ALSO INSIDE: Legislative Monitoring Committee Kicks Off the New Session

THE OKLAHOMA BAR
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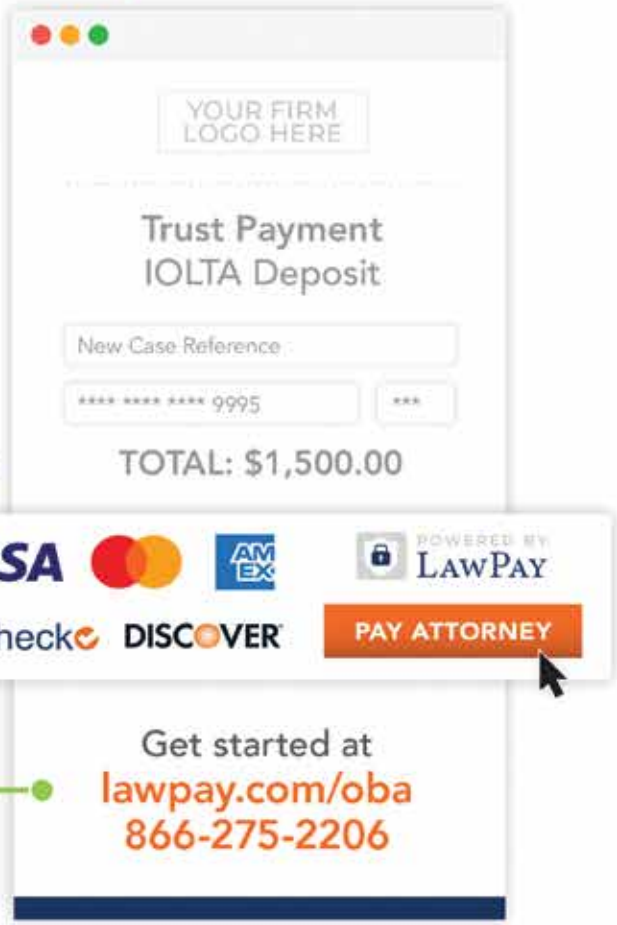

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THE OKLAHOMA BAR Journal

contents

February 2022 • Vol. 93 • No. 2

THEME: LABOR & EMPLOYMENT

Editor: Roy Tucker

FEATURES

DEPARTMENTS

PLUS

PAGE 30 – Legislative Monitoring Committee

Esprit de Bar

By Jim Hicks

THIS YEAR, I WOULD LIKE THE OBA TO COMMIT to what many of us have long been committed to – *esprit de bar.* A feeling of pride, fellowship and common loyalty that is shared by the members of our association. When a group, whether it's a team, club, class or scout troop, gives its members a sense of cohesion and support, it has *esprit de corps*. If you've ever been on a sports team that had great morale and team spirit, you've experienced esprit de corps. The term is French, and it literally means "the spirit of the body," with *body* in this case meaning "group."

> Over the years, many attorneys who have been and remain committed to working together to strengthen our legal profession have experienced *esprit de bar*.

Over the years, many attorneys who have been and remain committed to working together to strengthen our legal profession have experienced *esprit de bar.* I look forward to working with all of you toward the continued advancement of our profession. And it is *our* profession and *our* organization. Every single Oklahoma attorney is included when I say this, although I recognize there are some members who might doubt or disagree.

At Annual Meeting, many attorneys were recognized and applauded by their colleagues for their contributions to the various projects, sections and committees of our organization. Groups recapped the year and began to plan for the future. I have been a volunteer in the organized bar for many years. At first, my involvement was negligible. But as I became more interested and believed there were places where I could make a difference, I became more involved. This is the simple version for many attorneys – there was a need, a lawyer responded to that need and as that lawyer saw more need, the volunteer time became greater. The vast majority of volunteers want to make the legal profession and bar better for lawyers, our clients, the public and Oklahoma.

I hope that any lingering negative sentiment toward our bar changes. As with any organization, there are many aspects we can improve upon or, perhaps, do differently. Recognition and identification of needed change are what enable progress and growth. We have dedicated board, committee and section members and hard-working volunteers who put their best foot forward as practitioners impacting our community. I want to create a spirit of solidarity – a sense of pride and honor among all our membership. Working together, we can identify areas of improvement and work toward solutions. I am at the helm for only one year. Perhaps this year will only be the beginning of the next great progression of the bar. But it is not just up to me. It is up to all of us. Are you in?

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Vaccine Mandates and Their Role in the Workplace

By F. H. Hamidi

IF BEFORE THIS YEAR YOU DID NOT KNOW YOUR NEIGHBORS, friends or coworkers' stances on vaccines, you most certainly do now. And whether or not you previously had any interest in another person's opinions on vaccine mandates, you are probably now interested. If you are an employer or counsel to an employer attempting to enforce a workplace vaccine mandate, you are likely concerned with the views of those who work in your industry on this topic. While the motive behind vaccine mandates is to create healthier working environments, the reality is that some employees will not take the vaccine and will instead retaliate by leaving their employers shorthanded or filing lawsuits against their places of work.

As the COVID-19 vaccine has been available to a portion of the adult population for a year now, we have seen enough instances of COVID-19 vaccine mandates by employers to assess the results of such mandates. This article will first offer an overview of the Biden administration's various COVID-19 vaccine mandates, guidance for implementing vaccine mandates in the workplace and recognized exemptions to those mandates. The article will then highlight precedent for vaccine mandates before discussing employee responses to COVID-19 vaccine requirements.

SOME EMPLOYERS MUST NOW MANDATE COVID-19 VACCINATION FOR THEIR EMPLOYEES

On Sept. 9, 2021, President Biden issued an executive order mandating COVID-19 vaccinations for federal employees, subject to such exceptions as required by law.[1] The order permitted the Safer Federal Workforce Task Force to publish guidance on vaccine mandates for federal employees and, later, similar guidance in response to an order mandating vaccination for federal contractors and subcontractors. Pursuant to the guidance, federal employees needed to be fully vaccinated by Nov. 22, 2021.[2] Employees are deemed "fully vaccinated" two weeks after receiving the requisite number of doses of a COVID-19 vaccine approved or authorized for emergency use by the U.S. Food and Drug Administration (FDA).[3] The task force noted on its guidance page that federal employees who work remotely are still subject to the requirement because those employees may still interact with the public as part of their job duties.[4] As for federal contractors and subcontractors subject to a covered contract, they must conform to COVID-19-related workplace safety protocols by Jan. 18, 2022.[5]

The guidance also answers frequently asked questions. For instance, a recent antibody test or past COVID-19 infection cannot act as a substitute for COVID-19 vaccination, and the requirement for contractors and subcontractors to become vaccinated also applies to those who work in outdoor settings.[6]

Prior to these sweeping mandates, President Biden required nursing homes and, later, all health care facilities that accept federal funding from the Centers for Medicare & Medicaid Services (CMS) to mandate vaccines for their employees, totaling an estimated 17 million workers.[7] The initial mandate on nursing homes receiving federal dollars was likely borne out of statistics from a CMS report concluding, "'Nursing home' beneficiaries accounted for just 2% (1.4 million) of the Medicare beneficiaries (62 million), but about 22% of all COVID-19 cases in the U.S."[8]

Dr. Charles Crecelius, medical director for two St. Louis-area nursing homes, commented that the downward trend of COVID-19 cases and related deaths in his nursing homes became clear after 90% or more of the staff became vaccinated pursuant to the mandate.[9] This small-scale observation is supported by researchers who found a striking correlation between an increased percentage of vaccinated staff and a decreased percentage of resident infection upon analyzing data from 500 Missouri nursing homes over a three-month period.[10]

Pursuant to the U.S. Occupational Safety and Health Administration's (OSHA) emergency authority over workplace safety, President Biden later announced on Nov. 4, 2021, that he intended to enforce a COVID-19 vaccine-or-test mandate for private-sector businesses that employ 100 or more workers.[11] This mandate, requiring large employers to require either the vaccine or weekly COVID-19 testing of their employees, became known as the OSHA Emergency Temporary Standard (ETS).

Both the CMS vaccine mandate and the OSHA vaccine-or-test mandate have worked their way up to the U.S. Supreme Court. To start, 10 states filed suit in the U.S. District Court for the Eastern District of Missouri requesting a preliminary injunction to temporarily block the CMS mandate from going into effect.[12] On Nov. 29, 2021, the district court issued the injunction that the 8th Circuit Court of Appeals upheld on Dec. 13, 2021. Meanwhile, 14 other states, including Oklahoma, requested the same injunction from the Western District Court of Louisiana.[13] The district court issued an injunction covering those 14 states plus the remaining 26 U.S. states that had not requested an injunction. On Dec. 15, 2021, the 5th Circuit Court of Appeals upheld the injunction as to the 14 states that filed the initial lawsuit *only*, reasoning that while injunctions can be binding throughout the country, not all of them should be.[14] Texas soon joined the 24 other states that had requested and received an injunction, splitting the country in half on the CMS mandate issue.[15]

On Nov. 6, 2021, the U.S. Court of Appeals for the 5th Circuit placed a nationwide stay on the OSHA vaccine mandate.[16] More than 40 lawsuits challenging the OSHA mandate were consolidated into one case before the U.S. Court of Appeals for the 6th Circuit. And, on Dec. 17, 2021, the 6th Circuit dissolved the 5th Circuit's stay, reasoning OSHA likely acted within its statutory authority in issuing the mandate, the OSHA mandate likely was not barred by the major-questions doctrine, OSHA likely had an adequate basis for implementing the mandate and the OSHA mandate is likely constitutional.[17] With the OSHA large employer mandate stay lifted, OSHA announced businesses employing at least 100 workers should comply with the ETS by Jan. 10, 2022, to avoid facing penalties.

