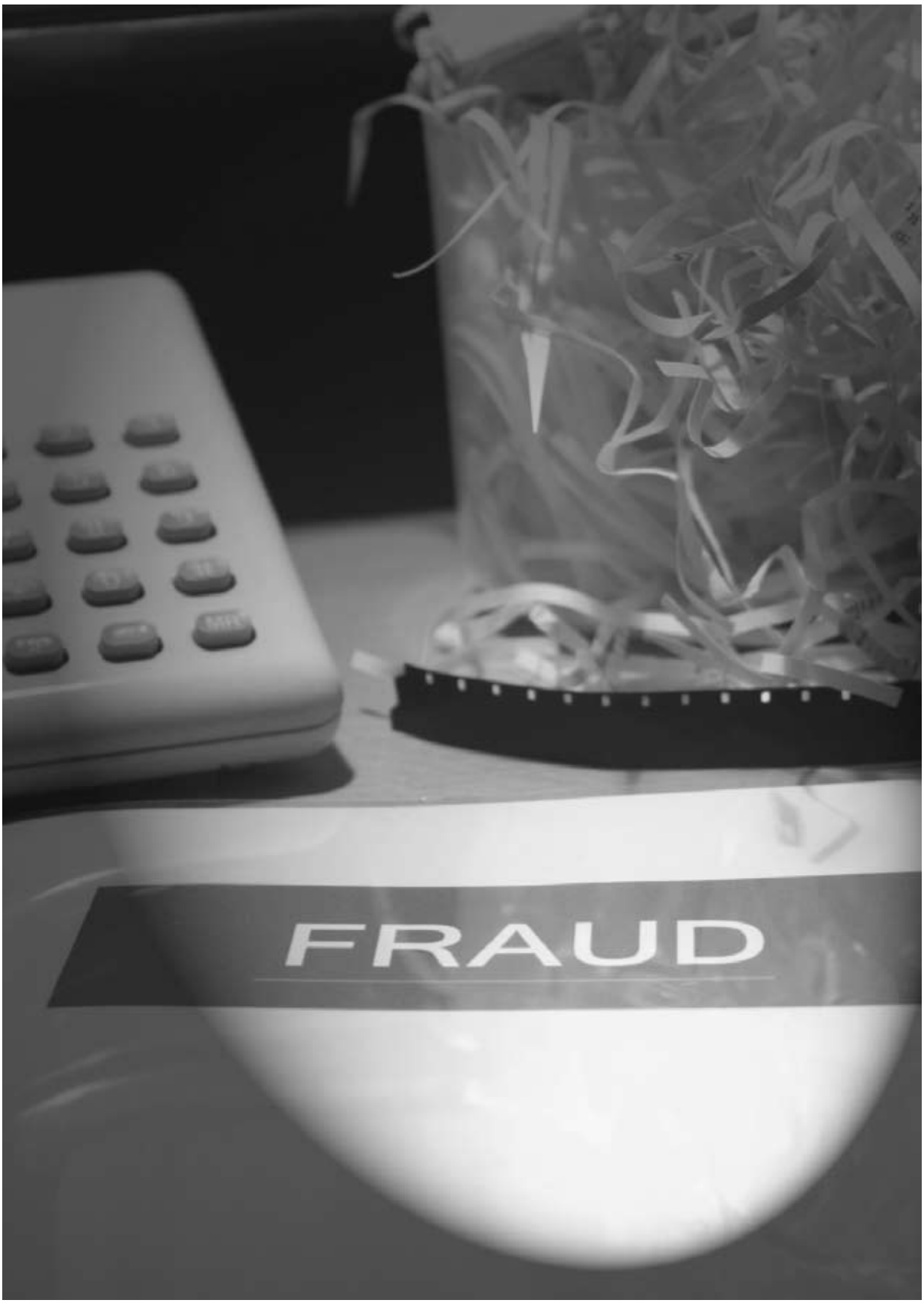
FRAUD

Indian
LAW

Are Indian Nations Subject to the Federal False Claims Act? An Examination of the Federal False Claims Act's Applicability to Oklahoma Tribes

By Mary R. Daniel and Maxwell Carr-Howard

Federal civil actions pursuing fraudulently obtained federal funds are steadily increasing. Oklahoma Tribes regularly receive millions of dollars in federal funding, so each tribe should be aware of the new enforcement focus. One of the major tools the United States uses to investigate fraud and recover money obtained through fraudulent conduct is the federal False Claims Act (FCA). But it is unclear whether the FCA can be applied to Indian Nations in general or to Oklahoma Tribes in particular. This article will examine whether the FCA can be used to recover funds from Oklahoma Tribes, and will offer some strategies for Oklahoma Tribes to avoid potential FCA liability.

FEDERAL ANTI-FRAUD EFFORTS ARE GROWING NATIONALLY

While the federal government pursues fraudulent claims in nearly every industry that receives federal funding, healthcare and the defense industry are the most scrutinized. Between 1987 and 2008, the Civil Division of the United States Department of Justice (DOJ) pursued a total of 10,063 referrals, *qui tam* actions and investigations.[1] Of those, almost 40 percent involved the Department of Health and Human Services (HHS) and almost 24 percent involved the Department of Defense (DOD). DOJ recovered a total of $21 billion from all fraud between 1987 and 2008.[2] The amount recovered for each agency is substantial.[3] HHS comprised 66 percent of the recovery, resulting in the agency recouping $14 billion.[4] DOD constituted 18.5 percent of the recovery, resulting in the agency recouping nearly $4 billion.[5] While any recipient of federal funds should be prudent and careful, healthcare providers and defense contractors should be extremely diligent.

THE FALSE CLAIMS ACT IS A POWERFUL TOOL PERMITTING BOTH PRIVATELY AND PUBLICLY INITIATED ACTIONS

To successfully pursue an FCA claim, the plaintiff must show that: 1) "any person" presented a claim for payment to be presented to an agent of the United States; 2) that was false or fraudulent; 3) knowing the claim to be false or fraudulent (or deliberate ignoring or reckless disregarding the falsity of the claim); and 4) that the United States suffered damages as a result of the claim.[6] The FCA was recently amended, but the amendments have not yet been significantly analyzed in case law. Therefore, the majority of the article will focus on the FCA before the 2009 amendments. The potential impact of the 2009 amendments will be discussed below.

What makes the FCA a popular enforcement tool is the *qui tam* provision, which allows anyone who knows about a potential FCA claim, referred to as a *qui tam* relator, to bring an action against the defendant on behalf of the government.[7] The *qui tam* relator is frequently referred to as a "private" attorney general. After the relator files a *qui tam* action, the government has 60 days to determine whether it will intervene.[8] Even if the government decides not to intervene, the *qui tam* action may still proceed.

If the FCA action is successful, and the defendant must pay the government back, the *qui tam* relator shares 15-25 percent of the recovery if the government intervenes,[9] and 25-30 percent of the recovery if the government does not intervene.[10] The amount that a *qui tam* relator obtains can be significant. In a recent *qui tam* action, the government will recover $2.3 billion from Pfizer for false claims related to Medicare and Medicaid, while six *qui tam* relators will share $102 million.[11] This creates a powerful incentive for individuals with knowledge of wrong doing — and the plaintiffs lawyers who represent them — to bring actions that the government might not bring on its own.

CAN THE UNITED STATES OR 'PRIVATE' ATTORNEYS GENERAL USE THE FALSE CLAIMS ACT AGAINST INDIAN NATIONS?

The 10th Circuit has not examined whether the FCA can be enforced against tribes, but there are a handful of cases from across the country that have examined the issue. The good news is that sovereign immunity is a significant barrier to liability under the FCA. The bad news is that sovereign immunity does not offer full protection from FCA liability. Individual employees, even if they act within their scope of employment, may not be protected from an FCA action. The next part of the article will explore tribal sovereign immunity, and how it affects FCA actions brought against tribes and tribal employees.

Tribal Sovereign Immunity

The Supreme Court has decided that tribes have sovereign immunity,[12] and the immunity cannot be abrogated unless Congress acts to abrogate it,[13] or a tribe expresses a clear and unequivocal waiver.[14] This legal doctrine has been extensively discussed in decisions based in Oklahoma. The most applicable are *Kiowa Tribe of Oklahoma*[15] and *C&L Enterprises*.[16] In *Kiowa Tribe of Oklahoma*, the Supreme Court held that sovereign immunity is governed by federal law, not state law.[17] The immunity extends to both governmental and commercial activities conducted both on and off Indian land.[18] However, the doctrine is not limitless. In *C&L Enterprises*, the Supreme Court held that a contractual arbitration clause waives sovereign immunity.[19]

Courts throughout the country have examined how far tribal sovereign immunity extends to tribal entities. Entities such as casinos that act as "an arm of the Tribe," where the tribe acted to create, own and control the casino, also enjoy sovereign immunity.[20] A tribal college that "serves as an arm of the tribe and not as a mere business" is also protected by a tribe's sovereign immunity.[21] A nonprofit health corporation that is "created and controlled by Indian tribes is entitled to tribal immunity."[22] A tribal housing authority is protected by tribal sovereign immunity,[23] even if the tribe forms a state corporation.[24] Finally, Indian casinos that are not located on Indian land,[25] or tribal for-profit corporations that manage a casino are protected by tribal sovereign immunity.[26]

It is not yet clear how the courts will treat hybrid entities. Some decisions suggest that some entities may be viewed by the courts as "a mere business" not entitled to sovereign immunity. For example, a tribally run company that manages the operations of dialysis centers, both tribal and non-tribal sites, might be viewed as "a mere business" unprotected by sovereign immunity. Particularly if the tribal company operates the dialysis center many miles away

from the borders of the Indian nation. It is not clear if such an entity operating outside of the tribe's borders would qualify as an arm of the tribe. Or, what about tribally created state corporations in other states besides Oklahoma? What about tribal municipalities? Are they more like local governments, or would courts still treat them as an arm of the tribe? The case law is not clear, and how the courts will resolve these questions is not clear.

The Application of the False Claims Act Qui Tam Provisions to State and Local Governments Vary, but All are Subject to Federally Initiated Investigations

1) The *Vermont Agency* Decision: States and State Agencies are not Subject to *Qui Tam* Liability: FCA *qui tam* liability extends to "any person." In *Vermont Agency v. Stevens*, the Supreme Court considered whether states met the definition of person for the purposes of establishing *qui tam* liability.[27] The court held that states and state agencies were not persons under the FCA *qui tam* section, and could not be subject to *qui tam* lawsuits.[28] The court determined that states are sovereigns protected by the 11th Amendment.[29] The court also analyzed how another section of the FCA, 31 U.S.C. 3733, explicitly includes states as a "person." This section allows the attorney general to "issue civil investigative demands."[30] The absence of states in the meaning of "person" in the qui tam section means that states were meant to be excluded from *qui tam* liability. In addition, the FCA assesses punitive damages, and states should generally not be subject to punitive damages.[31] Finally, a similar statute called the Program Fraud Civil Remedies Act of 1986 did not include states in the definition of "person."[32]

2) The *Cook County* Decision: Municipalities are Subject to *Qui Tam* Liability: Cook County, Illinois sought to extend *Vermont Agency* to local governments. However, the Supreme Court refused to offer local governments the same protection against *qui tam* lawsuits.[33] In *Cook County v. Chandler*, the Supreme Court held that local governments were "persons" under the *qui tam* provision.[34] The court decided that nothing in the statutory text or legislative history explicitly excluded municipalities and other local governments.[35] The court also determined that the danger of assessing punitive damages against states does not apply to municipalities and other local governments because they do not have sovereign immunity like states.[36]

3) The *Stoner* Decision: State Employees are Subject to *Qui Tam* Liability: Employees of California state agencies thought that *Vermont Agency's* protection would extend to them. However, in *Stoner v. Santa Clara County Office of Education*, the 9th Circuit held that state individual employees could be subject to *qui tam* liability.[37] This liability even extends to employees who act within their official capacity as a state employee.[38] The 9th Circuit determined that states' sovereign immunity is not jeopardized by allowing *qui tam* suits against individual employees.[39]

Cases in Indian Country Analyzing the False Claims Act

1) The *Braun* Decision: Tribes are Not Subject to *Qui Tam* Liability: For several years, Leon Braun accused the Seminole Tribe of Florida of submitting false claims to the government by failing to give accurate financial information to the Bureau of Indian Affairs (BIA).[40] The 11th Circuit, the 8th Circuit and the 2nd Circuit all recognized that the Seminole Tribe was protected from any *qui tam* liability through its tribal sovereign immunity.[41] All of the cases were dismissed.[42] While none of the circuits explained their decision, one may assume that the circuits knew that tribes enjoy sovereign immunity. And, in light of *Vermont Agency*, the circuits probably determined that tribes as sovereigns are similar to states.

