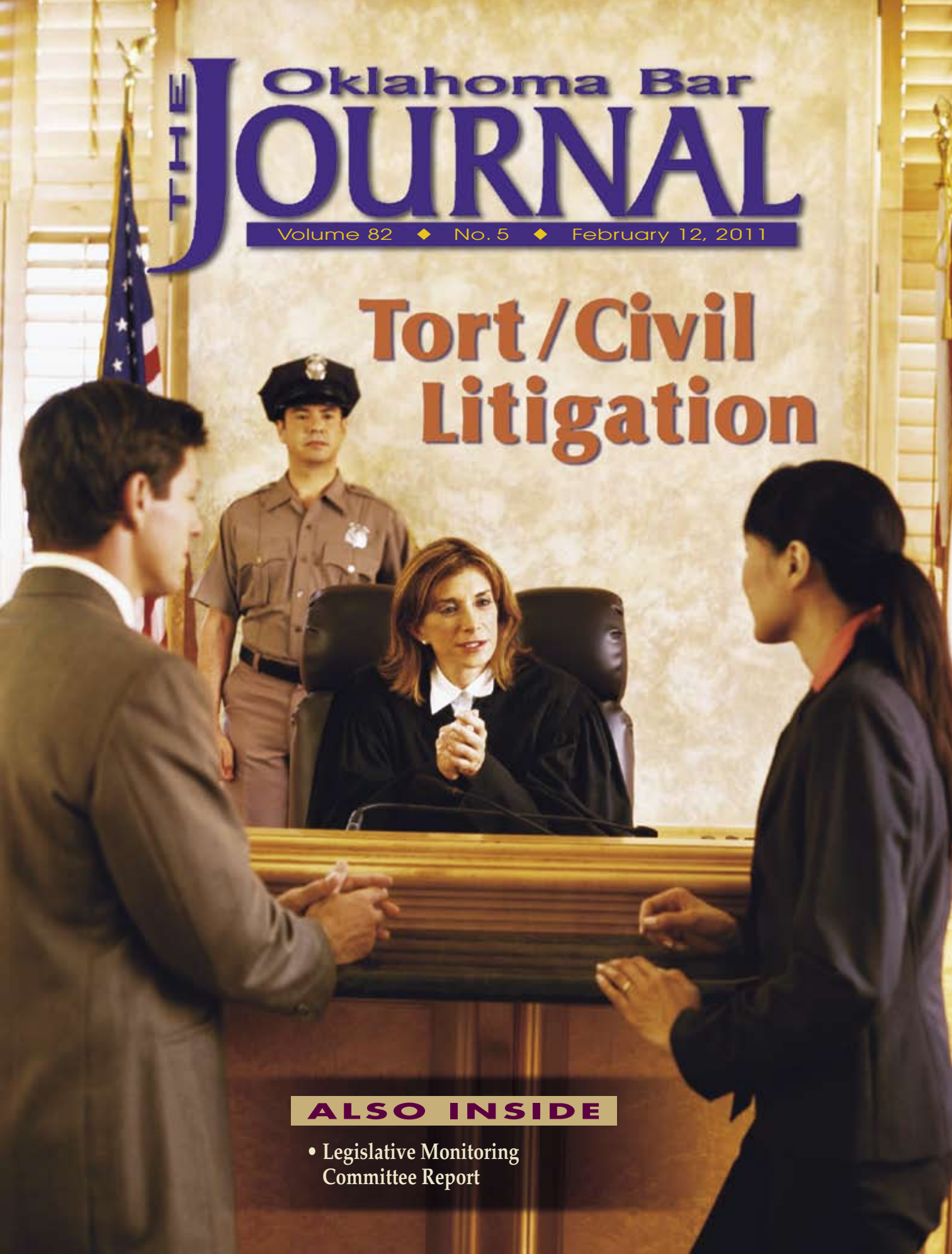
THE Oklahoma Bar JOURNAL
Volume 82 ◆ No. 5 ◆ February 12, 2011

Tort/Civil Litigation



ALSO INSIDE

- Legislative Monitoring Committee Report

Live Streaming CLE Replays

Recent Developments 2010 (day 1)
Feb. 14, 15, 2011 - 9 a.m (Feb 14) - 3:30 p.m. (Feb. 15) Your Computer. 6 hours MCLE/ 0 ethics

Recent Developments 2010 (day 2)
Feb. 14, 15, 2011 - 9 a.m (Feb. 15) - 3:30 (Feb. 14) Your Computer. 6 hours MCLE/ 1 ethics

The Amazing Case - Illustrations and Demonstrations of the Commercial Case
Feb. 15, 2011 - 6 p.m. Your Computer. 6.5 hours MCLE/ 0 ethics

25th Annual Advanced Bankruptcy Seminar: Riding the Bankruptcy Tsunami (day 1)
Feb. 17, 2011 - 9 a.m. Your Computer. 6 hours MCLE/ 0 ethics

25th Annual Advanced Bankruptcy Seminar: Riding the Bankruptcy Tsunami (day 2)
Feb. 22, 2011 - 9 a.m. Your Computer. 6 hours MCLE/ 1 ethics

Advanced Estate Planning: Estate Planning for the Family Business Owner
Feb. 24, 2011 - 9 a.m. Your Computer. 6 hours MCLE/ 1 ethics

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March 1, 2011 - 9 a.m. Your Computer. 7 hours MCLE/ 1 ethics

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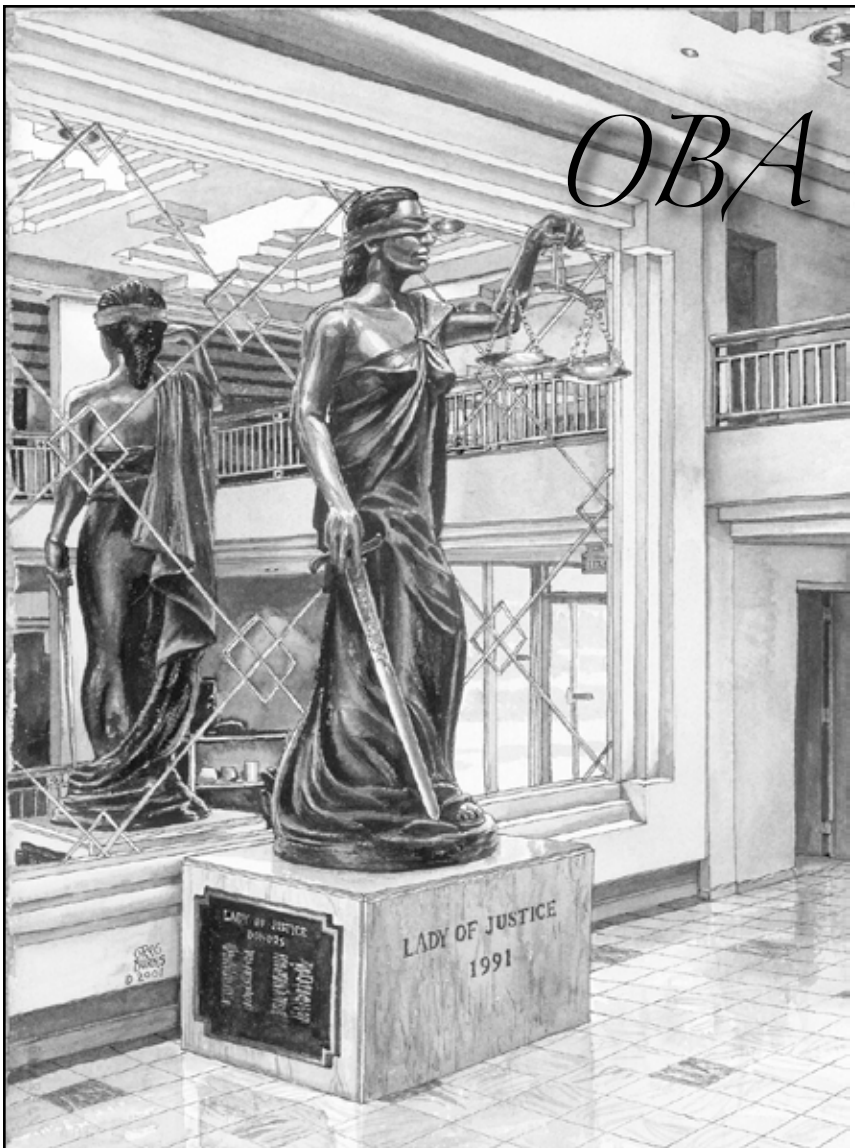

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WHAT: OBA members are asked again this year to help take pledge calls during the OETA Festival to raise funds for continued quality public television. For 32 years OETA has provided television time as a public service for the OBA's Law Day "Ask A Lawyer" program. By assisting OETA, we show our appreciation. It is also a highly visible volunteer service project.

WHEN: Wednesday, March 16 @ 5:45 - 10:30 p.m.

WHERE: OETA studio at Wilshire &
N. Kelley, Oklahoma City for dinner & training session

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

Theme:
Tort/Civil Litigation
Editor: Leslie Taylor

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Remember to Wag Your Tail

By Deborah Reheard

We all hope we leave a legacy when we depart this life. Maybe being remembered for some cutting edge invention, some good deed or some words of wisdom imparted during our lifetime.

As your new bar president, I have the opportunity to travel around the state speaking not only to lawyer groups but also to civic groups and organizations. A presidential speech writer was not in the OBA budget, so I have attempted to hone and perfect a few good speeches to fit different occasions.

It never hurts to quote Winston Churchill about the great things in life — freedom, justice, honor, duty, mercy and hope. Or Robert F. Kennedy talking about how lawyers standing up against an injustice creates a ripple that can build and knock down walls of oppression. Or Marian Wright Edelman who said, "Service is the rent we pay for the privilege of living."

I tried to speak profound words before the Supreme Court of Oklahoma at the swearing-in ceremony of the new Board of Governors for 2011. I attempted to impart pearls of wisdom to the December law school graduates at Oklahoma City University at their commencement.

I always hope that something I say to these and other groups will strike a chord, hit a nerve, be so insightful and intelligent that it will be emblazoned upon my tombstone or recalled in my eulogy. My own smaller version of "I Have a Dream" or "Ask Not What Your Country Can Do for You."

Well, maybe I have, but not with the quote, the profound words or the pearls of wisdom I expected. It was a quote from my favorite philosopher, my Dad, the late Tommy Reheard: "Money can buy a really nice dog, but it can't make him wag his tail."

I have received more feedback about that one quote from my Dad than quotes I use from famous people. People have called, written notes, stopped me at the courthouse, wanting to make sure they had that quote right and telling me they were going to start using it, too.

I do not remember when my Dad first said that to me. Probably during one of those times when I was in the barn "helping" with the milking (I am sure I did not help much but he tolerated me.) I was probably wanting a new Barbie, a Grand Funk Railroad 8-track, a horse or a car. Something that I had to have to make me happy or I'd surely die. I never asked Dad where he heard that phrase. He's been gone now for 27 years but his legacy lives on for me with those words of wisdom.

Deb Reheard pets Winston, who is owned by OBA members Peggy Stockwell and Richard Stevens. Winston visited a recent Yellow Ribbon event, where Oklahoma lawyers offered free legal advice to soon-to-deploy military men and women.

We all want to be successful, and how much money we make, earn or have is one of our society's easiest ways to measure our "success." But while we are trying to achieve those successes and chase our dreams, let's not forget to do the stuff that makes us wag our tail.

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EVENTS CALENDAR

FEBRUARY 2011

16 **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: Barbara Swinton (405) 713-7109

OBA Women in Law Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Deborah Bruce (405) 528-8625

OBA Professionalism Committee Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Patricia Podolec (405) 760-3358

Oklahoma Council of Administrative Hearing Officials; Italiano's, Oklahoma City; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212

17 **OBA Law-related Education Close-Up;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

OBA Law-related Education Close-Up Teachers Meeting; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

OBA Bar Association Technology Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Gary Clark (405) 744-1601

OBA Mock Trial Committee Meeting; 5:45 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Contact: Judy Spencer (405) 755-1066

OBA President's Summit; Post Oak Lodge, Tulsa; Contact: John Morris Williams (405) 416-7000

18 **OBA Board of Governors Meeting and President's Summit;** 9 a.m.; Post Oak Lodge, Tulsa; Contact: John Morris Williams (405) 416-7000

Association of Black Lawyers Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donna Watson (405) 721-7776

For more events go to www.okbar.org/calendar

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

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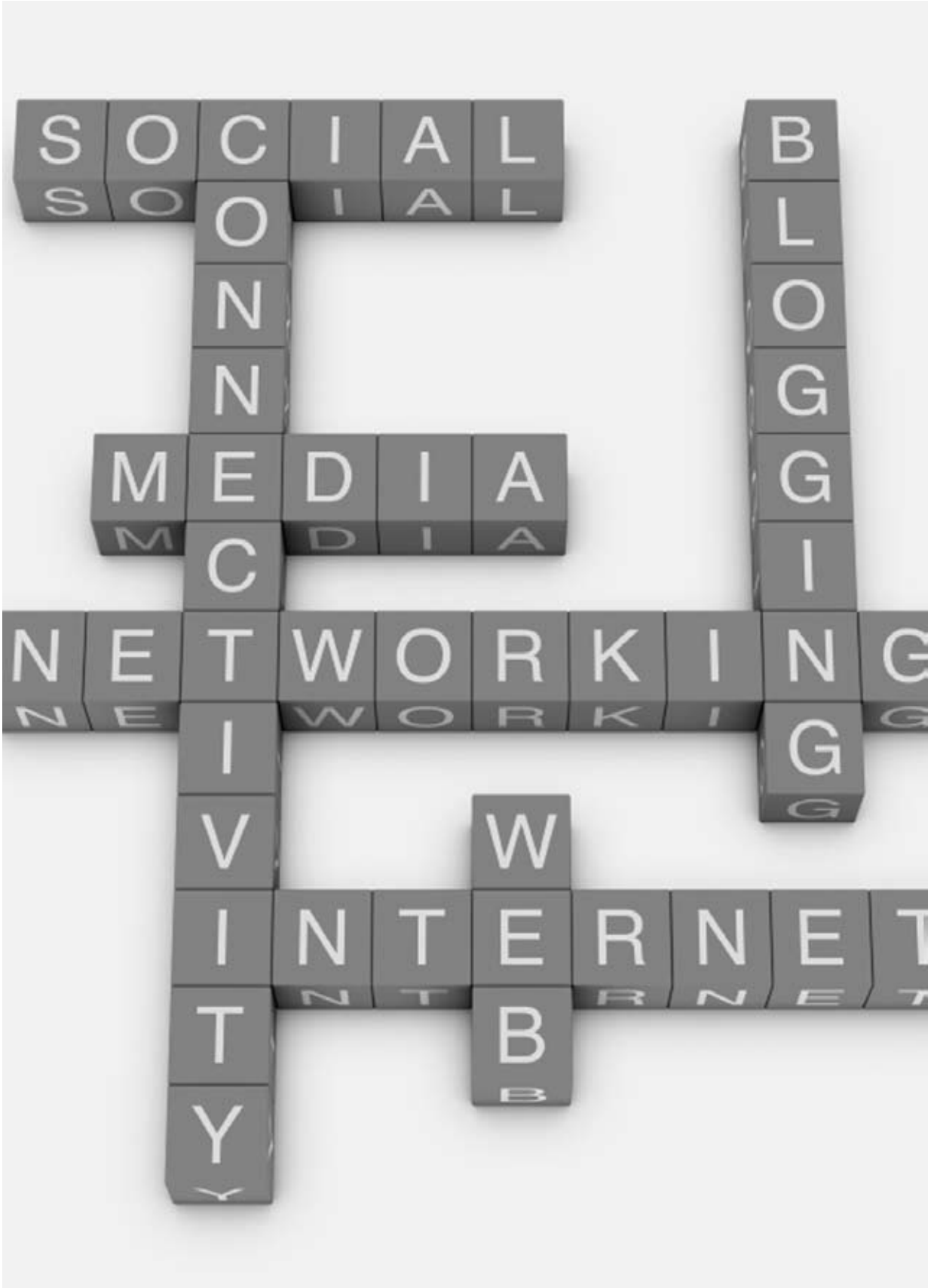
SOCIAL
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Facing up to Facebook

Discoverability of Social Media Evidence

By John G. Browning

With the seemingly all-pervasive presence of social networking sites, it's no wonder that lawyers all across the country now have a vast digital treasure trove of information at their disposal. Nearly 60 percent of adult Internet users in the U.S. have a profile on a social network. Facebook, founded in 2004, boasts more than 600 million users. The more business-oriented site LinkedIn is now up to 90 million members. Twitter, the social networking/microblogging site in which people "tweet" news or updates in bursts of up to 140 characters at a time, has grown to 190 million users since its founding in 2006. To give you some sense of its exponential growth, consider this: in 2007, Twitter handled 5,000 tweets per day. Today, the site processes 600 tweets every second — a staggering 50 million in a single day.

Given the sheer abundance of statements, photos, videos and other potential evidence being shared on such sites every day, they've become a rich hunting ground in all kinds of cases — from criminal cases to personal injury lawsuits and from employment litigation to family law. In fact, a February 2010 study done by the American Academy of Matrimonial Lawyers showed that 81 percent of the attorneys responding acknowledged finding and using social media evidence in their cases. Want to prove that personal injury plaintiff may not really be as physically limited by her injuries as she claims? Go to her Facebook page for photos of her indulging in her favorite sports and recreational activities. Are you convinced that an estranged husband is lying about his income in a child support modification proceeding? Then check out his social networking site or LinkedIn profile, where he's bragging about a recent bonus or promotion (one ex-husband who cried poor was actually impeached by photos of him sitting in a Lamborghini and going on exotic vacations). Are you convinced that the drunk driver you're prosecuting isn't as penitent as he seems? Look at his MySpace photos of partying and binge drinking, posted since his arrest.

Yet despite the fact that such a wealth of information is out there, many attorneys are unclear about what they can or can't do when seeking such information; what kind of information can prove useful to their case; and just what kind of information is truly discoverable. Let's deal with the ethical issues first.

ETHICAL QUESTIONS

Although the American Bar Association's Commission on Ethics 20/20 is studying the issue of whether new technology (like social

media) merits new or updated ethics rules, one should be guided for now by existing ethical guidelines and a healthy dose of common sense. Only two associations have addressed the ethics of social media discovery — the Philadelphia Bar Association and the New York City Bar Association. In March 2009, the Philadelphia Bar Association's Professional Guidance Committee responded to an inquiry about the propriety of asking a third party to "friend" a witness in order to access information on her Facebook and MySpace pages. The attorney had deposed the witness in question, learned of her social media presence, and determined that her testimony would be helpful to the adverse party. Although he didn't ask her to reveal the contents of her pages or provide access to them, he learned through subsequent visits that access to her social networking pages was restricted to the witness' "friends." He wanted to have a third party (such as a paralegal or investigator) "friend" her, but while not revealing the third party's affiliation with his law firm or that access was being sought in order to uncover information that might be used against this witness.

The Philadelphia Bar's Professional Guidance Committee found that such conduct would be unethical. Using a nonlawyer to procure such information doesn't release the attorney of his responsibilities for the conduct of such assistants under Rule 8.4 of the Rules of Professional Conduct, the committee held. It would also violate prohibitions against lawyers engaging in conduct that involved dishonesty, fraud, deceit or misrepresentation. Not disclosing the third party's connection with the lawyer, the committee reasoned, "omits a highly material fact, namely, that the third party who asks to be allowed access to the witness' pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness."

In September 2010, the New York City Bar Association's Committee on Professional Ethics, reached the same conclusion. That opinion also held that ethical rules prohibiting dishonesty, fraud, deceit, misrepresentation, or knowingly making false statements of fact would bar such "friending" of another party. As the committee said, "these rules are violated whenever an attorney 'friends' an individual under false pretenses." The committee even went into detail on specific ruses that would be off limits, such as creating a false Facebook profile in hopes that it would be of interest to a specific witness, or emailing a YouTube account holder falsely touting a digital posting as a "hook" to gain access to the account holder's channel and view all of her digital postings.

Nevertheless, the New York opinion acknowledges the widespread use of discovery via social media, and while prohibiting the use of deception to access such information, it saw nothing wrong with a lawyer accessing publicly viewable information or relying on formal discovery "of the targeted individual or of the social networking sites themselves."

PRIVACY ISSUES

Some attorneys and parties are hesitant to turn over what they consider to be private contents on a social networking profile. But as at least one federal judge has pointed out, one doesn't go onto a social networking site to engage in a soliloquy. As one MySpace user discovered after posting an article on the site only to later claim invasion of privacy when a newspaper published facts from it, once you post something on a social networking site, it's not so private after all.[1]

In a case in which two female plaintiffs were alleging sexual harassment, their former employer sought formal production of the contents of their social networking profiles, including all photographs or videos posted by the two women as well as "all updates, messages, wall comments, causes joined … activity streams … and applications."[2] The claimants, who had alleged depression and stress disorders stemming from their employment, object that granting such access to their privacy-restricted or "locked" pages was harassing, embarrassing and violated their privacy. But the judge disagreed, finding that such information was relevant to their allegations, and that "locking" the profiles from public access did not constitute a legitimate basis for shielding such information from discovery. As for their privacy concerns, the court noted that "the production here would be of information that the claimants have already shared with at least one other person through private messages or a larger number of people through postings."

While there isn't any Oklahoma authority yet on these discoverability issues, courts in other states are beginning to tackle them. In a recent New York case, a personal injury plaintiff suing the maker of an office chair objected to a

request that she provide full access to her Facebook and MySpace profiles. The defendant manufacturer, Steelcase Inc., maintained that publicly-viewable portions of her profiles indicated that the plaintiff had an active lifestyle, contrary to her allegations in the lawsuit. The court rejected her privacy argument, and found that she had placed her physical condition at issue by asserting tort claims. It ordered the plaintiff to provide the access sought, reasoning that "In light of the fact that the public portions of plaintiff's social networking sites contain material that is contrary to her claims and deposition testimony, there is a reasonable likelihood that the private portions of her sties may contain further evidence such as information with regard to her activities and enjoyment of life, all of which are material and relevant to the defense of this action."[3]

"The court rejected her privacy argument, and found that she had placed her physical condition at issue by asserting tort claims."

In other words, first gather what you can informally from profiles that are publicly viewable. Two caveats: to avoid making yourself a fact witness and to aid in authenticating the digital evidence you find, have a legal assistant or investigator print off the screenshots and other evidence that you find. In addition, print off the information as soon as you find it: more than one attorney has later returned to a site only to find that it's been altered or deleted entirely. And while there are ways to retrieve such information anyway and to pursue spoliation allegations, you'll save yourself time and trouble just by printing out what you find right away.

When information is not publicly viewable, it's time for formal discovery. Facebook and similar sites tend to be fairly uncooperative with civil discovery efforts. Your best bet is to propound formal discovery requests to the opposing party seeking any and all online profiles, postings, messages (including status updates, wall comments, tweets, retweets, comments, etc.), photographs and video that refer or relate to the allegations in the complaint, to any facts or defenses raised, and to any emotion, feeling or mental state that may be at issue.

WHAT TO LOOK FOR

The Lakota Sioux used virtually all of the buffalo after a hunt — meat for sustenance, hide for clothing and shelter, bone and sinew for tools and so forth. When considering the sort of evidence one might glean from a social networking site, lawyers should take a similar approach. While incriminating statements, photos or video posted on a social networking site may be what you'd typically look for, don't overlook other sources of information. For example, checking out who a person's "friends" are may lead you to more witnesses. Their mood indicator (a feature where a user shows what kind of mood he or she is in that day) can also prove helpful, as one criminal defense attorney found out when cross-examining a witness who'd reset his indicator to "devious" just before trial.

Status updates and log on/log off records can also be useful. A young man in New York facing armed robbery charges in November 2009 was able to demonstrate that he was on Facebook at the time of the crime, posting a status update miles away from the robbery. In one Canadian case, a British Columbia court found that a plaintiff's late night computer usage on Facebook — as demonstrated by the server log on/log off records — was evidence relevant to his personal injury claims against his employer.[4]

Items like status updates and log on/log off records are like digital footprints. The trail they leave can refute an adverse party's timeline of events or his testimony about them. Judges monitoring the status of defendants on probation have been known to visit their social networking pages to see if their online chronicle contradicts what is represented to the court. In one case in Texas, I was able to impeach the testimony of an individual contesting a default judgment who had maintained that he was unaware of the lawsuit until it was too late, and that failing to answer was simply an oversight or clerical error. His Facebook status updates, however, told a different story, as they revealed not only his awareness of the lawsuit and its significance, but also his eventual discussions with a lawyer about what he should say.

Social networking is here to stay. The ways in which people communicate about their lives has undergone a sea change. Thanks to the increasing tendency for people to live their lives online or to engage in a digital catharsis by posting to Facebook and other social networking sites, a wealth of information awaits the enterprising lawyer.

1. *Moreno v. Hartford Sentinel, Inc.*, 91 Cal. Rept. 3d 858 (Cal. Ct. App., April 2, 2009).
2. *EEOC v. Simply Storage Management LLC*, No. 09-1223 (S.D. Ind. May 11, 2010).
3. *Romano v. Steelcase Inc.* Case No. 2006-2233, New York (Suffolk County) Supreme Court (2010).
4. *Bishop v. Minichiello*, B.C.J. No. 692 (S.C.J.) (2009).

ABOUT THE AUTHOR

John Browning is a partner in the Dallas office of Thompson, Coe, Cousins & Irons LLP. Mr. Browning handles civil litigation in state and federal courts, in areas ranging from employment and intellectual property to commercial cases and defense of products liability, professional liability, media law and general negligence matters. He is a frequent contributor to national and regional legal publications and authors the award-winning syndicated newspaper column "Legally Speaking."

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Oklahoma Attorneys Mutual Insurance Company

Declares 27% Policy Dividend

The Board of Directors of Oklahoma Attorneys Mutual Insurance Company recently declared a 27% policy dividend. The dividend will total approximately $1.9 million. Policyholders with an active policy on December 31, 2010 will receive their dividend payment prior to February 26, 2011.

OAMIC is pleased to be able to reward policyholders in this manner, especially in these economic times. Dividends over the past 17 years exceed $23.7 million. We appreciate our policyholders' support!

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Caging the 'Parret,' But Scaring the Parents

Consequences and Remaining Problems in the Employee's Tort Action for Injuries in the Workplace in Light of the Legislature's Recent Abolishment of the Substantial Certainty Test

By Clark W. Crapster

Most civil litigators in Oklahoma have heard of the Legislature's recent abolishment of the "substantial certainty" test in the context of suits against employers for employee injuries in the workplace. Since the Oklahoma Supreme Court's landmark 2005 decision in *Parret v. Unicco Service Co.*, injured employees have been able to recover in tort not only against employers who acted with the desire to cause the harm but also employers with knowledge that the harm was substantially certain to occur.[1] Under the new Aug. 27, 2010, legislation however, employees may only recover when the employer desired the harm. In the wake of this major statutory change, there are important consequences in tort law for both employees and employers, today and in the future. This article will examine some of these effects.

With the abolishment of the substantial certainty test, the Legislature has created both positive and negative effects, some of which will take place almost immediately, while others may occur more gradually. Having lost an available common law method of proving intent, employees will be more inclined to focus on proving liability of third parties. Some have even stretched to assert claims against parent corporations, while asserting that they should be denied the protection of the workers' compensation statute. A few employees have attempted to show that the parent corporation was negligent in its management of the subsidiary's workplace safety. With respect to these types of allegations, logic, principles of fairness and important public policy considerations should require that the workers' compensation statute essentially protect the parent corporation, unless the employee demonstrates that the parent committed a tort that was either intentional or wholly separate from the subsidiary's nondelegable duty of managing safety.

BACKGROUND: THE EXCLUSIVE REMEDY OF WORKERS' COMPENSATION AWARD AND THE *PARRET* DECISION

When an employee is injured during the course and scope of his employment, the Workers' Compensation Court provides the remedy for those injuries, pursuant to Okla. Stat. tit. 85, § 11. Section 11 governs the employer's liability "for the disability or death of an employee resulting from an accidental injury sustained by the employee arising out of and in the course of employment, without regard to fault."[2] Section 12 of the act assures that the liability is "exclusive and in place of all other liability of the employer."[3] As indicated by the Oklahoma Supreme Court in its 2001 decision in *Davis v. CMS Continental Nat. Gas Inc.*, the only exception to this rule is in those very rare occasions when an employee has been injured as a result of an intentional tort by the employer.[4]

In the 2005 *Parret* decision, the Supreme Court of Oklahoma specifically condoned the long established, common law substantial certainty test as a means of proving the requisite intent for an intentional tort in this context. Under *Parret*, the employee-plaintiff, to state a cause of action against his employer, must offer specific allegations of fact that could plausibly give rise to a finding that the employer either: 1) desired to cause the injury; or 2) knew to a substantial certainty that the injury-causing accident would occur. In the new version of Okla. Stat. tit. 85, § 12, the Legislature stepped in and expressly removed the second part of the *Parret* test.

THE *PARRET* RULE — 2005-2010 . . . PLUS A COUPLE MORE?

For now, the *Parret* rule is not totally obsolete. Although the new legislation refining the *Parret* decision went into effect on Aug. 27, 2010, the new legislation alters substantive rights of employees, as opposed to mere procedural or evidentiary rules. Thus, the new law will likely have no retroactive application.[5] If the injury occurred prior to Aug. 27, 2010, then the courts will probably apply the *Parret* decision and the other pre-Aug. 27 substantial certainty cases. Indeed, attorneys for plaintiffs might be more inclined to find and pursue *Parret* suits now that this era is nearing an end.