Challengers to both mandates filed emergency applications with the U.S. Supreme Court to stay the mandates as they worked their way through the circuit courts. On Jan. 7, 2022, the U.S. Supreme Court heard oral arguments on both 1) the emergency applications to stay the Missouri and Louisiana district court injunctions judicially enjoining the CMS mandate and 2) the emergency applications to re-stay the OSHA mandate. This was a rare move by the court as oral arguments are typically only heard at the merits stage of cases. The court quickly issued its ruling on Jan. 13, 2022. In a 6-to-3 decision, the court blocked the OSHA employer mandate, while allowing the CMS mandate to take effect with votes from five justices, including Chief Justice Roberts and Justice Kavanaugh.[18]

The Supreme Court's Jan. 13 ruling simply determined whether the mandates would go into effect *while* the courts of appeals consider the challenges to them. Nevertheless, it appears unlikely the circuit courts will rule differently on these issues than the Supreme Court's rulings on the stays.

In fact, soon after the court released its ruling, President Biden urged states and employers to proceed with workplace vaccine mandates, regardless of the court's ruling on the OSHA ETS stay, to make working environments safe for employees and consumers.[19] Major companies like Citigroup, Google and United Airlines have already implemented vaccine mandates, while others plan to follow suit despite the Supreme Court's unfavorable OSHA ETS ruling.[20]

EMPLOYERS SHOULD BECOME FAMILIAR WITH RECOGNIZED EXEMPTIONS

As many agencies and businesses have either become subject to requirements mandating the COVID-19 vaccine or elected to implement such mandates of their own accord, employers should familiarize themselves with exceptions to the rule or "exemptions." Employees may request exemptions to their employers' COVID-19 vaccine mandate based on a sincerely held religious belief or a medical condition/disability covered by the Americans with Disabilities Act (ADA). Examples of such reasonable accommodations, as identified by the Equal Employment Opportunity Commission (EEOC), include requiring an unvaccinated employee entering the workplace to wear a face covering, work at a distance from others, work a

shorter shift if around other people, submit to COVID-19 testing, work remotely or accept reassignment.[21]

The EEOC recently expanded its guidance on religious exemptions to employer vaccine mandates under Title VII of the Civil Rights Act of 1964.[22] Generally, employees may request an exception, called a religious or reasonable accommodation, from an employer requirement, such as a requirement to receive vaccination, that conflicts with their sincerely held religious beliefs, practices or observances.[23] The granting or denying of such a request should be determined upon consideration of the particular facts of each employee's situation. Only sincerely held religious beliefs, practices or observances qualify for religious-based accommodation.[24] An employee does not need to use magic words to make a request, but the employee should communicate the existence of a conflict between their religious beliefs and a workplace COVID-19 vaccination requirement.[25] The EEOC emphasizes that employers may inquire into the employee's religious accommodation request on a limited basis by questioning either the religious nature of the employee's belief or the sincerity of an employee's stated beliefs.[26] Uncommon religious practices can be recognized under the exemption as long as the belief is sincerely held.

Title VII does not require an employer to provide the accommodation in the event the employer is unable to reasonably accommodate an employee's religious belief without "undue hardship."[27] The U.S. Supreme Court defined "undue hardship" in this situation as requiring an employer to bear more than a minimal or *de minimis* cost to accommodate an employee's religious belief. Both financial costs and any burden on an employer's business practices, including, here, the risk of spreading COVID-19 to others, should be considered when determining the level of hardship an accommodation poses.

Persons covered by the ADA may request exemptions from their employer's COVID-19 vaccination mandate based on medical conditions or disabilities that would prevent them from safely taking the vaccine.[28] Those conditions may include:

- allergic reactions to the vaccine,
- pregnancy conditions,
- chronic illnesses and
- other disabilities as determined by an employee's physician.

To validate those conditions that may warrant disability exemptions from a COVID-19 vaccination mandate, employers may obtain medical documentation from workers who request disability-related accommodations to the extent permitted by law.[29] Potential questions the EEOC suggests employers ask of their employees when a need for accommodation is not obvious include 1) how the disability creates a limitation, 2) how the requested accommodation will effectively address the limitation, 3) whether another form of accommodation could effectively address the issue and 4) how a proposed accommodation will enable the employee to continue performing their fundamental job duties.[30] Again, employers are not required to grant every accommodation request, and not all requests should be viewed in the same light. Confirming the need for accommodations should result from an open exchange of information between the employee and employer to ensure 1) requiring vaccination of a particular employee would cause more physical harm than benefit to the employee and 2) the employee is not needlessly creating a health hazard for others in their workplace by refusing to take the vaccine.

EMPLOYEE RESPONSES TO EMPLOYER MANDATES

Despite the U.S. Supreme Court's long-held precedent on vaccine mandates dating back to 1905, employees and local governments have fought against the mandates announced in 2021. For the most part, this resistance does not appear to stem from a desire to contract COVID-19 or from a fear of the vaccine's formula but rather from a fear that mandates of this nature violate individual rights. In *Jacobson v. Commonwealth of Massachusetts*, Massachusetts citizens living in Cambridge in 1897 experienced a smallpox outbreak,

For the most part, this resistance does not appear to stem from a desire to contract COVID-19 or from a fear of the vaccine's formula but rather from a fear that mandates of this nature violate individual rights.

resulting in a public health crisis.[31] Inhabitants of the city who were not vaccinated against smallpox by a date certain were subject to fines for noncompliance with the public health mandate.[32] Exemptions were limited to children under 21 years of age who presented a "certificate signed by a registered physician that they are unfit subjects for vaccination."[33] Mr. Jacobson, who was of age, could not prove the alleged danger of the smallpox vaccine in his argument to the court.[34] The court upheld the fine, reasoning that any risk of injury from the carelessness in administering the vaccine, or even in a conceivable case without carelessness, was too small to be seriously weighed against the benefits of proper administration and use of the vaccine – those benefits being public health and safety.[35]

Fast-forward to 2021: Some employers, particularly in health care, voluntarily implemented COVID-19 vaccine requirements before President Biden's series of mandate announcements. Last summer, a group of more than 100 health care workers in Texas filed suit against their employer, Houston Methodist Hospital, claiming that Houston Methodist's vaccine requirement was unlawful.[36] The lawsuit followed the health system's announcement to its 26,000 employees in April 2021 that a COVID-19 vaccine was now a condition of continued employment, subject to medical and closely held religious belief exemptions.[37] The plaintiffs requested a temporary restraining order preventing 1) the hospital's vaccination mandate and 2) termination of employees who refused to take the vaccine within the timeframe outlined by hospital policy.[38] The court denied the plaintiffs' request on June 12, 2021, reasoning that the policy did not involve coercion. Judge Lynn N. Hughes of the U.S. District Court of the Sothern District of Texas opined, "This is not coercion. Methodist is trying to do their business of saving lives without giving them the COVID-19 virus. It is a choice made to keep staff, patients, and their families safer. [Plaintiffs] can freely choose to accept or refuse a COVID-19 vaccine; however, if [they] refuse, [they] will simply need to work somewhere else."[39] Elaborating on the nature of an at-will employment relationship, Judge Hughes continued, noting, "If a worker refuses an assignment, changed office, earlier start time, or other directive, he may be properly fired. Every employment includes limits on the worker's behavior in exchange for his remuneration. That is all part of the bargain."[40]

Although the federal government is now responsible for many COVID-19 vaccine mandates currently in place within agencies and health care organizations, employers subject to the federal mandates who implemented mandates *prior to* those federal mandates may still face lawsuits like the one over which Judge Hughes presided in Texas. Large employers not affected by government mandates who voluntarily implement vaccine requirements should also prepare for employee backlash. Nurses, grocery store workers and airline personnel alike have rallied around the idea that conditions of employment should not include taking a vaccine. Many have left their jobs in droves and sacrificed their livelihood in response to employer vaccine mandates. Counsel representing employers against such claims by employees should closely review their clients' mandate policies and documentation of accommodation requests, approvals and denials in conjunction with guidance from the EEOC, Title VII and ADA to ensure compliance.