2) The *Kendall* Decision: An Entity that is an "Arm of the Tribe" is Not Subject to *Qui Tam* Liability: Tracie K. Kendall accused her former employer, the Chief Leschi School District, a Puyallup tribal corporation, of committing fraud and of firing her in retaliation when she began investigating the alleged fraud.[43] The school district is more like a municipality or local government than a state. However, as a tribal corporation, the school district can be considered a part of the tribe. The Western District Court of Washington took the approach that the school district is an "arm of the tribe," and dismissed the action, which afforded the school protection by the tribe's sovereign immunity.[44] The district court recognized that tribal sovereign immunity is limited only when a tribe consents to a lawsuit, or Congress abrogates the immunity.[45] The district court also determined that the Puyallup Tribe is similar to the state of Vermont because both are sovereigns.[46]

3) The *Menominee Tribal Enterprises* Decision: Tribal Employees are Subject to *Qui Tam* Liability: The government brought an action against Menominee Tribal Enterprises (MTE) and two employees for submitting false claims to the BIA.[47] The MTE managed the forest and road maintenance programs.[48] The government claimed that the MTE billed for over $48,000 of work that was not actually performed, and improperly charged over $78,500 for equipment.[49] The Eastern District Court of Wisconsin considered both the *Vermont Agency* and *Cook County* decisions, comparing a tribe to both a state and a municipality.[50] The district court dismissed the action against MTE because the tribe is a sovereign like a state, and therefore does not meet the definition of a "person" under the FCA *qui tam* provision.[51] And, the district court took it one step further by deciding that the entire FCA, not just the *qui tam* provision, is inapplicable to states, and therefore tribes.[52] However, the district court determined that the tribal employees, like the *Stoner* state employees, met the definition of a "person" under the FCA, and could be subject to *qui tam* liability even when acting in their official capacity.[53] And, like the *Stoner* court, the district court determined that allowing recovery against the tribal employees did not jeopardize tribal sovereign immunity.[54]

Discussion of Case Law

The FCA cases in Indian Country show that courts are not willing to limit tribal sovereign immunity to allow an FCA claim to proceed against a tribe. It is an interesting progression, starting with tribes enjoying immunity from *qui tam* actions, ending where tribes enjoy complete immunity from the FCA. However, individual tribal employees should be aware that they may be subject to a *qui tam* lawsuit. Oklahoma tribes should also recognize that *Menominee Tribal Enterprises* is limited to the Eastern District Court of Wisconsin but should be concerned that Oklahoma courts could be persuaded to adopt the reasoning in *Menominee*. Will all courts follow the reasoning in *Menominee Tribal Enterprises*, or will some courts recognize FCA liability when an action is initiated by the government? What about when there is an express waiver of tribal sovereign immunity? The next section of the article will focus on healthcare, an area where tribes may be subject to FCA liability.

HEALTHCARE AND THE FALSE CLAIMS ACT

The prosecution of healthcare providers for fraud under the FCA has been a focus of the government in recent years. As discussed above, the rate of return is significant, making the prosecution of healthcare providers worth the government's time and effort. Healthcare providers may be subject to FCA liability for many reasons, but the three main areas that are routinely prosecuted: a violation of the federal anti-kickback statute (AKS), a violation of the Stark law, and falsely billing Medicare and Medicaid. The government, through the DOJ, the Office of the Inspector General of HHS (OIG) or the U.S. Attorney's Office, have tied AKS and Stark violations to the FCA. Several healthcare providers have been exposed to FCA liability through AKS and Stark violations, and have settled with the government for amounts ranging from a few hundred thousand to several million dollars.

The AKS prohibits the "knowing and willful" solicitation, receipt, or payment of remuneration in exchange for a referral that requires the furnishing (including the arrangement) of an item or a service that may be payable by a federal healthcare program — or in exchange for purchasing, leasing, ordering or arranging (including the recommendation) for any good, facility, service or item for which payment may be made by a federal healthcare program.[55] The intent standard is an important element, as a person cannot unwillingly violate the AKS. An example of an AKS violation is knowing and willfully paying a physician a higher salary because he or she will make referrals to your tribal facility that include Medicare or Medicaid. Someone found guilty of violating the AKS may face criminal prosecution, and fines of up to $25,000.[56] In addition, the government can assess civil monetary penalties against a violator,[57] and the violator can be excluded from participation in the federal healthcare programs.[58]

The Stark law prohibits a physician who has a financial relationship with an entity from making referrals for certain designated health services unless an exception can be met.[59] Unlike the AKS, Stark violations are strict liability, and do not have an intent requirement. If the Stark law is violated, the entity that furnished the designated health services may not bill Medicare for those services.[60] Examples of when a tribal healthcare provider may incur Stark lia-

bility include paying a physician who is not employed for medical director services without a written agreement, or allowing an employed physician to collect a productivity bonus for services that were not personally performed by the physician. The Stark law has been referred to as "draconian" because parties do not need to possess any bad intent, and simple mistakes can cost healthcare providers millions of dollars. A healthcare provider that violates the Stark law should pay back all of the Medicare payments received as a result of the tainted relationship.[61] And similar to an AKS violation, the government may also assess civil monetary penalties against a violator,[62] and the violator can be excluded from participation in the federal healthcare programs.[63]

Simple billing errors may also lead to liability under the FCA. At some point, almost every healthcare provider encounters a billing error that resulted in an overpayment from Medicare or Medicaid. It have may have been something as simple as a coder error. In the past, some entities would fix the problem, but would simply keep the overpayment. This approach is problematic, and has led to million dollar settlements between the government and several healthcare providers.[64]

Tribal Healthcare Providers and Medicare

For Medicare funds, tribal healthcare providers may be insulated from FCA liability because of tribal sovereign immunity. Neither the AKS or the Stark law contain an explicit abrogation of tribal sovereign immunity. However, from the OIG's perspective, the AKS may be applicable to tribes. In 2001, a tribe submitted a request for an advisory opinion to the OIG.[65] The proposed arrangement was a 10 percent discount for services provided to the patients of the tribal health facility. The OIG considered the arrangement a "routine waiver of the Medicare copayment," which the OIG views with suspicion. However, the OIG concluded that it would not impose sanctions against the tribe. The OIG did recognize that there is a unique relationship between the government and "sovereign Indian nations." Interestingly enough, the OIG did not even consider whether it had the authority to impose sanctions, it just assumed the power. Arguably, because the AKS does not have an explicit provision that includes tribes, the OIG may have overstepped its authority. We may not know the ultimate conclusion until another tribe submits an advisory opinion.

Tribal Healthcare Providers and Oklahoma Medicaid

Many tribal healthcare providers participate in the Oklahoma Medicaid program. The Oklahoma Health Care Authority has made a concerted effort to respect tribal sovereignty. None of the provider agreements contain an explicit waiver of sovereign immunity. But, there is one provision that tribal healthcare providers should be aware of because it could subject them to potential FCA liability. In all of the agreements, there is a section regarding the satisfaction of claims.[66]

> Satisfaction of all claims will be from federal and state funds. Any false claims, statements, or documents, or any concealment of a material fact may be prosecuted.

While this is a blanket statement, it is clear that any "false claims" may be prosecuted. If a federal court treated this statement as an explicit waiver of sovereign immunity, similar to the *C&L Enterprises* arbitration clause, this may subject Oklahoma tribes who participate in Oklahoma Medicaid, or their employees, to FCA liability.

Generally, a waiver of sovereign immunity made by a tribe must be clear and unequivocal, or Congress may abrogate it. So, the question is whether a tribe that agrees to have false claims prosecuted is giving a clear and unequivocal waiver of sovereign immunity. While it does not explicitly state that a tribe is waiving their immunity, a court, in light of *C&L Enterprises*, could determine that merely agreeing to prosecution is enough to waive a tribe's immunity. Perhaps *Vermont Agency's* reasoning would be persuasive enough to prevent tribal prosecution under this agreement section. However, the state of Vermont did not explicitly waive its immunity. Would *Vermont Agency's* protections apply if a court determined that agreeing to prosecution is a waiver of tribal sovereign immunity? Moreover, would this subject a tribe to *qui tam* liability? One simple way to avoid these issues is to add a sentence at the end of the section stating that by agreeing to prosecution, a tribe is not waiving its sovereign immunity.

AMENDMENTS TO THE FALSE CLAIMS ACT

The FCA was recently amended, effective on May 20, 2009. The changes are significant, and reverse a recent Supreme Court decision inter-

> Generally, a waiver of sovereign immunity made by a tribe must be clear and unequivocal, or Congress may abrogate it.

preting the FCA. In *Allison Engine v. Sanders*, the Supreme Court added an intent element to an FCA action.[67] To be liable under the FCA, the government and/or *qui tam* relator had to show that the defendant intended "to get" false claims "paid or approved by the government."[68] The amendments eliminated this requirement. Instead, the making, using, or causing to be made or used a record or statement "material" to a false or fraudulent claim invokes FCA liability.[69] Material means to have "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[70] Because the intent requirement has been eliminated, these changes make it easier to prove an FCA claim.[71]

Another change broadens the scope of the FCA. The definition of claim now includes a request or demand for money or property that is presented to the government, or an agent of the government, regardless of whether the government has title to the money or property.[72] This means that entities could be liable for false claims submitted to a government contractor, so long as the government contractor receives federal funds, and regardless of whether federal funds actually paid for the false claims.

One disturbing change is the treatment of obligations and overpayments. Any person who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government"[73] is now liable under the FCA. An obligation under the FCA means "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment."[74] While Medicare and Medicaid overpayments have been an issue under the FCA (as discussed above), this change now applies to any overpayment of federal funds. And, liability can result from both the action or inaction of a party.

Even without actual knowledge, a person who acts with reckless disregard or deliberate ignorance of an obligation or overpayment could also be liable. With the use of billing and claims software, many healthcare providers have automated billing systems, so that an overpayment should, theoretically, be easier to detect. The reckless disregard standard may make healthcare providers liable if they simply fail to notice an automated process that results in an overpayment, or fail to enact an automated process that should detect an overpayment. The only circumstance that the knowing retention of overpayments may not invoke the FCA is when a process mandated by statute or regulation allows for the reconciliation of cost reports and other financial processes. Once this process is complete, or the submission of payments is final, FCA liability would apply to any overpayments knowingly retained.[75]

Oklahoma tribes must be aware of these changes because they may invoke FCA liability in areas not previously contemplated. However, another way to view the changes is in favor of tribes. Congress had the opportunity to explicitly waive tribal sovereign immunity when it passed the FCA amendments, and the lack of discussion about tribes in the text of the statute or the Senate Report may mean that Congress has not expressly abrogated tribal sovereign immunity for the purposes of FCA. Even with this view, in light of *Menominee Tribal Enterprises*, individual tribal employees must still be aware of potential FCA liability.