In part, what the precise remaining life span of *Parret* will be depends upon what statute of limitation applies to a *Parret* claim against an employer. If an employee is injured on July 1, 2010, for example, is the deadline for bringing the *Parret* claim July 1, 2012? Hedge your bets on that one. Plaintiffs' attorneys representing an injured employee would be wise to bring their *Parret* suit against the employer within one year after the injury. The two-year statute of limitations of Okla. Stat. tit. 12 § 95(3) arguably will not apply. It provides a two-year period with respect to actions "for injury to the rights of another, not arising on contract, and not hereinafter enumerated." Section 95(4) then provides a one-year limitation period for several enumerated intentional torts, including battery. Regardless of whether the plaintiff is attempting to prove substantial certainty or specific intent, his *Parret* action will be an intentional tort action, arguably falling under the category of civil battery.

The True Parret Substantial Certainty Test— Misunderstood and Abused

Given the lingering *Parret* claims and the prospect of more cropping up in the next few years, a brief examination of the *Parret*-type lawsuit prior to Aug. 27, 2010, will be helpful. It will also show that the problem, sought to be remedied by the Legislature, did not exist in the law, but in its application.

The "substantial certainty" test was, in theory, supposed to be a very high standard for employees to meet.[6] Applying long-established tort law, it requires that the employer knew the injury was virtually certain to occur, or was nearly inevitable.[7] One renowned scholar in tort law, Dan B. Dobbs, refers to the rule as "the certainty test" and points out that the test is often distorted and improperly applied in the workers' injury context.[8] The substantial certainty test is not satisfied by a showing of negligence, recklessness or gross negligence. In order to satisfy the "substantial certainty" standard, "more than knowledge and appreciation of the risk is necessary."[9] This traditional substantial certainty test has been properly applied to civil battery cases for centuries without much trouble or confusion.[10]

The Employee V. Employer Context

But in the context of workplace accidents, the test perplexes judges, who must either find a fact issue on substantial certainty or throw out the employee's whole case against the employer. Courts have had to wrestle with how far into mere probabilities "substantial certainty" may properly extend. In doing so, Oklahoma courts have looked to several types of employ-

er conduct as being factors indicative of knowledge of a substantial certainty of injury: 1) directing the employee to subject himself to what the employer knows to be a high risk of injury, 2) ignoring employee requests for elimination of the danger, or 3) concealing facts from employees who are unaware of the danger.[11] In essence, rather than treating the substantial certainty test as being the near equivalent of the specific intent test, requiring virtual certainty of injury, Oklahoma courts have erroneously seemed to view it as including a range of probabilities depending on the perceived reprehensibility of the employer's conduct. In contradiction to the common law recognized by the *Parret* decision, some courts have arguably allowed cases to proceed to jury so long as there was a good chance of injury and the employer's conduct was significantly reprehensible. This, of course, is an erroneous application of the true substantial certainty test, and the cases have consequently seemed inconsistent with each other, creating difficult problems for litigators.

For example, it was logically held that where an employer knowingly directed the employee to work in violation of a doctor's note, it was, as a matter of law, not substantially certain that the employee would suffer a stroke-related injury.[12] Yet in a commonly misinterpreted decision, *Craft v. Graebel-Oklahoma Movers Inc.*, it was seemingly held that, where the employer knowingly directed employees to ride in vans that were in general disrepair with missing seat belts, the facts were sufficient to raise an intentional tort theory, although the court explicitly declined to hold whether such facts were sufficient to create a fact issue for trial. The trial court in *Craft* did not consider an intentional tort theory, thus the Supreme Court remanded for an initial determination on that issue.[13] In light of *Craft*, and despite the court's refusal to actually address whether a fact issue on substantial certainty existed, employees may incorrectly argue that there need not be complete substantial certainty of an outside intervening cause, so long as it is likely to occur at some time and the employer's conduct is substantially certain to cause injury if the potential event does occur. The argument goes: *If* one assumes that a car wreck is almost certain to occur during the relevant time period, then perhaps one could conclude that failure to wear a seat belt is nearly certain to cause an injury, *if* the car wreck is severe enough. Some employees may even argue erroneously that the apparent logic in *Craft* could extend to the employee's own knowing violation of safety rules, which would essentially force employers to assume that workers will not follow their own safety rules. Such positions show that the logic is flawed.

The recent *Price v. Howard* decision by the Oklahoma Supreme Court added clarity to the mix. It is clear, under *Price*, that a showing of recklessness or substantial likelihood of injury is insufficient, as a matter of law, to create a fact issue on substantial certainty of injury.[14] The court also noted that "violation of government safety regulations, even if willful and knowing, does not rise to the level of an intentional tort."[15] Additionally, the *Price* decision crafted an important assumption — that individuals will not engage in self destructive behavior. This reasoning arguably would apply to a workplace scenario where an employee knowingly exposes himself to a serious danger. The *Price* decision further implied that an outside event contributing to the injury, at least an event such as a rainstorm, should be considered in the substantial certainty analysis. However, while the Supreme Court's clarification in *Price* was an important and helpful step towards reeling in the broad *Parret* suit allegations against employers, it did not come soon enough for Oklahoma.

THE LEGISLATURE'S BROAD APPROACH AND THE RESULTING CONSEQUENCES

Due to abuse of the *Parret*-type lawsuit, the Legislature reacted by taking the only corrective action available to it, completely abolishing the substantial certainty test in workplace accident cases. Employees may argue that, because a result was substantially certain to occur, the court can infer the requisite mental state for an intentional tort. But this is essentially the same reasoning that underlies the substantial certainty test, and with its elimination on the books, the courts should be hesitant to entertain such arguments. Generally, it will not be plausible for the employee to allege that the employer intended the harm.

Thus, in most cases there simply will be no common law cause of action against the employer at all. This certainly comes very close to obtaining the appropriate result, since most workplace injuries are not the result of intentional conduct, or its equivalent, by the employer. But this should have been the result under the old *Parret* decision and its progeny. Now, in

the rare instance where an employer knows an injury is nearly inevitable as a result of his conduct, and does nothing to prevent it, the employee will have no common law recovery for the employer's egregious conduct, because the employer did not specifically intend for the harm to occur. This may not be a consequence that Oklahoma desires.

Consider, for instance, one of the classic illustrations, provided by the Restatement, of the type of scenario the substantial certainty test was intended for: Company X runs an aluminum smelter plant and emits harmful chemicals from its roof. Company X knows that the particles, carried through the air, *will* fall upon the neighboring property, causing various harms. Company X does not desire this and regrets it. Nevertheless, due to the knowledge of the virtual certainty of harm, the Restatement (Third) would hold the company liable for intentional battery under the substantial certainty test.[16] However, in Oklahoma, if Company X employed additional workers for jobs on the neighboring property, who are harmed by the chemicals, the company might escape liability outside workers' compensation, citing the new Okla Stat tit. 85, § 12's abolishment of the substantial certainty test. Luckily, such conduct by employers is rare, but should it occur, the employee has lost a valid common law intentional battery claim due to the new statutory change.

A SHIFT OF FOCUS: THIRD PARTIES AND PARENT CORPORATIONS

Another and perhaps farther reaching result is that some employees in Oklahoma may shift their attention almost entirely to other potentially liable parties, to whom the workers' compensation exclusivity rule may not apply. If an employee can show that some other third party, such as a distributor, manufacturer, property owner or parent corporation is responsible for the harm, then the employee's attorney will now focus almost all of her efforts on building the employee's negligence or product liability claim against such parties. With the employer out of the picture, litigation against these types of individuals and entities will likely increase and become even more hotly disputed.

The law governing liability of distributors and manufacturers is fairly well established and claims against these entities will likely continue without substantial change. Even with respect to the unique situation where an employee of an independent contractor sues the premises owner, the law provides that, so long as the property owner hiring the contractor "does not himself undertake to interfere with or direct that work," he "is not obligated to protect the employees of the contractor from hazards which are incidental to or part of the very work which the independent contractor has been hired to perform."[17]

> "Additionally, the *Price* decision crafted an important assumption — that individuals will not engage in self destructive behavior."

But the present state of Oklahoma law governing a parent or affiliate corporation's liability for safety hazards at a subsidiary's workplace is a potential area for abuse, especially in light of the recent elimination of the *Parret* rule. Plaintiffs have already begun to test and exploit these waters. Rather than trying to frame the negligence claim against the employer as an intentional tort claim, employees may frame a negligence claim such that it implicates an alleged breach of duty on the part of a parent corporation, which, inevitably, plaintiffs will argue does not fall within the protection of the workers' compensation statute. The successor to the *Parret* claim will perhaps be similar to what was asserted in *Love v. Flour Mills of America*, 647 F.2d 1058, 1062 -63 (10th Cir. 1981).

Love v. Flour Mills of America

The facts of *Love* involved an explosion at a grain elevator in Durant, wherein the plaintiff, Love, suffered severe injuries. Love sued the parent corporation, Chickasha Cotton Oil Co., for negligence, asserting that Chickasha owned the elevator along with Flour Mills and that the injuries were the result of the negligence of both Chickasha and Flour Mills in the maintenance of the Durant facility. Love argued that Chickasha knew or should have known of the dangers at the plant due to Chickasha's experience in the industry and ownership of other similar plants.

The Tenth Circuit agreed with Love that Chickasha could not claim to be "the employer" and thereby obtain immunity under the workers' compensation statute, noting that it is generally not proper for a parent corporation to "pierce its own corporate veil" to seek the statutory protection.[18] But does this mean that the parent may be liable under a negligence theory for alleged safety hazards? Oklahoma state courts have not specifically addressed the question, but the Tenth Circuit in *Love*, accurately recognized that a parent corporation generally has no duty to "'to furnish a place for [an employee of the subsidiary entity] to work safe or otherwise.'"[19] The near universal rule is that a parent corporation is not liable for an injury at a subsidiary workplace solely by virtue of the corporate relationship. It is only liable for its own independent torts.[20]

The "Independent Tort" Problem

When is there independent negligence committed by the parent such that the injured employee may bring suit? Again, Oklahoma has been silent, but according to the Tenth Circuit's decision in *Love*, the law should not allow an employee to sue the parent corporation for alleged negligence in managing safety matters at the subsidiary workplace, for that would "have the anomalous effect of treating shareholders as employers and then refusing to grant them employer immunity under the Workers' Compensation Act."[21] Parent corporations should only be held liable for torts truly independent from management of the subsidiary's workplace, as when an agent of the parent negligently strikes an employee of the subsidiary in a work-related vehicle collision.[22] In *Love*, therefore, the Tenth Circuit held that since the allegations against the parent merely involved management of safety at the subsidiary work site, Love failed to state a claim for relief against Chickasha, the parent corporation.

Yet there are some cases in other jurisdictions that strangely permit the "anomalous effect" of holding a parent liable for negligence in managing safety at the subsidiary workplace, while at the same time denying the parent the protection of the workers' compensation act. Amongst these cases, the majority require that the employee at least show an affirmative assumption of duty by the parent corporation. This rule is based on the "Good Samaritan Doctrine," embodied in § 324(A) of the Restatement (Second) of Torts.

The "Assumption of Duty" Cases

In the assumption of duty line of cases, unless the parent undertook a specific service negligently thereby causing the harm, the plaintiff must usually argue that the parent assumed the subsidiary's nondelegable duty to maintain a safe workplace. In addressing this question, the courts have looked to three factors: 1) the scope of the parent's involvement with the subsidiary's maintaining safety; 2) the extent of the parent's authority with respect to safety matters; and 3) the intent of the parent with respect to controlling safety.[23] Generally, proof of mere knowledge of safety hazards, budgetary control and failure to take action has been insufficient to show an assumption of the duty to maintain a safe workplace.[24] In addition, evidence that the parent corporation merely monitored safety at the subsidiary's site, provided safety advice or literature, or rendered limited specific safety services, such as inspections, is generally insufficient to show an assumption of the duty to maintain a safe workplace.[25] It follows that the mere sharing of directors or officers and intermittent control over various subsidiary matters when needed would not be sufficient for there to be an assumption of the subsidiary's whole duty to maintain safety at its workplace.[26] A very small number of cases have erroneously held a parent potentially liable for a subsidiary's workplace hazards under a "direct-participant" theory of liability, but such reasoning confuses torts based upon a duty owed by the parent corporation to the public at large and torts based upon allegations that the parent corporation assumed the subsidiary's separate and nondelegable duty to maintain a safe workplace.[27]

Why the Assumption of Duty Cases Are Wrong for Oklahoma: Public Policy Requires Extending the Workers' Compensation Immunity Provision to Parent Corporations That Assume the Subsidiary's Duty to Maintain a Safe Workplace.

Absent a negligent rendition of a specific service by the parent corporation that thereby causes harm, the assumption of duty cases clearly tend to hold the parent corporation liable only upon a demonstration of a complete overtaking of the subsidiary's duty to maintain a safe workplace. A major problem exists, however, with respect to such a theory of liability, as the Tenth Circuit in *Love* has alluded to. Why is the parent corporation denied the immunity, which would otherwise be granted to the subsidiary-employer under the workers' compen-

sation statute, when the parent has essentially stepped in the shoes of the subsidiary with respect to the duty to maintain safety?

The reasoning of the courts which distinguish the parent and the subsidiary in this respect has been their status as separate entities along with the concept that a parent corporation cannot pierce its own corporate veil to benefit the subsidiary's statutory immunity.[28] But when the *plaintiff* alleges that the parent completely assumed the duty of the subsidiary to maintain a safe workplace by control or otherwise, then, in essence, the plaintiff is attempting to pierce the corporate veil to that extent, not the parent corporation. The body of law pertaining to the subsidiary's duty, which is assumed by the parent, should logically apply.

The *Love* court clearly recognized this logic. While a sole shareholder, or parent corporation, "should not be able to claim immunity for an independent tort that has nothing to do with the management of [the subsidiary]," allowing the employee to bring suit based on mere allegations that the parent mismanaged safety at the subsidiary workplace "places upon shareholders an independent duty, which in reality is the nondelegable duty of the employer."[29] As the Tenth Circuit stated: "Such a holding would have the anomalous effect of treating shareholders as employers and then refusing to grant them employer immunity under the Workers' Compensation Act."[30] The Tenth Circuit, briefly discussed the Sixth Circuit case of *Boggs v. Blue Diamond Coal Co.,* 590 F.2d 655 (6th Cir. 1979), which some may argue was an assumption of duty case where the parent corporation controlled subsidiary safety.[31] But the Tenth Circuit merely used *Boggs* for its "corporate distinctness" analysis.[32] If the Tenth Circuit desired to follow an "assumption of duty" rule, it clearly could have done so. Instead, it held that, since Love merely alleged negligent management of safety at the subsidiary, he stated no cause of action, as that would have "the anomalous effect" of treating the parent as the employer but without affording the statutory immunity.[33]

Public policy considerations should also be considered in this regard. It is beneficial for our society and the safety of employees to encourage parent corporations to take over or manage safety matters when needed. Not only is it illogical and unfair to hold parent corporations liable for managing the subsidiary's workplace safety, when the subsidiary receives immunity, but it undermines public policy by encouraging parents to take a hands off approach and leave all safety matters to the subsidiary. The law will frighten the parent corporations into passive observance, the sure way to avoid unfair liability. Some may argue that allowing parent corporations to manage safety at the subsidiary without risk of a negligence suit will encourage poor management. This argument, however, overlooks the corporate reality that if the parent is so related to the subsidiary that it desires to control its safety, the legislatively created workers' compensation remedy is as much of a negligence deterrent for the parent as it has been for the subsidiary. It also overlooks the fact that allowing negligence suits against a parent corporation for assuming the subsidiary's duty to maintain a safe workplace allows a loop hole around the workers' compensation exclusivity rule, even though the Legislature has recently gone to extreme lengths to protect it from such loop holes. To the extent the parent corporation assumes the duty of safety, it is the employer to that extent, and the better rule is to hold the parent liable only for those torts that are intentional or wholly independent from management of safety at the subsidiary workplace.

CONCLUSION

Many legal questions will continue to arise in the context of an employee's common law tort action for injuries occurring in the workplace. As plaintiffs' attorneys search for successor theories to the substantial certainty test, courts and the Legislature must consider when and to what extent third parties, such as parent corporations, should be liable for essentially taking on the employer's duty to maintain safety. To protect the exclusivity requirement of the workers' compensation statute and promote cooperation between parent corporations and employers regarding safety matters, the parent should only be liable for tortious conduct that is either intentional or wholly independent from management of safety matters at the subsidiary workplace.

Beyond this, other legal questions may arise pertaining to, for example, application of the election of remedies doctrine and contribution amongst the defendants. In addressing all such questions, litigators and courts should bear in mind the legislative purpose behind the workers' compensation statute — providing a sure and fast form of exclusive recovery for injured employees — in addition to public policy con-

siderations such as the need for cooperative participation by related entities in employee safety at the workplace. And certainly, in handling those remaining substantial certainty cases, courts and litigators should be careful to properly apply the common law test and not allow cases to proceed through trial when there was, as a matter of law, merely a potential for injury, as opposed to near certainty. Both the Supreme Court of Oklahoma and the Legislature have clearly indicated that they did not intend for recovery without a virtual certainty of injury. The courts and litigants should abide by that intent and long-established common law rule as the last remaining years of *Parret* suits wind down.

1. *Parret v. Unicco Service Company*, 127 P.3d 572 (Okla. 2005).
2. Okla Stat. tit. 85, §11.
3. Okla Stat. tit 85, §12.
4. 2001 OK 33, 23 P.3d 288, 294-96 (Okla. 2001).
5. *See, e.g., Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 165 L. Ed. 323 (U.S. 2006); *Gray v. Gray*, 459 P.2d 181, 186 (Okla. 1969).
6. *See Price v. Howard*, 2010 OK 26, 2010 WL 925175, *1, 3-4 (Okla. 2010).
7. *See, e.g.*, Restatement (Third) of Torts, §1 (2005) (Reporters' Note, comment a) (discussing "virtually certain"); *Reagan v. Olinkraft, Inc.*, 408 So.2d 937, 940 (La. Ct. App. 1982) (discussing "nearly inevitable" as synonymous in meaning with "substantially certain").
8. *See* Dan B. Dobbs, The Law of Torts, §24 (2000).
9. *Parret*, 127 P.3d 572, 574-79, *citing Beauchamp v. Dow Chemical Co.*, 398 N.W.2d 882, 893 (Mich. 1986).
10. *See, e.g., Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955).
11. *See Parret v. Unicco Service Co.*, 2006 WL 752877 (W.D. Okla. 2006); *Craft v. Graebel-Oklahoma Movers, Inc.*, 2007 OK 79, 178 P.3d 170, 177 (Okla. 2007); *see also Almegard v. San Juan Pilot Training, Inc.*, 133 F.3d 932 (10th Cir. N.M. 1998).
12. *Hill v. United Parcel Serv. of America, Inc.*, 2009 WL 1974461 (W. D. Okla. 2009).
13. 2007 OK 79, 178 P.3d 170, 177 (Okla. 2007).
14. *Price v. Howard*, 2010 OK 26, 2010 WL 925175, *1, 3-4 (Okla. 2010).
15. *Id*. at *4.
16. Restatement (Third) of Torts, §1 (2005) (illustration 3).
17. *Marshall v. Hale-Halsell Co.*, 932 P.2d 1117, 1119 (Okla. 1997).
18. *Love*, 647 F.2d 1058, 1062 -63.
19. *Id*. at 1062 -63 (quoting Neal v. Oliver, 438 S.W.2d 313, 339 (Ark. 1969).
20. *Id*.
21. *Id*. at 1063.
22. *See id*. at 1062. (discussing actionable independent torts).
23. Annette T. Crawley, Environmental Auditing And The "Good Samaritan" Doctrine: Implications For Parent Corporations, 28 Ga. L. Rev. 223, 242-43 (1993).
24. S*ee Waste Mgmt., Inc. v. Sup. Crt.*, 119 Cal. App. 4th 105, 109-14 (Cal. Ct. App. 4th Div. 2004); *Born v. Simonds International, Corp.,* 2009 WL 5905396, * 1-7 (Sup. Ct. Mass. 2009).
25. *See Muniz v. Nat'l Can Corp.,* 737 F.2d 145, 148-51 (1st Cir. 1984); *Heinrich v. Goodyear Tire & Rubber Co.*, 532 F. Supp. 1348 (D. MD 1956); *Bujol v. Entergy Servs., Inc.*, 922 So.2d 1113, 1128-33 (La. 2004) ; *Davis v. Liberty Mutual Ins. Co.*, 525 F.2d 1204, 1208 (5th Cir. 1976); *Rick v. RLC Corp.,* 535 F. Supp. 39 (E.D. Mich. 1981); *Proctor & Gamble Co. v. Staples,* 551 So.2d 949, 951-55 (Ala. 1989).
26. *See Born*, 2009 WL 5905396, * 1-7; *Muniz*, 737 F.2d at 148-51; *Love v. Flour Mills of America*, 647 F.2d at 1062 -63.
27. *E.g., Forsythe v. Clark USA, Inc.*, 864 N.E.2d 227, 232-40 (Ill. 2007).
28. *See, e.g., First Nat'l Bank of Camden v. Tracor, Inc.*, 851 F.2d 212, 214 (8th Cir. 1988).
29. *Love*, 647 F.2d at 1063.
30. *Id*.
31. *Id*. at 1061-62.
32. *Id*. at 1062-63.
33. *Id*. at 1062-64.

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The False Claims Act, Whistleblowers and the Fight Against Fraud, Waste and Abuse of Taxpayer Dollars

By Marcia Bull Stadeker and Christopher Meazell

INTRODUCTION

Whistleblowers now have added ammunition in their fight against fraud, waste and abuse of taxpayers dollars. Fraud by those who do business with the government is nothing new. Neither are the laws intended to prosecute them. But recent amendments to the federal False Claims Act (FCA or the act), 31 U.S.C. §§3729 to 3733, and other legislation at the federal and state level, have given both whistleblowers and federal prosecutors more tools in their fight against fraud by government contractors.

This article discusses the recent amendments to the FCA and similar legislation and what those changes mean for whistleblowers committed to holding government contractors accountable for fraud.

WHAT IS THE FALSE CLAIMS ACT?

The FCA was enacted by Congress in 1863 to combat rampant fraud by suppliers to the Union Army during the Civil War.[1] Besides allowing prosecutors to sue unscrupulous government suppliers,[2] the act, from its inception, permitted private citizens (known as relators) to bring suit on behalf of the government and share in any damages recovered.[3] As now, the purpose of the whistleblower or *qui tam* provisions[4] was to get ordinary citizens to "aid in the effort to root out fraud against the government."[5]

EARLY AMENDMENTS TO THE FALSE CLAIMS ACT

The FCA has undergone a number of substantive changes since its enactment almost 150 years ago. In 1943, Congress curtailed the act due to a rash of "parasitical suits" by relators based on information copied from government files and indictments[6] and a ruling by the Supreme Court that the act did not specifically prohibit such suits even though the relators played no role in uncovering the alleged fraud.[7] Among other things, the 1943 amendments prohibited *qui tam* lawsuits "based upon evidence or information in the possession of the

United States, or any agency, officer or employee thereof, at the time such suit was brought"[8] and reduced the relator's share from 50 percent of the government's recovery to no more than 25 percent.[9] The 1943 amendments caused a substantial decline in *qui tam* lawsuits,[10] a trend that continued for the next four decades until the act was again amended in 1986.

The 1986 amendments aimed to strengthen the FCA in light of skyrocketing fraud against the government, especially in defense contracts.[11] Among other things, the amendments imposed treble damages against defendants, increased penalties from a maximum of $2,000 per claim to a range of $5,000 to $10,000,[12] increased the relator's share of the recovery to a maximum of 30 percent and created a cause of action for employees subjected to retaliation for helping to uncover fraud.[13] The 1986 amendments transformed the act into a popular and effective weapon against fraud and abuse of taxpayer dollars. And the changes, as intended, triggered a marked increase in the number of whistleblower lawsuits.[14]

THE 2009 AMENDMENTS

In 2009, Congress substantially amended the FCA yet again. The amendments contained sweeping procedural and substantive changes to the FCA, intended to close loopholes exploited by defendants, clarify certain provisions and overrule certain court decisions that had limited the act's reach.[15]

The substantive changes included the following:

- The definition of a "claim" was expanded to include not only fraudulent demands for payment submitted directly to the government, but also those made to third parties who disburse payment on behalf of the government or to advance a government program.[16] This change expands the pool of possible defendants and actionable conduct.
- There is now liability for knowingly retaining an overpayment, even if it was innocently received.[17]
- The amendments expanded the scope of liability for "reverse" false claims — situations where the government is paid less than it is owed. Before the 2009 amendments, liability for a reverse false claim required the creation or use of a false record or statement. Now, a defendant is also liable if he or she "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government."[18]
- The amendments added a definition for "obligation" that essentially broadens the category of conduct or duties that can trigger a false claim lawsuit.[19]
- The scope of liability for conspiracy is now broader and includes conspiring to violate any act that is forbidden under the FCA.[20]
- Persons protected from retaliation now include not only employees, but also contractors and agents; and those liable for retaliation can be persons other than an "employer."[21]
- The conduct protected from retaliation is expanded to include any lawful effort to stop one or more violations of the FCA.[22]

The 2009 amendments also made significant procedural changes to the FCA, with the aim of facilitating the litigation and investigation process. For example:

- The government now has more efficient subpoena and discovery capabilities when deciding whether to file a false claims suit or intervene in a *qui tam* action. Specifically, the U.S. attorney general can now delegate his authority to issue civil investigative demands (CIDs) to secure documents, answers to interrogatories or oral testimony.[23] This delegation power will allow assistant attorneys general and U.S. attorneys around the country to take a more active investigative role in cases, allowing more efficient and effective investigations of false claims cases by local federal prosecutors.
- The amendments allow government officials to share more information with relators and their attorneys, as well as with state and local authorities.[24] This should allow for greater collaboration between the government and whistleblowers in prosecuting *qui tam* actions.
- The amendments expressly provide that in the event of a *qui tam* lawsuit, the government can still file its own complaint or amend the relator's complaint. Moreover, for statute of limitations purposes, any such filings by the government will relate back to the filing date of the relator's original complaint.[25]

Overall, the 2009 amendments permit greater collaboration between whistleblowers and the government in prosecuting *qui tam* actions. The amendments also make clear the government's desire to go after a broader spectrum of those who misuse government funds and to recruit more whistleblowers to aid in that effort.

THE 2010 AMENDMENTS

The FCA was amended twice in 2010. The first amendments significantly revised the act's "public disclosure" provision, 31 U.S.C. Section 3730(e), which bars *qui tam* lawsuits based on information already publicly disclosed. Specifically, the amendments narrowed the grounds on which defendants can obtain dismissal of *qui tam* lawsuits due to prior public disclosure of the lawsuit's subject matter.[26] Notably:

- Dismissal is not required if the government opposes dismissal.[27]
- A federal hearing where "the Government or its agent is a party" qualifies as a public disclosure, but not a state hearing or, presumably, private litigation in federal court.[28]
- A federal report, hearing, audit or investigation qualifies as a public disclosure, but not one by the state.[29]
- To be dismissed, the allegations in the whistleblower's lawsuit must be "substantially the same" as the public disclosure, not merely "based upon" that information, as previously required.[30]
- the "original source" exception to dismissal has been broadened. As before, a relator can still avoid dismissal if he or she is the original source of the information, but he or she no longer needs to have "direct and independent knowledge" of the information to avoid dismissal.[31]

These revisions are clearly intended to allow more whistleblower lawsuits to go forward. Indeed, lawsuits that would have been dismissed under the previous "public disclosure" standard are allowed under the new standard. As a result, there will likely be an increase in *qui tam* lawsuits based on information already publicly disclosed.

The second set of 2010 amendments establish a three-year statute of limitations for retaliation actions brought under 31 U.S.C.§3730(h).[32] They also correct an apparent drafting error in the 2009 amendments to the same section. Under these 2010 amendments, conduct protected from retaliation includes both "lawful acts done…in furtherance of [a false claims action]" as well as "other efforts to stop 1 or more violations of this subchapter."[33]

OTHER RECENT WHISTLEBLOWER LEGISLATION

Congress' legislative efforts in the last few years show a clear intent to rein in fraud against the government and taxpayers and to recruit private citizens in that effort. Besides strengthening the FCA, Congress recently has enacted whistleblower legislation to combat tax and securities fraud as well.[34] Although neither legislation allows for *qui tam* suits, they do reward whistleblowers whose efforts lead to the recovery of monetary sanctions or tax underpayments and do provide some degree of confidentiality for whistleblowers.[35]

> "Several in Congress have proposed changes to the false marking statute so that only the United States or those persons suffering a 'competitive injury' may sue."

Patent Fraud

In the area of patent fraud, Congress appears to be bucking the trend toward greater whistleblower participation. Indeed, there is pending legislation aimed at reducing the number of whistleblower suits concerning patent fraud. The false marking statute, 35 U.S.C. §292, currently prohibits the use of false patent markings on an unpatented product, and imposes a fine of up to $500 per offense.[36] Under the statute, "[a]ny person" may sue the wrongdoer and receive half of the recovery, with the other half going to the federal government.[37]

Prior to 2009, the false marking statute generated relatively few whistleblower lawsuits. However, several recent decisions by the Court of Appeals for the Federal Circuit,[38] have gen-

erated more interest in the statute and a jump in the number of *qui tam* suits.[39] Notably, the court in *The Forest Group Inc. v. Bon Tool Co.*, 590 F.3d 1295, 1301 (Fed. Cir. 2009), held that the statute's $500 maximum fine applied to each falsely marked item, rather than to each decision to falsely mark. This means that a company engaged in mass production of falsely marked goods could face a multimillion or multibillion dollar judgment if found liable, with half the recovery going to the whistleblower. The court's holding resulted in a sharp increase in false marking *qui tam* lawsuits. In light of this decision and others, several in Congress have proposed changes to the false marking statute so that only the United States or those persons suffering a "competitive injury" may sue.[40] The proposed change would apply immediately, to all pending cases, thereby eliminating any pending actions that did not conform to the proposed amendments.[41] It remains to be seen, however, whether this or other proposed changes will become law.