CONCLUSION

While vaccine mandates are not new in the United States, with the first such law enacted in 1809 mandating vaccination against smallpox, neither is vaccine hesitancy, as demonstrated in *Jacobson*.

In the late 19th and early 20th centuries, science, technology and society all moved more slowly than we can fathom today. The last smallpox outbreak in the United States occurred in 1949, and it was not until 1980, after a centuries-long battle involving multiple generations, that the World Health Assembly declared smallpox eradicated.[41] With every other aspect of daily life expedited (*e.g.*, from riding in horse-drawn carriages to now traveling by air, and from waiting patiently on the arrival of telegraphs to now instantly transmitting writings via text message), we should expect scientific discovery and eradication of viruses to move just as rapidly as everything else in 2022. Scientists formulated the vaccine expeditiously, yes, but only because of the incredible resources at their disposal now as compared to the last pandemic that required emergency response 100 years earlier. COVID-19 vaccine mandates are a last resort after we collectively failed to voluntarily take the vaccine, failed to consistently wear face masks in public and failed to socially distance in those first weeks of the pandemic's United States spread two years ago. The attention and resources our government and employers have allotted to preventing the spread of this deadly virus will be resources well spent if ours is the only generation to know a world with COVID-19.

ABOUT THE AUTHOR

Fareshteh Hamidi is an associate at Sweet Law Firm in Oklahoma City, where she practices medical malpractice defense and general insurance defense. She is a proud 2019 graduate of the University of Tulsa College of Law.

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Intersectionality: Understanding a New Subcategory of Discrimination Under Title VII

By Katherine Mazaheri and Chelsi Chaffin Bonano

LINDA IS A WOMAN OVER 40 WHO IS TERMINATED FROM HER bustling job in downtown Oklahoma City. She is an excellent employee and has worked at her job for 30 years. Linda has tried to understand why her long-time employment ended so abruptly, and after looking back, she noticed there was a pattern of women "of a certain age" being replaced by much younger women. Looking at the situation, it is difficult for her to claim that she was fired for being a woman because all the women under 40 are still securely employed. Additionally, it is difficult for her to say she was fired for her age because all the older men over 40 also still possess their jobs. She concludes the *actual* reason for her termination is not that she is a woman or that she is older than 40, but because she is a combination of these two immutable characteristics – an "older woman." These two immutable characteristics are now a subcategory of a protected class under Title VII, and the discrimination she has experienced is best explained as intersectionality: The intersection of the experience of being a woman and the experience of being over 40.

The theory of intersectionality, and the term itself, was introduced in 1989 by Professor Kimberlé Crenshaw.[1] When Crenshaw first introduced the term, she sought to describe the experience of Black women in discrimination cases.[2] Intersectionality theory seeks to "explain and analyze the experience" of intersecting traits.[3] Since Crenshaw introduced the term, intersectionality as a whole has continued to evolve and now encompasses many different types of intersectional plaintiffs struggling to prove discrimination cases. This article is presented in two parts. The first part will explore the history of intersectionality as it was originally proposed by Crenshaw and her application of intersectionality to the way Black women struggled in proving race and sex discrimination claims. The second part of this paper will dive into how intersectionality has evolved into a wider array of claims and produced a much broader spectrum of plaintiffs in discrimination cases. Intersectionality has provided a framework for sex-plus discrimination cases and has helped intersectional plaintiffs face and fight their specific sub-type of discrimination. Part one and part two will be evaluated with Linda's story in mind. The concept of intersectionality and its effect on sex-plus discrimination provides Linda with a new cause of action against her employer for the sex-plus discrimination she experienced.

PART I: INTERSECTIONALITY AND THE BLACK WOMAN

Kimberlé Crenshaw is a professor of law at Columbia Law School.[4] She has spent more than 30 years studying civil rights, race and racism.[5] In 1989, she published an article titled "Demarginalizing the Intersection of Race and Sex" in the *University of Chicago Legal Forum*.[6] It was in this article that she first

used the term "intersectionality" and where she explored its boundaries.[7] In her paper, Crenshaw argued the court seemed to take a narrow approach to racism and sexism, thinking of these concepts as single issues.[8] But Crenshaw argued that Black women faced both racism and sexism in a different way than racism and sexism experienced by either Black men or white women.[9] Black women had experiences that were more than just racism or just sexism, but rather, they had experiences made up of the combination of both.

One of the three cases Crenshaw used to show the extra challenges Black women faced was a 1977 8th Circuit Court of Appeals case, *DeGraffenreid v. General Motors*.[10] This case involved General Motors, a company that did not begin to hire Black women until 1964.[11] Following the recession of the early 70s, the company's seniority policy required the company to layoff the newest members first, who were primarily Black women.[12] The plaintiffs could not show there was race discrimination because Black men continued working for the company.[13] They could not show there was sex discrimination because white women were being hired by the company even before the Civil Rights Act.[14] Crenshaw used this case to show that this claim was clearly not just based on racism or sexism alone but the combination of the two.[15] The 8th Circut, however, thought combining the racism and sexism claims would not be workable.[16] The court stated there was no reason demonstrated by plaintiffs that showed Black women needed to be treated as their own special protected class.[17] Crenshaw argued in her paper that "by treating Black women as purely women or purely Black, the courts, as they did in 1976, have repeatedly ignored specific challenges that face Black women as a group."[18] Under the court's view, Black women are only entitled to relief when their experiences coincide with the experiences of the Black man and the white woman.[19]

This idea of intersecting traits has continued to expand to cover more than just racism and sexism. Intersectionality can be any combination of traits, including gender, age and race.[20] It can also include other characteristics like sexual orientation, nationality and disability.[21] Intersectionality can make a legal claim much more complicated because laws often address only one type of discrimination rather than the intersection and combination of multiple traits working together. For Linda, the intersection of her femaleness and her aging resulted in her having a completely different experience (the experience of her employment being terminated) than the experience of her other female colleagues and the experience of her male colleagues of the same age (both groups of which remained securely employed). Linda will need to sue her employer under a claim of sex-plus-age discrimination because she will be unable to win solely on a sex claim or an age claim alone. The work of Kimberlé Crenshaw brought to light this issue of intersecting discrimination claims; with the help of slow-moving courts, it provided Linda with a cause of action against her employer.

PART II: INTERSECTIONALITY AND ITS EVOLUTION

Intersectionality: Statutes and Case Law

Title VII of the Civil Rights Act, passed in 1964, prohibits employment discrimination based on race, color, religion, sex and national origin.[22] The Age Discrimination in Employment Act (ADEA) protects employees over 40 years old from age discrimination in the workplace.[23] While there is no doubt this legislation has been greatly beneficial to many employees who have been wrongfully discriminated against based on sex, a plaintiff like Linda would have historically been out of luck. Linda would have been required to prove discrimination based on sex or based on age but not based on both characteristics combined.[24] She would have been unable to prove any sex discrimination because, as mentioned above, not all women working at her job were being discriminated against, just the older ones. In the past, Linda would not have been successful in legal actions brought under a Title VII sex discrimination suit or an ADEA claim.

The case law in this area has been challenging. In addition to the cases discussed by Crenshaw in her paper detailing the struggle Black women had in winning sex-plus discrimination cases, the United States Supreme Court has provided little guidance on sex-plus discrimination. In 1971, the court ruled in favor of a female plaintiff who alleged she was not hired for a job position due to having preschool-age children, while men with the same age children were being employed with no issues.[25] The plaintiff did not solely allege sex discrimination because other women were hired, but she alleged sex-plus-motherhood discrimination.[26] The court held that the company could not have differing hiring policies for men and women.[27]

While the 8th Circuit case, *DeGraffenreid v. General Motors*, did deny Black women a claim of race and sex discrimination in 1977, the 5th Circuit took a slightly different approach. In 1980, the 5th Circuit remanded a lower court decision that failed to address a Black female plaintiff's claims of both race and

This, however, changed in the fall of 2020 when the United States Supreme Court made a ruling in a landmark case, *Bostock v. Clayton County*, that helped to greatly expand Title VII sex discrimination and establish the precedent regarding the standard for sex-plus discrimination.[31]

sex discrimination.[28] The lower court had separated the plaintiff's claims as two separate claims: a claim of race discrimination and a claim of sex discrimination.[29] The 5th Circuit said, "The essence of [the plaintiff's] argument is that an employer should not escape from liability for discrimination against Black females by a showing that it does not discriminate against Blacks and that it does not discriminate against females."[30] Even though this court's decision to remand did not make an official ruling that Black women could bring a race *and* sex discrimination claim, it certainly did not outright deny the possibility of the two forms of discrimination being considered together.