CONCLUSION AND RECOMMENDATIONS

Oklahoma tribes need to become more cognizant of the prosecution of the FCA. Healthcare providers already conduct routine training, but the content may need to include information related to individual liability under the FCA. And, in general, all programs that receive federal funding should undergo annual training on the FCA. Below are some specific recommendations.

1) All programs, departments and tribal entities should conduct compliance training on an annual basis. The training should discuss the FCA. Individual employees should understand that they may be personally liable under the FCA and may not be protected by the tribe's sovereign immunity.

2) The tribe should develop an anonymous reporting mechanism so potential FCA issues may be reported to the administration, and the issue can be fixed before FCA liability attaches. Examples include a toll-free number with a voicemail system, a general drop box located in a break room or other central meeting area, or a general e-mail drop box that someone is required to check on a daily basis.

3) The tribe should have policies in place to address a potential FCA issue. There should be a period of investigation, and an analysis of the potential FCA issue. All of this should be documented. The potential FCA issue should then be corrected, including the imposition of disciplinary action against employees.

4) The tribe should be mindful of due process. Do not let the FCA investigation turn into a witch hunt or become an instrument of tribal politics. To avoid this, consider hiring a third party to conduct the investigation. These third parties include law firms, consultants or auditors.

5) Once the investigation is complete, the tribe should consider whether it needs to self-disclose to the government, and if so, to which entity the self-disclosure should go to. In healthcare, self-disclosures may go to the OIG, or they may go the U.S. Attorney's Office. Legal counsel may need to be advised to help the tribe make the best determination.

6) If the tribe uses some sort of billing and claims software to handle reconciliations and audits of federal funds, be sure to have a thorough understanding of the process. Unintentional errors creating an overpayment of federal funds, or the lack of detecting an overpayment may create FCA liability. A third party, such as a consultant, auditor or financial advisor, may be able to assist with this analysis.

7) Tribes need to keep up with current law and the enforcement of the FCA. Assign a person to annually review the law to determine if there is any policy that needs to be updated.

Based on the statutes, and the case law, whether the FCA can be used to recover funds from Oklahoma tribes is still an open question. However, it does seem very likely that tribal employees are subject to FCA liability, and even *qui tam* liability. While there is an argument that bad actors deserve just punishment, the FCA, especially with the 2009 amendments, may create liability in situations where "badness" or intent is irrelevant. Consider the innocent coder who punches in the wrong code for a Medicare bill, or an innocent physician who does not realize that his or her productivity bonus includes credit for services that he or she did not perform. Oklahoma tribes now have the time to implement effective compliance programs, before the OIG, the government investigator, or the *qui tam* relator comes knocking at the door. Being proactive is the best approach, as it is easier and more cost effective for Oklahoma tribes to avoid FCA liability then to litigate whether the FCA does really apply. Who wants to roll the dice in court when a few hours of training and planning may completely avoid the issue?

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2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
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7. 31 U.S.C. 3730(b).
8. *Id.*
9. 31 U.S.C. 3730(d)(1).
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11. Department of Justice, Office of Public Affairs, www.justice.gov/opa/pr/2009/September/09-civ-900.html.
12. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).
13. *Id.*
14. *Id.*
15. *Kiowa Tribe of Oklahoma v. Manufacturing Tech. Inc.*, 523 U.S. 751 (1998).
16. *C&L Enterprises Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 523 U.S. 411 (2001).
17. *Kiowa Tribe of Oklahoma*, 523 U.S. at 756.
18. *Id.* at 760.
19. *C&L Enterprises Inc.*, 532 at 424.
20. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006).
21. *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000).
22. *Id.* (citing *Pink v. Modoc Indian Health Project*, 157 F.3d 1185, 1188 (9th Cir. 1998)).
23. *Dillon v. Yankton Sioux Tribe Housing Auth.*, 144 F.3d 581, 583 (8th Cir. 1998).
24. *Duke v. Absentee Shawnee Tribe of Oklahoma*, 199 F.3d 1123, 1125 (10th Cir. 1999).
25. *Redding Rancheria v. Super. Ct.*, 88 Cal.App.4th 384, 388-89 (Cal. App. 2001).
26. *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 642 (Cal. App. 1999).
27. *Vermont Agency of Natural Resources v. Stevens*, 529 U.S. 765 (2000).
28. *Id.* at 787-88.
29. *Id.* at 778-82.
30. *Id.* at 783-84.
31. *Id.* at 784-85.
32. *Id.* at 786.
33. *Cook County v. Chandler*, 538 U.S. 119 (2003).

34. *Id.* at 134.
35. *Id.* at 133-34.
36. *Id.* at 131-32.
37. *Stoner v. Santa Clara County Office of Education*, 502 F.3d 1116 (9th Cir. 2007).
38. *Id.* at 1125.
39. *Id.*
40. *Braun v. Seminole Tribe of Florida*, 157 Fed. Appx. 418, 419 (2nd Cir. 2005).
41. *Id.*
42. *Id.*
43. *Kendall v. Chief Leschi School Inc.*, 2008 WL 4194021 (W.D.Wash. 2008).
44. *Id.*
45. *Id.*
46. *Id.*
47. *U.S. v. Menominee Tribal Enterprises*, 601 F. Supp. 1061, 1064-66 (E.D.Wis. 2009).
48. *Id.* at 1065.
49. *Id.* at 1066.
50. *Id.*
51. *Id.* at 1068.
52. *Id.* at 1069.
53. *Id.* at 1070.
54. *Id.* at 1071.
55. 42 U.S.C. 1320a–7b(b).
56. 42 U.S.C. 1320a–7b(b).
57. 42 U.S.C. 1128A(a)(7).
58. 42 U.S.C. 1128(b)(7).
59. 42 U.S.C. 1395nn.
60. 42 U.S.C. 1395nn(a)(1)(B).
61. 42 U.S.C. 1395nn(g)(2).
62. 42 U.S.C. 1395nn(g)(3).
63. 42 U.S.C. 1395nn(g)(3).
64. A Florida hospital settled for $14 million, a Nebraska hospital settled for $4 million, and a D.C. hospital (through the District) settled for $12 million. These settlements are a result of the hospitals failing to disclose overpayments from Medicare, Medicaid or both. *See* www.usdoj.gov/usao/cac/pressroom/pr2006/171.html; www.integriguard.org/wp-content/uploads/St_Elizabeth-10-30-06.pdf; http://newsroom.dc.gov/show.aspx/agency/dmh/section/2/release/14514/year/2008.
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66. Oklahoma Healthcare Authority, www.ohca.state.ok.us/providers.aspx?id=108&menu=56&parts=7551_7553_7555.
67. *Allison Engine Co. v. Sanders*, 128 S.Ct. 2123, 2130 (2008).
68. *Id.*
69. 31 U.S.C. 3729(a)(1)(B).
70. 31 U.S.C. 3729(b)(4).
71. These are the only set of changes that are retroactive to June 7, 2008.
72. 31 U.S.C. 3729(b)(2)(A).
73. 31 U.S.C. 3729(a)(1)(G).
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75. S. Rep. No. 111-10, at 14 (2009).

ABOUT THE AUTHORS

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Judge, Oklahoma Workers' Compensation Court, Position 6
Judge, Oklahoma Workers' Compensation Court, Position 7

[There is no residency requirement imposed upon appointees to the Oklahoma Workers' Compensation Court. To be properly appointed, one must have been licensed to practiced law in the State of Oklahoma for a period of not less than five years prior to appoi ntment.]

Application forms can be obtained by contacting Tammy Reaves, Administrative Office of the Courts, 1915 North Stiles, Suite 305, Oklahoma City, Oklahoma 73105, (405) 521-2450, and should be submitted to the Chairman of the Commission at the same address **no later than 5:00 p.m., Friday, March 5, 2010. If applications are mailed, they must be postmarked by midnight, March 5, 2010.**

Mark D. Antinoro, Chairman
Oklahoma Judicial Nominating Commission

Legislative Monitoring Committee Gears Up for Legislative Session

By Duchess Bartmess

In a continuing effort to use the training and experience of members of the bar and to provide public service to the citizens of Oklahoma, the Legislative Monitoring Committee is already hard at work.

Because of the large number of bills and resolutions introduced in each session of the Legislature, the primary mission of the committee is to assist the legislative process by reviewing language for clarity, for conformance with applicable constitutional provisions and for effect if adopted.

The committee has a specific — though limited — mission. Specifically, the work of the members of several subcommittees is to review legislation as it progresses through the legislative process with an eye to constitutionality, form, clarity, specificity and legal implications or unintended consequences. There are such a large number of bills which have to be written by the legislative staff, read and understood by legislative committees and individual legislators that the Board of Governors determined this was an area of public service which bar members could provide. It was the decision of the board that our experience and expertise can be of service to the legislative process.

The work of this committee does not include any policy analysis or comment.

Unlike most committees of the bar, the Legislative Monitoring Committee does not have regular meetings. Instead, due in part to time sensitivity, the committee members communicate by e-mail. This year, the possibility of teleconferencing has been added to the methods of communication. Another reason for this variation from the usual committee procedure is to allow members who cannot easily drop everything and rush to the city to meet on short notice. Members located anywhere in the state can be actively involved in the day-to-day needs of the committee.

The committee functions only from January until after *sine die* in May. Although several bar committees currently have legislative review or monitoring subcommittees for specialized areas, the need for a general legislative committee to review all introduced legislation is needed.

With the new Legislature beginning in 2009 and continuing in 2010, the committee has three goals: first, to obtain participation from more members around the state by use of

Bills on OBA Legislative Agenda

Only matters that have been approved by at least 60 percent of the members voting at the House of Delegates can be placed on the OBA Legislative Program. The matters set forth below were approved by the House of Delegates at the 2009 Annual Meeting and have been introduced in the Oklahoma Legislature. Both bills are awaiting hearing before the Senate Judiciary Committee.

SB 2039: Clarifies procedure for statewide and single or multiple county licensing of process servers. Amends discovery and disclosure statutes to provide greater detail and explanation for electronic discovery, closely following the Federal Rules of Civil

continued

Procedure. Provides for mandatory disclosure of certain information and protection of confidential or other protected documents. Requires electronic data to be included in response to a request for business records. Addresses the form in which electronic data is to be provided. Allows for "clawback" agreements. Provides for courts to limit or expand the number of written depositions, requests for the production written or electronic data, requests. Includes provisions for partial production of information when the whole category may not be discoverable. Recognizes good faith destruction of documents in the normal course of business and exempts such good faith destruction from being subject to sanctions.

SB 2040: Requires that the fee for a civil jury trial must be paid at the time of pretrial by the party requesting a jury trial.

e-mail communication making it easier to participate in the committee process; second, to coordinate with other committees and sections of the bar in providing a comprehensive review of all introduced legislation; and third, to increase availability to the Legislature the many levels of expertise existing from all areas of the bar.

Another function of the committee is to provide consultation to Executive Director John Morris Williams (and other members of the bar on specific pieces of legislation upon request) with information regarding pending measures which are clear, well written, compatible with existing statutes and constitutional. As always, we serve in an advisory capacity, and do not speak for the bar — that function is left to the Board of Governors and the executive director.

Our purpose remains to provide information, and the committee will communicate using the *Oklahoma Bar Journal* and the Web site as time and space allows about selected bills. Our goal remains to provide assistance in such a manner that will encourage individual legislators to rely on our expertise and objectivity. We will not be taking any position on policy decisions as a bar committee; however, this does not preclude any committee member from communicating with legislators on their own as to their views on a particular policy or item of legislation.

Ms. Bartmess practices in Oklahoma City and is chairperson of the Legislative Monitoring Committee.

OBA Day at the Capitol
Tuesday, March 2
Details at www.okbar.org

FROM THE PRESIDENT

continued from page 348

Indians is casinos, smoke shops, or in certain circumstances, small areas surrounding tribal courts or centers of tribal government. It's almost as though the treaties the U.S. government signed with indigenous peoples 150 years ago promised those lands to the tribes "as long as the sky is blue, the grass is green and the waters flow" included, apparently written in invisible ink, "or until gold, silver, oil or gas is discovered."