Oklahoma

With the FCA as a guide, more and more states are enacting their own false claims legislation to fight fraud locally. The Oklahoma Medicaid False Claims Act, enacted in 2007, is one such example.[42] Although the statute's title suggests that it is limited to Medicaid-related false claims, the provisions themselves are drafted more broadly and could apply to other types of fraud against the state.[43]

Under Oklahoma's statute, a defendant is liable for three times the amount of damages that the state sustains, plus a fine between $5,000 and $10,000.[44] Like the federal law, Oklahoma's statute also rewards relators up to 30 percent of the proceeds recovered from the defendant. The statute also provides a cause of action for retaliation for employees who suffer adverse action as a result of their participation in a false claims lawsuit or investigation.

WHAT DOES IT ALL MEAN?

The recent amendments to the False Claims Act as well as other legislative developments at the federal and state level suggest that governments are increasingly concerned with the loss of revenue due to fraud and abuse of taxpayer dollars. And perhaps recognizing the limits of what the government can do, federal and state authorities are looking increasingly to private citizens to help them identify and prosecute those who defraud the government, offering potentially sizable rewards and protection from retaliation in return.

Although it is still too early to gauge the full impact of the most recent amendments to the False Claims Act, if history is a guide, one should expect an increase in whistleblower lawsuits and government prosecutions. To date, these lawsuits have recovered billions of taxpayer dollars from fraudulent government contractors. And, for their efforts, whistleblowers have shared in these proceeds, sometimes in the millions of dollars. Given the latest crop of federal and state whistleblower laws, this trend will likely continue.

1. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000) (quoting *United States v. Bornstein*, 423 U.S. 303, 309 (1976)).

2. *Erickson ex rel., United States v. American Inst. of Biological Sciences*, 716 F. Supp. 908, 915 (E.D. Va. 1989) (citing the act of March 2, 1863, c. 67 12 Stat. 696).

3. James Roy Moncus III, "The Marriage of the False Claims Act and the Freedom of Information Act: Parasitic Potential or Positive Synergy," 55 *Vand. L. Rev.* 1549, 1554 (2002).

4. "Qui Tam" means "who as much as." The phrase is derived from the longer Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur" which means "who brings the action for the king as well as for himself." *Erickson*, 716 F. Supp. at 909 n.1 (citing W. Blackstone, *Commentaries on the Law of England* 160 (1768)).

5. *United States ex rel. Williams v. NEC Corp.*, 931 F. 2d 1493, 1497 (quoting *Erickson*, 716 F. Supp. at 915).

6. *Williams*, 931 F. 2d at 1497 (citing *United States ex rel. Stinson v. Provident Life & Accident Ins.*, 721 F. Supp. 1247, 1249 (S.D. Fla. 1989)).

7. *See generally United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

8. *Williams*, 931 F. 2d at 1497 (quoting 31 U.S.C. §232(C) (Supp. III 1943), 57 Stat. 608 (1943)).

9. Charles Doyle, *Congressional Research Service*, R40785, "Qui tam: The False Claims Act and Related Federal Statutes" 6-7 (2009).

10. *Erickson*, 716 F. Supp. at 916.

11. *United States ex rel. LaVally v. First Nat'l Bank*, 707 F. Supp. 1351, 1355 (D. Mass. 1988) ("The legislative history in both houses of Congress reveals a sense that fraud against the Government was apparently so rampant and difficult to identify that the Government could use all the help it could get from private citizens with knowledge of fraud."); Doyle, *supra* note 9 at 7 n. 48 (quoting S. Rept. No. 990345, at 2-3 (1986) as stating: "In 1985 ... 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses. Additionally, the Justice Department has reported that in the last year, four of the largest defense contractors ... have been convicted of criminal offenses while another ... has been indicted and awaits trial.... The Department of Justice has estimated fraud as draining 1 to 10 percent of the entire Federal budget. Taking into account the spending level in 1985 of nearly $1 trillion, fraud against the Government could be costing taxpayers anywhere from $10 to $100 billion annually.")

12. Violations taking place on or after Sept. 29, 1999, are subject to penalties between $5,500 and $11,000 per claim. *See* Civil Monetary Penalties Inflation Adjustment, 64 Fed. Reg. 47099 (Aug. 30, 1999), 28 C.F.R. §85.3(9) (2000).

13. Public Law 99-562 (Oct. 27, 1986), 100 Stat. 3153; Doyle, *supra* note 9 at 7-8; U.S. Dept. of Justice, "The False Claims Act: A Primer" (2010) *available at* www.justice.gov/civil/frauds/FCA_primer.htm.

14. U.S. Dept. of Justice, Fraud Statistics – Overview, Oct. 1, 1987 — Sept. 30, 2010, *available at* www.justice.gov/civil/frauds/fcastats.html.

15. The amendments were enacted as part of The Fraud Enforcement and Recovery Act of 2009 (FERA), Public Law 111-21, 123 Stat. 1617, legislation intended to combat mortgage and financial fraud in the midst of a severe recession and a nearly trillion dollar government expenditure to shore up the economy. Among other things, the 2009 FERA amendments sought to curb the impact of cases such as *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008) (narrowly construing 31 U.S.C. §3729(a)(1) to mean that liability under that provision required a claim to be directly presented to the government); *id.* at

2128 (interpreting the "paid and approved by the Government" language in 31 U.S.C. §3729(a)(2) to mean that claims presented to intermediaries were actionable under that provision only if the presenter "intended" "that the Government itself pay the claim") and *United States ex rel. Totten v. Bombardier Corp.*, 380 F. 3d 488, 490 (D.C. Cir. 2004) (narrowly construing 31 U.S.C. §3729(a)(1) to mean that liability "only attach[ed] if the claim [was] 'presented to an officer or employee of the Government.'") (citation omitted).

16. 123 Stat. 1622-23; new 31 U.S.C. §3729(b)(2).
17. 123 Stat. 1623; new 31 U.S.C. §3729(b)(3).
18. 123 Stat. 1622; new 31 U.S.C. §3729(a)(1)(G)
19. 123 Stat. 1623; new 31 U.S.C. §3729(b)(3).
20. 123 Stat. 1621; new 31 U.S.C. §3729(a)(1)(C).
21. 123 Stat. 1624-25; new 31 U.S.C. §3730(h).
22. 123 Stat. 1624-25; new 31 U.S.C. §3730(h)(1).
23. 123 Stat. 1623-24; new 31 U.S.C. §3733(a).
24. *Id.*; 123 Stat. 1625; new 31 U.S.C. §3733(c).
25. 123 Stat. 1623; new 31 U.S.C. §3731 (c).
26. The first set of 2010 amendments are contained in the 111th Congress' major health care legislation, The Patient Protection and Affordability Care Act (PPACA). *See generally* Public Law 111-148, 124 Stat, 119. 901-02 (2010); new 31 U.S.C. §3730(e)(4)(A),(B).
27. 124 Stat. 901; new 31 U.S.C. §3730(e)(4)(A).
28. *Id.*
29. *Id.*
30. *Id.*
31. 124 Stat. 901-02; new 31 U.S.C. §3730(e)(4)(B).
32. The second set of 2010 amendments are contained in The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Congress' most significant overhaul of financial regulation since the Great Depression. *See generally* Dodd-Frank Act, Section 1070A(c), 124 Stat. 1376; new 31 U.S.C.§3730(h).
33. *Id.*
34. *See generally* Dodd-Frank Act, Section 922, 124 Stat. 1376 (implementing securities fraud whistleblower legislation); 26 U.S.C. §7623 (discussing tax fraud whistleblower legislation).
35. *See id.; see also* 26 U.S.C. §6103 (discussing confidentiality of tax informants' identity); 26 C.F.R. 301.7623-1(e) (same).
36. 35 U.S.C. §292 (a).
37. 35 U.S.C. §292 (b).
38. *See, e.g., Stauffer v. Brooks Brothers Inc.*, 619 F.3d 1321, 1325-26 (Fed. Cir. 2010) (finding that *qui tam* plaintiff had standing to sue based on the government's partial assignment of its damages claim through the false marking statute to "any person" who sues on behalf of the government and offering half of any fine imposed); *Pequignot v. Solo Cup Co.*, 608 F.3d 1356, 1364 (Fed. Cir. 2010)(finding that evidence of a defendant's knowingly false statement creates a rebuttable presumption of an intent to deceive the public, but that evidence of good faith such as reliance on the advice of counsel is sufficient to overcome that presumption); *The Forest Group Inc. v. Bon Tool Co.*, 590 F.3d 1295, 1301 (Fed. Cir. 2009) (finding that the statute's $500 civil fine applied to each falsely marked article, rather than to the decision to falsely mark).
39. *See* False Marking Case Information (updating false marking filings since Jan. 1, 2010), *available at* www.grayonclaims.com/false-marking-case-information/.
40. S. 23, 112th Congress, at Section 146 H.R. 146, 112th Congress at Section 2, *available at* www.thomas.gov.
41. *Id.*
42. *See generally* 63 O.S. §§5053 to 5053.7.
43. *See id.*
44. *Id. at* §5053.1(B)(7).

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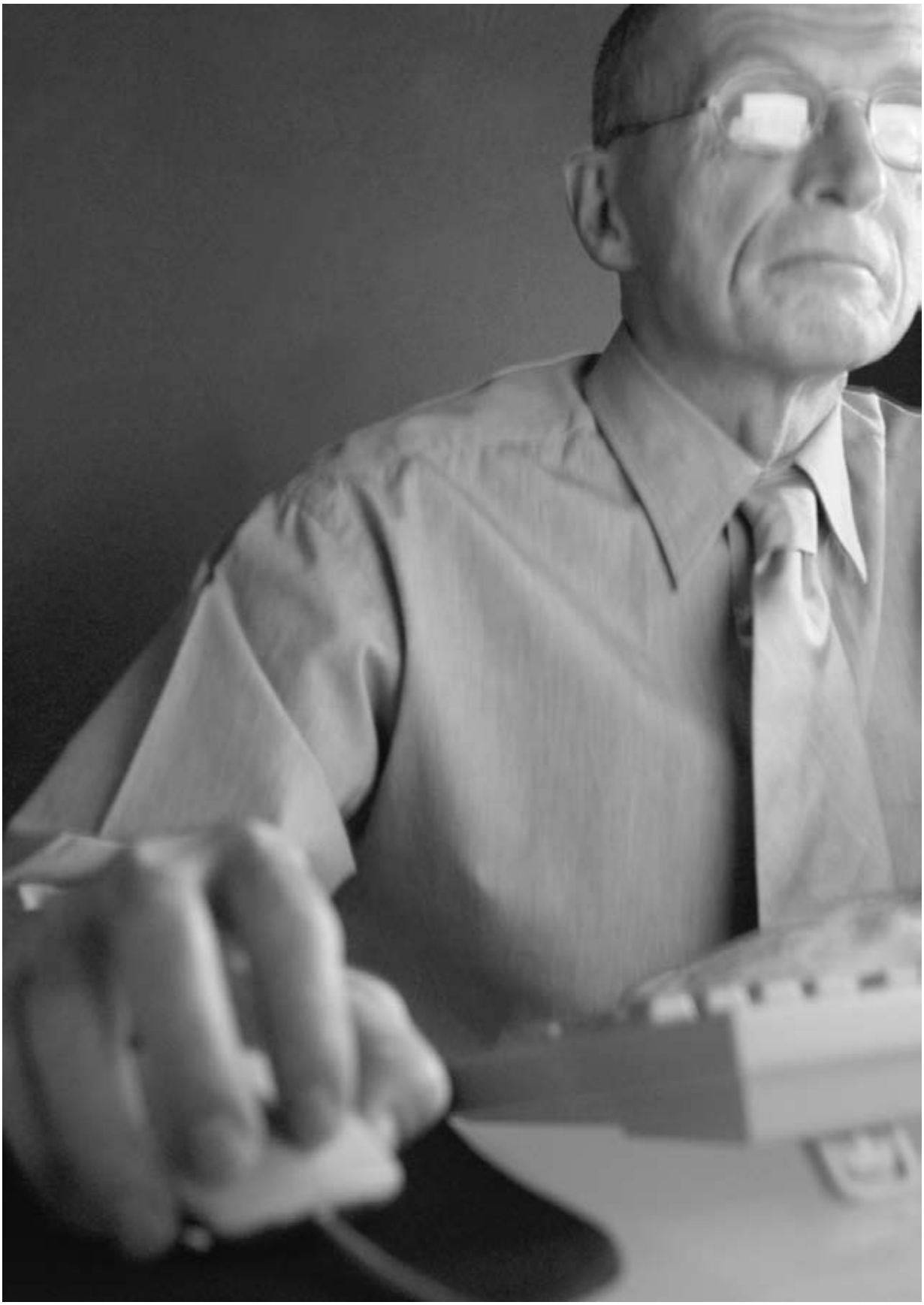

E-mail and Backup and Production – Oh My!

Electronically Stored Information under the Oklahoma Discovery Code and Practical Steps to Take When Dealing with ESI

By Courtney Davis Powell

The proliferation of electronically stored information (ESI), especially e-mail, has created unique and difficult issues in civil discovery. The federal court system directly addressed this problem in updating the Federal Rules of Civil Procedure in 2006. That system is now developing working-group commentary and case law to address these issues. Unfortunately, most states have lagged behind in addressing the unique issues relating to discovery of ESI. The Oklahoma Discovery Code was amended in 2010 to mirror, to a certain degree, the processes established in the Federal Rules of Civil Procedure for production of electronically stored information.

ESI is often the 800-pound gorilla, lurking throughout the discovery process. The impact of ESI has changed the way discovery is conducted and how cases are tried. The focus of this article is to briefly review Oklahoma discovery provisions and discuss steps attorneys can take to minimize the headaches that often accompany electronic production.

STATUTORY PROVISIONS

Effective Nov. 1, 2010, 12 O.S. §3226, now specifically addresses the production of electronically stored information. The statute provides:

> B.1.a. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any documents, **electronically stored information** or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(Emphasis added) In short, the Oklahoma Discovery Code now explicitly permits discovery of electronically stored information. Similarly, 12 O.S. §2004.1 was amended to permit a party to subpoena a third-party's electronically stored information. This provision is similar to Rule 26 of the Federal Rules of Civil Procedure.

Nearly identical to Rule 26(b)(2)(B), Title 12, Section 3226 (b)(2)(B) of the Oklahoma Discovery Code permits a party to refuse to produce information if the party can show the information is not "reasonably accessible because of **undue** burden or cost." (emphasis added)

The provision states:

> A party is not required to provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources if the requesting party shows good cause, considering the limitations of subparagraph c of paragraph 2 of subsection. The court may specify conditions for the discovery.

The leading case on this issue in the federal courts is *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003), The *Zubulake* court stated:

> It is worth emphasizing again that cost-shifting is potentially appropriate only when *inaccessible* data is sought. When a discovery request seeks accessible data — for example, active online or near-line data — it is typically inappropriate to consider cost shifting.

Id. at 284 (emphasis in original). Cases discussing this issue focus on whether data located on backup tapes, legacy systems or deleted file systems need be searched in the first instance. *See e.g. In re Veeco Instruments Inc. Securities Litigation*, 2007 WL 983987, *1 (S.D.N.Y. 2007); *Wells v. XPEDX*, 2007 WL 1200955, *1-2 (M.D. Fla. 2007).

In addition, the *Sedona Principles*, a series of principles and commentaries created by The Sedona Conference Working Group of Electronic Retention & Production, are routinely cited by federal courts when addressing e-discovery issues. *See e.g. Regan-Touhy v. Walgreen Co.*, 526 F.3d 64 (10th Cir. 2008). Principle 13 of the *Sedona Principles* clearly holds the reasonable costs of retrieving and producing ESI should be borne by the responding party. The exception is when the information sought is not reasonably available.[1] The commentary states: "The ordinary and predictable costs of discovery are fairly borne by the producing party." Likewise, the Conference of Chief Justices' "Guidelines for State Trial Courts," states that ordinarily costs of ESI discovery should be borne by the responding party and not shifted in whole or in part to the requesting party.

Title 12, Section 3237 was also amended to address the failure of a party to provide ESI in certain situations. It states:

> G. ELECTRONCIALLY STORED INFORMATION. Absent exceptional circumstances, a court may not impose sanctions on a party for failure to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic system.

Section 3237 is nearly identical to Rule 37(f) of the Federal Rules of Civil Procedure. Hence, interpretations and applications of Rule 37(f) are instructive with regard to how the provision will be applied in Oklahoma.

The Notes to Rule 37 observe that the provision applies to information lost if the operation was in good faith. The Notes continue, "[g]ood faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations or a court order in the case. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve."

WHAT NOW?

Similar to emptying out file folders of documents, attorneys and clients are now obligated to sift through electronic files and determine which files, folders, spreadsheets, e-mails, etc.,

are relevant and responsive. This process, unlike the old-fashioned file cabinet, often involves thousands of files. Practically, waiting until you receive a discovery request asking for the ESI will not provide you with enough time to review your client's ESI before being required to produce it. You must take steps before you receive the request, to protect your client. The remainder of the article will focus on basic steps that can be taken to alleviate any ESI-induced headaches.

> "Determining when your client had notice of the suit may not be crystal clear, but there are certain events an attorney can look for when determining this date."

1) Know your client's system. This is often the most challenging step for an attorney. Let's face it — we are not computer gurus. However, in an age where we often communicate by e-mail and text message, it is imperative that an attorney knows how the client conducts business. Below is a nonexclusive list that could be used as a starting point for discussions with a client.

- What e-mail system does your client use?
- What is your client's e-mail retention policy and practice?
- What is your client's backup practice?
- What type of electronic devices do the key players use (home computer, work computer, smartphone, electronic voicemail, etc.?)
- What data is at the greatest risk of alteration or destruction?
- How will you search the ESI?

Often, your client will have an IT person who can provide this information. Be sure to ask your client or their IT person any questions about programs, and responses you do not understand. Remember, it is the attorney, not the IT person, who will be conducting discovery and depositions on ESI. It is not enough to merely get the answers, you need to know what the answers mean.

2) Litigation Hold. Attorneys are familiar with the concept of litigation holds with respect to paper documents. Corporate clients are also becoming more aware of ESI obligations. A 2009 study found that on average, a corporate investment in ESI discovery had almost doubled from what it was in 2008.[2] Amazingly, however, 21 percent of U.S. companies who were surveyed do not have a policy in place to suspend their document retention policy in cases of litigation and 22 percent of companies surveyed did not know if they had such a policy in place.[3] However, holds must also be put in place to preserve electronic data.

As soon as practicable, identify who the key players in the litigation are. Once those individuals are identified, learn what types of ESI those individuals may have and ensure that their information is not destroyed. A comprehensive litigation holds need to be put in place as soon as a client has notice that litigation may be filed. Judge Sheindlin of the Southern District of New York, roundly considered one of the pre-eminent jurists on ESI discovery matters, addressed the issue of failure to preserve ESI in a decision earlier this year. Judge Sheindlin stated that "the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information."[4]

Determining when your client had notice of the suit may not be crystal clear, but there are certain events an attorney can look for when determining this date. For example, has a Charge of Discrimination been filed with the EEOC?[5] If so, the duty to preserve has likely been triggered, and the responding party should place a litigation hold on its destruction of electronically stored information.

Understanding and implementing litigation holds for electronically stored information are critical. Attorneys are responsible for overseeing their party's compliance with the litigation hold and their client's efforts to retain relevant documents.[6] In short, it is not enough to merely tell your client they need to institute a hold and ensure information is preserved, the attorney must make sure the litigation hold is in place and it is being followed. Failure to do so can result not only in sanctions for the client but for the attorney as well.[7]

3) Preservation Letters. As soon as an attorney receives notice of an action or files a lawsuit, it is advisable to send a preservation letter to the opposing party. A preservation letter is your request that information related to the case

not be destroyed or altered. This allows an attorney to put the opposing party on notice that certain information will be requested. In addition, the attorney is formally requesting that the opposing party cease destruction of electronically stored information. If your client is a corporate entity, it is advisable to discuss the hold with the IT department and any employee that may be involved in the lawsuit. Requiring employees to sign an acknowledgment that they have been advised to cease destruction adds an additional layer of protection.

4) Review your client's ESI. Attorneys would never think of sending documents to opposing counsel without reviewing them, and the same principle should apply to the production of ESI. ESI is a collection of documents, and the attorney must read them. Often, it seems, ESI is not taken seriously because it is not a hard piece of paper. It is not until depositions are taken and exhibits are used that the producing party has any idea what they have given the other side. Rather than waiting to be surprised at a deposition (and in front of a client), attorneys should review the ESI they produce, just like they review the ESI they receive.

CONCLUSION

"Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI…It is time that the bar — even those lawyers who did not come of age in the computer era — understand this."[8] The Oklahoma Discovery Code's recent ESI-related amendments would seem to indicate that the law in this area will soon be developing in this state. It is up to attorneys not only to understand what ESI is and its importance in litigation, but to work with each other to reach a desirable outcome for all.

1. For example, information on backup tapes or antiquated media that could not be easily accessed would not reasonably be available. *See e.g. Zubulake v. UBS Warburg*, LLC, 217 F.R.D. 309, 323 (S.D.N.Y. 2003).
2. *Third Annual ESI Trends Report*, Kroll Ontrack Inc., at 7 (2209).
3. *Id.* at 8.
4. *Pension Committee of the University of Montreal Pension Plan v. Banc of American Securities LLC*, 685 F.Supp.2d 456, 465 (S.D.N.Y. 2010).
5. *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1261 (10th Cir. 1976) (emphasis added); *see also Posey v. Skyline Corp.*, 702 F.2d 102, 104 (7th Cir. 1983).
6. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).
7. *Phoenix Four Inc. v. Strategic Resources Corp.*, 2006 WL 1409413, at *9 (S.D.N.Y. 2006) (monetary sanctions imposed on party and counsel); (imposing monetary sanction equally on party and its counsel); see also, *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284 (S.D.N.Y. 2009); *Bray & Gillespie Management LLC v. Lexington Ins. Co.*, 259 F.R.D. 568, 590 (M.D. Fla. 2009).
8. *William A. Gross Construction Associates Inc. v. American Manufacturers Mutual Insurance Company*, CIV 07-10639 (S.D.N.Y. 2007) U.S. Magistrate Judge Andrew Peck.

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OKLAHOMA BAR ASSOCIATION

Bad Faith Breach of Contract: Is this a Viable Cause of Action in the Commercial Context?

By Adam C. Hall

The claim of breach of the covenant of good faith and fair dealing — the "bad faith" tort — is a claim long recognized by Oklahoma jurisprudence. However, it has been a point of contention whether this tort action is applicable in a purely commercial setting. This article explores various precedential decisions on the subject, as well as Oklahoma Court of Civil Appeals decisions that conflict with the decisions rendered by the Oklahoma Supreme Court.

THE BAD FAITH TORT

Oklahoma jurisprudence, as well as most other states throughout the nation, recognizes that implicit in every contract is an implied-at-law duty of good faith and fair dealing between those parties to the contract.[1] "The common law imposes this implied covenant upon all contracting parties, that neither party, because of the purposes of the contract, will act to injure the parties' reasonable expectations nor impair the rights or interest of the other to receive the benefits flowing from their contractual relationship."[2] This is particularly so in the insurance context, where a breach of the implied covenant of good faith and fair dealing by an insurance carrier "gives rise to an action in tort for which consequential and, in a proper case, punitive, damages may be sought" by the insured.[3]

In *Christian v. Am. Home Assurance Co.*, the Oklahoma Supreme Court discussed the "special relationship" that exists between an insurer and insured which gives rise to the duty to deal fairly and in good faith.[4] This special relationship is premised upon the inherent "disparity in the economic situations and bargaining abilities" of the insurer and the insured and the "quasi-public nature" of insurance companies and the need to subject insurance companies to state control for the protection and benefit of the public.[5] To date, however, the Oklahoma Supreme Court has been hesitant to extend the bad faith tort, or *Christian* tort, to purely commercial contracts.[6]

OKLAHOMA SUPREME COURT DECISIONS DISCUSSING THE BAD FAITH TORT IN THE COMMERCIAL CONTEXT

In *Rodgers v. Tecumseh Bank*, the Oklahoma Supreme Court declined to extend the implied-in-law duty of good faith and fair dealing imposed upon insurance contracts to contracts for commercial loans.[7] *Rodgers* involved a dispute arising out of a commercial loan contract

entered into between a bank and its borrowers.[8] The borrowers brought suit against the bank for breach of contract and tortious breach of contract relating to the bank's refusal to renew the borrowers' loan.[9] The trial court sustained the bank's motion for summary judgment and dismissed the borrowers' causes of action.[10] The borrowers appealed.[11]

The primary issue before the Supreme Court on appeal was whether the implied-in-law duty of good faith and fair dealing imposed upon insurance contracts under the *Christian* decision should be extended to contracts for commercial loans.[12] Citing the differences between an insurance contract and a commercial loan agreement, the court declined to extend the *Christian* tort to the debtor-creditor relationship.[13] The court pointed to the fact that insurance contracts, unlike commercial loan agreements, are adhesion contracts which involve one party drafting the entire agreement and the weaker, non-drafting party lacking an opportunity to negotiate the terms of the agreement.[14] On the other hand, the court found a commercial loan agreement distinguishable from an insurance contract in that the borrower has the opportunity to negotiate favorable terms into the final agreement and, unlike an insurance contract, a commercial loan agreement involves "arms-length negotiating, a relatively equal bargaining capacity and no snares or traps for the unwary…"[15] The court reasoned that there are such inherent differences between commercial loan agreements and insurance contracts, including the absence of public policy concerns and a special relationship between the borrower and the bank, that "to impose tort liability on a bank for every breach of contract would only serve to chill commercial transactions."[16]

In *First National Bank and Trust Co. of Vinita v. Kissee*, the Oklahoma Supreme Court further clarified *Rodgers* and upheld its decision not to extend the implied-in-law duty of good faith and fair dealing to guaranty agreements.[17] In *Kissee*, the bank brought suit against the guarantor for breach of the guaranty agreement and the guarantor asserted the affirmative defense of economic duress and asserted counterclaims against the bank.[18] In support of his counterclaims, the guarantor argued, *inter alia*, that the bank breached the covenant of good faith and fair dealing owed to the guarantor in that it knew of the borrower's financial distress and conspired with the borrower to obtain the guaranty agreement from the guarantor.[19] The trial court sustained the bank's motion for summary judgment and dismissed the guarantor's counterclaims against the bank.[20] The guarantor appealed.[21] As in *Rodgers*, the court rejected the guarantor's tort claim for breach of the implied covenant of good faith and fair dealing, noting that such a cause of action does not generally apply to the debtor-creditor relationship:

> Our examination of decisions of other jurisdictions discloses that the great weight of authority, and what we consider to be the best-reasoned opinions, support our previous statement in *Rodgers*, that to 'impose liability on a bank for every breach of contract would only serve to chill commercial transactions.'[22]

The court also noted that there was "no evidence of any impaired bargaining power, superior knowledge or unconscionable advantage between bank and guarantor."[23]

Succeeding the decisions in *Rodgers* and *Kissee*, the Oklahoma Supreme Court next addressed the application of the bad faith tort in the context of the bank-depositor relationship. In *Beshara v. Southern Nat'l Bank*, the depositor brought suit against the bank for wrongful dishonor, breach of the duty of good faith and fair dealing, and conversion, after the bank froze the depositor's account while investigating an internal embezzlement scheme carried out by an employee of the bank.[24] The trial court sustained several of the bank's motions and dismissed the depositor's conversion and bad faith breach actions but the depositor's wrongful dishonor claim was tried before a jury.[25] After the close of the depositor's evidence, the trial court sustained the bank's motion for summary judgment as to all of the depositor's claims.[26] The depositor appealed.[27] In reversing the trial court's grant of summary judgment to the bank, the Oklahoma Supreme Court held that the depositor should have been afforded the opportunity to pursue his claim for breach of the duty of good faith and fair dealing against the bank.[28] In so holding, however, the court referenced the *Kissee* decision and stated:

> Oklahoma recognizes the common law rule that the relationship between a bank and its customer is not fiduciary in nature, but is that of creditor-debtor. In all cases, the determination of the existence of a fiduciary relationship depends upon the factual

circumstances, including the relationship of the parties involved, to each other and to the disputed transaction.[29]

After the rulings in *Rodgers, Kissee* and *Beshara*, the majority of Oklahoma courts have continued their respective confinement of the bad faith breach of contract tort to instances involving insurance contracts.[30] In fact, the U.S. District Court for the Northern District of Oklahoma in *Lewis v. Aetna U.S. Healthcare Inc.*, conducted an "exhaustive study" of the breadth of Oklahoma jurisprudence discussing the bad faith breach of contract tort and concluded that the Oklahoma Supreme Court has "at all times limited the *Christian* tort to insurance contracts" and that recent cases "re-emphasized this limitation, notwithstanding the fact that at various times lower courts have entertained expanding the cause of action beyond insurance."[31] Based upon this body of case law, it seems evident that the *Christian* tort is applicable only in the context of insurance contracts or, at most, is arguably applicable in a situation involving a special relationship or unequal bargaining power amongst the parties to a contract.

OKLAHOMA COURT OF CIVIL APPEALS DECISIONS APPLYING THE BAD FAITH TORT IN THE COMMERCIAL CONTEXT

In a departure from the Oklahoma Supreme Court decisions of *Rodgers, Kissee* and *Beshara*, the Oklahoma Court of Civil Appeals has endeavored to extend the bad faith breach of contract tort to instances outside the confines of insurance contracts.

Following the Supreme Court's decision in *Christian*, but preceding those of *Rodgers, Kissee* and *Beshara*, the Court of Civil Appeals in *EKE Builders Inc. v. Quail Bluff Assoc.*, held that a claim for breach of the covenant of good faith and fair dealing was applicable to a commercial construction contract.[32] The litigation in *EKE Builders* surrounded alleged misrepresentations and breach of a commercial construction contract.[33] One of the plaintiff's claims sounded in tort and alleged that defendant made false representations concerning the defendant's lender requirements under the construction contract and that defendant generally failed to deal with the plaintiff in good faith.[34] The plaintiff's other cause of action was for breach of the construction contract.[35] The defendant moved for summary judgment arguing that the plaintiff failed to meet a condition precedent under the construction contract and, therefore, there could be no breach of the construction agreement.[36] Ignoring altogether the tort claim, the trial court sustained the defendant's motion for summary judgment. Plaintiff appealed.