The lack of a uniform standard of sex-plus discrimination amongst the courts and the Supreme Court's relative silence on the matter led many plaintiffs, like our Linda, to be frustrated with their claims. This, however, changed in the fall of 2020 when the United States Supreme Court made a ruling in a landmark case, *Bostock v. Clayton County*, that helped to greatly expand Title VII sex discrimination and establish the precedent regarding the standard for sex-plus discrimination.[31]

Bostock was brought to the Supreme Court as a result of several plaintiffs being fired for being homosexual or transgender,[32] and plaintiffs alledged this was sex discrimination under Title VII.[33] The respective circuit courts hearing these cases were split in their rulings, so the Supreme Court decided to grant *certiorari* to determine whether termination for being homosexual or transgender qualified as sex discrimination under Title VII.[34] In an opinion written by Justice Gorsuch, the court ruled that "the answer is clear. An employer who fires an individual for being a homosexual or a transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision; exactly what Title VII forbids."[35] The test in *Bostock* is relatively simple. If an employee is fired for certain traits or behaviors but that same trait or behavior is tolerated in another employee of the opposite sex, then it is discrimination based on sex.[36] "[I]f changing the employee's sex would have yielded a different choice by the employer – a statutory violation has occurred."[37] The decision in *Bostock* has partially lifted the burden for plaintiffs to prove and has helped shape a relatively new cause of action in employment sex discrimination cases under Title VII, referred to as sex-plus discrimination. Sex-plus discrimination means the employee was discriminated against based on sex and some other additional characteristic that was tolerated in an employee of the opposite sex. Shortly after the *Bostock* ruling, the 10th Circuit Court of Appeals ruled on a sex-plus-age employment discrimination case, *Frappied v. Affinity Gaming Black Hawk, LLC*.[38] This case was brought before the 10th Circuit when a casino laid off employees, eight of who were women over 40 years of age.[39] The women sued the casino claiming it was discriminating against older women.[40] Using the precedent set by *Bostock*, the 10th Circuit ruled that a sex-plus-age claim can be brought under a Title VII cause of action for sex discrimination.[41] The case explained that it did not matter that

age was not a protected characteristic under Title VII.[42] Quoting the *Bostock* opinion, the 10th Circuit said, "So long as sex plays a role in the employment action, it 'has no significance' that a factor other than sex 'might also be at work.'"[43]

Linda v. Employer: Sex-Plus Discrimination

Under the newly formed interpretations of a Title VII sex discrimination cause of action, shaped through the Supreme Court's *Bostock* opinion and the 10th Circuit's *Frappied* case, Linda would certainly have a good chance of recovering from a sex discrimination cause of action against her former employer. Linda would need to allege that had she been a man, she would not have been terminated. "If a female plaintiff shows that she would not have been terminated if she had been a man – in other words, if she would not have been terminated but for her sex – this showing is sufficient to establish liability under Title VII."[44]

Because Linda's case will be about proving discrimination against a subgroup of females rather than just females as a whole, she will want to prove her case using both "same-sex comparator evidence" and "opposite-sex comparator evidence."[45] The circuit courts are split on what type of evidence the plaintiff needs to show for a sex-plus discrimination case; however, the strongest cases are going to be the ones in which both types of comparator evidence can be proven.[46] Linda will need to offer proof that her female counterparts of a younger age were not treated the same as Linda was treated. This is her same-sex comparator evidence. Then she will need to offer proof that her male counterparts who possess the same "plus" characteristic were also treated differently. This will be her opposite-sex comparator evidence. If Linda can establish both types of comparator evidence, her chances of winning against her employer for her sex-plus-age discrimination claim are very high.

CONCLUSION

Intersectionality has been on a long evolutionary journey. The courts have greatly differed on whether and when to apply sex-plus discrimination, and the Supreme Court was previously relatively silent on the matter. Black women plaintiffs had many struggles proving a race discrimination claim when the Black men were being employed, just as they struggled to prove a sex discrimination claim when white women were being employed. Combining the sex-plus-race discrimination is essential in ensuring that specific intersectional discrimination is brought to light rather than allowed to continue through a loophole.

In 2020, the Supreme Court finally made the standard for sex-plus discrimination clear in its precedential *Bostock* ruling. The employee would need to show that if she had been a man, she would not have been terminated. This has given the much-needed guidance to the lower courts on how to handle the sex-plus discrimination claims and has allowed for the 10th Circuit to make its precedential sex-plus-age ruling in *Frappied*. Now that the law is better defined, plaintiffs like Linda and others with intersectional characteristics have a better chance at proving their intersectional discrimination claims.

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How Economists Calculate Losses from Lost Earnings in 10th Circuit Employment Termination Cases

By Charles L. Baum II

CALCULATING ECONOMIC LOSSES IN EMPLOYMENT TERMINATION cases soon will likely become more important: The U.S. Supreme Court recently determined[1] that employment protections under Title VII of the Civil Rights Act extend to sexual orientation and gender identity. Otherwise, economic losses are awardable as damages in federal employment cases from discrimination based on sex, race, religion, age, disability and pregnancy under various federal statutes. Attorneys may hire an economist to calculate the economic losses. This article describes the methods economists use for their calculations and reviews whether these approaches are permissible under federal statutes and case law from the 10th Circuit. Eight key elements are examined.

LOST EARNINGS

Economists have calculated economic losses from lost earnings in federal employment termination cases.[2] They typically base their calculations on the worker's earnings at the time of the termination or on an average of past earnings. This information is typically available from tax returns, W-2 statements and pay stubs. Economic damages are awardable in federal employment termination cases for lost earnings to make the terminated worker whole.[3] Both back (pre-trial) pay[4] and front (post-trial) pay[5] are recoverable, although reinstatement may be preferred as a remedy to front pay.[6] In the 10th Circuit, factors to be considered include "work life expectancy, salary and benefits at the time of termination, any potential increase in salary through regular promotions and cost of living adjustment, the reasonable availability of other work opportunities, the period within which a plaintiff may become re-employed with reasonable efforts, and methods to discount any award to net present value."[7]

EMPLOYMENT BENEFITS

Economists often include the value of employment benefits in their economic loss calculations along with earnings because both are part of a worker's compensation. Common employment benefits are various types of insurance benefits, retirement benefits and benefits that are mandated by the government.

The pecuniary value of a worker's employment benefits could be based on the cost incurred by the employer to provide them. This amount may be different than the replacement cost to the terminated worker in the market due to group rates and tax deductibility. Alternatively, economists may identify the value of lost employment benefits as a percentage of annual salary[8] or use national or occupation-specific average costs for employers.[9] The Bureau of Labor Statistics regularly provides this information.[10] Currently, the average cost of worker employment benefits for employers is 29.9% of compensation for private-sector workers and

37.7% of compensation for public-sector (government) workers.

Economic losses from lost employment benefits are awardable in 10th Circuit employment termination cases,[11] with one notable exception. Lost benefits have not been awarded when the terminated worker did not pay to replace the lost benefit and incurred no costs from the benefit being lost,[12] as may be the case with health insurance.

WORKLIFE EXPECTANCY

Economists have used three measures of worklife expectancy over which to calculate lost front pay. First, economists have used common retirement ages, such as 62, 65 or 70.[13] The Social Security normal retirement age – the age at which one can retire and receive full retirement benefits without penalty – ranges from 65 to 67, depending on the year of birth. Second, economists have used projections from worklife tables. Worklife projections are published by economists using federal government data.[14] The projections are provided separately by age, gender, race and education for individuals currently in and not in

the labor force. Third, economists have used a fixed number of years (*e.g.,* two, five or 10 years) over which to consider lost front pay.

Federal courts in employment termination cases have accepted each of these approaches, although the 10th Circuit has explicitly recognized the appropriateness of worklife expectancy.[15] In the 10th Circuit, damages for lost pay have been awarded for relatively short periods, such as two years of back pay and no front pay,[16] and relatively long periods, such as 13 years of lost front pay.[17]

MITIGATING FACTORS

Economists typically assume terminated workers attempt to mitigate damages by searching for another job. In turn, economists calculate lost earnings by subtracting actual or projected earnings after the termination, if any, from projected earnings without the termination. This is required in federal employment cases,[18] including those in the 10th Circuit.[19] The worker must exercise reasonable diligence seeking replacement employment[20] but is not required to accept a demotion.[21] The terminated worker otherwise forfeits the right to damages, but it is the defendant's burden to prove the plaintiff did not use reasonable diligence.[22]

Collateral source rules typically stipulate that income and benefits from third-party sources should not be deducted from the economic losses to prevent the wrongdoer from receiving a windfall. The 10th Circuit retains wide discretion over how to handle collateral benefits in employment cases.[23] Unemployment benefits[24] and disability benefits[25] should not be deducted in the 10th Circuit, but severance pay from the terminating employer should be.[26] Other findings are mixed. Social Security income has[27] and has not been deducted;[28] pension income has[29] and has not been deducted[30] as well.