In the summer of 2004, my wife and I took our oldest granddaughter to the Grand Tetons and Yellowstone. Included in the trip was a visit to the Battle of the Little Big Horn in southeastern Wyoming between the 7th Cavalry and allied groups of tribes that occurred on June 25, 1876. In a Butte, Mont., museum I found a framed picture of photographs of 13 North American Indian chiefs described as "Chiefs at the Battle of the Little Big Horn." Included in these portraits is Oglala Sioux Chief Gall. I have read virtually every book I can find on that fatal encounter between two civilizations and most accounts attribute the deathblow of Custer to this 6-foot-8-inch, 240-pound Sioux warrior.

Ironically, what many people consider to be the North American Plains Indians' greatest victory over the White Man, resulted in their total defeat in less than 15 years. I thought we should all remember this as we deal with the current worldwide problems and conflicts we are having in our east/west clash of civilizations.

This current monthly edition is dedicated to a description and examination of "Indian Law" with contributions from many talented and knowledgeable lawyers. While I am no expert on Indian law, I have in the past and am currently involved in a case in Cherokee Tribal Court in Tahlequah. My re-examination of tribal law reveals a fascinating amalgamation of traditional Native American legal concepts enmeshed with our common law European legal principles. This exercise is an attempt to reach the never fulfilled compromise of assimilation and retention of individual identity and sovereignty.

UPCOMING EVENTS

The next month is a busy one for our association. On March 2, we have a Day at the Capitol at which we will attempt to convey our views and needs of our association and the legal profession to the Legislature and executive branches of government. The high school mock trial finals are on the same day, followed on March 16 by the OETA Festival and our Board of Governors meeting in Weatherford.

I urge all of you who can to attend the Day at the Capitol to support the goals of our organization and profession.

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A Brave New World

By John Morris Williams

As a member of the National Association of Bar Executives Program Committee, I was asked a couple of years ago to produce a program on the future of continuing legal education (CLE). With the help of our Director of Educational Programs Donita Douglas, I was able to locate one of the top gurus in the world of CLE. As he began his presentation, he said, "There are three things that you need to know about the future of CLE — online, online and online."

This was not particularly breaking news to me. The OBA has been producing online programs both live and archived for some time. It was our belief that this was the future, and our CLE Department was well ahead of the trend. The OBA had already invested in the equipment, contracted with a provider to handle the distribution part of webcasting and our CLE Department had realigned staff to handle this part of the business. That is right, I said business. It is a business and a very competitive business.

The OBA is the leader in CLE presentation in the state of Oklahoma. However, the market share has greatly decreased in the last 10 years. The figures are a bit misleading here. If you take into account all the CLE that is provided by OBA committees, sections and done by staff for groups such as county bar associations and add that to the programming done through the OBA CLE Department, the number would be significantly higher. As we like to say, our biggest competitor is "free." By that I mean the CLE that is offered without charge. A good deal of the "free" CLE is actually taught by OBA staff. Jim Calloway, Travis Pickens and Gina Hendryx do numerous programs all around the state without charge. I am proud that we have these talented staff members who are great presenters. Having attended a number of their "free" presentations, I can personally attest to the fact that they are as good as money can buy.

"The OBA is on the cutting edge of online CLE presentations."

The Mandatory Continuing Legal Education Commission (MCLE) was created when the Oklahoma Supreme Court issued its order mandating 12 hours of CLE, including an hour of ethics. The MCLE Commission is the body that oversees compliance issues and is totally separate and apart from the OBA CLE Department. This group, with the aid of Beverly Petry and her staff, reviews programs for credit eligibility and keeps up with all the individual member credits. With the aid of technology, the OBA has significantly improved the reporting method for its members.

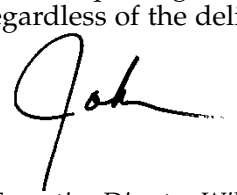
Just when we thought that we had the work stabilized, the mushrooming of online programming has this department now reviewing more than 2,000 different providers on an annual basis. Regardless of the number of attendees, it takes the same amount of time to review the program materials and enter the provider information for a local program with 200 attendees as it does for an online program with only one OBA member participating.

The bottom line is that the vast amount of online programming has created a huge amount of work. But for the use of technology, which cuts out thousands of individual annual paper reports, the MCLE Department would be stretched beyond capacity to get the work done. Just when we thought we had it whipped, "online, online and online" changed the whole game. The work never seems to decrease, it just changes.

The OBA is on the cutting edge of online CLE presentations. Since this involves the use of technology, there are times when it is not perfect. Many of the problems are beyond our control, and we just have to realize that is part of the business. The good news is that the technology is improving, the Internet is becoming more stable and over time the cost of high-tech tools are becoming more affordable. All of this means "online, online and online" will get better, be faster and hopefully more affordable to produce in the future.

For the OBA it is a brave new world. It is a world where electronic data replaces paper and hundreds of CLE providers are offering courses to our members. It is a world where lawyers who used to network and catch up with old friends at CLE courses are now sitting alone at a computer obtaining credit. It is predicted that the large in-person CLEs that we continue to offer in Emerson Hall, or at other venues around the state, will get fewer and fewer as "online, online and online" makes accessible many more course offerings available at the touch of a button.

The OBA is committed to offering the highest level of CLE geared toward Oklahoma lawyers. We are prepared and well positioned for the future. We understand the value of in-person attendance and recognize that many of our members prefer this method to obtain credit. These changes present both challenges and opportunities. The OBA is well prepared to meet the challenges and to capture the opportunities. To sum it up, it is a brave new world of "online, online and online." Your bar association is ahead of the curve and prepared to offer the highest quality CLE and reporting methods to its members regardless of the delivery system.



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

Oklahoma Bar Journal Editorial Calendar

2010

- 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.

Legal Citations: An Interview with Professor Darin K. Fox

By Jim Calloway, Director, OBA Management Assistance Program

One of the first things a law student learns is how to read and create proper legal citations. Back when many of us were in law school, *The Bluebook* citation was the only method of finding court opinions, scholarly articles or most other legal research material. Electronic research was useful for full-text searching, but to cite something, you needed the citation.

Today, of course, often when we want to read an article of any kind we can just click on a hyperlink and to locate these articles we just go to Google. It is a good idea to step back and explore where scholarly citations are in 2010.

To explore this topic, I interviewed Professor Darin Fox, who is director of the Donald E. Pray Law Library and associate professor of law at the University of Oklahoma College of Law. Professor Fox joined the OU Law Library in 2005, and he has been a law professor and law librarian for more than 15 years. He teaches law students how to research the law, emphasizing concepts like cost efficiency, advanced search techniques and the organization of legal publishing. He follows technology closely, and his scholarly interests are focused on how technology is impacting information delivery and research techniques in the legal profession.

Q. Well, let's start off with what is probably a softball question for a law librarian. Given the ability to post links to current cases posted online in many jurisdictions, are scholarly legal citations dead or on the way out?

Answer: You have put your finger on two important issues here. The first relates to the permanence of legal materials on the Internet. The second involves the continuing transition of legal publishing from print to electronic formats and the widespread preference to use electronic resources. The introduction to *The Bluebook* states the following: "The central function of a legal citation is to allow the reader to efficiently locate the cited source." You might think that citing the URL to an established Web site would accomplish the goal of providing permanent and efficient access to legal authorities. Unfortunately, this often isn't the case. Legal citation is still experiencing the growing pains caused by our ongoing transition into the world of digital publishing.

The expectation that online resources will remain consistently available at the same URL over time has not been realized yet. Law librarians have conducted several studies over the past 10 – 15 years regarding the continued availability (or rather lack of availability) of online information cited in law review footnotes. Many readers may be surprised to learn that a huge percentage of online resources cited in law review footnotes are no longer available at the URL provided by the author. A five-year study of law review footnotes found that between 38 percent and 70 percent of URLs cited in law reviews were broken links.[1] One scholar in this area, Susan Lyons, summed up the current situation in this way, "Today the scholarly literature of law, medicine, science and the humanities rests on a foundation of footnotes riddled with broken URLs."[2]

The next question we might ask ourselves, assuming a link to the case we want is available, is "should I be linking to this case?" In other words, is this an authoritative source? Providing links to online resources is very convenient, but currently, links to official government sources are not available for a wide range of legal materials. We are very lucky in Oklahoma to have a Web site like OSCN (www.oscn.net) which is a very comprehensive and free database of government

information. Many states do not have such a system. They simply have not gone backwards in time, digitized their court opinions prior to 1995, and made them available on a free, government Web site, as we have done in Oklahoma. So, we have a situation where most *current* legal authority is available online through government sources, but many states do not have information that is more than 10 or 15 years old available, except through commercial sources like Westlaw, LexisNexis or Fastcase.

When you consider the two reasons described above, we can start to understand why *The Bluebook* continues to prefer citations to print resources whenever possible and states that a writer may be providing a link to the online resource as a parallel citation when this will "substantially improve access to the cited source."[3] It also provides a few exceptions for citing *only* to the online version when the source does not exist in print or when it is "practically unavailable."[4] Until we have both 1) official sources of government information available online and 2) permanent URLs that provide more reliable access to legal authorities over time, we will continue to struggle with this problem.

Q. OK. But if you do have a link to something, shouldn't you include it? I can see where some lawyers would think it was bad form to keep a link secret from them, forcing them to spend more time locating an item because they had only the citation.

Answer: I think you are right that legal information has been heading in that direction for some time, and it is only picking up speed. In 1994, there were just four instances of Web citations in three law review articles. By 2003 there were at least 96,946 citations to the Web in law review footnotes.[5] The growing use of online resources matches what legal interns are reporting too. Every year, I conduct a survey of legal interns at the OU College of Law to see what types of materials they are using on the job. I've been doing the survey now for 15 years. It's probably no surprise that the use of online materials continues to increase, and the use of print is decreasing. Over the past five years, 83 percent of legal interns have responded that they either "*mostly* use online resources" or "*only* use online resources" on the job. Only 14 percent use an equal mix of online and print resources. The primary print resources in use in Oklahoma today are the statutes and perhaps a key treatise that matches the firms' practice area.

I think *The Bluebook* editors, through the language in Rule 18, are trying to ensure that authoritative sources are cited while also recognizing that legal publishing is changing rapidly. It will be a major change to legal citation when we finally reach a point that links to the online version of a document become the stable, authoritative source and the one preferred by *The Bluebook*, and every law review editor and staff member will celebrate when that day arrives.

Q. Dead links are certainly a problem for the Internet and legal researcher, but so is the fact that the only copy of a publication cited may be a hundred miles away. Do you have any tips about accessing hard-to-find law review articles and scholarly publications without making a road trip?

Answer: There is a relatively new product, called HeinOnline, which is slowly making its way into law firms across the country. HeinOnline is a unique product for two reasons. First, it includes PDF versions of each law review which are page images of the print publications. Second, HeinOnline has scanned each journal beginning with the first issue and continuing up through the more recent issues. You may know that Westlaw and LexisNexis often do not have articles older than the mid-1990s. HeinOnline now contains more than 1,300 law reviews and law journals. However, it is important to note that HeinOnline is not a current awareness service. Each journal has a one-to-three year "window" or embargo period before issues can be made available on HeinOnline. For most law reviews, this means that the most current year is not available on HeinOnline. Academic law libraries have had HeinOnline for several years now. Aside from HeinOnline, most of the academic law reviews have posted the most recent 10 – 15 years of their journals on their own Web sites. OU Law Library has a link to a detailed directory of law reviews which indicates of whether full-text is available.

Q. We hear a lot about the problems that newspapers and magazines are having with losing subscribers. Are law reviews in a similar situation? Do you think we will see more access to law reviews online in the future?