In holding that it was error to grant the defendant summary judgment, the Court of Civil Appeals referenced the general rule that the "implied covenant to act in good faith and deal fairly inhered in [the] subject contract" and that the defendant's "bad faith breach carried with it the consequences described in *Christian*…"[37] Even though the parties to the construction contract appeared for all intents and purposes to be sophisticated parties of even bargaining power dealing at arm's length, the court reasoned that the same principles set forth in *Christian* applied to commercial contracts generally.

In *Roberson v. Painewebber Inc.*, the Court of Civil Appeals extended the bad faith breach of contract tort to a commercial investment contract.[38] Investors brought a lawsuit against a brokerage firm asserting various claims, including breach of the implied covenant of good faith and fair dealing, related to the brokerage's sale of bonds.[39] The defendant brokerage firm filed a motion to dismiss all of the plaintiff's claims and the trial court sustained the defendant's motion to dismiss.[40] Plaintiffs appealed.[41] One of the issues on appeal was whether there were disputed facts to withstand the defendant's dispositive motion relating to plaintiff's claim for breach of the implied covenant of good faith and fair dealing.[42] Citing *Beshara,* the Court of Civil Appeals noted that the Oklahoma Supreme Court has not recognized an action for breach of the implied covenant of good faith and fair dealing in a commercial contact "unless there was gross recklessness or wanton negligence by a party" and held that the plaintiffs had presented a question of fact as to whether the brokerage firm's conduct rose to the level of gross recklessness or wanton negligence.[43]

In *Worldlogics Corp. v. Chatham Reinsurance Corp.*, the Court of Civil Appeals further extended *Beshara* and applied the bad faith breach of contract tort to a commercial construction and surety contract.[44] A property owner asserted a bad faith claim against a performance bond surety to recover damages resulting from the surety's failure to conduct a reasonable investigation of the property owner's claim and failure to timely pay a claim.[45]

The matter was tried before a jury and the trial court granted the defendant surety's motion for judgment as a matter of law.[46] Plaintiff appealed. The issue on appeal was whether the defendant surety owed a duty of good faith and fair dealing to the obligee under the surety bond and whether a breach of any such duty could give rise to liability in tort.[47] The defendant surety argued that the performance bond at issue was fundamentally different from an insurance contract and that it should be treated as a commercial contract to which the bad faith tort does not apply.[48] The Court of Civil Appeals disagreed with the defendant surety's argument and held that a surety bond is a form of insurance and the surety owes the obligee under a surety bond the duty of good faith and fair dealing.[49]

THE CURRENT STATUS OF THE BAD FAITH TORT IN A COMMERCIAL SETTING

While *Beshara* did not decisively extend the bad faith breach of contract tort to contracts other than insurance contracts, the current body of Supreme Court decisions makes it evident that the *Christian* tort is applicable only in the context of insurance contracts — at most, the *Christian* tort is arguably applicable in a situation involving a special relationship or unequal bargaining power amongst the parties to a contract. In contrast, the *EKE Builders*, *Roberson* and *Worldlogics* opinions seem to indicate the Court of Civil Appeals' willingness to extend the bad faith breach of contract tort to commercial contracts outside the insurance arena. Although the *EKE Builders*, *Roberson* and *Worldlogics* opinions lacked an in-depth analysis of the "special relationship" discussed in *Christian*, the Court of Civil Appeals has nonetheless extended the bad faith breach of contract tort to a construction contract, an investment contract and a surety contract. To date, it remains unclear whether the bad faith breach of contract tort is applicable to a purely commercial contract negotiated by sophisticated parties of equal bargaining power in an arm's length transaction.

1. *See generally W. Natural Gas Co. v. Cities Serv. Gas Co.*, 1976 OK 76, 507 P.2d 1236.
2. *First Nat'l Bank and Trust Co. of Vinita v. Kissee*, 1993 OK 96, 859 P.2d 502, 509.
3. *Christian v. Am. Home Assurance Co.*, 1977 OK 141, 577 P.2d 899, 904.
4. *Id.* at 902.
5. *Id.*
6. *Kissee*, 1993 OK 96, 859 P.2d 502, 509.
7. *Rodgers v. Tecumseh Bank*, 1988 OK 36, 756 P.2d 1223, 1226.
8. *Id.* at 1224.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 1226.
14. *Id.*
15. *Id.*
16. *Id.* at 1226-27.
17. *First Nat'l Bank and Trust Company of Vinita v. Kissee*, 1993 OK 96, 859 P.2d 502, 509.
18. *Id.* at 503.
19. *Id.* at 503, n.2.
20. *Id.*
21. *Id.*
22. *Id.* at 509.
23. *Id.* at 508.
24. *Beshara v. Southern Nat'l Bank*, 1996 OK 90, 928 P.2d 280, 281-82.
25. *Id.* at 283.
26. *Id.* at 284.
27. *Id.*
28. *Id.* at 288.
29. *Id.*
30. *See generally Lewis v. Aetna U.S. Healthcare Inc.*, 78 F. Supp. 2d 1202 (N.D. Okla. 1999). *See* also *Fed'l Deposit Ins. Corp. v. Hamilton*, 122 F.3d 854, 863, n.1 (10th Cir. 1997); *First Bank of Turley v. Fid. and Deposit Ins. Co. of Maryland*, 1996 OK 105, 928 P.2d 298, 307 n.34.
31. *Lewis*, 78 F. Supp. 2d at 1209.
32. *EKE Builders Inc. v. Quail Bluff Assoc.*, 1985 OK CIV APP 46, 714 P.2d 604, 608-09.
33. *Id.* at 605.
34. *Id.* at 606.
35. *Id.*
36. *Id.*
37. *Id.* at 608-09.
38. *Roberson v. Painewebber Inc.*, 2000 OK CIV APP 17, 998 P.2d 193.
39. *Id.* at 196.
40. *Id.*
41. *Id.*
42. *Id.* at 201.
43. *Id.*
44. *Worldlogics Corp. v. Chatham Reinsurance Corp.*, 2005 OK CIV APP 16, 108 P.3d 5, 7-8.
45. *Id.* at 5.
46. *Id.*
47. *Id.*
48. *Id.* at 7.
49. *Id.*

ABOUT THE AUTHOR

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Oklahoma City • March 3, 2011

Time - **5:30-7 p.m.**

Location
The Oil Center – West Building
1st Floor Conference Room – 2601 NW Expressway
Oklahoma City, OK 73112

.....

Tulsa • February 24, 2011

Time - **5:30-7 p.m.**

Location
The Center for Therapeutic Interventions
4845 South Sheridan, Suite 510
Tulsa, OK 73145

Women Helping Women.....

Oklahoma City • March 10, 2011

Time - **5:30-7 p.m.**

Location
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Oklahoma City, OK 73112

.....

Tulsa • March 3, 2011

Time - **5:30 - 7 p.m.**

Location
The Center for Therapeutic Interventions
4845 South Sheridan, Suite 510
Tulsa, OK 74145

Food and drink will be provided! Meetings are free and open to OBA members. Reservations are preferred (we want to have enough space and food for all.) For further information and to reserve your spot, please e-mail stephaniealton@cabainc.com.

LAWYERS HELPING LAWYERS
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Navigating the Offer of Judgment Quagmire

By Andrea Cutter

An offer of judgment made by a defendant during ongoing litigation is essentially a formal settlement offer that can result in a judgment instead of simply a settlement and release agreement signed by the parties to the litigation. Because the failure to accept an offer of judgment may negatively impact the amount a plaintiff may ultimately recover following trial, and in some instances may actually create a monetary liability owed by a plaintiff to a defendant, an offer of judgment creates a much larger incentive for a plaintiff to resolve the case as compared to the incentive that a simple settlement offer would create on its own.

Certainly that is the recognized purpose of offer of judgment statutes generally; they create additional incentives to the parties that encourage early resolution of disputes in order to avoid the costs associated with protracted litigation.[1] Unfortunately in Oklahoma, there are several offer of judgment statutes, and under what circumstances a particular statute should be used can be very confusing, both to the practitioner and to his client. The courts can be unforgiving about holding a party to the offer of judgment statute cited in the offer and not allowing the party to later rely upon a different offer of judgment statute that would be more beneficial to that party.[2] Therefore, it is important to fully research the available options before an offer is made to ensure that the appropriate statute is relied upon. Likewise, from the plaintiff's perspective, it is important to understand the very different possible ramifications to your case based upon which statute the particular offer of judgment is made, so that the client can be advised accordingly regarding what may happen if a particular offer is refused. This article will strive to explain the key differences between the four offer of judgment statutes in Oklahoma, and will provide some guidance for areas of discussion with clients during the process of deciding what to include within an offer of judgment, and issues to consider in responding to an offer of judgment.

12 OKLA. STAT. §1101:

Section 1101 is an offer of judgment statute that applies in actions for the recovery of money only.[3] Defendant may make an offer of judgment at any time before trial.[4] The offer must be in writing, and it must be for a specific sum.[5] Plaintiff has five days within which to accept the offer. *Id.* If the offer is not timely accepted, the offer is deemed to be automatically withdrawn, and the offer is inadmissible at trial.[6] If the offer is rejected and the judgment entered is for an amount equal to or less than the amount of the offer of judgment, then plaintiff must pay defendant's costs from the date of the offer forward.[7] Note that the amount of the offer of judgment is compared to the amount of the judgment, not to the amount of the verdict. This difference is significant. The courts have held that the amount of the offer of judgment is

compared to the amount of the judgment actually entered, which means the amount of the verdict, minus any applicable credit or remittitur, plus prejudgment interest.[8]

As a general rule, Section 1101 only shifts costs, it does not shift attorney's fees as well.[9] An exception to this rule may apply when there is an independent statute which awards attorney's fees to the "prevailing party" in a particular case.[10] For example, in the *Hicks v. Lloyd's General Insurance Co.* case, the court awarded costs and attorney fees to defendant from the time the Section 1101 offer was made, because defendant was a "prevailing party" under a statute that allowed the prevailing party to recover attorney's fees in an action to recover for labor or services, or for breach of implied warranty (12 Okla. Stat. §936), where the judgment entered in favor of plaintiff was less than the amount of the offer of judgment.[11] In seeking to shift both costs and attorney's fees, the careful practitioner should be leery of relying solely upon an argument that *Hicks* should apply outside the context of a case brought under 12 Okla. Stat. §936. Unless there is direct support that Section 1101 applies to shift both fees and costs in a particular case, counsel should seriously consider making the offer of judgment pursuant to Section 1101.1 instead.

12 OKLA. STAT. §1101.1:

Section 1101.1 is a more complex offer of judgment statute. It is divided into two parts. The first part, Section 1101.1(A), applies to personal injury, wrongful death, discrimination and workers compensation retaliation claims where the demand made is over $100,000 or where the offer made is over $100,000.[12] The statute allows that an offer of judgment may be "filed" at any time more than 10 days prior to trial.[13] The offer must be for a specific sum, and "shall be deemed to include any costs or attorney fees otherwise recoverable unless it express provides otherwise."[14] Unlike Section 1101, Section 1101.1(A) gives a plaintiff three choices in how to respond to the offer, specifically within ten 10 days of the offer, he may: 1) not respond; 2) file a written acceptance or rejection of the offer; or 3) make a counteroffer of judgment.[15] If plaintiff fails to respond in a timely manner, the offer shall be deemed rejected.[16] Even if an initial offer is rejected, defendant may still make subsequent timely offers. *Id.* If a counteroffer is filed by a plaintiff, then defendant has ten 10 days to file a written acceptance or rejection of the offer.[17] If no response is filed, then the counteroffer of judgment shall be deemed rejected.[18] Subsequent counteroffers of judgment may be made, but apparently only in response to subsequent offers of judgment.[19]

Instead of simply shifting costs (as Section 1101 generally does), Section 1101.1(A) shifts both costs and attorney's fees. This is significant, because in Oklahoma, the circumstances under which attorney's fees are recoverable are relatively limited. Oklahoma follows the American Rule as to attorney's fees; each party pays its own attorney's fees, unless there is a specific statute or contract that allows for attorney's fees to be shifted to the opposing party.[20] There are several statutes in Oklahoma that allow for the "prevailing party" in certain cases, to recover her attorney's fees from the opposing party.[21] Those statutes are to be construed narrowly by the courts.[22]

The specific attorney's fees and cost shifting provisions of Section 1101.1(A) are:

> 3. In the event the plaintiff rejects the offer(s) of judgment and the judgment awarded the plaintiff is less than the final offer of judgment, then the defendant filing the offer of judgment shall be entitled to recover reasonable litigation costs and reasonable attorney fees incurred by that defendant from the date of filing of the final offer of judgment until the date of the verdict. Such costs and fees may be offset from the judgment entered against the offering defendant; provided, however, that prior to any such offset, the plaintiff's attorney may:
>
> a. exercise any attorneys lien claimed in an amount not to exceed 25 percent of the judgment, and
>
> b. recover the plaintiff's reasonable litigation costs, not to exceed an additional 15 percent of the judgment or $5,000, whichever is greater.
>
> 4. In the event a defendant rejects the counteroffer(s) of judgment and the judgment awarded to the plaintiff is greater than the final counteroffer of judgment, the plaintiff shall be entitled to recover reasonable litigation costs and reasonable attorney's fees incurred by the plaintiff from the date of filing of the final counteroffer of judgment until the date of the verdict. Such costs and fees may be added to the judgment entered in favor of the plaintiff.

A defendant may recover its attorney's fees under this section, even if its fees were paid for by its insurance company.[23] To hold otherwise would thwart the purpose of Section 1101.1 to encourage early settlement of cases and would effectively limit the application of this section to uninsured defendants.[24]

By allowing a plaintiff to make a counteroffer of judgment, the statute creates the risk not only that plaintiff will have to bear defendant's costs and attorney's fees from the date of the offer forward if plaintiff rejects the offer and plaintiff's award is less than the amount of the offer, but it also creates the risk that defendant will have to bear plaintiff's costs and attorney's fees if defendant rejects plaintiff's counteroffer, and the award is higher than the amount of any counteroffer that was made.[25] A plaintiff has to make a written counteroffer in order to possibly recover attorney's fees under this section.[26]

The second part of Section 1101.1 (1101.1(B)) applies in cases for the recovery of money or property, other than for personal injury, wrongful death, discrimination and workers' compensation retaliation claims.[27] Section 1101.1(B) is essentially the same as (A) with regard to procedural requirements, and with regard to a plaintiff's ability to make a counteroffer of judgment. The two parts differ, however, as to the fee and cost shifting provisions. Section 1101.1(B) states in pertinent part:

> 3. If no offer of judgment or counteroffer of judgment is accepted and the judgment awarded the plaintiff is less than one or more offers of judgment, the defendant shall be entitled to reasonable litigation costs and reasonable attorney fees incurred by the defendant with respect to the action or the claim or claims included in the offer of judgment from and after the date of the first offer of judgment which is greater than the judgment until the date of the judgment. Such costs and fees may be offset from the judgment entered against the offering defendant.
>
> 4. If no offer of judgment or counteroffer of judgment is accepted and the judgment awarded the plaintiff is greater than one or more counteroffers of judgment, the plaintiff shall be entitled to recover the reasonable litigation costs and reasonable attorney fees incurred by the plaintiff with respect to the action or the claim or claims included in the counteroffer of judgment from and after the date of the first counteroffer of judgment which is less than the judgment until the date of the judgment. Such costs and fees may be added to the judgment entered in favor of the plaintiff.[28]

In subpart (B) cases, the judgment awarded is compared to all of the offers of judgment, to determine if it is less than (or greater than, in the case of a counteroffer) any of the offers. In contrast, in subpart (A) cases, the comparison is only to the "final" offer or counteroffer made. Subpart (A) allows the recovery of fees and costs from the date of the "final" offer or counteroffer, until the date of verdict. Subpart (B) allows the recovery of fees and costs from the date of whichever offer or counteroffer the comparison is based upon, until the date of judgment.[29] Additionally, under subpart (A), if the defendant is entitled to recover its attorney's fees and costs by operation of the statute (which may be offset from a judgment entered against it), prior to the offset, plaintiff's counsel can exercise his attorney's lien for an amount of no more than 25 percent of the judgment, and recover litigation costs of no more than 15 percent of the judgment or $5,000, whichever is greater.[30] No such language appears in subpart (B). Subpart (B) also states expressly: "An award of reasonable litigation costs and reasonable attorney's fees under paragraph three of this subsection shall not preclude an award under paragraph four of this subsection, and an award under paragraph four of this subsection shall not preclude an award under paragraph three of this subsection."[31] This language does not appear within subpart (A).

Section 1101.1 also contains provisions that apply to all offers and counteroffers made under that section regardless of whether it is made under subpart (A) or (B). For example, for purposes of comparing an offer (or counteroffer) with a judgment, the amount of attorney's fees and costs incurred by the offeree up to the date of the offer are only added to the amount of the judgment if amounts for attorney's fees and costs were included within the offer (or counteroffer).[32] Further, evidence of an offer and a counteroffer are inadmissible in any proceeding, except one to enforce the offer or counteroffer, or a proceeding to determine attorney's fees or costs under this section.[33]

Additionally, Section 1101.1(A) and (B) apparently allow either plaintiff or defendant to recover attorney's fees even if they would not

be entitled to recover fees in the underlying action. Specifically, Section 1101.1 (E) states: "This section shall apply whether or not litigation costs or attorney's fees are otherwise recoverable."[34] Although this provision and the threat of the recovery of attorney's fees is obviously what makes using §1101.1 such an attractive option, it creates additional risks as well. The risk to an offering defendant is that plaintiff may ultimately recover attorney's fees and costs where she would not otherwise have been able to do so.

12 OKLA. STAT. §1106

Section 1106 states in its entirety:

> After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action; whereupon, if the plaintiff, being present, refuse to accept such confession of judgment in full of his demands against the defendant in the action, or, having had such notice that the offer would be made, of its amount, and of the time of making it, as the court shall deem reasonable, fail to attend, and on the trial do not recover more than was so offered to be confessed, such plaintiff shall pay all the costs of the defendant incurred after the offer. The offer shall not be deemed to be an admission of the cause of action, or the amount to which the plaintiff is entitled, nor be given in evidence upon the trial.

"As with Section 1101, as a general rule, Section 1106 only shifts costs, it does not shift attorney's fees."

As with Section 1101, as a general rule, Section 1106 only shifts costs, it does not shift attorney's fees.[35] As discussed above regarding Section 1101, there may be an argument that Section 1106 also shifts attorney's fees when there is an underlying statute that awards attorney's fees to a "prevailing party."[36] As in the Section 1101 analysis, until the case law is better developed in this area, if creating the possibility of shifting attorney's fees is a priority, counsel should seriously consider making the offer of judgment pursuant to Section 1101.1 instead of Section 1106, if possible.

Note also that Section 1106 expressly states that an offer "shall not be deemed to be an admission of the cause of action…."[37] The other offer of judgment statutes do not contain this language. Interestingly, one Oklahoma court has relied upon that language, along with the language contained within all of the offer of judgment statutes that the offers shall not be admissible at trial, as support for the proposition that an offer of judgment is not an automatic admission of liability.[38] To hold that an offer of judgment made under Section 1101.1(B) is an automatic admission of liability "would thwart the purpose, history and legislative intent behind the offer of judgment statutes. Such an interpretation would do little to encourage early settlement of cases or to curtail litigation costs as these statutory provisions intended."[39]

12 OKLA. STAT. §940

Section 940(A) allows a "prevailing party" to recover reasonable attorney's fees, costs and interest in cases brought for the recovery of "negligent or willful injury to property."[40] There must be a negligent or willful physical injury to the property in order for the statute to apply.[41]

Section 940(B) contains an offer of judgment provision, which a defendant may use as a means to potentially change the circumstances under which a plaintiff will "prevail," and thus attempt to avoid having to pay plaintiff's fees, costs and interest under the statute.[42] Pursuant to Section 940(B), not less than 10 days after being served in an action, defendant may serve upon plaintiff a written offer of judgment.[43] The plaintiff may accept the offer within five days following service. If plaintiff does not timely accept, the offer is deemed withdrawn, and the offer is inadmissible during trial.[44]

Pursuant to this statute, following the rejection of an offer of judgment, if judgment is entered for defendant, or for plaintiff but in an amount less than the amount offered, then plaintiff will not be entitled to recover its attorneys fees, costs or interest. If judgment is rendered for plaintiff for the same amount as the amount offered, then plaintiff and defendant shall each incur their own attorney's fees, costs

and interest. If judgment is rendered for plaintiff for an amount greater than the amount offered, then plaintiff shall be entitled to recover her attorney's fees, costs and interest.[45] Note that §940 can also limit a plaintiff's ability to recover interest.[46] Sections 1101 and 1101.1 are both silent as to interest.

GENERAL RULES REGARDING OFFERS OF JUDGMENT IN OKLAHOMA

It is very important that counsel specify within the offer of judgment on which statute the offer is based. In *Foreman v. Brewer*,[47] defendants served plaintiff with offers of judgment pursuant to Section 1101 for $3,500. The offers were rejected. The jury returned a verdict for defendants on all claims. Defendants requested and were awarded costs. Defendants also requested attorney's fees based upon Section 1101.1, which was denied because the offers were not expressly made under Section 1101.1, but instead under 1101, which does not allow the recovery of attorney's fees.[48]

Further, separate offers should be made to separate plaintiffs.[49] An offer of judgment is invalid if one offer is made to two plaintiffs; two separate offers should be made so that plaintiffs may separately evaluate their claims in light of the offer made.[50]

For purposes of determining what number should be compared to a rejected offer of judgment, if an offer is inclusive of attorney's fees and costs, then the plaintiff's attorney's fees and costs incurred up to the time of the offer plus prejudgment interest are added to the jury's verdict, in order for the court to determine whether the judgment is more or less than the rejected offer.[51] For example, in the *United Motors* case, the final jury verdict was $1,800. The offer of judgment, inclusive of fees and costs, was $5,000, which had been rejected. Plaintiff had evidence of $8,000 in attorney's fees up to the date of the offer. The court included the reasonable attorney's fees in the amount of the judgment, and determined that the offer made was not more than the judgment.[52]

Furthermore, acceptance of an offer of judgment results in the extinguishment of plaintiff's cause of action and replaces it with "the right to claim the confessed recovery."[53] Therefore, following the acceptance of an offer of judgment, plaintiff cannot pursue any element of damages that are part of the cause or causes of action that were the subject of the accepted offer.[54]

Finally, there must be a "final adjudication, i.e., conclusion, to the action or the claim or claims included in the offer of judgment for an attorney's fee and cost recovery to be triggered."[55] In the *Boston Avenue Management* case, defendant made an offer of judgment under Section 1101.1, which was rejected. Defendant then moved for summary judgment on the basis that plaintiff was not the real party in interest. The trial court granted the motion. The litigation continued with the real party in interest as plaintiff. Defendant filed a motion to recover attorney's fees and costs against the original plaintiff under Section 1101.1(B). The court determined that this type of summary judgment ruling was not the final adjudication necessary to recover attorney's fees and costs from the plaintiff. The summary judgment ruling did not "end the lawsuit" or "render an ultimate determination as to [defendant's] liability on the claims asserted against it…."[56] However, the court did not preclude all summary judgment rulings from being considered final adjudications, instead, the court's language provides an argument that a summary judgment that is a determination as to defendant's liability would trigger the application of Section 1101.1.[57] This argument has been made successfully in a case where a motion for summary judgment was granted that disposed of all claims asserted against the defendant.[58] The court in the *Commercial Financial Services* case held that the order granting summary judgment triggered the application of Section 1101.1(B), and upheld the award of attorney's fees and costs to the defendant in that case.[59]

ISSUES TO ADDRESS WITH CLIENTS REGARDING MAKING AN OFFER OF JUDGMENT

Of course, what specific issues to address with a client regarding whether and for what amount to make an offer of judgment in a particular case depends upon the unique issues of the case. Generally, what should be included within the amount of the offer of judgment (besides the amount associated with the actual claim itself) should be carefully considered. It appears that, when deciding for what amount an offer of judgment should be made, prejudgment interest as of the time of the offer should always be part of the calculation.[60] Counsel must also consider whether to also include amounts for plaintiff's attorney's fees and costs. Counsel should address with the client from the beginning whether or not attorney's fees and

costs should be included within an offer of judgment. It is difficult, once an amount is arrived at, to later go back to a client and discuss additional amounts that should be included in an offer for fees and costs. If an offer made includes amounts for attorney's fees, costs, and/or interest, the better practice is to state explicitly what items are included so that it is clear to all what amounts should be compared to the offer at the time of judgment. Of course, if an offer is made pursuant to Section 1101.1 that does not include attorney fees's or costs, the offer must state that explicitly as well.[61]

An offer of judgment made in a case where a plaintiff would not otherwise be entitled to recover attorney's fees should obviously not include an amount for attorney's fees. However, an offer of judgment made in a case where a plaintiff would otherwise be entitled to recover attorney's fees should include an amount for fees. This is the better practice in Oklahoma. To illustrate this point, consider the following: assume in a case where plaintiff may recover attorney's fees pursuant to a "prevailing party" statute or contract provision, that an offer of judgment is made that expressly excludes fees, and that the offer is accepted and judgment is entered in favor of plaintiff pursuant to the terms of the offer. Arguably, pursuant to an attorney's fees statute, following the entry of judgment, the plaintiff would be the "prevailing party" and thus would be entitled to recover his attorney's fees. The plaintiff in *Allison v. City of El Reno, Oklahoma*[62] case made such an argument successfully and was awarded attorney's fees in addition to the amount of the offer of judgment. In that case, defendant tried to withdraw and modify the offer following plaintiff's acceptance of the offer, however the court refused to so, holding: "given the clear imperative of the statute [Section 1101], the [trial] court had no discretionary inherent power which would allow it to withdraw or modify the offer."[63] The same reasoning was applied by the court following an offer of judgment made pursuant to Section 940(B) (which did not include a sum for attorney's fees), resulting in an additional award of attorney's fees in addition to the amount of the offer of judgment, following plaintiff's acceptance of the offer.[64]

Further, if Section 1101.1 is being considered as the offer of judgment statute to use, counsel must inform his client that it gives plaintiff the ability to counteroffer, which in turn creates a risk that plaintiff may be able to recover her attorney's fees in a case where she otherwise would not be able to do so. The client should be informed of that risk prior to a Section 1101.1 offer being made.

ISSUES TO ADDRESS WITH CLIENTS REGARDING RESPONDING TO AN OFFER OR MAKING A COUNTEROFFER OF JUDGMENT

Upon receipt of an offer of judgment, plaintiff's counsel of course should determine under which statute the offer is being made, and determine how much time he has to respond to the offer. The client should be fully informed of the difference between receiving an offer of judgment as opposed to a settlement offer, and specifically how rejection of the offer may impact the amount plaintiff can recover following trial, and when appropriate, that rejection of the offer may actually lead to money being owed to a defendant following trial. Certainly, if a Section 1101.1 offer is received, the possibility and effects of making a counteroffer should also be discussed with the client. The primary concern is to fully inform the client in writing as to the repercussions of rejecting an offer and/or making a counteroffer, so that there are no surprises for the client later on in the litigation.

CONCLUSION

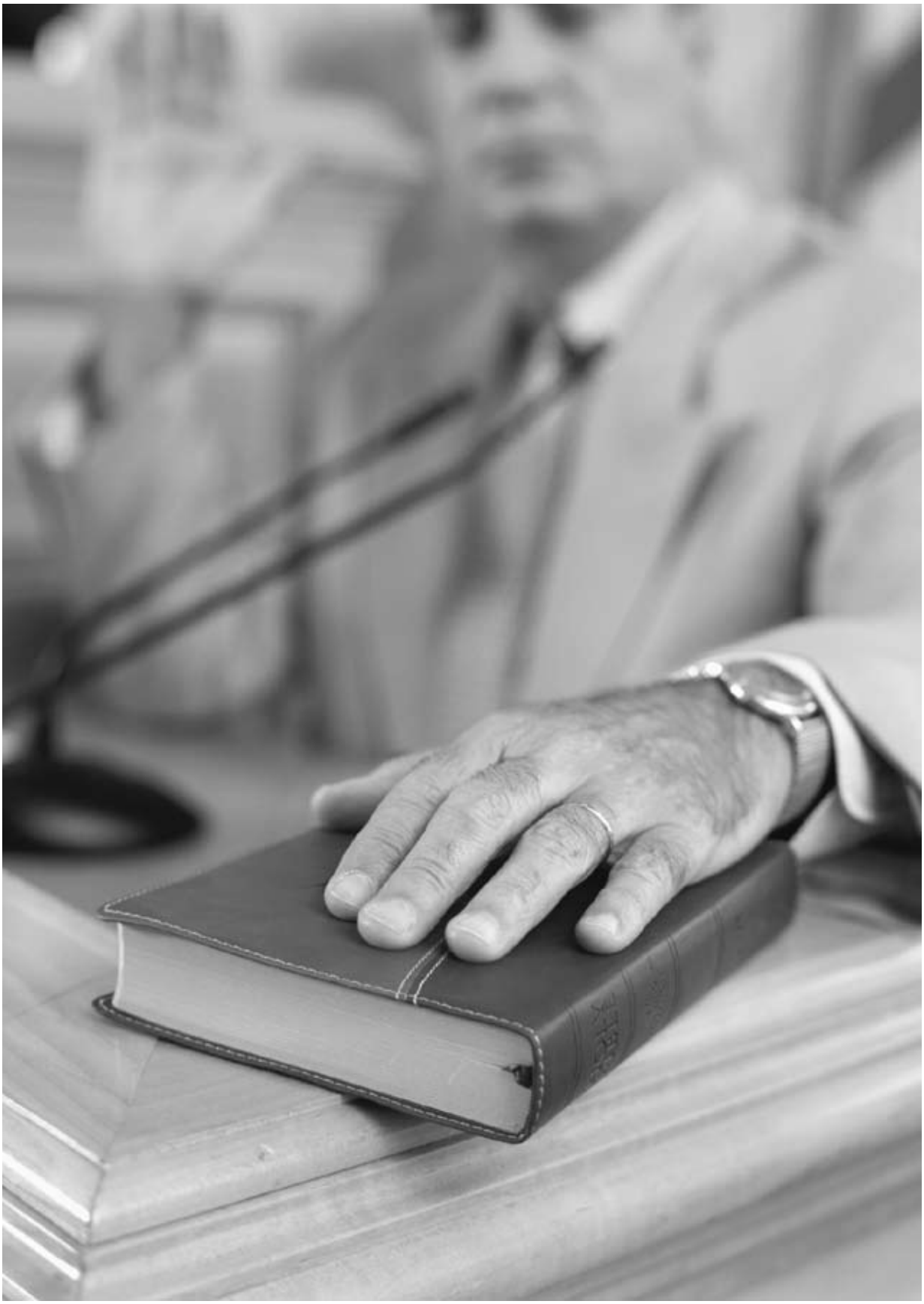
The offer of judgment statutes in Oklahoma set up a system that is very confusing. It is important to fully research the statutes themselves and the case law, in order to choose the correct (and best) statute for your particular circumstance. It is important to inform your client regarding the potential ramifications of making an offer of judgment, so that they can effectively consider the advice you are giving them regarding whether and/or for how much an offer should be made. It is also important to carefully draft your offer of judgment based upon the statute and case law upon which you intend to make the offer. This is not an area that lends itself to the use of a form. Plaintiff's counsel must also be aware of this statutory scheme and supporting case law in order to adequately inform their clients regarding the effect of receiving an offer of judgment, and the potential courses of action that can be taken in response to an offer of judgment.