GROWTH RATES

Wages typically grow over time with price inflation to maintain purchasing power and with technological advances as workers become more productive. Wages also increase over a career as workers gain experience and skills. Economists may use a worker's past rates of salary increases to project future wage growth. When information on a worker's past earnings is not available, economists may predict future wage growth using historical growth rates experienced by all or part of the labor force, provided in several reports from the Bureau of Labor Statistics.[31] In addition, economists forecast wage growth for several federal entities such as the Congressional Budget Office, the Council of Economic Advisers and the Social Security Advisory Board.[32]

Including projected wage growth, step increases and anticipated raises in economic loss calculations are permitted in the 10th Circuit.[33] However, earnings growth is not always explicitly included in the 10th Circuit,[34] and other circuits have denied wage growth absent expert testimony.[35]

DISCOUNTING TO PRESENT VALUE

Economists typically discount future losses to present value in their calculations.[36] This is because a lump-sum payment made today will grow over time when invested. If the nominal amount of future losses was paid in the present without discounting, this damage award plus interest when invested would grow to a larger amount in the future than the losses. Economists have used three methods to discount future losses to present value: the "case-by-case" method, where the rate used to project future wage growth and the interest rate used for present value discounting are independent of each other; the "below-market" discount method, where the wage growth rate and the discount rate are both identified excluding inflation, so these adjustments are made using real values with inflation offset; and the "total offset" method, where the rate of wage growth is assumed to be exactly equal to the interest rate used for discounting, resulting in no adjustments because the two offset each other.

Federal courts direct future losses to be discounted to present value,[37] but the only guidance given on the discount rate to use is that it should be "the best and safest investments."[38] Courts in the 10th Circuit have typically set the wage growth rate and the discount rate separately.[39] In a first exception, some 10th Circuit courts have used a "net discount rate," defined as the interest rate for discounting minus the rate of wage growth.[40] One 10th Circuit court recommended a range of 1 to 3% for the net discount rate.[41] A second exception has been where the court neglected both to include future wage growth and to discount future losses to present value.[42] The court assumed the two canceled each other out.

Economists may base their discount rate on historical averages, current rates or forecasted future rates. Historical averages may be made over the past 20 or 30 years or over a past period whose length mirrors the period into the future over which losses are projected. Current rates represent the rates at which a lump-sum payment could be invested today but may not accurately reflect future rates.[43] Forecasted future rates are provided by economists for the Social Security Advisory Board, the Congressional Budget Office and the Economic Report of the President.[44]

PRE-JUDGMENT INTEREST

Economists may include pre-judgment interest in their economic loss calculations when the terminated worker has lost back pay. This is because the worker lost the use of that money for a time, and the money's value has been eroded by the effects of inflation.[45] Economists have frequently used interest rates on bonds to calculate pre-judgment interest. Including pre-judgment interest in awards for economic damages is typically considered discretionary in 10th Circuit employment cases to make the plaintiff whole.[46] Although the 10th Circuit has not stipulated a pre-judgment interest rate, often used are state statutory rates, the federal post-judgment rate set forth in 28 U.S.C. §1961 and the IRS rate set forth in 26 U.S.C. §6621.[47]

TAX ADJUSTMENTS

Unlike in personal injury cases,[48] damage awards for lost earnings in employment cases are taxable.[49] Economists may adjust damage awards for tax differentials because a large, lump-sum payment may move the plaintiff into a higher income tax bracket in the year of the award.[50] Additionally, a damage award for lost employment benefits will be taxed, but the employment benefits (*e.g.,* health insurance benefits) when otherwise received might not have been taxable.

10th Circuit courts have the discretion to adjust damage awards for taxes.[51] The 10th Circuit had traditionally concluded that tax adjustments were inappropriate,[52] but this circuit now may provide these adjustments in response to changes in the federal tax code.[53] Testimony from an economist may help the court quantify the size of the necessary adjustment.[54]

CONCLUSION

This article summarizes the stipulations and guidance provided by federal statutes and 10th Circuit case law for eight important elements economists typically address in their damage calculations. This summary is designed to give economists and attorneys a better understanding of the methods and techniques that are permissible in 10th Circuit employment cases.

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Oklahoma Construction Trusts

By Chase McBride

WHAT IS A CONSTRUCTION TRUST & BREACH OF CONSTRUCTION TRUST CLAIM?

Construction trusts protect funds during construction projects by placing a fiduciary duty on the person or entity handling the funds for the project. When this fiduciary duty is breached, it opens the door for a beneficiary to sue for a breach of construction trust claim. These claims can have a huge impact on construction litigation because, if successful, the claim can pierce a corporate veil and result in a judgment against the managers or owners of a corporate entity. Breach of construction trust claims often arise when a general contractor takes profit from the construction funds before all subcontractors have been paid.

STATUTORY CREATION

Sections 42 O.S. §§152-153, titled "Proceeds of Building or Remodeling Contracts, Mortgages or Warranty Deeds as Trust Funds for Payment of Lienable Claims" and "Payment of Lienable Claims," lay out the construction trust.

Section 152 explains under what circumstances and to whom a fiduciary duty applies:

> 1) The amount payable under any building or remodeling contract shall, upon receipt by any contractor or subcontractor, be held as trust funds for the payment of all lienable claims due and owing or to become due and owing by such contractors or subcontractors by reason of such building or remodeling contract.
>
> 2) The monies received under any mortgage given for the purpose of construction or remodeling any structure shall upon receipt by the mortgagor be held as trust funds for the payment of all valid lienable claims due and owing or to become due and owing by such mortgagor by reason of such building or remodeling contract.
>
> 3) The amount received by any vendor of real property under a warranty deed shall, upon receipt by the vendor, be held as trust funds for the payment of all valid lienable claims due and owing or to become due and owing by such vendor or his predecessors in title by reason of any improvements made upon such property within four (4) months prior to the delivery of said deed.[1]

Section 153 explains further elements of the construction trust and who can be held liable for a breach:

> 1) The trust funds created under Section 152 of this title shall be applied to the payment of said valid lienable claims and no portion thereof shall be used for any other purpose until all lienable claims due and owing or to become due and owing shall have been paid.
>
> 2) If the party receiving any money under Section 152 of this title is an entity having the characteristics of limited liability pursuant to law, such entity and the natural persons having the legally enforceable duty for the management of the entity shall be liable for the proper application of such trust funds and subject to punishment under Section 1451 of Title 21 of the Oklahoma Statutes. For purposes of this section, the natural persons subject to punishment shall be the managing officers of a corporation and the managers of a limited liability company.
>
> 3) The existence of such trust funds shall not prohibit the filing or enforcement of a labor, mechanic or materialmen's lien against the affected real property by any lien claimant, nor shall the filing of such a lien release the holder of such funds from the obligations created under this section or Section 152 of this title.[2]

Courts have made it clear that construction trusts are based solely on statute:

> The lien statutes of Oklahoma afford an abundance of protection for mechanics and materialmen, but likewise, such subcontractors must perfect a lien prescribed by law to fall within the protection afforded by §§152 and 153, because "the construction trust fund statutes reflect by title and content they are an integral part of the lien laws" of this State … Since a lien did not exist at common law, it must hence be strictly confined to the ambit of the enactment giving it birth. A lien that is not provided for by the clear language of the statute cannot be created by judicial fiat. The terms prescribed by statute cannot be ignored. They are the measure of the right and of the remedy.[3]

Because construction trusts are a statutorily created fiduciary duty, they should not be confused with constructive trusts or the fiduciary duties found in common law as they may have different elements and remedies.

STANDING

Breach of construction trust claims may be asserted by any beneficiary of the construction trust, such as the property owner, subcontractor, material providers or lenders.[4] Defendants have argued the breach of construction trust claim cannot be asserted by the property owners since a property owner cannot place a lien on their own property. Courts have adamantly rejected this argument.

In ruling in favor of a property owner, the Oklahoma Supreme Court held:

> Our decisions … place us squarely in the majority camp which recognizes that owners enjoy the protection offered by construction trust fund statutes. These courts reason that the primary purpose of such statutory schemes is to protect the owner involved in a fiduciary relationship with the contractor. The property owner is considered the direct beneficiary of the statutorily created trust because of the owner's potential for double liability if the contractor does not pay laborers and materialmen ... Although these decisions are not binding, we do note that two federal courts considering

> the effect of our lien statutes have determined that owners are intended beneficiaries of the statutory trust provisions.[5]

Financial lending institutions that assert control over loaned funds may even be found liable of a breach of the construction trust. Many lending institutions monitor certain customers, especially high risk. However, the Oklahoma Supreme Court has held that if a lending institution begins actually assuming control of the funds and disbursement, they may become an involuntary trustee of the construction trust funds and be held liable if the funds are misapplied.[6]

ELEMENTS

The elements for a construction trust claim are: "(1) the trustee received trust funds, (2) not all valid lienable claims were paid and (3) trust funds were applied to a purpose other than payment of valid lienable claims."[7]

However, many in the construction business have poor accounting records and often deal in cash, resulting in these elements being difficult or impossible to prove. If that is the case, a claimant may establish a *prima facie* claim by only showing "that valid lienable claims remain unsatisfied and that trust funds are either unaccountable or have been applied to purposes other than payment of valid lienable claims …"[8]

WHAT IS A LIENABLE CLAIM

Lienable claims are based on liens found within Title 42. The Federal Bankruptcy Court has said, "Applying basic rules of construction, it would seem that a lienable claim is a claim that is capable of becoming a lien on the building or improvement being constructed."[9]

This is important to note because if strictly construed by a court, a court could hold that no lienable claim exists after the time to file a lien has passed without a lien actually being filed. If so, this holding would be fatal to a breach of construction trust claim. "Under Oklahoma law, one who furnishes material or labor to a contractor may obtain a lien by filing a sworn statement of lien in the county clerk's office within 90 days after the material or labor was furnished. Okla. Stat. tit. 42 §143. A claim not so perfected loses its 'lienable' character."[10]

The breach of construction trust can only be used for claims that may result, or have resulted, in a lien being placed on the property. The claim will not cover other potential damages incurred due to an action of a defendant.