Answer: Yes, we are seeing a decline in law review sub-

scriptions. There may be a few reasons for this. As I mentioned above, HeinOnline has created a comprehensive database of law reviews in PDF format starting with the first volume of the journal in most cases. In relation to current legal scholarship, there are many avenues now to gather this information. It is easy to access new journal articles on Westlaw or LexisNexis, even on a pay-as-you-go basis. Many scholars and practicing attorneys are actively writing blogs. Finally, many legal scholars are choosing to make their content available through new databases, like SSRN (Social Science Research Network) and BePress (The Berkeley Electronic Press).[6] These sites allow scholars to create their own personal site for scholarship, post articles and working papers, and even track downloads.

Q. On behalf of lawyers who are quite a few years out of law school, I want to ask what recent developments you have noted relating to your areas of interest.

Answer: Google has been active in the legal arena in past few years. Last fall, Google announced a major new addition of legal materials to its Google Scholar product. It includes all federal case law from 1923 to the present, all U.S. Supreme Court case law from 1791 to the present, and all state appellate and supreme court cases from 1950 to the present. It doesn't include any statutes, regulations or commercial features like headnotes, digest or citators, but it is a major new source of case law accessible with the excellent Google search engine. Google Scholar also includes some law journal content, and it is possible to tell Google Scholar to search only the legal content within the larger Google Scholar database.

Google has been in the news for another reason too. The Google Book Search litigation has been very active. In 2005, Google began scanning the books in 40 libraries, including several major research libraries like Harvard, Michigan, Stanford and New York Public Library. Google did not obtain the permission of authors or publishers prior to scanning the books. The authors and publishers sued Google for copyright infringement. In 2009, the authors, publishers and Google attempted to settle this class-action suit, but there were many objections to the first settlement agreement. A new settlement agreement is being considered now. The Google settlement, if approved, would create a vast online bookstore (not a library) of about 15-20 million volumes. It would give researchers the ability to keyword search a huge database of material, including many works from the last 75 years which are still in copyright and not currently available online.

Westlaw and LexisNexis have announced new interfaces for their research products in 2010. The new version of Westlaw, called WestlawNext, was formally announced on Feb. 1 at the Legal Tech New York show. According to previews, WestlawNext will be more Google-like and will allow researchers to more easily search across multiple databases. This is a major change from how we used to interact with Westlaw — by first selecting a database (or a very small set of databases) and by thinking about the charges related to each database. The pricing model for this type of search will be key, and law firms will still need a mechanism to determine that they have been "thorough" in their search for relevant material. Natural language searching, like Google's search algorithm, which provides relevancy ranking of search results is counter to the idea of thoroughness, unless used with additional tools like digests and citators.

In terms of mobile computing, there have been two new "apps" to facilitate research on-the-go. LexisNexis released a new app for the iPhone within the last few months. Unfortunately, it is limited to retrieving documents by citation only. Fastcase has just released a new iPhone app which permits searching and retrieving documents in the same relevancy ranking format that you see in a Web browser. Both apps are free, though you must have an account to access each service. Regarding Westlaw, if you haven't already used Westlaw's mobile site, wireless.westlaw.com, I highly recommend it. It allows you to search all the major databases in natural language or terms and connectors mode, and the search results are easy to read. This site can be used on any mobile phone with Internet access, not just the iPhone.

1. Mary Rumsey, *Runaway Train: Problems Of Permanence, Accessibility, And Stability In The Use Of Web Sources In Law Review Citations*, 94 LAW LIBR. J. 27, 34 (2002).
2. Susan Lyons, *Persistent Identification Of Electronic Documents And The Future Of Footnotes*, 97 LAW LIBR. J. 681, 684 (2005).
3. See Rule 18.2, THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 153, (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).
4. *Id.* at 156.
5. Lyons at 681.
6. SSRN can be found at www.ssrn.com. BePress can be found at www.bepress.com.

The Rules of Professional Conduct: Read Them Again, for the First Time

By Travis Pickens, OBA Ethics Counsel

If you were to pass on one statute book or e-file from your library that a new lawyer should read in order to become a fine, successful lawyer, which would it be? Civil procedure? I don't think so. They change too often. The evidence code? Probably not. Not everyone goes to trial. The discovery code? I hope not. Discovery statutes and rules can be read as, well, cynical. The U.S. Constitution? Perhaps, but the Rules of Professional Conduct are a better choice. To understand why, one must see the rules in a different way, as different from a long list of restrictions. You should read them again, for the first time.

The rules explain why it is important to be a lawyer and to be a good lawyer. The rules open with the "Preamble: A Lawyer's Responsibilities." The preamble sets out why most of us chose this difficult but fulfilling career.

> [1] A lawyer, as a member of the legal profession, is a representative of clients, an *officer of the legal system* and a public citizen having *special responsibility for the quality of justice.*
>
> [2] *As a representative* of clients, a lawyer performs various functions. As *advisor*, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As *advocate*, a lawyer zealously asserts the client's position under the rules of the adversary system. As *negotiator*, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an *evaluator*, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.
>
> [3] In addition to these representational functions, a lawyer may serve as a *third-party neutral* (*e.g.* judge, arbitrator, mediator), a nonrepresentational role helping the parties to resolve a dispute or other matter… [parenthetical added]
>
> ***
>
> [13] *Lawyers play a vital role in the preservation of society*. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. *The Rules of Professional Conduct, when properly applied, serve to define that relationship.* (emphasis added)
>
> Lawyers make the legal system work. Without the legal system, nothing else works.

Secondly, *the rules, properly understood, protect us lawyers, as much as the general public.* If there were no written, reasonable ethical standards, and lawyers faced the prospect of having to defend ourselves against whispery accusations of vague wrongdoings from the public, it would be a frightening thing indeed. Abuses of the disciplinary process (*e.g.* unfounded grievances) by the public is an everyday fact and risk for lawyers, but imagine what it would be like without relatively clear rules and laws to follow. Very few grievances would be dismissed summarily without specific standards of conduct. The fact that most grievances amount to nothing is precisely because lawyers most often do the right or reasonable thing as defined by a specific standard upon which the conduct can be judged without a hearing and without

further disruption to the attorney's career.

Finally, *the rules, if faithfully followed, are a guide to a healthy and prosperous practice* (which thereby in turn, guards the integrity of the justice system and protects the public). Among other things, the rules stress mastery of subject matter, diligence, effective advocacy, good communication with the client, tasteful marketing, the importance of client confidentiality and integrity, and the value and worth of public service. The rules are we lawyers' book of Proverbs, our Wisdom text. Have you ever known a lawyer you respected who did not exemplify most if not all these attributes? It is unlikely any other book or electronic file in your office contains any better advice to someone interested in success as a lawyer.

For us, the Rules of Professional Conduct should be a sacred text. The rules tell us why we are here, offer protection from those who would harm us, and provide a practical guide for a successful lawyerly life. Read them again, for the first time.

Have an ethics question? It's a member benefit, and all inquiries are confidential. Contact Mr. Pickens at travisp@okbar.org or (405) 416-7055; (800) 522-8065.

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January Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Friday, January 15, 2010.

REPORT OF THE PRESIDENT

President Smallwood reported that he made final committee appointments, held discussions regarding the mortgage foreclosure seminar in February, worked on arrangements for the November Annual Meeting and presented the commencement address at the OCU December law school graduation.

REPORT OF THE PRESIDENT-ELECT

President-Elect Reheard reported she attended the December board meeting, helped finalize plans for the commemorative dinner for former board members and made initial contact with committee members to start 2010 projects.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported that he met with the Oklahoma Lawyers Association executive director, attended the staff luncheon and several meetings with the contractor and designer on first floor renovations. He moderated the Leadership Academy meeting and reviewed its agenda for the board.

BOARD MEMBER REPORTS

Governor Brown reported he attended the OBA Board of Governors December meeting and Legal Aid Services of Oklahoma Board of Directors meeting. He worked on committee business for the OBA Bench and Bar Committee including its 2010 meeting schedule and published an article entitled "Court Funding Principles are Needed" for the *Judicial Division Record* Winter 2010 issue. **Governor Carter** reported she attended the December board meeting, December board holiday party and worked with the Lakeside/Tulsa County mock trial team. **Governor Chesnut** reported he attended the December Board of Governors meeting. **Governor Dobbs** reported he attended the Oklahoma County Bar Christmas reception, OBA board dinner and December meeting. **Governor Hixson** reported he attended the December board meeting and Christmas party, Canadian County Bar Association Christmas party and the retirement reception for Judge Edward C. Cunningham. **Governor McCombs** reported he attended the Thursday night social event, OBA board meeting and McCurtain County Bar Association luncheon. **Governor Moudy** reported she attended the December board meeting and functions. She also reported that as Law Day Committee liaison she participated in online voting for contest awards. **Governor Poarch** reported he attended the Oklahoma County Executive Board meeting and holiday gathering, Cleveland County Bar Association meeting and OBA Bench and Bar Committee meeting. **Governor Shields** reported she attended the December board meeting and the annual Oklahoma County Bar Association holiday party in December. **Governor Stuart** reported he attended the December board meeting and worked on obtaining articles for the May *Oklahoma Bar Journal*.

COMMITTEE LIAISON REPORT

Governor Stuart reported the board's Audit Committee will meet after the February board meeting. Governor Moudy reported the Law Day Committee's initial voting for a winner in the YouTube contest resulted in a tie. She raised the question of providing additional funding to award two prizes. Governor Chesnut reported the board's Investment Committee will meet Jan. 29 at 3 p.m. at the Oklahoma Bar Center to review the investment funds for the Clients' Security Fund.

OETA FESTIVAL

Communications Director Manning described the community service activity the OBA participates in every year to support OETA, the state's PBS television station, which produces the Ask A Lawyer show. Volunteers are being recruited to take pledges the evening of March 16. She said President Smallwood will appear live to present the OBA's donation, which comes from individual lawyers, firms and bar associations.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx briefed the board on the current status of two cases of pending litigation against the OBA. Motions to dismiss have been filed in both. She reported in December 2009 the Office of General Counsel began implementing Oklahoma Rule of Professional Conduct 1.15 requirements for trust account overdraft notification, which directs the office to maintain an approved list of banking institutions that agree to notify the office of trust account overdrafts. Forms were sent to more than 300 financial institutions with attorney trust accounts, and 80 percent have already responded. Overdraft notifications are coming in more frequently. She reviewed the procedure, which is working well. She advised the board that paperwork has been completed and checks disbursed for 17 of the 18 Clients' Security Fund claims that were approved at the December meeting.

She also reported she attended the December meeting of the Professional Responsibility Commission, gave a CLE presentation to the Oklahoma City Claims Attorney Association and attended dinner with the Leadership Academy. A written status report of the Professional Responsibility Commission and OBA disciplinary matters for December 2009 was submitted for the board's review.

REPORT OF THE YOUNG LAWYERS DIVISION

YLD Chairperson Aspan presented her appointments of YLD liaisons to OBA committees. She reported the division will hold an orientation Jan. 16 at the Waterford Marriott in Oklahoma City for YLD leaders, including the new liaisons. The ABA/YLD secretary will attend, as will a district YLD representative. Board members were invited to attend.

OBA DAY AT THE CAPITOL

Executive Director Williams reviewed the agenda of distinguished speakers for the March 2 event. He urged board members to attend and to encourage participation of bar members within their own districts.

MORTGAGE FORECLOSURE SEMINAR

Executive Director Williams reviewed the details of the Defending Foreclosures in Oklahoma seminar, which offers eight hours of free CLE credit to lawyers who are willing to provide 20 hours of pro bono service within the next 12 months with Legal Aid Services of Oklahoma. The seminar, to be held Friday, Feb. 19, is presented by OBA/CLE and cosponsored by LASO and the OBA House Counsel Section.

OBA 2012 MEMBER SURVEY TASK FORCE

President Smallwood appointed Brian Hermanson, Ponca City, to chair the task force and M. Joe Crosthwait Jr., Midwest City, to serve as vice chairperson.