1. *See Dulan v. Johnston*, 1984 OK 44, 687 P.2d 1045, 1047. 1.
2. *See, e.g., Foreman v. Brewer*, 2006 OK CIV APP 149, 149 P.3d 1083.
3. 12 Okla. Stat. §1101.
4. *Id.*

5. *Id.*
6. *Id.*
7. *Id.*
8. *See Bohnefeld v. Haney*, 1996 OK CIV APP 141, 931 P.2d 90.
9. *Bullard v. Grisham Construction Co.*, 1983 OK 21, 660 P.2d 1045.
10. *See Hicks v. Lloyd's General Insurance Agency Inc.*, 1988 OK 97, 763 P.2d 85.
11. *Id.*
12. 12 Okla. Stat. §1101.1(A)(1), (5).
13. 12 Okla. Stat. §1101.1(A)(1).
14. *Id.*
15. *Id.*
16. *Id.*
17. 12 Okla. Stat. §1101.1 (A)(2).
18. *Id.*
19. *Id.*
20. *Fulsom v. Fulsom*, 2003 OK 96, 81 P.3d 652, 655, *citing State ex rel. Tal v. City of Oklahoma City*, 2002 OK 97, 61 P.3d 234, 243.
21. *See e.g.*, 12 Okla. Stat. §§936-941.
22. *Fulsom*, 2003 OK 96, 81 P.3d at 655.
23. *See Hopkins v. Byrd*, 2006 OK CIV APP 132, 146 P.3d 864.
24. *Id.*
25. 12 Okla. Stat. §1101.1 (A)(4).
26. *See Oltman Homes, Inc. v. Mirkes*, 2008 OK CIV APP 64, 190 P.3d 1182.
27. 12 Okla. Stat. §1101.1(B)(1), (6).
28. 12 Okla. Stat. §1101.1(B)(3) and (4).
29. *Cf:* 12 Okla. Stat.. §1101.1 (A) (3) and (4) with §1101.1(B) (3) and (4).
30. 12 Okla. Stat. §1101.1 (A)(3).
31. 12 Okla. Stat. §1101.1(B)(5).
32. 12 Okla. Stat. §1101.1 (C).
33. 12 Okla. Stat. §1101.1(D).
34. 12 Okla. Stat. §1101.1(E).
35. *Bullard v. Grisham Construction Co.*, 1983 OK 21, 660 P.2d 1045.
36. *See Hicks v. Lloyd's General Insurance Agency, Inc.*, 1988 OK 97, 763 P.2d 85.
37. 12 Okla. Stat. §1106.
38. *Station Operation, LLC v. Circle K Stores, Inc.*, 2010 OK CIV APP 2, 229 P.3d 1283.
39. *Id.* at 1286.
40. 12 Okla. Stat. §940 (A).
41. *ABC Coating Co., Inc. v. J. Harris & Sons Ltd.*, 1987 OK 125, 747 P.2d 271; *Woods Petroleum Corp. v. Delhi Gas Pipeline Corp.*, 1984 OK 94, 700 P.2d 1011.
42. 12 Okla. Stat. §940 (B).
43. *Id.*
44. *Id.*
45. 12 Okla. Stat. §940(B).
46. *Id.*
47. 2006 OK CIV APP 149, 149 P.3d 1083.
48. *Id.* at 1085-86.
48. *See Haddock v. Woodland Park Home, Inc.*, 2004 OK CIV APP 42, 90 P.3d 594.
50. *Id.*
51. 12 Okla. Stat. §1101.1 (C); *Carson v. Specialized Concrete, Inc.*, 1990 OK 87, ¶ 6 801 P.2d 691, 693 (applying this analysis to offers made pursuant to Section 940(B)); *see also, L. Environmental Service, Inc. v. United Motors, Inc.*, 2006 OK CIV APP 49, 134 P.3d 928 (applying the same analysis to a Section 1101 offer as well).
52. *L. Environmental Service.*, 134 P.3d at 930-931.
53. *Fleet v. Sanguin, Ltd.*, 1993 OK 76, 854 P.2d 892, 898-99.
54. *Id.* (plaintiff could not pursue an additional amount for prejudgment interest where prejudgment interest was an element of damages recoverable in plaintiff's cause of action); *see also Station Operation, LLC v. Circle K Stores, Inc.*, 2010 OK CIV APP 2, 229 P.3d 1283 (plaintiff could not seek a permanent injunction following the acceptance of an offer of judgment because "Plaintiff's request for a permanent injunction is but another remedy sought under the same set of facts, and Plaintiff's acceptance of defendant's offer extinguished plaintiff's cause of action…." *Id.* at 1287.).
55. *Boston Ave. Management, Inc. v. Associated Resources Inc.*, 2007 OK 5, 152 P.3d 880, 886.
56. *Id.* at 888.
57. *Id.*
58. *Commercial Financial Services, Inc. v. J.P. Morgan Securities Inc.*, 2007 OK CIV APP 8, 152 P.3d 897.
59. *Id.*
60. *See Bohnefeld v. Haney*, 1996 OK CIV APP 141, 931 P.2d 90 (generally, the amount of the judgment which should be compared to the offer of judgment amount is the amount of the verdict (minus applicable credits or remittitur) plus prejudgment interest.).
61. 12 Okla. Stat. §§1101.1 (A)(1) and (B)(1).
62. 1994 OK CIV APP 170, 894 P.2d 1133.
63. *Id.* at 1136.
64. *Fluharty v. Speedy Wrecker Service, Inc.*, 1987 OK CIV APP 79, 748 P.2d 49.

ABOUT THE AUTHOR

Andrea Treiber Cutter is a solo practitioner in Tulsa where her practice includes business litigation and insurance, employment and environmental law. She received her J.D. from Baylor Law School in 1994 and practiced in the Gulf Coast region of Texas for 12 years before returning home to practice in Oklahoma in 2006.



Professional Negligence: No Affidavit, No Case

By Sharolyn Whiting-Ralston

For years, doctors have asked the Oklahoma Legislature for protection from malpractice lawsuits, and in 2009, the Legislature answered the call — or did it? Oklahoma Statute Title 12, Section 19 (Section 19) went into effect Nov. 1, 2009. The new law heightens the burden of a plaintiff claiming professional negligence by requiring an expert affidavit as a prerequisite to bringing suit (or at least surviving a motion to dismiss). The law bears a striking resemblance to a 2003 statute that was struck down as unconstitutional under this state's constitution, but contains some changes designed to permit it to withstand constitutional scrutiny. But, will this one pass the test? This question has been the source of debate among attorneys over the last year, and while Oklahoma courts are yet to address the issues, case law from other jurisdictions may shed some light. This article explains the basic requirements of Oklahoma Statute Title 12, Section 19 and then contemplates its applications and constitutionality.

BASIC REQUIREMENTS

If you work in the medical malpractice arena, the implications of Oklahoma Statute Title 12, Section 19 may seem pretty straightforward, but attorneys outside that area are finding themselves, and their clients, subject to some new hurdles. Section 19 requires people who want to sue for professional negligence to obtain the written opinion of a "qualified expert" on the issue prior to filing suit.[1] The "qualified expert" has to agree that based on the information provided to him or her, the actions of the professional did indeed constitute professional negligence.[2]

The person filing the lawsuit has to state under oath in an affidavit that he or she has reviewed the written opinion of the expert and has "concluded that the claim is meritorious and based on good cause."[3] The affidavit must attest to the following:

a. the plaintiff has consulted and reviewed the facts of the claim with a qualified expert,

b. the plaintiff has obtained a written opinion from a qualified expert that clearly identifies the plaintiff and includes the determination of the expert that, based upon a review of the available material including,

but not limited to, applicable medical records, facts or other relevant material, a reasonable interpretation of the facts supports a finding that the acts or omissions of the defendant against whom the action is brought constituted professional negligence, and

c. on the basis of the review and consultation of the qualified expert, the plaintiff has concluded that the claim is meritorious and based on good cause.[4]

The expert's written opinion must "state the acts or omissions of the defendant or defendants that the expert then believes constituted professional negligence and shall include reasons explaining why the acts or omissions constituted professional negligence."[5] The written opinion of the expert does not need to be attached to the affidavit, nor is it admissible at trial or subject to inquiry in discovery or trial.[6] However, the defendant does have a right to a copy of the opinion, along with a properly executed HIPAA form from the plaintiff concerning all medical records relating to the plaintiff for five years prior to the incident in question.[7]

If a plaintiff fails to attach the requisite affidavit the court has two choices: 1) dismiss the petition "without prejudice," meaning the plaintiff can refile the action, or 2) grant the plaintiff 90 days after the petition is filed to bring it into compliance.[8] The court can also dismiss the action if the plaintiff fails to provide the written expert opinion and HIPAA form to the defendant upon request.[9]

APPLICATION OF THE LAW

Without even addressing the constitutional issues, the law leaves several questions undetermined. First, who is a professional under Section 19? The law does not define "professional." However, in reviewing history, doctors, lawyers, insurance agents, real estate brokers and builders, among others, have all been subject to professional negligence suits. In fact, Oklahoma maintains licensing requirements for over 50 different professions/occupations under Title 59 alone[10] — does that mean anyone required to have a license falls within the protection of the statute, and does it mean professions not requiring a license cannot be subject to a professional negligence suit?

Similar statutes in other states provide more guidance on who is a professional protected under the statute. For instance, Georgia's law states:

> (a) In any action for damages alleging professional malpractice against:
>
> 1) A professional licensed by the state of Georgia and listed in subsection (g) of this Code section;
>
> 2) A domestic or foreign partnership, corporation, professional corporation, business trust, general partnership, limited partnership, limited liability company, limited liability partnership, association, or any other legal entity alleged to be liable based upon the action or inaction of a professional licensed by the state of Georgia and listed in subsection (g) of this Code section; or
>
> 3) Any licensed healthcare facility alleged to be liable based upon the action or inaction of a healthcare professional licensed by the state of Georgia and listed in subsection (g) of this Code section…[11]

Oklahoma's statute does not define, nor limit, who may be a professional for purposes of the affidavit requirement; accordingly, it appears to possibly include not just physicians, but also architects, lawyers, engineers, pharmacists, hairstylists, mechanics, etc.

Second, what constitutes a "qualified expert" under Section 19, and can the opinion be challenged at the motion to dismiss phase? Section 19 uses the phrase "qualified expert" without definition. Indeed, several different legal definitions of "experts" exist, but the Legislature chose not to define exactly who qualifies for purposes of the expert report. So, does the defendant have the right to challenge whether the "qualified expert" is a "qualified expert," and can the court investigate that issue?

A Texas court recently faced the question of whether the "expert" was qualified to give an expert affidavit opinion and whether such opinion passed muster under the Texas statute. In *Benchmark Engineering Corp. v. Sam Houston Race Park*,[12] Benchmark Engineering filed a motion to dismiss Sam Houston Race Park's claim for professional negligence, asserting the affidavit of an engineer failed to meet the requirements of the statute and the engineer was not qualified to render an expert opinion. The district court denied the motion to dismiss and the court of appeals upheld the decision.[13] The appellate court relied heavily on the plain language of the statute and rejected the defen-

dant's argument that the affidavit not only had to articulate the factual basis for its opinion, but also had to spell out the standard of care under which the professional was required to perform.[14] According to the court, "every word excluded from a statute must also be presumed to have been excluded for a purpose."[15] The court also rejected defendant's claim that the "factual basis" provided in the affidavit was insufficient to withstand a motion to dismiss.[16] While the court acknowledged that Texas statute required the affidavit be submitted by an expert "competent to testify," the court stated the Legislature did not require the certificate of merit based upon the affidavit be "competent as evidence."[17] Again adhering to the strict language of the statute, the court also went on to address the affiant's qualifications, ultimately finding he had sufficiently illustrated his qualifications under the statute.[18]

> "Interestingly, the Georgia Supreme Court recently found a Georgia statute, very similar to Oklahoma's to be constitutional."

Applying *Benchmark Engineering Corp.* and looking at the plain language of Oklahoma's statute, it appears neither the defendant nor the judge have the ability to question the preliminary opinion or the qualification of the expert. First, Section 19 does not provide any guidance on who may be a "qualified expert," nor does it require such expert articulate any qualifications. Second, the statute makes clear the opinion is not admissible at trial or for use in discovery, but simply requires the report to identify the plaintiff and include a determination "that, based upon a review of the available material including, but not limited to, applicable medical records, facts or other relevant material, a reasonable interpretation of the facts supports a finding that the acts or omissions of the defendant against whom the action is brought constituted professional negligence."[19] Indeed, it seems implausible the Legislature intended the "qualified expert" to be subject to *Daubert* type requirements at the motion to dismiss stage, as that is clearly an onerous level of proof at such a preliminary point in the case. As illustrated by *Benchmark Engineering Corp.*, and cases like it, one can assume the absence of these answers will lead to future litigation. However, that litigation may very well be secondary to the constitutional challenges that will inevitably be raised.

CONSTITUTIONAL CONSIDERATIONS

In 2003, the Legislature passed a statute very similar to the present one.[20] The previous law contained two characteristics which this law seemingly sought to overcome. First, the 2003 law only applied to cases of professional medical negligence.[21] As stated previously, the present law applies to all professional negligence actions.[22] Second, the 2003 law failed to provide a provision for those who cannot afford to obtain an expert prior to filing a case.[23] The present law does allow for certain people, based upon financial condition, to file a petition without getting the expert report.[24] The test is whether the prospective plaintiff is "indigent" — a term that has no precise definition.

The changes in the new statute likely stem from the case that declared the 2003 statute unconstitutional, *Zeier v. Zimmer*.[25] In that case, the court looked at Oklahoma Constitution, Article 5, §46 which is a "mandatory prohibition against special laws." According to the court:

> In a special laws attack under Article 5, §46, the only issue to be resolved is whether a statute upon a subject enumerated in the constitutional provision targets for different treatment less than an entire class of similarly situated persons or things.[26]

The court held that the law did just that, and thus was unconstitutional.[27]

The *Zeier* court also recognized that the 2003 law "creat[ed] an unconstitutional monetary barrier to the access to courts guaranteed by the Oklahoma Constitution Article 2, §6."[28] Article 2, §6 provides: "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property or reputation; and right and justice shall be administered without sale, denial, delay or prejudice." Again, the 2003 law had no exception to the affidavit requirement for those who could not afford an expert. Accordingly, the court declared it unconstitutional.[29]

Interestingly, the Georgia Supreme Court recently found a Georgia statute, very similar to Oklahoma's to be constitutional.[30] In *Walker v. Cromartie et al.*,[31] the plaintiffs appealed a district court decision dismissing their claim for professional legal malpractice based upon their failure to submit an expert affidavit with their complaint. Plaintiffs challenged the affidavit requirement on the grounds the statute was a special law because it imposed an additional burden on indigent plaintiffs, and that it violated the equal protection and due process rights of indigent defendants.[32] The Supreme Court rejected the arguments holding that any due process or equal rights violation may only be at the hands of the government, and any additional costs imposed upon plaintiffs were not imposed by the government but by the private experts providing affidavits.[33] The Supreme Court also held the law applied to all people filing claims for professional negligence, not just indigent plaintiffs, and thus it was not a "special law."[34] The arguments before the Georgia Supreme Court were, of course, somewhat different than those made in *Zeier*, but it illustrates the various challenges to the statute, and the potential outcomes.

Without doubt, the new law invites both practical and constitutional challenges. At the very basic level, the statute creates uncertainty as to which professions it applies, and the level of scrutiny to which the supporting affidavit and report can be held. On its face, the statute seems to need a listing of those occupations or services which are subject to its protections. Likewise, the statute needs definition of the term "qualified expert," along with some standards and procedures for determining whether the affidavit requirements have been met.

Practical considerations aside, the constitutionality of the statute remains a question. While the current version attempts to overcome the shortcomings of previous versions, many still question whether it is a "special law" as our Supreme Court would define. The next few years of litigation will eventually tell us whether the law will remain in place 10 years from now and whether it adds any meaningful protections for professional defendants.

1. *See* Okla Stat. tit. 12, §19.
2. *Id.* at §19(A)(1)(b).
3. *Id.* at §19(A)(1)(c).
4. *Id.* at §19(A).
5. *Id.* at §19(A)(3).
6. Okla Stat. tit. 12, §19(A)(3).
7. *Id* at §19(C)(1).
8. *Id* at §19(A)(2), (B).
9. *Id* at §19(C)(2).
10. *See* Okla Stat. tit. 59, §1 *et seq*.
11. Ga. Stat. 9-11-9.1 (2007). Subsection (g) states:

The professions to which this Code section shall apply are:
(1) Architects;
(2) Attorneys at law;
(3) Audiologists;
(4) Certified public accountants;
(5) Chiropractors;
(6) Clinical social workers;
(7) Dentists;
(8) Dietitians;
(9) Land surveyors;
(10) Marriage and family therapists;
(11) Medical doctors;
(12) Nurses;
(13) Occupational therapists;
(14) Optometrists;
(15) Osteopathic physicians;
(16) Pharmacists;
(17) Physical therapists;
(18) Physicians' assistants;
(19) Podiatrists;
(20) Professional counselors;
(21) Professional engineers;
(22) Psychologists;
(23) Radiological technicians;
(24) Respiratory therapists;
(25) Speech-language pathologists; or
(26) Veterinarians.

12. 316 S.W. 3d 41 (Tex. App. 2010).
13. *Id.* at 43.
14. *Id.* at 45-48.
15. *Id.* at 46.
16. *Id.* at 46-48. The court heard evidence on the issues, and thus converted the motion to one for summary judgment.
17. *Benchmark Engineering Corp.*, 316 S.W. 3d at 47.
18. *Id.* at 49-50.
19. Okla Stat. tit. 12, §19 (A)(1)(b). According to the plain language: "The written opinion from the qualified expert shall not be admissible at trial for any purpose nor shall any inquiry be permitted with regard to the written opinion for any purpose either in discovery or at trial." *Id.* at §19(A)(3).
20. *See* Okla Stat. tit. 63, §1-1708.1E (repealed by HB 1603, c. 228, §87, eff. Nov. 1, 2009.)
21. *See id*.
22. *See* section B, *supra*.
23. *See* Okla Stat. tit. 63, §1-1708.1E; *Zeier v. Zimmer*, 2006 OK 98, 152 P.3d 861.
24. *See* Okla Stat. tit. 12, §19(D).
25. 2006 OK 98, 152 P.3d 861.
26. *Id.* at ¶ 13.
27. *Id.* at ¶ 18.
28. *Id.* at ¶ 19.
29. *Id.* at ¶ 26.
30. Ga. Stat. 9-11-9.1; *see also* n. 11, *supra*.
31. 696 S.E. 2d 654 (Ga. 2010).
32. *Id.* at 656-57.
33. *Id.*
34. *Id.* at 657.

ABOUT THE AUTHOR

Sharolyn Whiting-Ralston is an associate attorney with McAfee & Taft in Tulsa. Her practice primarily focuses on labor and employment law and general civil and business litigation, including construction disputes, class actions and complex commercial litigation.

Legislative Monitoring Committee Begins Efforts to Review Bills

By Duchess Bartmess

It is that time of year again. By the time this issue of the bar journal went to press, the first Session of the 53rd Oklahoma Legislature will have convened. That means the Legislative Monitoring Committee has begun its work. Because this is the first session of a new Legislature and, as always, there are a number of new members, traditionally a lot of bills and joint resolutions are introduced. This year, 1,213 bills and joint resolutions have been introduced in the House and 1,015 bills and joint resolutions have been introduced in the Senate. The LMC does not review simple resolutions and concurrent resolutions as they do not have the force and effect of law.

Over 2,000 bills to review presents quite a challenge to the LMC and to members of the bar who are interested in the quality of laws enacted. Each year the LMC tries to improve their internal process to provide help to members of the bar and to the Legislature in reviewing pending measures in the current session. This year, the day after the final day to introduce bills in both houses of the Legislature, the OBA executive director conducted a meeting at the bar center to review the introduced bills and joint resolutions. Members of the LMC attended along with members from some other bar committees and sections. The purpose was to do a preliminary review of the pending measures. With over 2,000 measures introduced, the amount of time that could be spent discussing the measures was limited. However, a number of measures were noted as being potentially of interest to practicing members of the bar. The measures noted are assigned to the various subcommittees of the LMC for review and recommendation. In addition, other measures which appear to be of potential significance are also assigned to the subcommittees for review.

The LMC still meets through e-mail in order to facilitate participation in the committee by bar members around the state. Each year, the categories of subcommittees varies because they are dictated by the emphasis of interest reflected by the number of measures introduced in a particular subject area. 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, legal implications or unintended consequences. This year the LMC will intensify their efforts to work with the other committees and sections of the bar to coordinate with their efforts in the specialized areas of the law those groups work on.

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.

DAY AT THE CAPITOL

The committee invites you to speak with your legislators about issues you believe are important during OBA Day at the Capitol, set for March 8, 2011.

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

OBA DAY at the CAPITOL

Tuesday, March 8, 2011

11:30 a.m. Registration — Oklahoma Bar Center

11:45 a.m. Working Lunch — Oklahoma Bar Center

12 – 12:15 p.m. Welcome and comments on session
Deborah A. Reheard, President,
Oklahoma Bar Association

12:15 – 12:30 p.m. Pending family law legislation
Phil Tucker and Noel Tucker

12:30 – 12:45 p.m. Status of bills relating to general practice of law
Thad Balkman

12:45 – 1 p.m. Supreme Court views of the session
Chief Justice Steven W. Taylor,
Oklahoma Supreme Court

1 – 1:15 p.m. Proposed changes in civil liability
Brad West

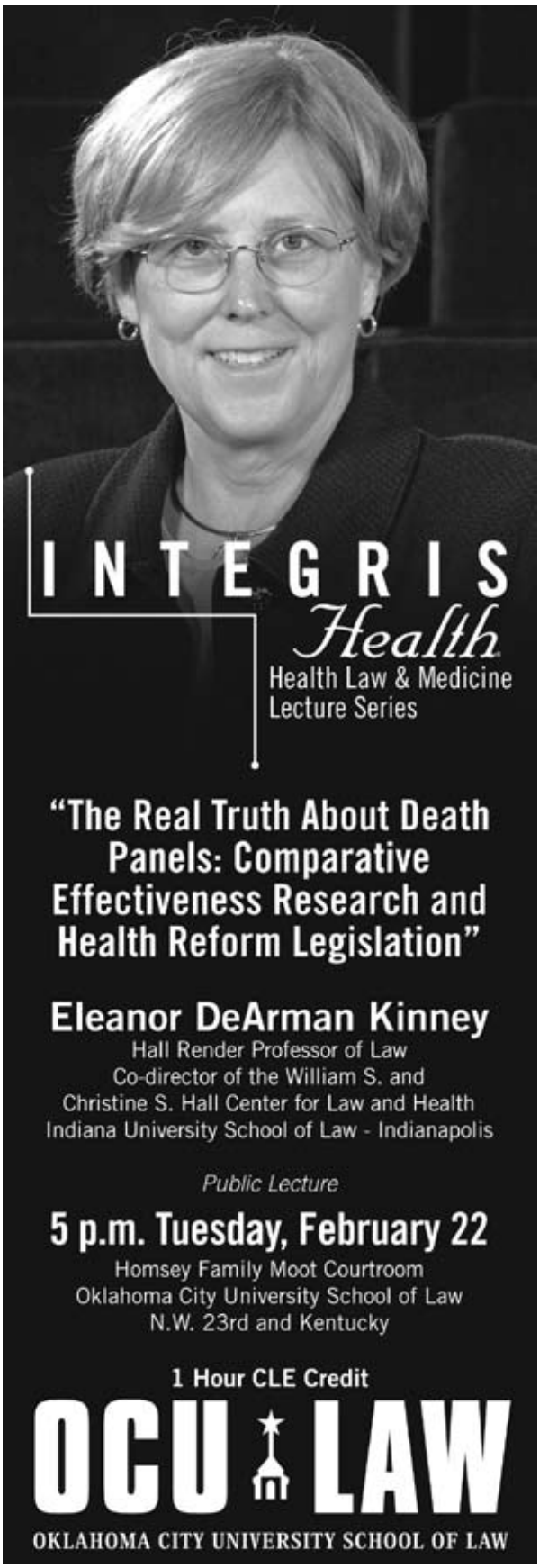
1:15 – 1:30 p.m. OBA bills & how to talk to legislators
John Morris Williams, Executive Director,
Oklahoma Bar Association

1:30 p.m. Adjourn to Capitol

1:30 – 5 p.m. Meet with Legislators — State Capitol

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.



ANNUAL REPORT OF THE PROFESSIONAL RESPONSIBILITY COMMISSION AS COMPILED BY THE OFFICE OF THE GENERAL COUNSEL OF THE OKLAHOMA BAR ASSOCIATION

January 1, 2010 through December 31, 2010

SCBD # 5718

(Filed with Oklahoma Supreme Court, February 4, 2011)

Pursuant to the provisions of Rule 14.1, Rules Governing Disciplinary Proceedings (RPDP), 5 O.S. 2001 ch. 1, app. 1-A, this is the Annual Report of grievances and complaints received and processed for 2010 by the Professional Responsibility Commission and the Office of the General Counsel of the Oklahoma Bar Association.

Historically, this document reflected the combined Annual Reports of the Professional Responsibility Commission and the Professional Responsibility Tribunal. The Professional Responsibility Tribunal has opted to file a separate report for 2010. Therefore, the following is submitted by the Office of the General Counsel on behalf of the Professional Responsibility Commission.

THE PROFESSIONAL RESPONSIBILITY COMMISSION:

The Commission is composed of seven persons — five lawyer and two non-lawyer members. The attorney members are nominated for rotating three-year terms by the President of the Association subject to the approval of the Board of Governors. The two non-lawyer members are appointed by the Speaker of the Oklahoma House of Representatives and the President Pro Tempore of the Oklahoma Senate, respectively. No member can serve more than two consecutive terms. Terms expire on December 31st at the conclusion of the three-year term.

Lawyer members serving on the Professional Responsibility Commission during 2010 were Melissa Griner DeLacerda, Stillwater; Michael E. Smith, Oklahoma City; William R. Grimm, Tulsa; Jon K. Parsley, Guymon; and Stephen D. Beam, Weatherford. Non-Lawyer members were Tony R. Blasier, Oklahoma City and Debra Thompson, Carney. Melissa Griner DeLacerda served as Chairperson and Tony R. Blasier served as Vice-Chairperson. Commission members serve without compensation but are reimbursed for actual travel expenses.

RESPONSIBILITIES:

The Professional Responsibility Commission considers and investigates any alleged ground for discipline, or alleged incapacity, of any law-

yer called to its attention, or upon its own motion, and takes such action as deemed appropriate, including holding hearings, receiving testimony, and issuing and serving subpoenas.

Under the supervision of the Professional Responsibility Commission, the Office of the General Counsel investigates all matters involving alleged misconduct or incapacity of any lawyer called to the attention of the General Counsel by grievance or otherwise, and reports to the Professional Responsibility Commission the results of investigations made by or at the direction of the General Counsel. The Professional Responsibility Commission then determines the disposition of grievances or directs the instituting of a formal complaint for alleged misconduct or personal incapacity of an attorney with the Oklahoma Supreme Court. The attorneys in the Office of the General Counsel prosecute all proceedings under the Rules Governing Disciplinary Proceedings, supervise the investigative process, and represent the Oklahoma Bar Association at all reinstatement proceedings.

VOLUME OF GRIEVANCES:

During 2010, the Office of the General Counsel received 287 formal grievances involving 195 attorneys and 1210 informal grievances involving 894 attorneys. In total, 1497 grievances were received against 996 attorneys. The total number of attorneys differs because some attorneys received both formal and informal grievances. In addition, the Office handled 611 items of general correspondence, which is mail not considered to be a grievance against an attorney.