LIMITATIONS

The breach of construction trust can only be used for claims that may result, or have resulted, in a lien being placed on the property. The claim will not cover other potential damages incurred due to an action of a defendant. This may lead to the need for other claims being asserted along with the breach of construction claim.

Courts have limited the fiduciary duty specifically to lienable claims:

> Oklahoma law is clear that the statutory duty imposed on a general contractor to hold funds in trust for the payment of subcontractors creates a fiduciary relationship between the owner and the contractor. The fiduciary duty, however, exists only to the extent that there are lienable claims due and owing by reason of a building or remodeling contract.[11]
>
> This statutorily imposed duty to pay lienable claims should be distinguished from the common law duty of a fiduciary to account. Since it is only express or technical (e.g., statutory) trusts which are implicated by §523(a)(4), the only relevant fiduciary duty here is that prescribed by the construction trust fund statutes, i.e., to pay lienable claims. If there are no lienable claims, there is nothing for which the contractor must account under these statutes.[12]

It is clear from this line of cases that the construction trust statutes are only limited relief to a plaintiff. The statute only provides damages for the amount that is lienable.

> Oklahoma construction trust fund statutes do not impose a fiduciary duty on a contractor to account (i.e., explain the

disposition of) to a homeowner for all construction funds paid to him. Rather, the contractor's fiduciary duty, as prescribed by the statutes that created the trust, is to pay lienable claims. A contractor who fails to pay suppliers of labor or materials is not guilty of breach of a fiduciary duty to the homeowner unless the unpaid laborers file timely liens which are not satisfied by the contractor.[13]

BENEFITS OF SUCCESSFUL CLAIM

The two teeth of the breach of construction trust claim are 1) the claim can be asserted against the managers or owners of a business entity personally and 2) the personal judgment is non-dischargeable by the individual through bankruptcy.[14]

A breach of the "fiduciary duty by failing to pay suppliers and subcontractors with funds entrusted to [a contractor] for that purpose, to the extent that [the owner] is required to pay those subcontractors or suppliers to clear her title to the Residence, [the contractor] is liable to [the owner] and that debt is non-dischargeable."[15]

TIPS FOR REPRESENTATION

If a construction trust beneficiary asks about remedies, you need to find out immediately when a statute of limitations may run for a lien to be filed regardless of who you may be representing. If you are representing a subcontractor or material supplier, it is recommended to file the lien as soon as possible to ensure you preserve the breach of construction trust claim. Once the lien is filed, your client will have one year to file suit.[16] This will give some time to sort out and negotiate with others involved.

For attorneys representing general contractors, great record keeping is a must. It is also recommended the general contractors create an escrow account for each project and pay directly out of the account. It is also recommended they not take out any profit until they can verify enough will remain in the escrow to pay all subcontractors and material suppliers.

ABOUT THE AUTHOR

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Combating Domestic Violence Discrimination in the Workplace

By Mary Rahimi-Ahrabi

DOMESTIC VIOLENCE, ALSO KNOWN AS INTIMATE PARTNER VIOLENCE, impacts more than 10 million women and men every year.[1] It can cause physical, mental and financial damage to its victims. Victims are often subjected to abuse that follows them after they leave their homes and go to their workplaces. Abusers may come to the victim's job to harass them or may even be a coworker of the victim.[2] Many employees attempt to hide the abuse they have been facing in fear they will lose their employment or disrupt the workplace. In fact, 21 to 60% of victims of intimate partner violence lose their jobs due to issues relating to the abuse.[3] Many of these victims struggle with unsympathetic employers who prefer to avoid discussing the situation by firing the abused employee.

DISPARATE TREATMENT

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers from discriminating against employees on the basis of sex, race, color, national origin and religion.[4] Employees who faced discrimination due to domestic violence were traditionally overlooked when it came to protections under federal anti-discrimination laws. However, Title VII is being increasingly applied to groups that were not originally protected, including victims of domestic abuse who may be facing employment discrimination.[5]

Disparate treatment occurs when members of a protected group have been denied the same employment opportunity or equal treatment offered to other employees.[6] According to the EEOC, disparate treatment based on sex includes treatment based on sex-based stereotypes that can target both men and women.[7] Employers may discriminate against female employees who face domestic violence by terminating them to avoid future "drama" in the workplace. The presumption that battered women will bring drama into the workplace is a sex-based stereotype that is potentially unlawful discrimination under Title VII.[8]

Men can also be victims of domestic violence and require protection under Title VII. An employer may stereotype that only women are victims of domestic abuse by presuming that males cannot be victims of domestic violence because they are assumed to be stronger than a female intimate partner.[9] Therefore, male victims of domestic violence can also be discriminated against if an employer terminates or takes other adverse employment action against him. Because he is a victim of domestic violence, the employer has discriminated against the employee due to a sex-based stereotype that falls under the protections of Title VII.[10]

Oftentimes, batterers may be employed at the same place as their victim. Victims of domestic violence could possibly prevail in a Title VII discrimination claim by showing disparate treatment by the employer. For example, the employer treats the batterer and victim differently upon learning of the abuse, especially if the employer terminates or takes an adverse employment action against the victim but not the abusive co-employee. Additionally, an employer cannot deny a female employee who is a victim of domestic abuse unpaid leave to testify in a criminal prosecution of her alleged abuser for domestic violence if the employer allows male employees to use unpaid leave for a court appearance in a criminal prosecution of assault.[11]

DISPARATE IMPACT THEORY

The disparate impact theory is often difficult in practice because it has a high evidentiary requirement for victims.[12] However, victims of domestic violence may indirectly lose their jobs from issues stemming from the abuse. Such issues could include taking time off work to allow injuries to heal or to seek counseling. Victims with children may be dealing with seeking medical help for any injuries their child has sustained from domestic violence. This can often lead to employees missing multiple days of work due to their status as a victim or survivor of domestic violence.[13]

"A survivor who is terminated or treated adversely by her employer due to the impact of domestic violence or sexual assault may have a cause of action under the disparate impact theory in employment discrimination law."[14] Under a disparate impact theory, terminating or reprimanding an employee based on issues caused by domestic violence is arguably impermissible gender-based discrimination because the majority of domestic violence survivors are women.[15] Employers are often aware of domestic abuse an employee may be facing. Instigating rigid policies that prevent a flexible work schedule or time off may specifically have a disparate impact on survivors

of domestic abuse.[16] The disparate impact theory looks to the results of an employer's practice, regardless of if the employment policy appears neutral.[17] Although an at-will state allows employers to terminate employees for any reason, it can be argued that an employer who systematically fires female employees due to issues of abuse impacting their attendance is doing it due to her status as a victim.[18]

FAMILY MEDICAL LEAVE ACT

Victims may be able to seek time off from work for issues relating to domestic abuse under the Family Medical Leave Act (FMLA). FMLA provides guaranteed leave from work due to serious health conditions for themselves or their family.[19] Should a victim employee need to take time off work to deal with physical injuries from domestic violence or to seek help from trauma stemming from the abuse, employers covered under FMLA must typically grant them leave. In order to qualify for FMLA leave, the employee must work for an employer that is covered by the law, and the employee must have worked for the employer for at least 12 months, accumulating at least 1,250 hours of work in those 12 months.[20] If an employee requests or takes leave under FMLA to address injuries sustained from domestic abuse, their employer may not terminate them for missing work.

STATE LEGISLATION

Many states have taken measures to protect victims of domestic abuse from facing penalties in their jobs for dealing with the abuse. Some states have their own comprehensive family leave laws in addition to FMLA. Many states also have specific statutes that protect domestic violence victims from being discharged or discriminated against for issues related to domestic violence.[21] Many of these states also have statutes that require paid and unpaid leave for domestic violence survivors who take time off to seek medical care or attend court proceedings. In Oklahoma, for example, 21 O.S. §142A-2 *suggests* that employers allow victims to attend court proceedings without penalty in the workplace.

DEALING WITH EMPLOYERS

Employers have been known to make excuses to terminate victims of domestic violence. Such excuses may include the employer falsely claiming the employee was underperforming and would have been fired anyway. They may also claim the batterer's appearance at the victim's workplace was the "last straw" after a victim had underperformed in the workplace, and the victim would have been terminated anyway.[22] Employers seeking to improve their workplace for employees who are victims of domestic violence and avoid potential claims of gender discrimination should be alert and look for signs of abuse in employees, discuss issues related to the abuse with the employee and provide flexible leave time should the employee need it.