NEXT MEETING

The Board of Governors will meet at 9 a.m. in Oklahoma City on Friday, Feb. 19, 2010.

LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM

If you need help coping with emotional or psychological stress please call 1 (800) 364-7886. Lawyers Helping Lawyers Assistance Program is confidential, responsive, informal and available 24/7.

OKLAHOMA BAR ASSOCIATION ®

A Tip of the Hat
(Here's to the Young Fellows)

By Phil Frazier

"Shop Talk" among the more seasoned lawyers (as opposed to the "older lawyers") is sometimes critical of the young lawyer (defined as three to five years out of law school). Criticisms include phrases like pushy, hard to work with, uncooperative or selfish. Generally, a lack of collegiality may be asserted.

In some social gatherings among "seasoned lawyers," the same concerns are presented in phrases such as "remember how it used to be" or "remember when lawyering was fun."

As a board member of the Oklahoma Bar Foundation and working with the younger lawyers, I have witnessed an opposite persona of the younger lawyer. An example of a lawyer, young or old, willing to devote his time and work to aid the profession and those citizens who need legal assistance, is previous OBF young lawyer Trustee Brett Cable.

During Brett's short time as a Trustee on the foundation board, he seldom ever missed a meeting, and in his "spare time" from his practice and professional association duties, he managed to encourage more Oklahoma lawyers to attain Fellow status than any other Trustee. Equally important, nearly all of the lawyers he presented as Fellows were those who would be considered "young lawyers."

Most likely, many still have student loans, new families, including costs we have all experienced in starting a law practice. None of us have practiced so long that we cannot remember how hard it was financially during the first three years out of law school. Nevertheless, the number of young lawyers choosing to become Fellow members of the Oklahoma Bar Foundation has shown an eagerness on behalf of the young lawyers to support the many worthy projects receiving assistance through the foundation. We must recognize that if the least affluent members of our profession, "those who we may criticize as selfish and uncaring," are eager to help others through the foundation, then so should we all.

There are young nonlawyers interested in understanding justice and our judicial system. One group of young people the foundation has helped with understanding our legal system and a form of legal activity is the Teen Court Inc. of Comanche County. The OBF gave this program $20,000 in 2008 and provided $15,000 in 2009.

The purpose of Teen Court is to develop and maintain a program for teen court presentation serving first-time juvenile offenders and their peers.

The coordinator of the Teen Court project, Marcia Frazier, has stated that the continuation of this very worthwhile project could not operate at its present standard without the assistance of the Oklahoma Bar Foundation.

The Comanche County Teen Court has been assisted by Lawton attorneys Emmit Tayloe, a defense attorney, and Mark Stoneman, assistant district attorney for Comanche County. Ms. Frazier, Mr. Tayloe and Mr. Stoneman are assisted by approximately 40 youthful volunteers, the peer group before whom the youthful offenders are tried. Teens make up the jury as well as perform duties such as court clerk and bailiff. The judge is an attorney or professor. With the help of the Okla-

homa Bar Foundation grant, the court was able to distribute juvenile justice manuals throughout Comanche County explaining juvenile law as it is applicable in the state of Oklahoma. Because of the wide diversity of citizenship and military base, these manuals have been most helpful explaining to the citizens of Comanche County about juvenile law in the state of Oklahoma.

The Teen Court operates on an annual budget ranging from $75,000 to $80,000, and the Oklahoma Bar Foundation has funded approximately 25 percent of the annual budget. Ms. Frazier says that without the help of the Oklahoma Bar Foundation, their program would take a severe hit and its very existence would be challenged. To say the program has been a success is a tremendous understatement. The Teen Court handles 125 cases per year and to date has a 94 – 95 percent success ratio.

There are numerous success stories such as Comanche County Teen Court made possible through the assistance of the Oklahoma Bar Foundation. All Oklahoma lawyers are members of the Oklahoma Bar Foundation and it is through your willingness to attain Fellow status that enables the foundation, in large part, to continue with its benevolent assistance to many projects in the state of Oklahoma. These projects have included everything from assistance with county courthouses to Legal Aid Services and projects such as the Comanche County Teen Court and Moot Court competition. Just as these projects are assisted by the foundation, the foundation is greatly assisted by the young lawyers of Oklahoma becoming Fellows.

The new young lawyer representative for the OBF Board of Trustees is Alan Gabriel Bass of El Reno. Gabe has followed a family tradition of distinguished Oklahoma lawyers and has already recognized the importance of lawyers assisting those who are less fortunate. Brett Cable, in recognition of his good work as the Young Lawyer Representative, has been appointed to continue to serve as a Trustee but his more immediate plans include service through the association, and he will always be a spokesman for the OBF.

A tip of the Oklahoma Bar Foundation hat to the young lawyers of Oklahoma becoming Fellows who help enable the foundation to perform its functions as the charitable arm of Oklahoma lawyers.

Phil Frazier is president of the Oklahoma Bar Foundation. He can be reached at pfrazlaw@swbell.net.

OBF

Fellow Enrollment Form

❍ Attorney ❍ Non-Attorney

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

Firm or other affiliation: _____

M ailing & 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!

Pro Bono Service Gives People Hope

By John E. Miley

I received the greatest honors of my legal career last year when I received the Oklahoma County Bar Association Pro Bono Award in June and the Oklahoma Bar Association Award for Outstanding Pro Bono Service at the 2009 Annual Meeting in November. For several years, I have been a volunteer for the Third Saturday Legal Clinic, sponsored by Legal Aid Services of Oklahoma at Epworth United Methodist Church in Oklahoma City.

On the third Saturday of every month, I volunteer with other lawyers to provide legal advice to the indigent and elderly in Oklahoma City. They come with many different questions and concerns. It is sometimes a challenge, but it is always rewarding.

In many cases, the attorneys at the clinic offer the first ray of hope to people who feel lost and alone in the legal system. In other cases, there is no hope, and it is our job to talk straight with the client and give her insight and understanding as to her current situation and what her realistic legal options are. In other cases, we are there to empower the client to ask for justice and fair treatment or to give advice on how to better present themselves and communicate their problems to someone in authority.

My time spent in pro bono service has been rewarding to me because it brings me in contact with people and issues I would not otherwise be aware of. It allows me to use my talents as a lawyer to help people who cannot receive this assistance in any other way. I believe the basic purposes of a lawyer in society — the reasons why we exist — are to solve problems and to help people.

In our regular practice, we charge fees or earn salaries to allow access to the justice system for our clients trying to resolve problems. There are many people who have a need to resolve problems through the legal system, but do not have the means to pay for legal assistance. If we believe in our legal system, we cannot leave these people behind. That is where pro bono service comes in.

I encourage every attorney to do some sort of pro bono service. Legal Aid Services of Oklahoma Inc. has several different ways volunteer attorneys can help. Please contact your local office or go to www.probono.net/ok to find out how you could best serve as a volunteer. The needs are great, and your efforts will be appreciated. My pro bono service is just beginning.

Volunteer attorney John Miley consults with a client at the Third Saturday Legal Clinic in Oklahoma City.

Mr. Miley is deputy general counsel for the Oklahoma Employment Security Commission in Oklahoma City.

State Service Project Planned, Orientation Held

By Molly Aspan, YLD Chairperson

Last year, the YLD developed a new committee, a Community Service Committee. The role of this committee was to determine need and develop project(s) for the YLD and the OBA in general to provide service to the community. Out of this committee came a new project for this year, and, although it is the first year, we hope that it will be successful and develop into a recurring event.

Statewide Community Service Project Day

On Saturday, May 1, 2010, the YLD will hold a Statewide Community Service Project Day, at which time lawyers across the state will give back to their communities by participating in multiple projects at local public libraries. The projects have not yet been determined, but YLD directors are responsible for determining the need and identifying projects in each of their respective communities. YLD directors are elected from each judicial district, so there should be at least one event occurring in each judicial district across the state.

The local libraries and projects have not yet been identified, but keep reading the "Letter from the YLD Chair" in your bar journal to keep updated. Once the projects have been identified, we will be asking for volunteers to help with the projects on May 1. Additionally, if you are interested in hosting a project at a public library in your community on May 1, please contact me at maspan@hallestill.com or (918) 594-0595 or the YLD Community Service Committee Chair Jennifer Kirkpatrick at jhkirkpatrick@eliasbooks.com or (405) 232-3722.

Orientation Session

The Young Lawyers Division held an orientation session for the Board of Directors and YLD liaisons to OBA committees last month in Oklahoma City. The orientation session had strong participation from all directors and liaisons, and those present heard from a star line-up of speakers.

After introductions, the day started off with OBA President Allen Smallwood, OBA President-Elect Deborah Reheard and OBA Past President Jon Parsley discussing the importance and benefits of involvement in the OBA and YLD, different opportunities for involvement and their plans for the upcoming years.

Next, OBA Executive Director John Morris Williams and OBA Web Services Coordinator Morgan Estes presented information about the history of the OBA and YLD, OBA operations and responsibilities, and use of the OBA Web site.

Molly Aspan

Finally, ABA/YLD Secretary/Treasurer Michael Bergmann from Chicago, ABA/YLD District 24 Representative Gwendolyn Ruckers from Little Rock, Ark., and Past ABA/YLD District 24 Representative Doris Gruntmeir of Muskogee presented information about the ABA/YLD, opportunities for involvement in the ABA/YLD, duties and functions of the ABA/YLD council and officers, and the correlation between the ABA/YLD and its affiliates (including the OBA/YLD, Tulsa County Bar Association YLD and Oklahoma County Bar Association YLD).

In the afternoon, the YLD continued the orientation session with information for YLD directors and an introduction of a new project this year for the OBA/YLD.

Calendar

February

15 **OBA Closed** – Presidents Day

16 **OBA Civil Procedure Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229

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

OBA Professionalism Committee Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Sharisse O'Carroll (918) 584-4192

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 Solo and Small Firm Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: B. Christopher Henthorn (405) 350-1297

OBA Government and Administrative Law Practice Section Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jami Fenner (405) 844-9900

19 **OBA Board of Governors Meeting;** 9 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

22-25 **OBA Bar Examinations;** Oklahoma Bar Center, Oklahoma City; Contact: Oklahoma Board of Bar Examiners (405) 416-7075

26 **OBA Lawyers Helping Lawyers Assistance Program Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Julie Simmons Rivers (405) 232-6357

OBA Communications Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Douglas Dodd (918) 591-5316

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

3 **OBA Women in Law Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Renee DeMoss (918) 595-4800

4 **Oklahoma Uniform Jury Instructions Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Chuck Adams (918) 631-2437

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 Civil Procedure Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229

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

24 **OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Sharisse O'Carroll (918) 584-4192

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

27 **OBA Young Lawyers Division Meeting;** Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Molly Aspan (918) 594-0595

April

1 **OBA Legal Intern Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: H. Terrell Monks (405) 733-8686

2 **Oklahoma Bar Foundation Meeting;** 12:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070

6 **OBA Law-related Education Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack G. Clark (405) 232-4271

7 **OBA Women in Law Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Renee DeMoss (918) 595-4800

9 **OBA Family Law Section Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kimberly K. Hays (918) 592-2800

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

17 **OBA Title Examination Standards Committee Meeting;** Stroud Community Center, Stroud; Contact: Kraettli Epperson (405) 848-9100

19 **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

20 **OBA Civil Procedure Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229

21 **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

22 **New Admittee Swearing In Ceremony;** Supreme Court Courtroom; Contact: Board of Bar Examiners (405) 416-7075

OBA Leadership Academy; 2:15 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027

OBA Leadership Academy Reception; 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027

23 **OBA Board of Governors Meeting;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000

Association of Black Lawyers Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donna Bacy (405) 424-5510

24 **OBA Young Lawyers Division Board of Directors Meeting;** Oklahoma Bar Center, Oklahoma City; Contact: Molly Aspan (918) 594-0595

27 **OBA New Lawyer Experience;** 8 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jim Calloway (405) 416-7051

28 **OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Sharisse O'Carroll (918) 584-4192

29 **OBA Ask A Lawyer;** OETA Studios, Oklahoma City and Tulsa; Contact: Tina Izadi (405) 521-4274

OBA Board Members Sworn In

Nine new members of the OBA Board of Governors were sworn in to their positions on Jan. 15. The new officers are President Allen Smallwood, Tulsa; President-Elect Deborah Reheard, Eufaula; Vice President Mack Martin, Oklahoma City; Immediate Past President Jon Parsley, Guymon; Glenn Devoll, Enid; David Poarch, Norman; Ryland Rivas, Chickasha; Susan Shields, Oklahoma City; and Young Lawyers Division Chairperson Molly Aspan, Tulsa.