On January 1, 2010, 361 formal grievances were carried over from the previous year. During 2010, 287 new formal grievances were opened for investigation. The carryover accounted for a total caseload of 648 formal investigations pending throughout 2010. Of those grievances, 346 investigations were completed by the Office of the General Counsel and presented for review to the Professional Responsibility Commission. Therefore, 302 investigations were pending on December 31, 2010.

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

TRUST ACCOUNT OVERDRAFT REPORTING:

Over the past 18 months, the Office of the General Counsel under the supervision of the Commission has implemented the Trust Account Overdraft Reporting requirements of Rule 1.15(j), Oklahoma Rules of Professional Conduct, 5 O.S. Supp. 2008, ch. 1, app. 3-A. Trust Account Overdraft Reporting Agreements have been submitted by and approved for depository institutions. In 2010, 284 notices of overdraft of a client trust account were received by the Office of the General Counsel. Notification triggers a general inquiry to the attorney requesting an explanation for the deficient account. Based upon the response, an investigation may be commenced. Repeated overdrafts due to negligent accounting practices have resulted in referral to the Discipline Diversion Program for instruction in proper trust accounting procedures.

DISCIPLINE BY THE PROFESSIONAL RESPONSIBILITY COMMISSION:

1. **Formal Charges**. During 2010, the Commission voted the filing of formal disciplinary charges against 16 lawyers involving 56 grievances.

2. **Private Reprimands.** Pursuant to Rule 5.3(c) of the Rules Governing Disciplinary Proceedings, the Professional Responsibility Commission has the authority to impose private reprimands, with the consent of the attorney, in matters of less serious misconduct or if mitigating factors reduce the sanction to be imposed. During 2010, the Commission issued private reprimands to 22 attorneys involving 36 grievances.

3. **Letters of Admonition.** During 2010, the Commission issued letters of admonition to 25 attorneys involving 29 grievances cautioning that the conduct of the attorney was dangerously close to a violation of a disciplinary rule wherein the

Commission believed warranted a warning rather than discipline.

4. **Dismissals.** The Commission dismissed 226 grievances where the investigation revealed lack of merit or loss of jurisdiction over the respondent attorney. Loss of jurisdiction included the death of the attorney, the resignation of the attorney pending disciplinary proceedings, a continuing lengthy suspension or disbarment of the respondent attorney, or due to the attorney being stricken from membership for non-compliance with MCLE requirements or non-payment of dues.

5. **Diversion Program.** The Commission may also refer matters to the Discipline Diversion Program where remedial measures are taken to ensure that any deficiency in the representation of a client does not occur in the future. During 2010, the Commission referred 19 attorneys to be admitted into the Diversion Program for conduct involving 41 grievances.

   The Discipline Diversion Program is tailored to the individual circumstances of the participating attorney and the misconduct alleged. Oversight of the program is by the OBA Ethics Counsel with the OBA Management Assistance Program Director involved in programming. Program options include: Client Trust Account Procedures, Professional Responsibility/Ethics Training, Law Office Management, Communication and Client Relationship Skills, Civility in the Practice of Law, In Office Procedures Review, Lawyers Helping Lawyers, and Mentor/Peer Referral.

DISCIPLINE IMPOSED BY THE OKLAHOMA SUPREME COURT:

In 2010, 10 public disciplinary cases were acted upon by the Oklahoma Supreme Court. The public sanctions are as follows:

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

Respondent	Effective Date
Pope, Eddie Michael	01/11/10
Waller, Katherine T.	03/08/10
Singletary, M. Benjamin	04/21/10
Robinson, James T.	11/15/10

Disciplinary Suspensions:

Respondent	Length	Effective Date
Wilburn, Rhett Henry	2 years + 1 day	03/16/10
McCoy, Gloyd Lynn	2 years + 1 day	09/21/10
Whitebook, Merl Alan	2 years + 1 day	10/12/10
Offill Jr., Phillip W.	Rule 7/ Indefinite	11/22/10

Public Censure:

Respondent	Effective Date
Martin, Jeffrey Allen	09/21/10

Dismissals:

Respondent	Effective Date
Fournerat, Wayne Morris	01/15/10

In addition to the public discipline imposed in 2010, the Court also issued four Rule 6/10 Confidential Interim Suspensions as follows:

Interim Suspension

Respondent	Length	Effective Date
Rule 6/10 Confidential	Indefinite	02/22/10
Rule 6/10 Confidential	Indefinite	03/25/10
Rule 10 Confidential	Indefinite	10/18/10
Rule 10 Confidential	Indefinite	11/08/10

There were 17 discipline cases filed with the Supreme Court on January 1, 2010. During 2010, 14 new formal complaints, two Rule 7 Judgments and two Resignations Pending Disciplinary Proceedings were filed for a total of 35 cases. On December 31, 2010, 24 cases remained pending.

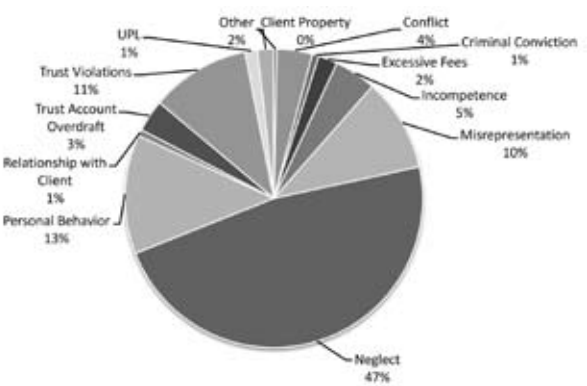
There were 11 active reinstatement cases filed with the Oklahoma Supreme Court as of January 1, 2010. There were 12 new petitions for reinstatement filed in 2010. In 2010, the Supreme Court approved 10 reinstatements, denied two, and one was withdrawn. On December 31, 2010, there were 10 petitions for reinstatement pending before the Oklahoma Supreme Court.

SURVEY OF GRIEVANCES:

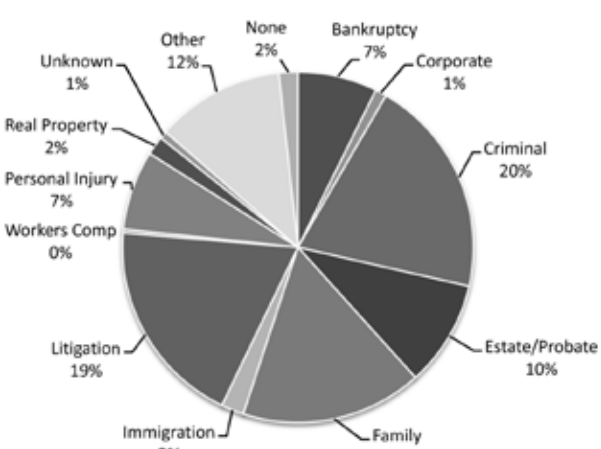
In order to better inform the Supreme Court, the bar and the public of the nature of the grievances received, the numbers of attorneys complained against, and the areas of attorney misconduct involved, the following information is presented.

Total membership of the Oklahoma Bar Association as of December 31, 2010 was 16,712 attorneys. Considering the total membership, the receipt of 1497 formal and informal grievances during 2010, involving 996 attorneys, constituted approximately six percent of the attorneys licensed to practice law by the Oklahoma Supreme Court.

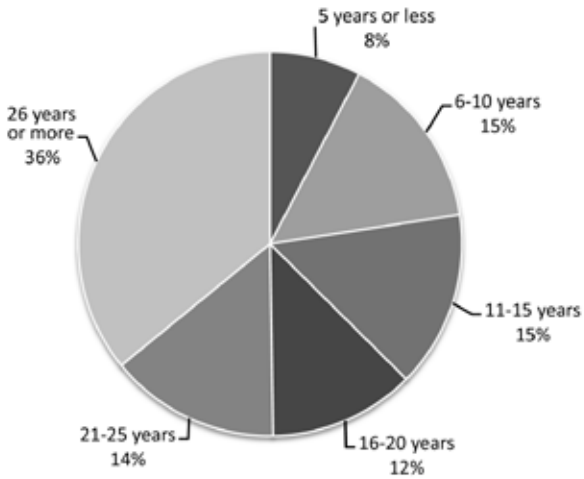
A breakdown of the type of attorney misconduct alleged in the 287 formal grievances received by the Office of the General Counsel in 2010 is as follows:



Of the 287 grievances registered, the area of practice is as follows:



The number of years in practice of the 195 attorneys receiving formal grievances is as follows:



The largest number of grievances received were against attorneys who have been in practice for 26 years or more. Considering the total number of practicing attorneys, the largest number have been in practice 26 years or more.

Of the 287 formal grievances filed against 195 attorneys in 2010, 158 are attorneys in urban areas and 118 attorneys live and practice in rural areas. Eleven of the grievances were filed against attorneys licensed in Oklahoma but practicing out of state.

ATTORNEY SUPPORT SERVICES:

In 2010, the Office of the General Counsel prepared 1332 Certificates of Good Standing/Discipline History at the request of Oklahoma Bar Association members. There is no fee to the attorney for preparation of same.

In 2010, the Office of the General Counsel processed 576 new applications and 448 renewal applications submitted by out of state attorneys registering to participate in a proceeding before an Oklahoma Court or Tribunal. Certificates of Compliance are issued after confirmation of the application information, the applicant's good standing in his/her licensing jurisdiction and payment of applicable fees. All obtained and verified information is submitted to the Oklahoma Court or Tribunal as an exhibit to a "Motion to Admit Pro Hac Vice."

UNAUTHORIZED PRACTICE OF LAW:

Rule 5.1(b), Rules Governing Disciplinary Proceedings, 5. O.S. 2001 ch. 1 app. 1-A, empowers the Office of the General Counsel to inves-

tigate allegations of the unauthorized practice of law (UPL) by non-lawyers. In 2010, the office investigated 29 complaints of UPL. Voluntary responses have been requested from each of the alleged participants. The findings of the investigations are presented to the Commission. The Office of the General Counsel filed for and was granted civil injunctive relief in three UPL matters and the investigative process is ongoing as to several others.

CIVIL ACTIONS (NON-DISCIPLINE) INVOLVING THE OBA:

The Office of the General Counsel has represented the Oklahoma Bar Association in three civil (non-discipline) matters during 2010.

1. *Fournerat v. Wisconsin Law Review, et. al.*, Case No. 10-6131, is currently briefed and pending decision before the United States Court of Appeals for the Tenth Circuit.
2. *Mothershed v. State of Oklahoma ex rel. Oklahoma Bar Association*, was filed in the United States District Court for the Western District of Oklahoma wherein the Court dismissed the plaintiff's complaint. Plaintiff appealed to the United States Court of Appeals for the Tenth Circuit where his appeal was denied. Plaintiff then filed a Petition for Writ of Certiorari with the United States Supreme Court, Case No. 10-6816. Certiorari was denied on November 29, 2010.
3. The Office of the General Counsel is currently representing the OBA in the matter of *Fent v. Henry, et. al.* filed in 2010 and currently pending before the Oklahoma Supreme Court.

ETHICS AND EDUCATION:

During 2010, the General Counsel, Assistant General Counsels, and the Professional Responsibility Commission members continued to speak to county bar association meetings, Continuing Legal Education classes, law school classes and various civic organizations. In these sessions, disciplinary and investigative procedures, case law, and ethical standards within the profession were discussed. This effort directs lawyers to a better understanding of their ethical requirements and the disciplinary process, and informs the public of the efforts of the Oklahoma Bar Association to regulate the conduct of its members. In addition, the General Counsel was a regular contributor to *The Oklahoma Bar Journal.*

RESPECTFULLY SUBMITTED this 4th day of February, 2011, on behalf of the Professional Responsibility Commission and the Office of the General Counsel of the Oklahoma Bar Association.

/s/ Gina Hendryx
Gina Hendryx, General Counsel
Oklahoma Bar Association

PROFESSIONAL RESPONSIBILITY TRIBUNAL ANNUAL REPORT

2010

SCBD No. 5717

Introduction

The Professional Responsibility Tribunal (PRT) was established by order of the Supreme Court of Oklahoma in 1981, under the Rules Governing Disciplinary Proceedings, 5 O.S. 2001 Ch. 1, App. 1-A (RGDP). The primary function of the PRT is to conduct hearings on complaints filed against lawyers in formal disciplinary and personal incapacity proceedings, and on petitions for reinstatement to the practice of law. A formal disciplinary proceeding[1] is initiated by written complaint,[2] which is a specific pleading filed with the Chief Justice of the Supreme Court. Petitions for reinstatement are filed with the Clerk of the Supreme Court.

Composition and Appointment

The PRT is a 21-member panel of Masters, 14 of whom are lawyers and seven are non-lawyers. The lawyers on the PRT are active members in good standing of the OBA. Lawyer members are appointed by the OBA President, with the approval of the Board of Governors. Non-lawyer members are appointed by the Governor of the State of Oklahoma. Each member is appointed to serve a three-year term, but limited to two terms. Terms end on June 30th of the last year of a member's service.

Pursuant to rule,[3] members are required to meet annually to address organizational and other matters touching upon the PRT's purpose and objectives. They also elect a Chief Master and a Vice-Chief Master, both of whom serve for a term of one-year. PRT members receive no compensation for their services, but they are entitled to be reimbursed for travel and other reasonable expenses incidental to the performance of their duties.

The lawyer members of the PRT who served during all or part of 2010 were: Martha Rupp Carter, Tulsa; Dietmar K. Caudle, Lawton; Lorenzo T. Collins, Ardmore; Patrick T. Cornell, Clinton; Steven Dobbs, Oklahoma City (term ended June 30); Luke Gaither, Henryetta; Robert H. Gilliland, Jr., Oklahoma City; Diane S. Goldschmidt, Oklahoma City; Cody B. Hodgden, Woodward; Andrew E. Karim, Oklahoma City; William G. LaSorsa, Tulsa (term began June 30); Kieran D. Maye Jr., Oklahoma City; Stephen R. McNamara, Tulsa; F. Douglas Shirley, Watonga; James M. Sturdivant, Tulsa.

Non-lawyer members who served during all or part of 2010 were: Norman Cooper, Norman; Glo Henley, Oklahoma City (resigned November 13); Kenneth D. Mitchell, Guthrie (term ended June 30); Bill Pyeatt, Norman; Jason Redd, Elk City; John Thompson, Nichols Hills; and Mary Lee Townsend, Tulsa. As of December 31, two non-lawyer member vacancies existed.

The annual meeting was held on June 30, 2010, at the Oklahoma Bar Association offices. Agenda items included a visit by the General Counsel,[4] appointment of a committee to review procedural rules, recognition of new members and members whose terms had ended, and discussions concerning the work of the PRT.

Andrew E. Karim was elected Chief Master and Kieran D. Maye, Jr., was elected Vice-Chief Master, each to serve a one-year term.

Governance

All proceedings that come before the PRT are governed by the RGDP. However, proceedings and the reception of evidence are, by reference, governed generally by the rules in civil proceedings, except as otherwise provided by the RGDP.

The PRT is authorized to adopt appropriate procedural rules which govern the conduct of the proceedings before it. Such rules include, but are not limited to, provisions for requests for disqualification of members of the PRT assigned to hear a particular proceeding.

Action Taken After Notice Received

After notice of the filing of a disciplinary complaint or reinstatement petition is received, the Chief Master (or Vice-Chief Master if the Chief Master is unavailable) selects three PRT members (two lawyers and one non-lawyer) to serve as a Trial Panel of Masters. The Chief Master designates one of the two lawyer-members to serve as Presiding Master. Two of the three Masters constitute a quorum for purposes of conducting hearings, ruling on and receiving evidence, and rendering findings of fact and conclusions of law.

In disciplinary proceedings, after the respondent's time to answer expires, the complaint and the answer, if any, are then lodged with the Clerk of the Supreme Court. The complaint and all further filings and proceedings with respect to the case then become a matter of public record.

The Chief Master notifies the respondent or petitioner, as the case may be, and General Counsel of the appointment and membership of a Trial Panel and the time and place for hearing. In disciplinary proceedings, a hearing is to be held not less than 30 days nor more than 60 days from date of appointment of the Trial Panel. Hearings on reinstatement petitions are to be held not less than 60 days nor more than 90 days after the petition has been filed. Extensions of these periods, however, may be granted by the Chief Master for good cause shown.

After a proceeding is placed in the hands of a Trial Panel, it exercises general supervisory control over all pre-hearing and hearing issues. Members of a Trial Panel function in the same manner as a court by maintaining their independence and impartiality in all proceedings. Except in purely ministerial, scheduling,[5] or procedural matters, Trial Panel members do not engage in *ex parte* communications with the parties. Depending on the complexity of the proceeding, the Presiding Master may hold status conferences and issue scheduling orders as a means of narrowing the issues and streamlining the case for trial. Parties may conduct discovery in the same manner as in civil cases.

Hearings are open to the public and all proceedings before a Trial Panel are stenographically recorded and transcribed. Oaths or affirmations may be administered, and subpoenas may be issued, by the Presiding Master, or by any officer authorized by law to administer an oath or issue subpoenas. Hearings, which resemble bench trials, are directed by the Presiding Master.

Respondents in disciplinary or incapacity proceedings and petitioners in reinstatement proceedings are entitled to be represented by counsel.

Trial Panel Reports

After the conclusion of a hearing, the Trial Panel prepares a written report to the Supreme Court. The report includes findings of fact on all pertinent issues, conclusions of law, and a recommendation as to the appropriate measure of discipline to be imposed or, in the case of a reinstatement petition, whether it should be granted. In all proceedings, any recommendation is based on a finding that the complainant or petitioner, as the case may be, has or has not satisfied the "clear and convincing" standard of proof. The Trial Panel report further includes a recommendation as to whether costs of investigation, the record and proceedings should be imposed on a respondent or petitioner. Also filed in the case are all pleadings, transcript of proceeding, and all exhibits offered at the hearing.

Trial Panel reports and recommendations are advisory only. The Supreme Court has exclusive jurisdiction over all disciplinary and reinstatement matters. It has the constitutional and nondelegable power to regulate both the practice of law and legal practitioners. Accordingly, the Supreme Court is bound by neither the findings nor a recommendation of action, as its review of each proceeding is *de novo*.

Annual Reports

Rule 14.1, RGDP, requires the PRT to report annually on its activities for the preceding year. As a function of its organization, the PRT operates from July 1 through June 30. Annual reports, however, are based on the calendar year. Hence, this Annual Report covers the activities of the PRT for the preceding year, 2010.

Activities in 2010

At the beginning of the calendar year, five disciplinary and six reinstatement proceedings were pending before the PRT as carry-over matters from a previous year. Generally, a matter is considered "pending" from the time the PRT *receives notice* of its filing until the Trial Panel report is filed. Certain events reduce or extend the pending status of a proceeding, such as the resignation of a respondent or the remand of a matter for additional hearing. In matters involving alleged personal incapacity, orders by the Supreme Court of interim suspension, or suspension until reinstated, operate to either postpone a hearing on discipline or remove the matter from the PRT docket.

In regard to new matters, the PRT received notice of the filing of 12 disciplinary complaints, four of which included allegations of personal incapacity;[6] one complaint filed solely on the basis of alleged personal incapacity (but later consolidated with its previously filed companion disciplinary proceeding);[7] and 12 reinstatement petitions. Trial Panels conducted a total of 17 hearings; seven in disciplinary and ten in reinstatement proceedings. A total of 16 Trial Panel reports were filed during the year.

On December 31, a total of 15 matters, seven disciplinary and eight reinstatement proceedings, were pending before the PRT.

Conclusion

Members of the PRT demonstrated continued service to the Bar and the public of this State, as shown by the substantial time dedicated to each assigned proceeding. The members' sense of commitment to the purpose and responsibilities of the PRT is carried forward from year to year.

Dated this 3rd day of February, 2011.

Professional Responsbility Tribunal
/s/ Andrew E. Karim
Andrew E. Karim, Chief Master

1. Formal disciplinary proceedings, which occasionally incorporate allegations of personal incapacity to practice law, arise in matters involving alleged misconduct by lawyers. Typically, charges include alleged violations of the Oklahoma Rules of Professional Conduct, 5 O.S. Ch.1, App. 3-A., and the RGDP. Unless and until a formal complaint is authorized by the Professional Responsibility Commission and filed by the General Counsel, the matter will not come before the PRT.

2. The complaint in this context should not be confused with a grievance (commonly termed a "bar complaint") or request for investigation, both of which are lodged with the General Counsel of the Oklahoma Bar Association.

3. Rule 4.2, RGDP.

4. The General Counsel of the Oklahoma Bar Association customarily makes an appearance at the annual meeting for the purpose of thanking members for their service and to answer any questions PRT members may have. Given the independent nature of the PRT, all other business is conducted in the absence of the General Counsel.

5. As a practical matter, all parties usually participate by telephone conference in matters involving scheduling issues.

6. Allegations of personal incapacity to practice law that are made under Rule 10, RGDP, remain confidential, unless otherwise ordered by the Supreme Court.

7. The Trial Panel assigned to hear the disciplinary proceeding was assigned to hear the personal incapacity proceeding.

Proceeding Type	Pending Jan 1, 2010	New Matters in 2010	Hearings Held 2010	Reports Filed 2010	Other Disposition	Pending Dec 31, 2010
Disciplinary	5	12	7	6	4	7
Reinstatement	6	12	10	10	-	8
Total	11	24	17	16	4	15

Speech Tools for Lawyers in 2011

By Jim Calloway, Director, OBA Management Assistance Program

In the 1986 movie "Star Trek IV: The Voyage Home," the Star Trek crew goes back in time to 20th Century Earth to rescue some whales. In one funny and memorable scene, Scotty has to interact with a 20th century computer. He walks up to the computer and says, "Computer." When he gets no response from that, he looks to a technician who points out the mouse to him. He then picks up the mouse, holds it in front of his mouth and says, "Computer."

Today's speech recognition tools are quite useful and work quite well, certainly far better than Scotty dictating into a mouse. The purpose of this article is cover briefly the state of the art of speech recognition tools, including some that may be unfamiliar to many readers. If a reader has not used some of these tools, particularly the smart phone apps and services, you may find some great time-savers here.

Personally I have to confess that I have been inconsistent using speech recognition software for writing these columns in the bar journal and CLE papers. Best results are achieved when I can dictate for five or 10 minutes at a time without having to pause. But I felt that it was obligatory to create this article with a speech recognition package. The majority of this article was dictated using Dragon NaturallySpeaking and my Samson Go Mic.

The above sentence demonstrates the weakness of speech recognition software even in today's impressive versions. While the first sentence of this paragraph (and most of the article) was transcribed flawlessly, the last sentence of the above paragraph came through as:

> "The majority of this article was picked hated using Dragon NaturallySpeaking and my Sam's son go Mike."

Frankly I think that is extremely good. "Sam's son go" is probably a more likely conclusion from my spoken words than the specialized product name. And, well over 90 percent of the time DNS will recognize the word "dictated" correctly, so I was probably sloppy in my pronunciation. For the new year, I do resolve to use these tools more.

There used to be other options (and technically still are), but Dragon NaturallySpeaking for the PC and Dragon Dictate for the Mac are essentially the only game in town for lawyers and other professionals who want produce documents on the computer in their offices. (Although I am told that Windows Speech Recognition in Windows 7 is pretty good.) My current version of the software is Dragon NaturallySpeaking Legal edition version 10.10. I generally advise lawyers to purchase Premium (formerly known as Preferred) rather than Legal or Professional, at least until they are sure that they will use it. I strongly suggest avoiding the purchase of the Home Edition. The savings of approximately $100 are not worth having a significantly inferior product. One benefit to the Legal and Professional editions that many will appreciate is being able to imbed the speech file in the document so a third party can proof your work.

Dragon NaturallySpeaking version 11 was released in July 2010.

To me, speech recognition works great for those times I

can dictate without interruption. When I am researching as I write; starting and stopping frequently, it is more effective even for a slow typist to use the keyboard.

Documents prepared with speech recognition tools are more challenging to proof as well. Speech recognition tools insert actual words, correctly spelled, every time. So it is easy to "miss" an incorrect word during proofreading when it a very similar word. Even though we lawyers strive for perfection, this is not nearly so big a risk in most types of legal work. A judge will probably recognize the word you meant in a brief, for example, and memos to the file are generally safe. But a single wrong word in a contract or document on a real estate transaction could be more significant.

Don't get the wrong idea. Dragon NaturallySpeaking is very good. It was very good when my colleague Lara Calloway of the Alabama State Bar and I demonstrated it at ABA TECHSHOW 2007 for a program called "Talking to Yourself: Your Voice as Your Assistant." Our materials for that presentation were later published on the ABA webzine *Law Practice Today* and include several tips which are still valid today. The paper can be found online at www.tinyurl.com/4bwofpp.

Some other voice tools are interesting as well. One of the best uses for speech on the smart phone is the ability to quickly dictate memos while at the courthouse or leaving the courthouse or to make notes on assignments and send them to your office staff. While this can be done by dictating to a voice file and attaching the voice file to an e-mail you send to your coworkers, the new tools that let you dictate and have a text file as a result are quite amazing.

For smart phone users, the Google Mobile App is an absolute "must have." It is available for most smart phones. You can see the types of phones supported and the slightly different set of features for each at www.google.com/mobile/google-mobile-app. Using the search app to locate websites and other information on the Internet is so easy and accurate on the iPhone that it is my first choice for search. A search tip is that one should use several words rather than just one so that the result is often the first return from your voice search. This app is free and is a must download.

Another "must have" app for iPhone users is the Dragon dictation voice recognition app that is powered by Dragon NaturallySpeaking. This is free and works on the iPhone, iPad or iPod Touch. This app is free at the moment and provides uncannily accurate speech recognition. I have not tried this for long text, but for dictating a quick e-mail or text to someone rather than typing it, it is an absolute jewel. After stopping the dictation, it takes a few seconds to convert it to text, then you see the text before you send it as a text message or e-mail. So you can determine if there are any glaring errors. Some lawyers currently use this application to dictate short e-mails to themselves or their assistants.

There's also a Dragon search application I have not tried since the Google mobile app works so well. Blackberry users may enjoy Dragon for e-mail which is an e-mail dictation system powered by Dragon NaturallySpeaking. Rumor has it that Nuance, the parent company for Dragon dictation products, uses these free speech recognition tools as a laboratory to improve their primary commercial product. Whether that is true or not, I doubt that these tools will remain free forever.

While I haven't personally used a Droid phone, I understand that you can dictate text into any text box the phone displays. That sounds like a very important feature. See www.voicetext.blogspot.com.

Some of you may have used the service Jott, which has also been acquired by Nuance. I was one of the many who stopped using this service when it ceased being free; however, it is still a very powerful tool combining speech recognition with touch up by Jott staff for certain messages and availability of the original voice file in case the text is not recognizable."

The company's website, www.jott.com, explains, "With Jott Assistant and Jott for Salesforce, you just call a simple phone number, speak your notes, messages or updates and hang up. Jott Voicemail works the same way, but your friends, family and colleagues are the ones leaving the messages when they call your number. Then, Jott takes the spoken messages, turns them into text and sends them to the right destination via e-mail, text message or web update."

Everyone recognizes that speech recognition tools are not perfect even though they're much improved. Today at least, nothing beats a

> Many lawyers may think that they cannot afford these services, but moderate use of them would certainly cost less than paying for a full-time employee.

trained person transcribing your dictation. There are a number of services that provide a live, trained transcriptionist who will transform your speech into text. Obviously they will do a great job of formatting and deal better with homonyms than any present day computerized speech-to-text available.

VIRTUAL ASSISTANTS

If you mention the term virtual assistant to many lawyers, they instantly think of outsourcing their work to India. There are, however, actually quite a number of independent contractors who work for law firms and are based right here in the United States. A virtual assistant may perform any task from transforming your clients' completed questionnaire into the first draft of bankruptcy schedules to scheduling your appointments and arranging your calendar for you. One of the services provided by virtual assistants is transcription. Since speech files can be easily transferred over the Internet, it really doesn't matter if your virtual assistant is located in Maine or California, except for time zone differences.

An Oklahoma City lawyer who was disappointed when his best legal assistant moved hundreds of miles away decided to experiment with keeping her as his legal assistant on a contract basis. He reports to me that arrangement is working very well. Many lawyers may think that they cannot afford these services, but moderate use of them would certainly cost less than paying for a full-time employee. Even those law firms which have staff to handle these tasks should be aware of them in case an absence causes an immediate need.

In fact some solo and small firm lawyers are (and should be) building a practice where they "ramp up" their staff when needed by using virtual assistants, online transcription services and alliances with other law firms. Then when they are not so busy they do not make use of these services and pay no fees.

Two nationally based services that specialize in providing transcription by a trained person on a same-day turnaround basis are Mobile Assistant and SpeakWrite. Mobile Assistant first came to my attention for their flat-fee dictation service. However, company officials advise me that most every lawyer will exceed the amount allowed under the consumer flat-fee service. They offer both medical and legal plans.

They provide a toll-free access number and a team of professional transcriptionists. It is really amazing how easily this service works. You are given a code number to verify your identity if you are dictating from a switchboard-based landline or another office. But generally speaking you just put the 800 number in your phone's contacts and register that number with the company. When you call in, it automatically recognizes you via caller ID and answers your call with "begin dictating please." You receive the results in a Word document the same day, often within a few hours, and the results are extraordinarily accurate based on my use of the service. To experience the service yourself you can go to the website and sign up for 20 free minutes of mobile dictation.

These types of services seem extraordinarily valuable to the litigator, who could dictate a memo to the client file after every hearing when the matters were still fresh in mind.

The fee for their standard legal transcription subscription for U.S. clients is $72.50 per month for up to 900 lines and 10 cents per line above 900 lines in a month. (A line is defined as 65 characters, spaces and hard returns included.) The transcriptions are automatically e-mailed to you or can be made available through a secure download. The company represents that they are "privacy friendly, confidential and completely secure." It should be noted that the company history is as a medical dictation transcription service.