ABOUT THE AUTHOR

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Legislative Monitoring Committee Kicks Off the New Session

By Miles Pringle

THE 2022 SESSION FOR THE Oklahoma Legislature is upon us, and the Legislative Monitoring Committee is working hard to provide information to committee and OBA members. We hope you were able to join us for the OBA's Legislative Kickoff on Friday, Jan. 28. Unfortunately, the omicron surge required that we hold the event virtually again, but we are hopeful this was our last virtual-only Legislative Kickoff. If you missed it, you can still register to watch it online.

We are *so* appreciative of all our presenters who volunteered for the Legislative Kickoff. They devoted their time and resources to put on a great program covering "90 Bills in 90 Minutes." We also want to thank our wonderful lawyer legislators who participated in our legislative panel.

ISSUES FOR THE 2022 SESSION

Despite the pandemic, there are a lot of reasons to be positive about the upcoming session for legislators. Estimates are that there will be about $10.3 billion to spend in fiscal year 2023. Approximately $1.2 billion is a one-time carryover from prior years. With that said, it has been pointed out by Senate Appropriations Chairman Roger Thompson that inflation may blunt the impact of increased revenue.

Criminal justice reform will be another item of interest at the Capitol. For example, there is a proposal to revise Oklahoma's sentencing code. The Attorney General's Criminal Justice Reclassification Coordination Council is recommending a plan that uses a matrix for sentencing. Proponents say it would make the process easier for defendants, jurors and others to understand the sentencing laws. Opponents warn it could increase prison lengths, particularly for lower-level drug and property crimes. There might also be a pay increase for state correctional officers.

Education is always an important issue as well. In a report from December 2021, the Legislative Office of Fiscal Transparency issued a report concluding that when adjusting for cost of living and other issues, Oklahoma teacher pay is the highest in the region. That finding has received a lot of pushback; however, the report had other important findings as well, such as "Oklahoma's Compensation Structure Provides Limited Incentives and Options for Professional Growth and Income Potential." We may not see legislation coming immediately from this report, but a debate has been started.

OBA DAY AT THE CAPITOL

The good news is there will be an OBA Day at the Capitol, so mark your calendars for Tuesday, March 22. Registration will begin at 9:30, and we have many wonderful speakers providing updates on the current legislative session. Stay tuned for further details.

LEGISLATIVE CALENDAR

Here are some of the important legislative dates for you to be aware of:

- Dec. 10: Bill request deadline
- Jan. 6: Deadline for specific information or language
- Jan. 20: Bill introduction deadline
- Feb. 7: Session begins
- Feb. 21: House deadline measures out of subcommittee
- March 3: Committee deadline
- March 24: House deadline for third reading of bills and joint resolutions in chamber of origin
- April 4: House deadline for SBs/SJRs out of subcommittee

- April 14: Committee deadline for bills from opposite chamber
- April 22: Deadline for SBs/SJRs out of full A&B committee
- April 28: Third reading in opposite house deadline
- May 27: *Sine Die* adjournment

JOIN THE COMMITTEE

As always, I encourage you to become a member of the Legislative Monitoring Committee. The Committee is the OBA's largest and one of its most active, with attorneys participating from around the state. If you are already a member, continue to sign on and use the MyOKBar Communities page on the OBA website to communicate with the committee. If you have a bill that needs to be posted for others to see, please do so. If you have any suggestions or questions, please feel free to contact me through the committee's Communities page.

ABOUT THE AUTHOR

Mr. Pringle is general counsel for The Bankers Bank in Oklahoma City and serves as the Legislative Monitoring Committee chairperson.


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How We Roll

By John Morris Williams

SEVERAL ARTICLES I HAVE read recently relating to the continuous stress all segments of society have been subjected to in the last two years caused me some alarm. The legal community has not been immune. I do believe that as a community, we may have some important skills that will help us all through these tough times. Lawyers are trained and equipped to find solutions in demanding situations. I have often said that every problem society cannot or will not solve ends up in the judicial system. To borrow a pedestrian term, "That is how we roll."

During the last two years, the legal community has advanced approximately 10 years in the use of technology. It is now common to interact with clients and even make court appearances utilizing video technology. The pace of technology and its application to the practices of law has long been predicted; however, no one foresaw the compacted timeframe forced on us by the pandemic. Yet, we mastered it. That is how we roll.

Early on, I was hopeful COVID would end quickly and things would quickly return to "normal." Obviously, those hopes were short-lived, and as we move into the beginning of year three, things still look uncertain. However, I am optimistic about the future and for good reasons. The OBA remains in solid financial condition, our staff is top notch and agile and we have talented and experienced elected leadership. That is how we roll.

I now understand the term "the new normal." The new normal is to assess the situation, gain a clear understanding of the objective and see what tools are at hand to make it happen. Not much different than sometimes in the day-to-day practice of law – except you must wear a mask and social distance. That is how we roll.

Our mission at the OBA is still the same: to provide enhancement to the professional lives of our members. I am mindful that the community we serve is no different than the community at large in the sense that all of us have been under a tremendous amount of stress adapting to a world that two years ago we could not have imagined. After continued reading on COVID stressors, I was reminded that I am part of a dynamic, problem-solving, intelligent and durable community that often operates under continuous stress, and we have important skills to bring to the forefront. Realizing our objectives are the same, regardless of the situation, we have the tools to make it happen. Most of those tools are the same ones we have always used. While technology certainly plays a hand in how we communicate, problem-solving and innovative thinking under pressure are our greatest assets. These are essential skills of lawyering. That is how we roll.

To say our community is immune from the common problems of the day would be naïve. If we continue to stay engaged and support each other, I know we can face every challenge and muster the tools necessary to meet every objective. It has been my observation that in some segments of our society, people are looking much harder for confrontations than solutions. As we move forward into 2022, we as the legal community, more so than any other community, have a sworn obligation to look hard for solutions. That is how we roll.

Regardless of the challenges ahead of us in 2022, I passionately believe that as a community, we shall meet our objectives and assemble the tools necessary to get the job done. That is how we roll.

Please let us know how we can help you meet your objectives and assist you with the tools necessary to get the job done. That is how we roll.

To contact Executive Director Williams, email him at johnw@okbar.org.

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Oklahoma Bar Association,
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Reading for Law Practice Management

By Jim Calloway

LAWYERS HAVEN'T ALWAYS begun their careers by enrolling in law school. Before there were many law schools, a period of study under a lawyer or judge (a practice then called "reading the law") was required, usually followed by an oral exam. The standards for these apprenticeship admissions were occasionally unevenly applied in some states or regions. After 1870, law schools began to emerge, offering a more comprehensive path to becoming a lawyer. Diploma privilege also emerged with graduation from law school, resulting in automatic bar admission in some states. Diploma privilege peaked in the early 1920s, and today only one state, Wisconsin, still has diploma privilege admission.[1]

There's never been a reading course of study for law practice management. In the 1920s, there were not many operational differences between running a law firm and running an accounting firm or insurance agency. Secretaries typed, filed papers and answered phones. Today's law firms, however, have many distinct operations. Among these are protecting client confidentiality, checking for conflicts of interest, trust accounting, electronic filing and managing records, updating processes to reflect changes in the law and many others. The Association of Legal Administrators is an important organization for professionals managing law firm operations.

The American Bar Association's Law Practice Division and other ABA entities publish many books each year on law office management and technology. This month, I'd like to focus on a couple of popular books for lawyers that focus on running a law firm from the client side of the equation.