OBA President Allen Smallwood is sworn into office in a ceremony last month.

OBA Member Resignations

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

Kathleen Marie McCarthy Anson
OBA No. 20024
123 NW 12th Ave., Apt. 228
Portland, OR 97209-4144

Amy Elizabeth DeMarco
OBA No. 19260
3501 Cold Harbor Lane
Birmingham, AL 35223

Carol A. Grissom
OBA No. 10827
6010 Tremont St.
Dallas, TX 75214

Barbara Anne McHenry
OBA No. 14702
8792 SE 166th,
Birchbrook Loop
The Villages, FL 32162

Robert D. Morrel
OBA No. 11683
774 N. Alexis Loop
Green Valley, AZ 85614-5664

Michael B. Schaefer
OBA No. 12464
3950 Cleveland Ave., No. 206
San Diego, CA 92103

Taye K. VanMerlin
OBA No. 10774
370 17th St., Suite 1700
Denver, CO 80202

Daniel Allen Woolverton
OBA No. 20377
7104 Remington Oaks Loop
Lakeland, FL 33810-4790

Robert Alan Youngberg
OBA No. 9976
1355 Settlement Drive
Park City, UT 84098-6565

PRC Names New Leadership

The Professional Responsibility Commission elected a new chairperson and vice chairperson at its December meeting. Melissa DeLacerda will serve as chair for 2010 and Tony Blasier will be vice chair. Ms. DeLacerda practices law in Stillwater and served as OBA president in 2003. Mr. Blasier, a non-lawyer member of the PRC, is the head of security at Chesapeake Energy in Oklahoma City. He is a former investigator with the OBA General Counsel Department. The PRC is charged with considering and investigating any alleged ground for professional discipline or alleged incapacity of any lawyer.

Bar Center Holiday Hours

The Oklahoma Bar Center will be closed Monday, Feb. 15 in observance of Presidents Day.

OBA LRE Helps Students Learn Citizenship

Enid High School outscored three other teams to be named state champion in the "We the People – The Citizen and the Constitution" competition held Jan. 23 at the state Capitol. The team will advance to the national competition in Washington, D.C. in April.

To prepare for the program, the students studied a curriculum that focuses on the history and principles of the U.S. Constitution. For competition, each team formed six small groups with each group making remarks on a different topic in the hearing format. Following prepared presentations, students answered questions, and judges scored the team on its efforts in both segments.

Judges were Breea Bacon, Judge Jerry Bass, Judge Daman Cantrell, Jack Clark, Judge Lisa Hammond, Brady Henderson, Brian Hermanson, David Hopper, Barbara Kinney, Steven Kuperman, Judge David Lewis, Jan Meadows, Jane Pennington, Jennifer Prilliman, Michael Wofford, Rick Goralewicz and Eugene Bertman.

The OBA administers the We the People program locally through its Law-related Education Program. It is co-sponsored by the California-based Center for Civic Education and the U.S. Department of Education.

"The We the People instructional program curriculum enhances students' understanding of the institutions of American constitutional democracy," said Oklahoma Bar Association Law-related Education Coordinator Jane McConnell. "Our simulated congressional hearings provide an avenue for high school students to demonstrate their knowledge and understanding of constitutional principles."

Rock Creek High School took second place in the competition, Norman High School earned third place and Southeast High School in Oklahoma City came in fourth.

NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

Judge of the Court of Criminal Appeals
District One

This vacancy will be created by the retirement of the Honorable Charles Chapel effective March 1, 2010.

[To be appointed to the office of Judge of the Court of Criminal Appeals an individual must have been a qualified elector of the judicial district applicable, as opposed to a registered voter, for one year immediately prior to his or her appointment, and additionally, must be at least 30 years of age and have been a licensed attorney, practicing within the State of Oklahoma, or serving as a judge of a court of record in Oklahoma, or both, for five years preceding his/her appointment.]

Application forms can be obtained by contacting Tammy Reaves, Administrative Office of the Courts, 1915 North Stiles, Suite 305, Oklahoma City, Oklahoma 73105, (405) 521-2450, or online at www.oscn.net under the link to Judicial Nominating Commission. Applications must be submitted to the Chairman of the Commission at the same address **no later than 5:00 p.m., Friday, February 19, 2010. If applications are mailed, they must be postmarked by midnight, February 19, 2010.**

Mark D. Antinoro, Chairman
Oklahoma Judicial Nominating Commission

Richard B. Kells Named Outstanding Oklahoma Tax Lawyer

Richard B. "Rick" Kells, a partner with the law firm of Hartzog Conger Cason & Neville PC, Oklahoma City, has been named the 2009 Outstanding Oklahoma Tax Lawyer by the Taxation Law Section of the Oklahoma Bar Association.

Rick is a partner at the Hartzog Conger Cason & Neville firm where his primary areas of practice are federal and state taxation, wealth transfer planning, and wills, trusts, estates and tax controversies. He has practiced in these areas for over 30 years. Rick received a B.S. degree in Accounting from Central Connecticut State University in 1975, his J.D. degree from Oklahoma City University in 1977, and an LL.M degree in Tax Law from New York University Law School in 1979. He is also a Certified Public Accountant in Oklahoma.

He is a member and past chairman of the OBA Taxation Law Section (2005-2006), a member and past chairman of the Oklahoma Society of CPAs (OSCPA) Tax Committee (2006-2008) and currently serves on the Board of Directors for the OSCPA. He is past president of the Oklahoma City Tax Lawyers' Group and past president of the Oklahoma City Estate Planning Council. Rick is a fellow of the American College of Trust and Estate Counsel and has been listed in *The Best Lawyers in America* in Tax Law and Trusts & Estates Law since 1988.

Rick has spoken at many national and Oklahoma seminars and written numerous articles, outlines, and course material pertaining to his areas of practice. He has become the most highly recognized practitioner with respect to Oklahoma tax law through a long and active practice before the Oklahoma Tax Commission and in court on tax issues. He is also a recognized authority by virtue of the extremely detailed survey updates he has skillfully presented for the past 13 years at the annual OSCPA Tax Institute and a similar paper annually presented in Oklahoma Bar Association Recent Developments CLE seminars. Rick also has served as an adjunct professor of income tax and oil and gas tax at Oklahoma City University School of Law, taught accounting classes at the Oklahoma City University Business School, and taught estate and gift tax for the Oklahoma Bar Review. As a member of the OBA Taxation Law Section, he has contributed countless hours volunteering to study, craft, and promote legislative changes in the Oklahoma tax law to improve its administration and provide greater fairness for the taxpayer — particularly in seeking to have an independent tax hearings body established to hear taxpayer administrative appeals.

In connection with the award, Rick's law partners, Steven Davis and Kevin Ratliff, noted for other members of the OBA Taxation Law Section who nominated him, that Rick possesses three important traits that have brought him well deserved success, recognition and esteem by all professionals and clients he has worked with through the years. These are an insatiable appetite for knowledge, especially with regard to intricate aspects of the tax law; a unique and selfless willingness to share his efforts and expertise with other professionals; and an unwavering commitment to provide the very best results for his and his firm's clients at all times. Ken Hunt, Tulsa, a colleague and section member, added Rick is a lawyer whose advice and insight is always "spot on" and who shares with others in a collaborative spirit which represents the highest ideals of the legal and accounting professions.

Rick's selection as 2009 Outstanding Oklahoma Tax Lawyer was announced at the Annual Meeting of the Taxation Law Section. The section leadership made the award to recognize Rick's contributions to the section and Oklahoma Bar Association through his high level and long period of professional achievement, expertise and distinction within the legal and accounting professions and business community across Oklahoma.

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.

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Kudos

David A. Poarch was recently elected to the American Law Institute. Mr. Poarch is one of only 36 Oklahoma attorneys with membership in the organization.

The new officers for the Oklahoma City Real Property Lawyers Association for 2010 are: **Howard Haralson**, past president; **Mike Voorhees**, president; **Joe Anthis**, vice president; **Phil Sturdivan**, secretary; **Mike Rubenstein**, treasurer; and **Zach Ball, Saul Reid** and **Barbara Bowersox** as board members.

Johnny Beech was inducted into the Oklahoma Tau Kappa Epsilon Hall of Fame during the fraternity's Founder's Day Dinner.

Fred Morgan will become the next president and CEO of the State Chamber of Oklahoma. He is currently serving as general counsel and senior policy advisor to state Senate leadership.

Kay L. Van Wey has been elected to membership in the Fellows of the Texas Bar Foundation.

On The Move

Barrow & Grimm PC of Tulsa has named **Wm. Brad Heckenkemper** and **Thomas D. Robertson** as common shareholders and directors of the firm. The firm has also named **David A. Sturdivant** and **Nicholas M. Jones** as associates. Mr. Heckenkemper was admitted to the OBA in 1980. His practice is concentrated in probate, commercial litigation and general business matters. Mr. Robertson was admitted to the OBA in 1979. His practice is concentrated in labor and employment law, representing management in all aspects of employment and labor issues. Mr. Sturdivant was admitted to the OBA in 2005. His practice consists primarily of business and commercial litigation and family law. Mr. Jones was admitted to the OBA in 2009. His practice focuses primarily on business and commercial transactions and estate planning.

The Hickman Law Group of Oklahoma City announces **Brad S. Clark** as an associate. Mr. Clark will practice in the areas of education, employment, administrative law and government contracting. In addition, his practice encompasses a broad range of business matters, including commercial transactions, oil and gas, condemnation, construction and advertising law. Mr. Clark received his J.D. from OCU.

GableGotwals of Tulsa has announced the promotion of **Tammy D. Barrett, Richard M. Carson, Jordan B. Edwards, Leslie L. Lynch, Tyson D. Schwerdtfeger** and **Jeremy K. Webb** to shareholders in the firm. Ms. Barrett is a 1990 graduate of OU Law. Her practice areas include state and federal litigation. Mr. Carson is a 1991 graduate of OU Law. His practice areas include securities/corporate finance, banking, commercial law, corporate and business organizations, energy and related industries, environmental law, mergers and acquisitions, oil and gas law, and aviation law. Mr. Edwards is a 2002 graduate of the University of Texas School of Law. His practice areas include banking and financial regulation, bankruptcy, workouts and creditor's rights, commercial law, corporate and business organizations, mergers and acquisitions, securities/corporate finance and wind energy. Ms. Lynch is a 1993 graduate of OCU Law. She is a litigator, representing firm clients in both state and federal court. Mr. Schwerdtfeger is a 2002 graduate of Vanderbilt University Law School. His practice areas include commercial litigation, oil and gas law, and products liability. Mr. Webb is a 2002 graduate of the University of Virginia School of Law. His practice areas include commercial litigation, environmental law, oil and gas law, and labor and employment litigation.

Wiggins Sewell & Ogletree of Oklahoma City has announced **Melissa A. Couch** as a partner in the firm.

Bass Law Firm PC has named **A. Gabriel "Gabe" Bass** president and shareholder. The firm has locations in El Reno and Oklahoma City.

Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile of Tulsa announces **Andrew C. Jayne** as a partner in the firm. Mr. Jayne graduated from OU Law in 2002 after receiving a B.A. in political science and history from Westminster College in Fulton, Mo. Mr. Jayne practices in the areas of insurance bad faith, products liability, automobile negligence and general business litigation.

Rachel C. Mathis has joined Hall, Estill, Hardwick, Gable, Golden & Nelson PC as a shareholder in the Tulsa office. Ms. Mathis received a B.S. from OSU and J.D. from OU. Her primary practice area is litigation with emphasis on defense of medical and professional liability claims, general insurance defense, products liability, civil rights and employment law.

Nick Merkley has been named director and shareholder at Fellers Snider Law Firm in Oklahoma City. His practice covers a wide range of litigation matters including products liability, personal injury/wrongful death, oil and gas, antitrust and trade regulation, and general contract disputes. He received his J.D. in 2004 from OU.

Daniel A. Loeffler has joined McAfee & Taft in its Oklahoma City office. Mr. Loeffler's practice is focused on litigation including those involving antitrust, appeals, class actions, securities and white-collar criminal defense. He also advises businesses on antitrust compliance and related issues. Mr. Loeffler graduated from Wheaton College and the University of Michigan Law School.

DeBee Gilchrist of Oklahoma City announces **Blaine M. Peterson** as a shareholder of the firm. Mr. Peterson's practice encompasses a broad range of business matters, including tax planning and controversies, comprehensive estate planning and business valuation. In addition to earning his J.D. from OU in 1999, he obtained a B.B.A. in accounting from OU in 1994. Mr. Peterson is also a certified public accountant and certified valuation analyst.

Stephen L. DeGiusti is the new general counsel for Quest Resource Corp. He may be reached at 210 Park Avenue, Suite 2750, Oklahoma City, 73102; (405) 702-7420; sdegiusti@grcp.net. Prior to joining Quest, Mr. DeGiusti was a shareholder and director of Crowe & Dunlevy PC in the firm's Oklahoma City office where he practiced law since 1983.

The Tulsa law firm of Richards & Connor announces **Elizabeth A. Hart** as partner and **Whitney R. Mauldin** and **Amanda L. Stephens** as associates. Ms. Hart graduated from TU with a health law certificate and focuses her practice on health care law and medical malpractice defense. Ms. Mauldin also received her law degree from TU and Ms. Stephens received her law degree from OU. Their practice will focus on bad faith defense, insurance coverage litigation and general insurance defense litigation.

At The Podium

Gerald Stamper spoke to members of the Forum Committee on the Construction Industry of the American Bar Association at its fall meeting in Philadelphia. He discussed Oklahoma's legislative actions and judicial decisions as a case study of state action for immigration reform.

Compiled by Chelsea Klinglesmith

Articles for the April 10 issue must be received by March 15. E-mail: barbriefs@okbar.org

IN MEMORIAM

Jim Chastain of Norman died Dec. 24, 2009. He was born Dec. 9, 1963. He graduated from the OU College of Law in 1989. Mr. Chastain was a Norman author and poet who worked as a lawyer for the Oklahoma Court of Criminal Appeals. His written works include an autobiography, *I Survived Cancer But Never Won the Tour de France*, and two poetry books, *Like Some First Human Being* and *Antidotes & Home Remedies*, which was a finalist for an Oklahoma Book Award in 2009. He participated in poetry readings across Oklahoma and the Southwest. His writings are based largely on his experiences with cancer. Memorial contributions may be made

to the Jim Chastain Memorial Fund at First Bank and Trust in Norman. This money will go toward a college fund for his two children.

Louis (Lou) Delaney II of Oklahoma City died Jan. 5. He was born Sept. 3, 1942, in Oklahoma City. He earned his B.A. from OSU, M.B.A. from UCO and J.D. from OU where he was the first student president of the *Indian Law Review*. **He began his professional life in the U.S. Army, where he served two tours in Vietnam and earned the rank of Lieutenant Colonel**. He later worked in various positions in the legal profession and finally as the assistant general counsel for the Oklahoma State Department of Transportation. He was an active member of the Oklahoma City Sail and Power Squadron, serving one term as commander and as district commander for United States Power Squadron, District 31. He also enjoyed membership in the Central Oklahoma Parrot Heads. Donations may be made in his name to Wild Care at www.wildcareoklahoma.org.

Franklin Carroll Freeman of Oklahoma City died Nov. 18, 2009. He was born Oct. 26, 1924, in Frederick. He attended Central High School where he was a member of the debate team. **He served in the United States Marine Corps**. He graduated from OU Law in 1948. He was also the voice of the Sooners, broadcasting OU football games along with veteran sports announcer Curt Gowdy. Upon graduation from law school, he worked as an assistant in the Oklahoma County Attorney's Office. He spent most of his career as the general counsel for Allied Materials Corp., an independent petroleum company with headquarters in Oklahoma City. He was an avid golfer and president of Quail Creek Country Club in 1983-84. He retired in Rancho Mirage, Calif. Donations may be made to the Dean McGee Eye Institute Foundation at 608 Stanton L. Young Boulevard, Ste. 300, Oklahoma City, 73104.

Reginald Gaston of Norman died Feb. 2. He was born July 20, 1944. He graduated from OU in 1968 with a bachelor's degree in journalism. He went on to earn his law degree from OU in 1972. While in law school, he served as an intern in the Cleveland County District Attorney's Office. Upon graduation, he was named first assistant to the district attorney. He served as a prosecutor until 1978, and then went into private practice. In 1984, he returned as an assistant district attorney and remained in that position until 1993 when he was appointed as special judge. He served as a special judge until his retirement in 2009.

Donald C. Manning of Oklahoma City died Nov. 28, 2009. He was born Sept. 18, 1927, in Ponca City. After graduating from College High in Bartlesville, he attended and graduated from OU obtaining a degree in government/political science. **He then enlisted in the U.S. Army. After an honorable discharge, he joined the Army Reserves and rose to the rank of Lieutenant Colonel**. He later attended law school at OCU and worked for OG&E for many years. He then practiced law, worked for the Public Defender's Office, and was appointed as special district judge in Oklahoma County. After retiring from the Oklahoma County court system, he served as a municipal judge for several years. While raising his family, "Judge" taught youth Sunday School and later taught the adult Neighbors Class at First Christian Church.

Frank Wilson Wewerka of Tulsa died Dec. 4, 2009. He was born Sept. 7, 1936, in El Reno. **He served in the U.S. Navy as a Lieutenant (junior grade)**. He attended OU for undergraduate and law degrees. He retired from Amoco Production Co. He was a member of the Czech and Slovak Club of Tulsa and a volunteer for Cancer Treatment Centers of America, Ronald McDonald House, Oklahoma Aquarium, Gilcrease Museum, Salvation Army and Denver Museum of Natural History. Memorial donations may be made to: Ronald McDonald House, 6102 S. Hudson Ave., Tulsa, 74136; or Cancer Treatment Center of America, 10109 E. 79th St., Tulsa, 74133.

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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.

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LESTER, LOVING & DAVIES PC, is looking for a highly skilled legal assistant with experience in federal complex civil litigation including labor and employment, business litigation, bad faith litigation, and cases with significant document management responsibilities and ESI. Send resume to Lester, Loving & Davies, 1701 South Kelly Avenue, Edmond, OK 73013.

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OKLAHOMA CITY LAW FIRM, seeking trial lawyer with two to five years experience to handle all phases of Personal Injury litigation. Please send resume and references to "Box T," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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Think You Can't Afford to Travel?

By Carolyn Smith

I'm not listening. If you say, "I wish we were free of family obligations so that we could travel," or "I wish we had time to travel," you have my sympathy. But *afford*??? Let's talk about that one.

In the last couple years, my husband and I have traveled to Poland, Slovakia, Hungary, Slovenia, Croatia, Bosnia, and we most recently spent a month each in New Zealand, Italy and the Swiss Alps, but neither of us has ever been that great at making money. We afford these trips by making them a priority and by living as simply abroad as we live at home.

We don't like tourists. We don't like being around them, and we certainly don't want to be them. Tourists have a herd mentality. They need the cocoon of others like themselves and accommodations "like back home" or better to insulate themselves from the unfamiliar.

We are travelers. There is a difference. We don't sit around in touristy cafes, nor do we want or need to be "taken care of." We embrace the unfamiliar as we immerse ourselves in another culture. We want to experience and to understand how these other people live. Fortunately for us, spending more money would be a barrier to these experiences.

We travel as the locals travel and stay where they stay when they vacation. In New Zealand, that's camping in a vehicle about the size of a Dodge Caravan. In Europe, that's trains and simple accommodations with maybe a few roommates and a communal bath down the hall. In Bosnia, I brushed my teeth in the courtyard, and we dried our clothes on the roof.

What ordinary local person could maintain the level of food spending in which tourists indulge? The locals who aren't trying to fleece the tourists are at some out-of-the way joint where the food is great and the prices are reasonable. They are also in the market and we are there, too. Three weeks before the earthquake in L'Aquila, Italy, we were eating fresh tomatoes in their square.

Then there's the luggage. Tourists carry luggage; travelers don't. For our month-long jaunts in Italy and Switzerland, we each carried only a day pack. While the tourists were lugging their monstrosities around or paying for taxis and porters, we travelers could hop on and off conveyances along with the locals.

Language? It's only a barrier if you allow it to be. Everybody understands, "Toilette?" and anything else is negotiable, as long as we avoid the tourist's arrogant notion that everyone should speak English. One hostess met us at the door with her hair in curlers, a smile on her face, and said, "Americans!!" That was about the only word we ever understood, but the stay was delightful– I had found someone online to arrange the reservation.

Which brings me to preparation. These trips don't just happen. What they don't require from the pocketbook, they do require in prep time. There's not space here for everything we've learned, but you can learn more from my online posts at tinyurl.com/SwissTripBudget.

If we didn't travel as we do, we would not have learned from our Muslim host what life was like for his family during the Bosnian War. We would not have seen the Hungarian's tears as he told us he could not yet visit the Communism museum because his memory of that era is still raw. The Italian man wouldn't have told us how much he appreciates that "America gave me my life, my liberty," after WWII. These experiences will make us better Americans.

Bon voyage, fellow traveler. Quitcher-bitchin and hit the road. Life is short.

Ms. Smith practices in Ponca City.

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Business and Agency Governance from Compliance to Prosecution - What You Need to Know

Wednesday, March 3, 2010

Topics:

- Ethical and Practical Realities of Representing Corporations and Public Bodies
- Liability of Officers and Directors
- Public Entity Corruption Prosecutions and/or Private Corporate Prosecutions
- The McNulty Memorandum and Cooperation During Investigation
- The Key Role of Compliance Programs, Internal Controls and Internal Audit
- What Good Corporate Citizens Should Know About the Federal Sentencing Guidelines
- False Claims Act

7.0 Total MCLE, 3.0 of which may be applied toward Ethics

Medicine for Lawyers: The Ten Top Illnesses and Injuries of the Brain & Spine

Saturday, April 10, 2010

Topics:

- Basic Anatomical Terms
- The Anatomy of the Back and Spine
- The Top Illnesses and Injuries– Causes, Symptoms, Diagnosis, and Treatment
- The Role of Diagnostic Testing in Trauma to the Brain and Spine

7.0 Total MCLE, (No ethics)

Basics of E-Discovery

Tuesday, April 20, 2010

In this technologically modern era in which we live and work, virtually every document that has the potential to lead to discoverable evidence is stored in a digital format. Knowing how to access and preserve this electronic information is crucial. Failure to pursue electronic discovery limits the litigation arsenal and potentially exposes practitioners to malpractice liability. This brand new, back to basics seminar will provide you with an introduction to e-discovery. This program defines electronic discovery, explains how to search for discoverable information, shows you how to properly produce and preserve electronic documents and most importantly, shows you how to do all of this in a cost-effective manner.

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