The company offers a discount to OBA members of 25 percent off the monthly flat rate, which would mean $54.37 per month for up to 900 lines of dictation. There is no discount on the 10 cents per line above 900 lines fee. The discount coupon code is: OKBAR

SpeakWrite has been around for a long time. They were formally known as Cyber Secretaries and were not contacted during the preparation of this article. They can be located at www.speakwrite.com. They also offer a free trial and their stated rate for legal transcription is 1.5 cents per word. They also offer same-day turnaround.

A lawyer recently introduced me to Dictamus, www.jotomi.com/dictamus In fact, as I recall, losing Dictamus was about the only thing he regretted in his switch from iPhone to Droid. Dictamus gives your iPhone many capabilities of a traditional hand-held dictation. Here are the features, from the website:

- Rewind, overwrite, insert: edit your recordings at any point, unlike most other recorder apps
- Lightning-fast recording controls: no noticeable delay between button press and action
- Voice activation: skips dictation pauses (silence) automatically
- Intuitive, powerful, easy-to-use interface: streamlined for professional use
- More sharing options than any other recorder: send e-mails, direct download to your computer, upload to your iDisk (MobileMe), to WebDAV and FTP servers
- Automatic security: all Internet-enabled sharing options use SSL/TLS encryption automatically (if supported by the respective servers)
- No intermediate servers for e-mail: send e-mail directly from your iPhone, with your name and e-mail address as sender….

More than just a voice recorder: Dictamus transforms your iPhone, iPad or iPod Touch (second generation) into a dictation device that sets new standards. Dictamus offers a professional recording system with extremely fast reaction, simple navigation, overwriting and inserting of recordings at any point and voice activated recording. A comprehensive mobile workflow for recording, management and sharing of dictations completes the package.

Dictamus' user interface is designed for professional use, with a simple structure and reduced to the essentials. Dictations are saved in WAV format to ensure maximum compatibility to all kinds of transcription and player applications on major operating systems.

The free version lets you try everything out, but is limited to 30-second dictation sessions and five jobs open.

The full app at $9.99 is only limited by the memory on your iPhone.

THE SAMSON GO MIC

My current dictation microphone of choice is a handheld rather than a headset. The Samson Go Mic compact USB microphone is a plug 'n' play microphone that is cute, functional, of quality construction and cheap. I record my podcast with it as well. (My podcast partner, Sharon Nelson, would say I have those in the wrong order with cheap being the first criteria for me.) Read all about it here: www.samsontech.com, but buy it on Amazon.com where it is, okay, cheaper.

Headsets and I never got along that well, so I enjoy just picking up a microphone and holding it in front of my mouth while I dictate. There is one trick with this microphone, however. When you plug it in, it transfers the sound of the computer to a plug in the microphone. To hear your computer sounds, you have to plug a headset or earbud into the microphone. That would defeat one of my main purposes, so I suggest going into control panel and restoring sound to the computer speakers. Some may prefer a headset. If you want to use a headset, just don't forget to purchase a USB headset.

That is it for this month. Happy dictation!

The Power of Procrastination

By Travis Pickens

Rule 1.3 of the *Oklahoma Rules of Professional Conduct* states: "A lawyer shall act with reasonable diligence and promptness in representing a client."

An informal ethics opinion from the ABA has defined "neglect" as follows: "[n]eglect involves indifference and *consistent failure* to carry out the obligations which the lawyer has assumed to the client or a conscious disregard for the responsibility owed to the client."[1] Arguably therefore, according to this opinion, a violation of this rule should typically not be found for a one-time instance, but rather when there is a pattern of neglected work. As always, however, the circumstances and individual facts make all the difference and could dictate a different conclusion. However, procrastination is an issue that generally means repetitive behavior.

Procrastination is a powerful adversary in that it affects so many of us. Statistics reported from the Office of the General Counsel tell us that this leads to more complaints than perhaps any other cause. It is especially powerful, again negatively, because of its insidiousness. It is an issue that we do not take all that seriously, a view that fosters the continuation of the problem. Finally, procrastination is a powerful enemy because it not only leads us to avoid doing what we should, but to expend time, talent and money on doing what we should not. The harm is doubled.

Reading disciplinary cases identifies a host of ethics violations that can be caused by procrastination: simple unnecessary delay in moving forward with work for a client as promised, unnecessary delay coupled with prejudice to the client's position (missed deadlines and statutes of limitation), related cover-up misrepresentations to clients, third-parties, other lawyers and/or the court, for example. All of this is obvious. What is more interesting is *why* we procrastinate.

Joseph Ferrari, Ph.D., associate professor of psychology at DePaul University in Chicago, and Timothy Pychyl, Ph.D., associate professor of psychology at Carleton University in Ottawa, Canada have identified 10 things we should know about procrastination.[2]

1) 20 percent of us are hard-wired to procrastinate. Procrastination is a life-style for this group. It affects every aspect of their lives.

2) As a culture, we do not take this problem of self-regulation seriously. We often do not call each other on this. We tolerate tardiness and flimsy excuses for missed deadlines with the thought "that's just the way they are."

3) Procrastination is not a problem of time management or of planning. "Telling someone who procrastinates to buy a weekly planner is like telling someone with chronic depression to just cheer up," according to Dr. Ferrari.

4) Procrastinators learn to dally; they typically are not born to delay. One apparent cause is an authoritarian parent who dictates everything and keeps a child from developing the ability to regulate themselves. It can also be a form of rebellion.

5) Procrastination often indicates higher levels of consumption of alcohol. Again, self-regulation is a problem. Also, substances are one form of "disengagement."

6) Procrastinators lie to themselves. They say things like "I work better in the morning" (the next morning).

7) Procrastinators look hard for distractions, like smartphones, e-mail, television and anything else.

8) Procrastinators come in three basic types: "thrill seekers" (who like the rush of adrenaline), "avoiders" (worried about what others think and fearing failure or even success) and "decisional" procrastinators (not making a decision gets them off the hook).

9) There are costs to procrastination. Two obvious costs are to your client and your legal career. Others include your health, your immunity to disease and your sleep.

10) A serious procrastination issue can be treated, usually with highly structured cognitive behavioral therapy. Of course, the seriousness of the problem is a matter of degree and the treatment relative to that.

For lawyers, specifically, we often delay in doing things that are boring, unprofitable or uncomfortable. It is important, urgent, that you address a serious issue with procrastination. Through the Lawyers Helping Lawyers Assistance Program Committee you are provided up to six sessions with a licensed counselor at no cost. Also, check out the paper "Overcoming Procrastination [How to Break the Habit]" by Irwin Karp with *Productive Time* (Sacramento, Calif.). Mr. Karp's paper was presented at the OBA's 2009 Solo and Small Firm Conference and can be found on the OBA's website.

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.

1. ABA Informal Opinion 1273, "Neglect"—Definition (Nov. 20, 1973).
2. "Procrastination: Ten Things To Know," *Psychology Today* magazine, by Hara Estroff Marano, first published on Aug. 23, 2003, but available online at www.psychologytoday.com.

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December Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Association in Oklahoma City on Friday, Dec. 17, 2010.

REPORT OF THE PRESIDENT

President Smallwood reported he has been working with President-Elect Reheard on certain aspects of her plans for next year and has been coordinating responses with the current political situation involving the Judicial Nominating Commission.

REPORT OF THE PRESIDENT-ELECT

President-Elect Reheard reported she presented the OBA budget to the Supreme Court and attended the Tulsa County Bar Association holiday party, reception for retiring Supreme Court Justice Hargrave and numerous meetings for 2011 committee appointments. She participated in a news conference to announce the formation of Pros 4 Vets, an advocacy group for veterans. She met with CLE Director Donita Douglas and Pros 4 Vets Executive Director Lauren Guhl to plan a free CLE offering to attorneys volunteering for the OBA's program, Oklahoma Lawyers for America's Heroes. She gave a presentation to the Pittsburg County Bar Association and to deploying Oklahoma Army National Guard members at yellow ribbon events about Oklahoma Lawyers for America's Heroes legal assistance program.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported that he attended the Annual Meeting events, General Assembly, House of Delegates, Supreme Court conferences on the OBA budget and judicial code, Military Assistance Task Force yellow ribbon event in Norman, monthly staff celebration, reception for Justice Hargrave, funeral for Justice Reif's father and staff meeting with President-Elect Reheard.

REPORT OF THE PAST PRESIDENT

Past President Parsley reported he attended the November board meeting, General Assembly and House of Delegates. He said he had been honored and privileged to serve on the board for so many years and will continue to be involved in the association in other areas.

BOARD MEMBER REPORTS

Governor Brown reported he attended the OBA Annual Meeting, General Assembly, House of Delegates and the OBA Bench and Bar Committee delegation to the Supreme Court to present the revised Code of Judicial Conduct and the Rules for the Committee on Judicial Elections. **Governor Carter** reported she attended the OBA Annual Meeting, General Assembly, House of Delegates, OBA Tellers' Committee meeting, OBA Military Assistance Task Force meeting and Professional Responsibility Tribunal reinstatement hearing. **Governor Chesnut** reported he attended the Annual Meeting events, General Assembly, House of Delegates and the Oklahoma Bar Foundation reception. He also hosted the Kansas representative at the Annual Meeting and signed up for Oklahoma Lawyers for America's Heroes legal assistance program. **Governor Devoll** reported he attended the November meeting of the board, November meeting of the Garfield County Bar Association and reception for retiring Judge Ron Franklin. **Governor Dobbs** reported he attended the Annual Meeting, November board meeting, Oklahoma Conservative Christmas reception and candidate function at the State Chamber of Commerce. He spoke to the High Noon Club and Oklahoma City Fraternal Order of Police. **Governor Hixson** reported he attended the November board meeting, Annual Meeting, General Assembly, House of Delegates, Canadian County Drug Court Planning Board meeting,

Canadian County Community Sentencing Planning Council meeting and Criminal Law Section annual luncheon. **Governor McCombs** reported he attended the McCurtain County Bar Association luncheon, November board meeting, Annual Meeting, December social event and board meeting. He was also an alternate for the House of Delegates. **Governor Poarch** reported he attended the November board meeting and the House of Delegates. **Governor Shields** reported she attended the news conference for Pros 4 Vets, December Oklahoma County Bar Association meeting and Oklahoma County Bar Association holiday party. **Governor Stuart** reported he attended the November board meeting, Oklahoma Bar Foundation reception, Board of Editors meeting and the House of Delegates.

PROFESSIONAL RESPONSIBILITY COMMISSION

PRC Chairperson Melissa DeLacerda introduced commission members present – William Grimm, Michael Smith, Stephen Beam and lay members Debra Thompson and Tony Blasier, in addition to Past President Parsley. She noted that Mr. Smith's term on the PRC was expiring in December, and she praised his efforts in keeping the commission together during difficult times. She said the commission members came to the board meeting to be present for General Counsel Hendryx's presentation on procedures for centralized intake and review of grievances filed against Oklahoma lawyers.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx briefed board members on pending litigation against the OBA. She reported the Office of the General Counsel (OGC) filed for a temporary and permanent injunction in Pontotoc County alleging the unauthorized practice of law by a defendant. She called attention to the increase in out-of-state attorney renewals during 2010 from previous years and discussed the procedure for filing a grievance against an Oklahoma attorney. All grievances will be filed with the Office of the General Counsel and reviewed by attorneys in that office. She reviewed the procedure of how a grievance is handled internally upon receipt. The implemented changes include grievances received at county bar associations. A written status report of the Professional Responsibility Commission and OBA disciplinary matters for November 2010 was submitted for the board's review.

***OKLAHOMA BAR JOURNAL* CONTRACT**

Communications Director Manning reviewed the process of requesting bids to design, print and mail the *Oklahoma Bar Journal* and reported on the results of the bid received for the two-year contract. The board approved the contract with Printing Inc. of Oklahoma City.

AMENDMENTS TO ENVIRONMENTAL LAW SECTION BYLAWS

Section Chairperson Gerald Hilsher reported the purpose of the amendments was to encourage law student associate members to join the section at a reduced rate of $10, which would allow them to learn about environmental law, meet environmental practitioners and grow the section as the law students graduate to become practicing environmental lawyers. The board approved the amendments.

LIBERTY DAY

President Smallwood reported he was contacted by Liberty Day, a national, nonprofit organization dedicated to educating students in grades 5-8 about the U.S Constitution and to provide education materials to teachers. He recommended supporting its efforts.

CLIENTS' SECURITY FUND REPORT

Chairperson Micheal Salem pointed out the recent high amount of claims recommended by the CSF Committee that if approved will result in a pro rata payment of about 50 percent. He said the partial payment of claims creates problems, and he gave suggestions for solutions. The board encouraged the committee to submit suggestions for changes to the board in the future. The board approved the Clients' Security Fund Committee recommendations and to pay $101,831.92 in claims. The board authorized the distribution of a news release about the claims with approval of the release from the OBA president, executive director and CSF chairperson.

OBA PAMPHLET FUNDING

Executive Director Williams reported the Communications Committee has excess funds utilized to print brochures on 15 different legal topics as a community service and plans

to use the funds in 2011. The board approved the rollover of the funds into the next year.

JUDICIAL NOMINATING COMMISSION RESOLUTION

Governor Dobbs moved that the board adopt a resolution requesting the Judicial Nominating Commission to defer its action on all judicial vacancies until after the committee is reconstituted. President Smallwood, who serves as JNC chairperson, reviewed activities that have taken place since the election. Action died for lack of a second.

APPOINTMENTS

The board voted to approve President-Elect Reheard's recommendations for the following appointments:

Board of Editors Chairperson — reappoint Melissa DeLacerda, Stillwater, for a one-year term expiring 12/31/11.

Board of Editors Associate Editors — appoint Judge Sheila Condren, Claremore, from Supreme Court District 1, to complete unexpired term of Scott Buhlinger ending 12/31/11; Craig M. Hoehns, Elk City, from District 4, to complete unexpired term of Tom Kennedy, ending 12/31/12; Joseph M. Vorndran, Shawnee, from District 8, to a three-year term expiring 12/31/13; reappoint Leslie D. Taylor, Oklahoma City, from District 3, and Pandee Ramirez, Okmulgee, from District 7, each for a three-year term expiring 12/31/13.

Clients' Security Fund Chairperson and Vice Chairperson — Reappoint Micheal Salem, Norman, as chairperson and William Brett Willis, Oklahoma City, as vice chairperson, each for a one-year term expiring 12/31/11.

Clients' Security Fund — reappoint attorney members Robbie Emery Burke, Tulsa; H. Susan Bussey, Oklahoma City; and J. William Doolin, Lawton; appoint Peggy Stockwell, Norman, to replace Dwight Lee Smith, Tulsa; appoint lay member Robert H. Sunday, CPA, Eufaula, to replace Steve Bentley, each for a three-year term expiring 12/31/13.

Legal Aid Services of Oklahoma Inc. Board of Directors — reappoint Dwight Smith, Tulsa, for a three year term expiring 12/31/13.

MCLE Commission — appoint as chairperson Daniel Sprouse, Pauls Valley, for a one-year term expiring 12/31/11; appoint as members Daniel Sprouse, Pauls Valley; Molly Aspan, Tulsa; and Wade Gungoll, Oklahoma City, each for a three-year term expiring 12/31/13.

Professional Responsibility Commission — appoint Angela Ailes Bahm, Oklahoma City, to replace Michael E. Smith, Oklahoma City; reappoint William R. Grimm, Tulsa, each for a three-year term expiring 12/31/13.

COMMITTEE AND LIAISON APPOINTMENTS

President-Elect Reheard presented a list of OBA members who have volunteered to serve as 2011 standing committee chairpersons, vice chairpersons and Board of Governors liaisons. She noted an addition to the list is retired Judge Candace Blalock, Pauls Valley, who will chair the Legal Intern Committee.

YOUNG LAWYERS DIVISION 2011 OBA STANDING COMMITTEE LIAISONS

2011 YLD Chairperson Tucker presented a list of YLD members appointed as liaisons to OBA standing committees. The board approved the appointments.

APPOINTMENTS

President-Elect Reheard announced the following appointments:

Audit Committee — appoint Susan Shields, Oklahoma City, as chairperson with a term expiring 12/31/11; appoint as members Chris Meyers, Lawton, Renée DeMoss, Tulsa, each for a three-year term expiring 12/31/13, and Roy Tucker, Muskogee, for a one-year term expiring 12/31/11.

Board of Medicolegal Investigations — reappoint Thomas A. Mortensen, Tulsa, for a term expiring 12/31/11.

Investment Committee — appoint as chairperson Joe Crosthwait, Midwest City, appoint as vice chairperson Jon Trudgeon, Oklahoma City, each with a one-year term expiring 12/31/11; reappoint - Bob Farris, Tulsa, and Susan Shields, Oklahoma City; appoint Kendra Robben, Ardmore, each for a three-year term expiring 12/31/13.

Legal Ethics Advisory Panel — reappoint as panel coordinator Jim Drummond, Norman, to a term expiring 12/31/11; reappoint to the Oklahoma City Panel Andrew Karim, Oklahoma City, Jim Drummond, Norman, and Peter Bradford, Oklahoma City; reappoint to the Tulsa Panel Jon Prather, Tulsa, Steve Balman, Tulsa, and David Butler, Enid, each for a three-year term expiring 12/31/13.

SWEARING-IN CEREMONY

Board members were reminded the swearing-in of new board members will take place Jan. 14, 2011, in the Supreme Court Courtroom at 10:30 a.m. Executive Director Williams announced transportation will be provided from the bar center. President-Elect Reheard reviewed the events.

LAW SCHOOL FOR LEGISLATORS

Executive Director Williams reviewed the plans for the event that will take place at the Oklahoma Bar Center on Jan. 5, 2011.

LEGISLATIVE WORKSHOP

Executive Director Williams reported the Legislative Monitoring Committee on Jan. 22, 2011, will spend the day reading legislation.

MILITARY ASSISTANCE TASK FORCE

President-Elect Reheard asked for volunteers to assist in the OBA's new effort to provide legal assistance to members of the military.

NEXT MEETING

The Board of Governors met in Oklahoma City on Jan. 14, 2011, and a summary of those actions will be published after the minutes are approved. The next meeting of the Board of Governors will be Feb. 17-19, at the Post Oak Lodge near Tulsa.

The OBF Role in Tort Law and Civil Litigation

By John D. Munkacsy Jr.

Your Oklahoma Bar Foundation has a significant role in the area of tort law and civil litigation. Every Oklahoma lawyer is a member of the foundation. Did you know that? More on that later… Because we are all members, the foundation's role in this area is a matter you may want to understand in your review of this issue of the bar journal. The foundation helps make possible litigation support through its grants to organizations that qualify as 501(c)3 charities, such as Legal Aid Services of Oklahoma Inc. The support the foundation gives is more lasting than a hot meal or bed for the night.

Cindy Goble, Pro Bono Coordinator for LASO office in Oklahoma City, reports the Oklahoma Bar Foundation has provided substantial support for the efforts of Legal Aid, a nonprofit agency, to provide quality legal assistance in civil matters to low-income and senior citizens in this state. Legal Aid is facing a budget shortfall this year, in part because the bar foundation is unable to fund at levels in the past. The contribution of time and money by attorneys in this state is crucial to Legal Aid being able to maintain the current level of services, which unfortunately, is not enough to meet the need of all Oklahomans in the population that we serve.

> "The support the foundation gives is more lasting than a hot meal or bed for the night."

One way to stretch the dollars we receive from the OBF is to promote pro bono efforts throughout the state. Our pro bono program has been developed to not only recruit pro bono attorneys, but to find innovative ways for attorneys, who would be unable to take cases, to donate their time and talents in various outreach efforts. Organized in 1986, one such outreach project is the *Passageway Project* at the local battered women's shelter. Volunteer attorneys meet in person with shelter residents on a weekly basis, so clients can receive initial legal advice in a protected setting. After a frightful escape from an abusive situation, legal advice to shelter residents can be crucial, especially where children are involved.

The most recent pro bono project, started in March 2010, in Oklahoma County, is a collaboration between Legal Aid, OCU Law School, Oklahoma County pro bono lawyers, district court judges, Oklahoma Child Support Services, a division of DHS, and the Oklahoma County Law Library staff and Board of Trustees, to assist *pro se* litigants on the divorce waiver docket. Pro bono attorneys and law students assist litigants whose pleadings are not sufficient for the judge to grant the decree. The litigants, most of whom are very frightened by the process, are very thankful and relieved that help is available to them through some very talented family law attorneys. It is very rewarding for the attorneys and a great learning experience for the law students, to assist a litigant in getting their divorce that day, or at least to point them in the right direction. The project served 164 clients during 2010, most of whom were Legal Aid eligible clients.

Glenna Dorris is the managing attorney in the Bartlesville Legal Aid satellite office, which requires coverage in six counties; she also manages a satellite office in Jay which covers another two counties. Ms. Dorris wants you to know that a great deal of the resources of her office is

directed to providing advice and representation to senior citizens in such matters as consumer law, guardianships and family law. Recently, a senior's problem with a rural water district threatening to pull the client's meter and cut off service was solved by the Bartlesville office.

On your behalf, I stopped in to visit the Lawton office and spoke with managing attorney **Kade McClure**, and I learned the Lawton Legal Aid office covers 10 counties in Oklahoma. Staff attorneys go to district court in a variety of areas such as protective order, visitation, custody or divorce cases where clients or their children are the victims of domestic violence. They go to Small Claims Court where clients are sued for eviction and where housing is unsafe or not habitable. Also, where a landlord has locked a tenant out, taken their personal belongings or shut off the utilities. Other representation includes contesting garnishments or seizure of clients' exempt income or assets, illegal debt collection or harassment where self representation is ineffective, and where predatory lending targets clients vulnerable because of age or disability. Legal Aid also goes to court to obtain expungement of criminal records in order to enable clients to secure employment.

The help that OBF provides through important grant programs delivers permanent solutions for clients through legal means and avenues. Other grant recipients are providing similar help and assistance. Please take time to become acquainted with organizations the foundation supports in your area such as –

- Center for Children & Families Inc., Cleveland County
- Community Crisis Center Inc., Ottawa, Delaware and Craig counties
- OBA/YLD Oklahoma High School Mock Trial Program
- Oklahoma Lawyers for Children Inc.
- Teen Court Incorporated, Comanche County
- Tulsa Lawyers for Children Inc.
- Law student scholarships for all three Oklahoma colleges of law

That is just a few of the grant recipients the foundation supports to help make possible the good work these organizations carry on because of your support through the IOLTA program, the Fellows program and active volunteer work by lawyers and law firms throughout the state. It is our responsibility to continue to meet the needs of our fellow citizens. The foundation was able to fund grants in 2007 of $807,500 and 2008 of $912,000. However the severe economic downturn only enabled funding levels of $532,500 in 2009 and $517,646 in 2010. **Please continue to support our foundation so that its unique mission remains strong**.

I mentioned every Oklahoma lawyer is a member of the Oklahoma Bar Foundation. Many are not even aware of that fact. If you weren't aware, it's not your fault. We simply haven't done enough to make our entire bar association more aware of the foundation. And as members, we are all eligible to become Fellows. If you are not a Fellow, please consider taking this important step and joining the ranks of the Fellows of the Oklahoma Bar Foundation today.

John D. Muncaksy Jr. is the president of the Oklahoma Bar Foundation. He can be reached at johnmunk@sbcglobal.net.

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FELLOW ENROLLMENT FORM ☐ Attorney ☐ Non-Attorney

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

Firm or other affiliation: _____

Mailing & delivery address: _____

City/State/Zip: _____

Phone: _____ E-Mail Address: _____

The Oklahoma Bar Foundation was able to assist 23 different programs or projects during 2010 and 25 in 2009 through the generosity of Oklahoma lawyers – providing free legal assistance for the poor and elderly; safe haven for the abused; protection and legal assistance to children; law-related education programs; other activities that improve the quality of justice for all Oklahomans. The Oklahoma Bar legend of help continues with **YOU**.

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

___ $100 enclosed & bill annually

___ Total amount enclosed, $1,000

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

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

___ I want to be recognized at the higher level of ***Sustaining Fellow*** & will continue my annual gift of *at least $100 – (initial pledge should be complete)*

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

LAWYERS TRANSFORMING LIVES

Through education, citizenship and justice for all.

The Oklahoma Bar legend of help continues with YOU!

- To become a Fellow, the pledge is $1,000 payable within a 10-year period at $100 each year; however, some may choose to pay the full amount or in greater increments over a shorter period of time.
- The OBF offers lesser payments for *newer* Oklahoma Bar Association members:
  - — ***First Year Lawyers*:** lawyers who pledge to become OBF Fellows on or before Jan. 2, of the year immediately following their admission may pay only $25 per year for two years, then only $50 for three years, and then at least $100 each year thereafter until the $1,000 pledge is fulfilled.
  - — ***Within Three Years*:** lawyers admitted three years or less at the time of their OBF Fellow pledge may pay only $50 per year for four years and then at least $100 each year thereafter until the $1,000 pledge is fulfilled.
- **Sustaining Fellows** are those who have completed the initial $1,000 pledge and continue their $100 annual contribution to help sustain grant programs.
- **Benefactor Fellows** is the highest leadership giving level and are those who have completed the initial $1,000 pledge and pledge to pay at least $300 annually to help fund important grant programs. Benefactors lead by example.

Your Signature & Date: _____ OBA Bar# _____

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Many thanks for your support & generosity!

Repaying a Debt

Lawyers To Step Up And Help Servicemembers

By Jim Drummond

I am writing to express what an honor it is to participate in Oklahoma Lawyers for Heroes. I served in the Army from 1969-1971, and afterwards saw many friends fall through the legal cracks, whether from lack of resources or post-conflict trauma. It is a privilege to repay the good fortune I had in emerging from a war era unscathed, by assisting those who have since served in some of the most inexorable conflicts in the history of the world, with grace, honor and courage.

In addition, my first client is a pleasure to know and represent. I can think of no more crucial initiative than to represent those who staked their lives to protect the rest of us and who have neither time nor inclination to debate the sometimes debatable policies behind the conflicts to which they have committed. I have two sons-in-law who have returned from Marine service in Iraq, one with a purple heart. They have established great careers and marriages; but what I have learned from them is that a soldier's life is always precious to the rest of us, no matter what problems they later face.

I have already received more than I have given from this representation, and I encourage — even exhort — my fellow lawyers to step up and assist these women and men in their hour of need as they have assisted this nation in its crises.

Mr. Drummond practices in Norman.

Medicaid Advantage Waiver: A New Option for Paying for Assisted Living

By Catheryn Koss

In 2009, the Oklahoma Health Care Authority opened the way for assisted living facilities to become certified to accept payment through the Medicaid ADvantage Waiver Program. Prior to this change, assisted living was generally an option only for those who either had long-term care insurance or who could privately pay. For those who were unable to continue living at home but could not afford to pay for assisted living, nursing home care was the only type of long-term care Medicaid would cover.

Under the new policy, a person who qualifies for Medicaid ADvantage can apply these benefits to pay for a portion of the cost of assisted living. The resident is still responsible for room and board. However, the facility may not charge the resident more than 90 percent of the SSI Federal Benefit Rate[1] ($674 in 2011).[2] The Medicaid ADvantage Waiver Program pays the assisted living facility a per diem rate based on the care needs of the resident.[3]

Unlike a nursing home, a resident in an assisted living facility has a private room with a bathroom, kitchenette and door that can be locked. Assisted living affords a resident more privacy and a home-like environment, making it preferable for those who need some assistance with activities of daily living, such as bathing or dressing, but do not require the higher level of care provided in a nursing home.

Because this is a new program, the number of certified assisted living facilities is limited. As of December 2010, there were three facilities, one in Oklahoma City, one in Yukon and one in Duncan. Oklahoma Department of Human Services provides a website, http://advantage.ok.gov/bycnty.aspx, where potential residents and their families can search by county for ADvantage-certified agencies. OKDHS also offers an ADvantage Services Consumer Inquiry System (CIS) Line at (800) 435-4711.

The Oklahoma Long-Term Care Ombudsman Office is another excellent source of information about assisted living and nursing home facilities. Through this program, staff and volunteers advocate for the rights of residents over the age of 60 who live in long-term care facilities across Oklahoma. To contact the main office, call (405) 521-6734.

Individuals or family members considering long-term care options may also contact the Senior Law Resource Center for more information about selecting a facility, residents' rights and paying for care. The Senior Law Resource Center is an Oklahoma nonprofit organization providing legal information and services to seniors and caregivers. For more information, go to www.senior-law.org or call (405) 528-0858.

Ms. Koss is the founding attorney and executive director of the Senior Law Resource Center in Oklahoma City.

1. OAC 317:30-5-764.
2. www.ssa.gov/OACT/COLA/SSI.html.
3. OAC 317:30-5-764.

YLD Projects Move Forward

Plans for 2011 Include Focus on Service

By Roy D. Tucker, YLD Chairperson

The Young Lawyers Division held its January meeting in Oklahoma City in conjunction with our roast of Immediate-Past Chair Molly Aspan. Despite the atmosphere of anticipated frivolity, the directors were clearly prepared to take on this year's tasks. Here are some of the highlights of the meeting.

The YLD first welcomed John Munkacsy of the Oklahoma Bar Foundation to discuss the need for YLD members to join the foundation. YLD Director of YLD and OBF Trustee Briana Ross issued a challenge to the board for 100 percent participation in the bar foundation.

The YLD also welcomed the appointments of Jacob Biby to fill the District One board seat and Karolina Roberts to fill one of the vacant at-large seats.

The YLD agreed to sponsor a hole for the Tulsa County Bar Foundation Annual Charity Golf Tournament as it has historically done.

CLE Committee Chair Briana Ross reported on her ongoing efforts to finalize a joint CLE program with the OBA. The CLE will be geared toward new/young lawyers and will cover the subject of litigation techniques, such as effective direct and cross-examination. Community Service Co-Chairs Colin Walke and Jennifer Kirkpatrick reported on the efforts they have made in compiling a list of homeless shelters in need of assistance for the statewide community service day to be held in conjunction with Law Day. Senior Committee Co-Chairs Byron Will and Amber Peckio-Garrett reported that the final draft of the Seniors Handbook was completed and would be circulated to the board for comment, with this fourth edition ready for print in March. Will and Peckio-Garrett also reported on their efforts to kick off the Serving Our Seniors Project, affirming that training on the program would take place in Oklahoma City in conjunction with the March meeting. The first live program is set to occur in April immediately following the YLD meeting in Muskogee. They also announced that LawWare would be donating software for use during the S.O.S. Project. Immediate Past-Chair Molly Aspan reported her progress in working with YLD representatives from Kansas, Arkansas and Missouri to secure an ABA/YLD Affiliates Outreach Program to be hosted in northeastern Oklahoma in August 2011. Finally, Military Services Committee Co-Chairs Erin Means and Kaleb Hennigh reported that the updates on the Military Handbooks are

> "The Serving Our Seniors Project is now seeking volunteer young lawyers who are willing to facilitate an S.O.S. event in their community."

Roy D. Tucker
2011 YLD Chair

progressing timely and would be ready for review and comment on February 1, with ample printing time to meet the mid-February deadline.

SERVING OUR SENIORS

The Serving Our Seniors Project is now seeking volunteer young lawyers who are willing to facilitate an S.O.S. event in their community. Hardware will be provided by the OBA/YLD and software will be provided through our partnership with LawWare. For more information, please review the orientation video at www.abanet.org/yld/sos/. If you would like to volunteer to facilitate an S.O.S. event, or to receiving information on training opportunities, please contact Amber Peckio-Garrett at amberpeckio@yahoo.com or Bryon Will at bryon@bjwilllaw.com.

Oklahoma Bar Journal Editorial Calendar

2011

- March:
  Criminal Law
  Editor: Dietmar K. Caudle
  d.caudle@sbcglobal.net
  Deadline: Jan. 1, 2011
- April:
  Law Day
  Editor: Carol Manning
- May:
  Real Estate and Title Law
  Editor: Thomas E. Kennedy
  thomas.kennedy@oktax.state.ok.us
  Deadline: Jan. 1, 2011
- August:
  Children and the Law
  Editor: Sandee Coogan
  scoogan@coxinet.net
  Deadline: May 1, 2011
- September:
  Bar Convention
  Editor: Carol Manning
- October:
  Labor and Employment Law
  Editor: January J. Windrix
  janwindrix@yahoo.com
  Deadline: May 1, 2011
- November:
  Military Law
  Editor: Dietmar Caudle
  d.caudle@sbcglobal.net
  Deadline: Aug. 1, 2011
- December:
  Ethics & Professional Responsibility
  Editor: Melissa DeLacerda
  melissde@aol.com
  Deadline: Aug. 1, 2011

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

Calendar

February

16 **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: Barbara Swinton (405) 713-7109

OBA Women in Law Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Deborah Bruce (405) 528-8625

OBA Professionalism Committee Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Patricia Podolec (405) 760-3358

Oklahoma Council of Administrative Hearing Officials; Italiano's, Oklahoma City; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212

17 **OBA Law-related Education Close-Up;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

OBA Law-related Education Close-Up Teachers Meeting; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

OBA Bar Association Technology Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Gary Clark (405) 744-1601

OBA Mock Trial Committee Meeting; 5:45 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Contact: Judy Spencer (405) 755-1066

OBA President's Summit; Post Oak Lodge, Tulsa; Contact: John Morris Williams (405) 416-7000

18 **OBA Board of Governors Meeting and President's Summit;** 9 a.m.; Post Oak Lodge, Tulsa; Contact: John Morris Williams (405) 416-7000

Association of Black Lawyers Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donna Watson (405) 721-7776

19 **OBA President's Summit;** Post Oak Lodge, Tulsa; Contact: John Morris Williams (405) 416-7000

OBA Young Lawyers Division Committee Meeting; 10 a.m.; Tulsa County Bar Center, Tulsa; Contact: Roy Tucker (918) 684-6276

21 **OBA Closed** – President's Day Observed

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

25 **OBA Lawyers Helping Lawyers Assistance Program Training;** 12 p.m.; Tulsa County Bar Center, Tulsa; Contact: Tom Riesen (405) 843-8444

OBA Board of Editors Meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carol Manning (405) 416-7016

28 **OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: D. Michael O'Neil Jr. (405) 239-2121

March

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

4 **OBA Lawyers Helping Lawyers Assistance Program Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donita Douglas (405) 416-7028

7 **Supreme Court Teacher and School of the Year Award Ceremony;** 2 p.m.; Supreme Court Courtroom, State Capitol; Contact: Jane McConnell (405) 416-7024

8 **OBA Day at the Capitol;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City and State Capitol; Contact: John Morris Williams (405) 416-7000

10 **OBA Appellate Practice Section Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Rick Goralewicz (405) 521-1302

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

16 **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

OBA Women in Law Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Deborah Bruce (405) 528-8625

OETA Festival Volunteer Night; 5:45 p.m.; OETA Studio, Oklahoma City; Contact: Jeff Kelton (405) 416-7018

17 **OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Barbara Swinton (405) 713-7109

18 **OBA Awards Committee Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: D. Renée Hildebrant (405) 713-1423

19 **OBA Real Property Law Section Meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Scott Byrd (918) 587-3161

OBA Young Lawyers Division Committee Meeting; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Roy Tucker (918) 684-6276

23 **OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Patricia Podolec (405) 760-3358

28 **OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: D. Michael O'Neil Jr. (405) 239-2121

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

April

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

5 **OBA Legal Intern Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Candace Blalock (405) 238-3486

OBA Law-related Education Committee Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Reta Strubhar (405) 354-8890

8 **Association of Black Lawyers Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donna Watson (405) 721-7776

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

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

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

OBA Women in Law Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Deborah Bruce (405) 528-8625

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

OBA Bench & Bar Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Barbara Swinton (405) 713-7109

OBA Bar Association Technology Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Gary Clark (405) 744-1601

OBA Board of Governors Meeting; Muskogee, Oklahoma; Contact: John Morris Williams (405) 416-7000

23 **OBA Young Lawyers Division Committee Meeting;** Muskogee, Oklahoma; Contact: Roy Tucker (918) 684-6276

25 **OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: D. Michael O'Neil Jr. (405) 239-2121

Bar Foundation Approves Grant

As recruiting efforts for the "Oklahoma Lawyers for Heroes" initiative kick into high gear, the project is getting a boost from the Oklahoma Bar Foundation. The OBF has approved a $2,000 out-of-cycle grant to underwrite the costs of a new handbook targeted toward the program.

The Military Law Handbook is designed for OBA members who will be offering pro bono legal assistance to military members in need. The handbook will outline facets of military law applicable to the veterans and service members who will be helped by the program. The book will also be used in conjunction with a free CLE seminar that is being offered at the bar center in February to those volunteering for the Oklahoma Lawyers for Heroes program.

Young Lawyers Division members have taken on the task of readying the book for publication. The YLD reports with help from the OBF, the handbook is progressing on time and will be ready for the printer by mid-February.

Mikkanen Nominated to Federal Bench

President Obama recently nominated OBA member Arvo Mikkanen to the U.S. District Court for the Northern District of Oklahoma. Mr. Mikkanen serves as an assistant U.S. attorney for the Western District of Oklahoma, a position he has held since 1994.

After confirmation by the U.S. Senate, Mr. Mikkanen will be the only Native American serving on the federal bench, and only the third Native American in history to secure a federal judgeship.

Mr. Mikkanen has served as a trial and appellate judge for several tribal courts. He is a 1986 graduate of the Yale Law School.

Edmondson to Head Justice Commission

OBA President Deborah Reheard has appointed former Oklahoma Attorney General Drew Edmondson to chair the newly formed Oklahoma Justice Commission. The commission is dedicated to preventing wrongful convictions in light of a growing number of individuals across the United States who were convicted of crimes and later exonerated through DNA evidence.

Ms. Reheard said Mr. Edmondson, now an attorney with the law firm of GableGotwals, was chosen because a person of his reputation as a fair and honest public servant is exactly what the commission was looking for.

"Drew Edmondson has dedicated his professional career to prosecution, first as a district attorney in Muskogee, and later as the state's attorney general," Reheard said. "His commitment to fairness and truth for all Oklahomans is unquestioned."

Mr. Edmondson said, "When a wrongfully convicted defendant is incarcerated, the true perpetrator remains unknown and unpunished. Erroneous convictions shake our criminal justice system to its foundation and build doubt in the minds of the people the system was created to serve and protect."

As chairperson of the Oklahoma Justice Commission, Mr. Edmondson is charged with appointing the commission's members. He expects to name 18 members and begin meeting by mid-February. Commission members will serve two-year terms.

OU Law Receives Historic Gift

The OU College of Law recently received a $6 million dollar gift to support student scholarship programs, marking the largest one-time contribution in the college's history.

OU Law Professor Emeritus Frank Elkouri and his wife, Edna Asper Elkouri, are being lauded by OU President and OBA member David L. Boren for the donation.

University of Oklahoma President David L. Boren (standing, left) and OU College of Law Dean Joseph Harroz (standing, right) meet with OU Law Professor Emeritus Frank Elkouri and his wife, Edna Asper Elkouri.

"Generations of students will benefit from this generous gift," said Boren, noting that Professor Elkouri was his teacher and also taught OU's First Lady, Molly Shi Boren, when they were students in the OU law school. Boren said, "Professor Elkouri's 58 years of service and the Elkouris' devotion and ongoing commitment to the law school provide an incredible example to our university community. They demonstrate what is best in the OU family."

The gift will provide scholarships for incoming law students as well as outstanding first-, second- and third-year students. Professor and Mrs. Elkouri said they were grateful to have scholarships while they were in law school, and they hope their gift provides similar opportunities to students today.

"We wanted to do for the students what we couldn't do for those who helped us," Professor Elkouri said. "OU is a very high quality institution. We always planned to give to the law school, so why wait? We decided to make our donation now, so we could enjoy it and observe it," he said.

Professor Elkouri joined the OU law faculty in 1952, teaching labor law, property, trade regulation, torts and workers' compensation. He retired from teaching full time in 1985.

Holiday Hours

The Oklahoma Bar Center will be closed Monday, Feb. 21 in observance of Presidents Day.

OBA Member Resignations

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

David Edward Lemke
OBA No. 11404
Nashville City Center
511 Union St., Suite 2700
Nashville, TN 37219-8966

James H. Meadows
OBA No. 14003
4025 Arbor Road
Joplin, MO 64804

Cleve Wallace Powell
OBA No. 11609
5900 Baywater Dr., Suite 2102
Plano, TX 75093

Jeremy N. Weingast
OBA No. 9444
650 Farmington Ave.
Hartford, CT 06105

Kudos

The Fellows of the American Bar Foundation announce **William G. "Bill" Paul** is the recipient of the 2011 Outstanding Service Award. The award is given annually to a fellow who for more than 30 years has adhered to the highest principles and traditions of the legal profession. He received the award during the annual awards banquet in Atlanta.

The American Law Institute recently elected OU College of Law **Professor Robert G. Spector** to its membership. Professor Spector is the Glenn R. Watson chair and centennial professor of law at the college, where he lectures and writes extensively on family law. Institute membership is limited to 3,000 members who reflect the excellence and diversity of today's legal profession.

Tulsa attorney **Richard Edmonson** has been elected president of the Oklahoma Renewable Energy Council. Mr. Edmonson's practice is focused on alternative and renewable energy as well as oil and gas law.

On The Move

Katherine E. Thomas and **R.L. Hert Jr.** have been appointed to serve as special district judges for the Ninth Judicial District. Judge Thomas was raised in Durant and graduated from OSU in 1991. She received her J.D. with honors in 1995 from the OU College of Law. In Stillwater, she has served for the last 15 years as an assistant district attorney for the Ninth District. Her primary duties will be in Payne County. Judge Hert graduated from OSU in 1966 with a degree in economics. He earned his J.D. from the OU College of Law in 1969. He has practiced law in law in Stillwater for more than 40 years. Judge Hert will serve primarily in Logan County while handling a domestic docket in Payne County.

Former Tulsa Mayor and Oklahoma Commerce Secretary **Kathy Taylor** has joined the law firm of McAfee & Taft. Her practice will focus on franchising and distribution, corporate and commercial transactions, mergers and acquisitions, and the facilitation of public-private partnerships. She will also consult on legal and business matters for business and government. She most recently served as Gov. Brad Henry's chief of Education Strategy and Innovation, a cabinet post. She was the 2003 recipient of the OBA Mona Salyer Lambird Spotlight Award.

Gene Haynes is retiring as district attorney for Rogers, Mayes and Craig counties after 20 years of service. He will be entering the private practice of law in Claremore. Mr. Haynes may be contacted at (918) 798-5518 or gnehaynes@aol.com.

Edmond attorney **Connie M. Bryan** is now practicing with the firm of McCormick & Bryan PLLC. The firm is located at 2529 S. Kelly Ave., Suite A, Edmond, 73013. She may be reached at (405) 225-2300 or cbryan@mccormickbryan.com.

Nash, Cohenour, Kelley & Giessmann PC announces **Gina D. Knight** as its newest partner, and the firm name will be changed to Nash, Cohenour, Kelley, Giessmann & Knight PC. Ms. Knight's practice areas include commercial and civil litigation, probate, estate planning and family law, with particular experience in the area of adoption and guardianship.

Jennifer H. Kirkpatrick has joined the law firm of Hall Estill in Oklahoma City. She joins the firm's administrative law practice group, focusing on regulatory matters using her experience in general civil litigation, bankruptcy, creditor rights and ad valorem tax issues. Ms. Kirkpatrick currently serves as chair-elect of the OBA's Young Lawyers Division. She is a graduate of the OCU School of Law.

Johnny Akers and **Rick Esser** announce the formation of their new law firm, the Law Center of Akers & Esser. The firm will focus on estate planning, business planning, real estate and litigation of all types, particularly plaintiffs' and injury cases. The firm is located at 401 S. Dewey, Suite 214, Bartlesville; (918) 336-1818; akersesserlaw@aol.com.

Hall Estill recently named **Molly A. Aspan, Richard L. Edmonson** and **James C. Shaw** as shareholders to the firm. Ms. Aspan joined the firm's Tulsa office in 2003, and her practice is primarily focused on labor and employment law. She is the outgoing chair of the OBA Young Lawyers Division. Mr. Edmonson joined the firm in 2008 after spending 30 years working as in-house counsel and in various management positions. His practice is primarily focused on alternative/renewable energy and oil and gas law. Prior to joining Hall Estill, Mr. Edmonson served as senior vice president, general counsel and corporate secretary with Syntroleum Corp. Mr. Shaw joined the firm's Oklahoma City office in 2009. His practice is focused on estate planning, probate, commercial and corporate law. Mr. Shaw has been in the private practice of law for 30 years in Oklahoma City, and he has been a contributor to the *Oklahoma Bar Journal*.

Doerner Saunders Daniel & Anderson has named **Sam G. Bratton II** as Bankruptcy, Creditors Rights and Business Reorganization Practice Group chairman and **G. Michael Lewis** as Litigation Practice Group chairman. Mr. Bratton's practice encompasses all phases of debtors, trustees, committees and secured and unsecured creditors. He is a director and past chair of the OBA Bankruptcy and Reorganization Section. Mr. Lewis has more than 30 years experience as a trial lawyer. His litigation practice involves the defense of healthcare institutions regarding antitrust and regulatory issues. His civil trial practice includes antitrust and commercial litigation and asbestos and toxic tort defense.

Rife Walters & Bruehl of Oklahoma City announces **R. Gene Stanley** as its newest partner and **Valerie R. Smith** as its newest associate. Mr. Stanley is a 2005 graduate of the OU College of Law. He is a member of the Cleveland County and Oklahoma County Bar Associations, Defense Research Institute and Oklahoma Association of Defense Counsel. Ms. Smith is a 2010 graduate of the OCU School of Law. She is a member of the Oklahoma County Bar Association.

Cheek & Falcone PLLC of Oklahoma City announces State **Rep. Randy Grau** has joined the firm as an of counsel attorney. Before working in public service, Mr. Grau was a defense attorney with one of Oklahoma's largest firms where his primary focus included the areas of insurance and business litigation as well as health care and corporate structuring. He also served as a deputy county commissioner, assisted in the administration and development of public policy and led the effort to establish the first Oklahoma County road assessment district. He graduated with honors from the OU College of Law in 2001.

Garrett Law Office PC announces **Mark S. Thetford** and **Scott Allen** have joined the firm as associate attorneys. Mr. Thetford focuses his practice in the areas of criminal defense and civil litigation with a focus on catastrophic personal injury, products liability and civil rights violations. Prior to joining the firm Mr. Thetford's was a partner at Doyle and Thetford. Mr. Allen's practice includes representing injured parties in catastrophic personal injury, medical malpractice, insurance bad faith and auto accidents cases, as well as providing criminal defense. Prior to joining the firm, Mr. Allen was an associate attorney with the Stipe, Harper, Laizure, Uselton, Belote, Maxcey & Thetford law firm. Mr. Thetford and Mr. Allen may be reached at the firm's offices at 111 W. Fifth Street, 8th Floor, Tulsa, 74103; (918) 622-9292.

Kay Bradley was recently named a principal with the Jones Financial Companies LLLP. She graduated from the TU College of Law and joined Edward Jones in 2007 as an associate general counsel responsible for commercial agreements. She is also responsible for Securities and Exchange Commission reporting. She is licensed to practice law in Missouri, Oklahoma and Texas.

Calvert Law Firm announces that **Monica J. Hoenshell** has become a member of the firm, and

Denielle Williams has joined the firm an associate. Ms. Hoenshell is a corporate lawyer whose practice encompasses a broad range of complex business transactions. She holds a master of laws degree in taxation from New York University School of Law and a J.D. from OU College of Law. Ms. Williams will practice in the area of business-related litigation in state and federal courts. She earned her J.D. from OCU School of Law.

At The Podium

Oklahoma City attorney **Chris Paul** of McAfee & Taft addressed the American Petroleum Institute Inspection Summit in January in Galveston, Texas. His presentation was titled, "Managing Records and Communications in a Litigious Society."

Jim Banowsky recently spoke at the Brazil Intellectual Property Forum in Rio de Janeiro. His presentation was titled, "Software Patents in BRIC Countries (Brazil, Russia, India and China)." Mr. Banowsky formerly practiced in Norman and now serves as director of Worldwide Patent Procurement at Microsoft Corp.

Compiled by Ashley Schovanec

How to place an announcement: If you are an OBA member and you've moved, become a partner, hired an associate, taken on a partner, received a promotion or an award or given a talk or speech with statewide or national stature, we'd like to hear from you. Information selected for publication is printed at no cost, subject to editing and printed as space permits. Submit news items **(e-mail strongly preferred)** in writing to:

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Articles for the March 12 issue must be received by Feb. 28.

IN MEMORIAM

Retired **Judge Richard L. Bohanon** of Oklahoma City died Jan. 18, 2011. He was born Feb. 9, 1935 and was a longtime resident of Oklahoma City, graduating from Casady School in 1953. He received his B.A. from Dartmouth College and received his Bachelor of Laws from OU College of Law. He earned a master's of law from New York University and continued his studies at the University of Grenoble, France. He served as law clerk for Chief Judge Alfred P. Murrah of the U.S. 10th Circuit Court of Appeals. In 1964 he and Ed Barth began practicing law together as Bohanon & Barth which merged with Andrews Davis in 1979. Mr. Bohanon was appointed to the Bankruptcy Court for the U.S. District Court for the Western District of Oklahoma where he served until his retirement in 2010. During his judicial career he was assigned as a bankruptcy judge to the Northern and Eastern Districts of Oklahoma, New Mexico, Southern District of Florida, Maryland and the Southern District of New York. He was a prolific lecturer throughout the United States and even taught judges in Mongolia. He was a witness before the House Judiciary Committee on bankruptcy. He was an active member of the bar both at the state and federal levels. He founded and led the Luther Bohanon Inn of Court in Oklahoma City, named for his father, who served as a U.S. District Court judge. In lieu of flowers the family suggests contributions to Mercy Health Foundation, World Neighbors, St. Paul's Episcopal Cathedral or Casady School Scholarship Fund.

Kenneth Wayne Elliott of Oklahoma City died Nov. 5, 2010. He was born on Sept. 6, 1953 in Houston. He earned a B.A. in economics with honors from OU, and went on to earn his J.D. at the OU College of Law. In addition to his law practice with the firm of Elliott and Pederson, he served on the Oklahoma Ethics Commission for 10 years and served on the National Conference of Commissioners on Uniform State Laws for 11 years. He was a long-standing member of Messiah Lutheran Church in Oklahoma City, was active in United Way and served on the Variety Health Founda-

tion Board of Directors. Memorial contributions can be made to the OU Pancreatic Research Foundation.

Longtime Oklahoma City resident **Clifford W. LeGate** died Dec. 24, 2010. He was born Jan. 13, 1942. He graduated from the OU College of Law in 1968. He was employed by the state of Oklahoma and was deputy commissioner of the Oklahoma Department of Agriculture until he retired. He was also co-owner of I-40 Auto Auctions Inc.

Judge Charles Gordon Humble of Bethany died Jan. 17, 2011. He was born Feb. 16, 1936, in Red Deer, Alberta, Canada. He became a naturalized citizen in 1946 and attended the Olivet Nazarene College in Kankakee, Ill. **He served four years in the U.S. Air Force**. He completed his J.D. at the University of Oklahoma in 1963. He served as municipal judge in Bethany for 25 years and special district judge in Oklahoma City for another 22 years. He was a past president of the Oklahoma Municipal Judicial Conference and served on the Bethany Mental Health Board. He was also a member of Southern Nazarene Benchwarmers, Phi Delta Phi, Bethany Kiwanis Club, Oklahoma Bicycle Society, and was active with Bethany Children's Center. Memorial contributions may be made to the Oklahoma Chapter of Leukemia and Lymphoma Society.

Robert "Dale" Kelly Sr. of Norman died April 5, 2010. He was born Sept. 27, 1949, in Ardmore and as was a 1987 graduate of the OU College of Law. He worked in the federal justice system, retiring in 1998. Mr. Kelly was an avid Sooner fan and loved to attend, watch or listen to all OU football games. Memorial contributions may be made to Full Circle Adult Day Center.

Jacob (Jack) Lehrer of Santa Rosa, Calif., died Oct. 31, 2010. He was born Nov. 12, 1928, and was a 1970 graduate of the OU College of Law. Mr. Lehrer worked as a real estate broker and a builder of homes and commercial properties for 50 years in northern California, Long Island, NY and Antigua, West Indies. He was a licensed pilot and enjoyed sailing, skiing and running.

Lifelong Oklahoma City resident **Sidney P. Upsher** died Nov. 28, 2010. He was born July 31, 1923, and graduated from Old Classen High School in 1941. He received a B.A. in 1947 and a law degree in 1948, both from OU. **During World War II, he enlisted in the Army Air Corps, where he earned his pilot's wings and officer's commission. As the command pilot of a B-17 Flying Fortress, he successfully completed a 50-mission tour of duty in Europe and was awarded the Distinguished Flying Cross, the Air Medal with Four Oak Leaf Clusters and the European Theater of Operations Ribbon with Four Battle Stars. He was then assigned to the Air Transport Command and, as a first pilot, flew personnel and cargo across the Pacific until he was discharged in October 1945. At the outset of the Korean Conflict, he was later recalled to duty with the Air Force in March 1951, where he was assigned to the Office of the Secretary of the Air Force at the Pentagon.** After his release from military duty in 1952, he served as general counsel for LeeWay Motor Freight for 25 years, then CEO for Mistletoe Express until 1987. He then served as of counsel to McAfee and Taft, retiring in 1999. He was also active in civic and community affairs including the United Way, Casady School and the City of Nichols Hills. Memorial contributions may be made to All Souls' Episcopal Church.

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Who Needs People?

By Jeff Nix

Not in the sense of "people" as in human beings, but people, as in "Have your people get in touch with my people." Let me explain. A few months ago, I had what I thought was a great idea. Long on imagination, short on funding and general wherewithal. So, I contacted a certified Big Shot, loaded with money and wherewithal. And, he loved the idea. To the extent he told me, "Great! Have your people get in touch with my people, and we'll work it out." "Cheerio" or something like, "Will do, mate" I said, and rang off. At which time it hit me with a thud...I don't have any people.

I have a wife, kids, brothers, a good mechanic and some tennis buddies, but these are not people. People are your advisors, your brain trust, effectuators, chauffeurs, bodyguards — "can do" people. Maybe even flunkies. You know, your people. I have a pretty good barber, a really good veterinarian, two guys I call when I need a laugh, and I get good advice on meat from the guy at Reasor's

meat counter who works days. But, they aren't associated exclusively with me. They're not mine. They are available to just about anyone. Face it — I can't afford people. Where would I put them? My office is a good size for me, but would be crowded if anyone else worked there. How would I pay them? What do people make? And, when my people weren't working on a big deal like I pitched to the Big Shot, I've basically got nothing for them to do. That would drive me nuts. My people would be bored to death, and would wind up resenting me.

So, kiss that idea I pitched to Mr. Big Shot goodbye...Unless...and again, another eureka moment. Maybe there are others out there like me who need people, but just when they need them. Not all the time. Just for special occasions, like my gazillion dollar idea. Part-time people! Rental people. People to go. I would start an agency to rent people to people like me, as needed. Temp people. Now my heart was pounding. This could work.

Ok, let's be practical. Are there people out there who could be people? So, I Googled "people." There are 1,090,000,000 hits for the term "people." Well, that should be enough of a labor market to find a few people people. And as a market for my new people rental agency, what businessperson doesn't now and then, once in a while, need (or let's face it, want to have people to impress other people)? Well, like all start-up companies, I would need a little financial help, being just an "idea" man. So, I called a Hot Shot well-to-do lawyer I know, who takes fliers on unique ideas now and then, and pitched him on my people plan. He became so excited, I was astounded. "Great," he said. "Million dollar idea," he said. "Can't miss" he said. Then, the bottom dropped out. He said, "Have your little girl get in touch with my little girl." My office help is about 5'8" and is a female, a woman and a lady. But neither little nor a girl.

Man...I was this close.

Mr. Nix practices in Tulsa.

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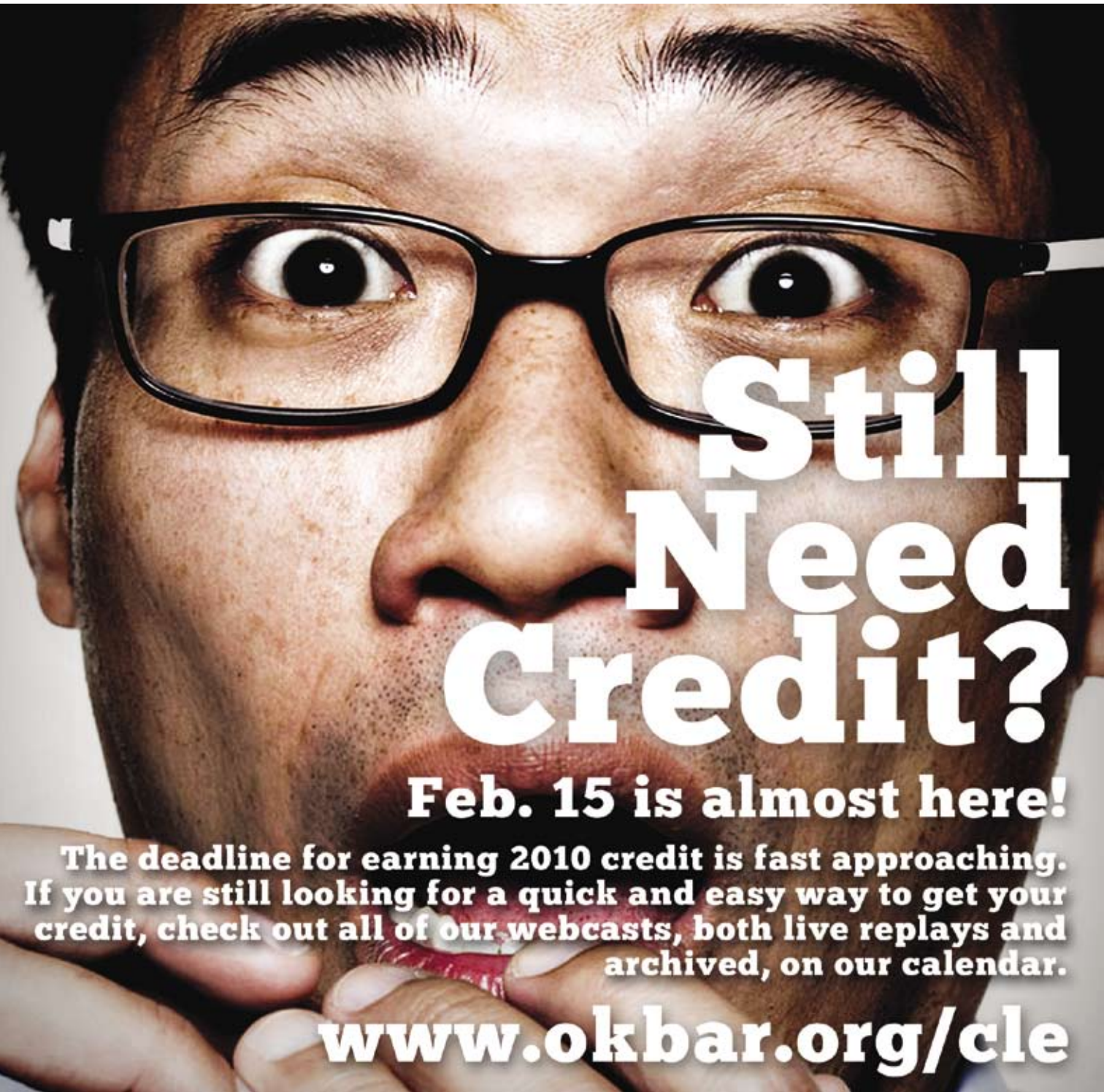
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