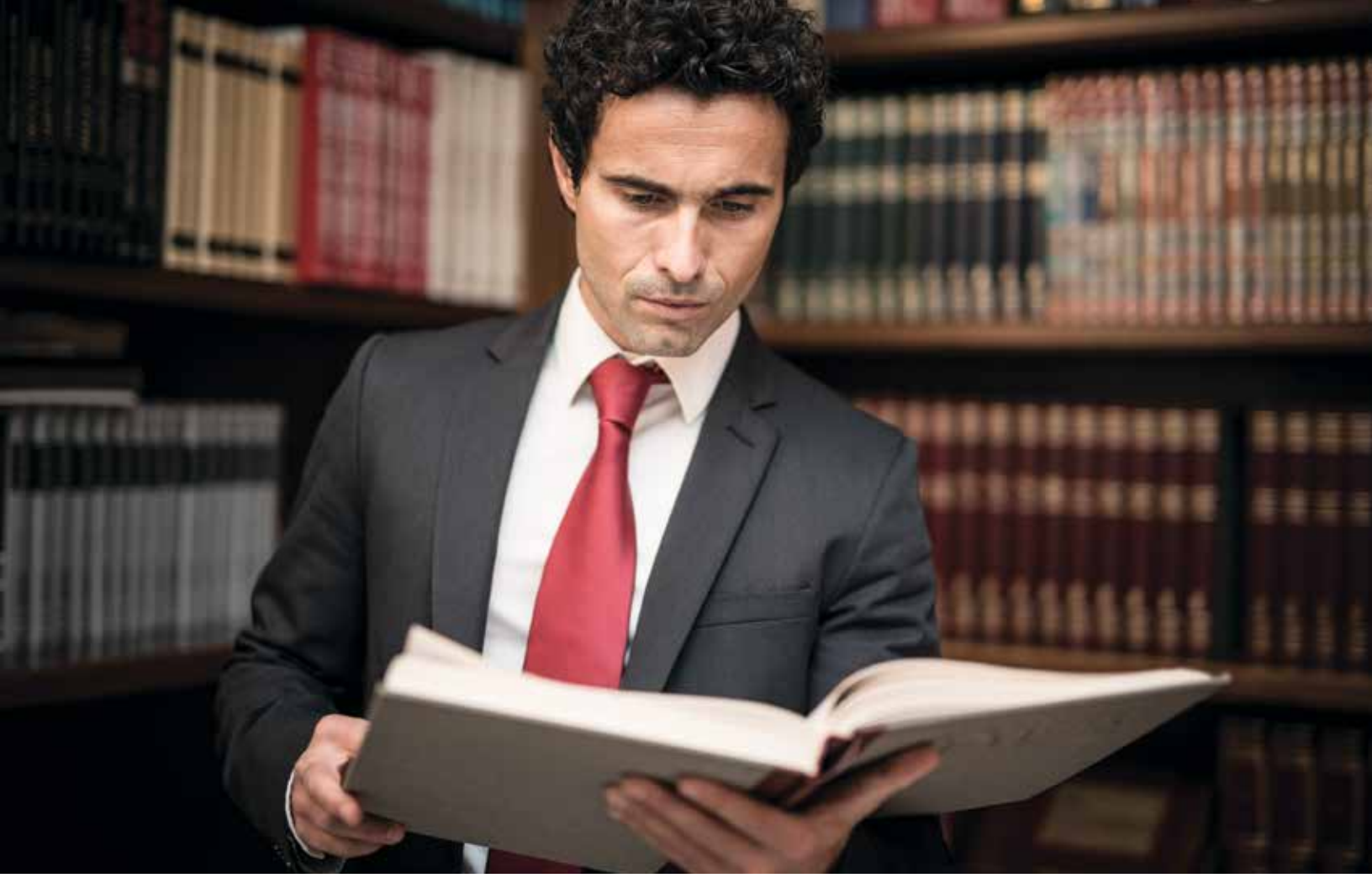
LAW IS A BUYER'S MARKET

Law is a Buyer's Market was published by Jordan Furlong, a well-known Canadian law firm consultant, in 2017. Mr. Furlong opens the book by noting that sometimes when the law comes to your door, it is something to celebrate, like a business expansion or the adoption of a new baby. But more often, the law comes to the door as an irritant, like being served with a suit against you. As we all can appreciate, legal troubles and challenges can be profound in nature. Mr. Furlong notes:

> From the poorest family to the richest corporation, the impact of the legal system usually disrupts – and frequently shatters – the normal flow of life's events. It lies heavily on human hearts and looms darkly over business prospects, until such time as the shadow it casts can somehow be resolved and removed. Often, when law comes to the door, it's a serious complication or a damaging setback, placing people and companies immediately into a deficit position.

A number of lawyers have told me how tough it is to be a seller of legal services these days, and I'm sure they're right. But on more than one occasion, I've felt like responding, "Really? Maybe try being a legal services buyer sometime." Try being a person or family or business that gets accosted by and dragged into the opaque, arcane, and sometimes ruinous legal system. Because that's pretty hard, too.

In the best possible circumstances, a legal services buyer pays a lawyer to advance an opportunity or facilitate an investment. But in most other circumstances, buyers pay a lawyer a lot of money to resolve a problem that they don't fully understand and for which they never asked. The best they can hope for is a return to square one – a restoration to the status quo ante, minus dozens of hours and thousands of dollars. If you're a lawyer and you're not fully cognizant of this fact, then you're missing



> out on information that can give you not just the empathy to help these buyers, but also the advance warning to prepare for what's coming our way.[2]

The delivery of legal services has traditionally been a seller's market because rules put in place to protect the public and guide the profession have also limited competition. Mr. Furlong has focused his consulting practice on larger law firms, and these firms were the first to feel the shift from a seller's market to a buyer's market. Businesses wanting to reduce their annual legal spend hired more in-house lawyers. Sometimes the general counsel's office would handle some routine legal work internally and was often tasked by their employer to reduce how much they paid outside law firms annually. So, the corporate client now had experienced negotiators on their side of the equation.

The status quo, understood by all lawyers, was to handle the legal problem perfectly, leaving no proverbial stone unturned to come up with the best legal solution to every problem. As many readers have personally experienced with their business clients, the new focus was on doing the legal work correctly but at a lower cost. Corporate clients also began reducing the number of outside law firms they used. There can't be a better expression of the change from a seller's market than a big client dropping outside counsel they had retained for years purely as a cost-saving measure.

I must note that the growth of the internet has also impacted individual consumer clients similarly. While referrals are still important for law firm marketing, people tend to look up things for themselves online – and it's not just looking for lawyers to hire online. Possible alternative solutions to their problems are also revealed because of their internet searches. Some of these are accurate and many are not, but it's important for every lawyer to appreciate that when you interview a potential client today, they are not only considering whether you are the proper lawyer to handle their legal matter but also whether some of the nonlawyer solutions they have seen online might serve them better.

Mr. Furlong has made electronic versions of *Law is a Buyer's Market* very affordable. The Kindle version is only $2.99.[3] He has also made a free PDF version of the book available for download.[4] If you are a Kindle user, you will likely prefer that format. If you would

> But one thing you can't do well is put yourself in your clients' shoes, particularly those clients who have never hired an attorney before.

like to hear some of Mr. Furlong's thoughts instead of reading them, he was a guest on our *Digital Edge* podcast Aug. 26, 2021. The topic was "The Rise of Re-Regulation in the Legal Industry."[5]

THE CLIENT CENTERED LAW FIRM

Several readers are likely familiar with the book *The Client Centered Law Firm: How to Succeed in an Experience-Driven World* by Clio CEO Jack Newton. Mr. Newton gave a presentation on the subject matter of his book during the virtual 2020 OBA Annual Meeting. That presentation was viewed by over 900 OBA members. The Amazon description of his book sums it up well:

> The legal industry has long been risk averse, but when it comes to adapting to the experience-driven world created by companies like Netflix, Uber, and Airbnb, adherence to the old status quo could be the death knell for today's law firms.
>
> In *The Client-Centered Law Firm*, legal technology expert Jack Newton offers a clear-eyed and timely look at how providing a client-centered experience and running an efficient, profitable law firm aren't opposing ideas. With this approach, they drive each other. Covering the what, why, and how of running a client-centered practice, with examples from law firms leading this revolution as well as practical strategies for implementation, *The Client-Centered Law Firm* is a rallying call to unlock the enormous latent demand in the legal market by providing client-centered experiences, improving internal processes, and raising the bottom line.[6]

The reviews of this book were extremely positive. Let me dispel one myth: You don't need to be a subscriber to Clio or any other particular technology tool to benefit from this book. It is about people – your clients and potential clients. He weaves data from Clio's annual legal trends reports with observations from his own experiences as a client and from many legal industry observers to create a compelling narrative. For example, consider his five values of the client-centered law firm. These are:

1) Develop deep client empathy,
2) Practice attentiveness,
3) Generate ease with communication,
4) Demand effortless experiences and
5) Create clients for life[7]

I'm certain the last point sounds great to many lawyers who tire of constant marketing efforts. But these values ring true. If you were to hire someone to help you with an important matter, wouldn't you want them to be empathetic, attentive and easy to communicate and work with?

Mr. Newton also notes that technology is still important:

> Technology isn't the main driver of what it means to run a client-centered law firm, but it's a critical part of it. And a world where legal consumers expect Amazon-like experience, running a practice with a pen and legal pad no longer cuts it.
>
> But tech without process – and tech without a client-centered mindset to guide its use and implementation – is just another shiny tool that staff and/or clients won't use. Technology needs to fit *into* the processes that are designed to provide good experiences and solve clients' problems – and you'll need to practice attentiveness to work out what those processes are. If tech doesn't fit, that's okay. The solution needs to work for *your* clients.[8]

This book is quite affordable as well. The Kindle version is $14.95, and the paperback edition is $19.98.[9]

A CHALLENGING LEARNING EXERCISE

It's no secret many lawyers prefer practicing law over closely managing their business operations. Many lawyers have found themselves named the managing partner by default rather than selecting that as a career path. We have seen many more medium-sized law firms hire full-time law office administrators. These positions are always important, but they are particularly needed when the lawyer-managers want to continue practicing law and serving clients.

None of this material I've cited is intended to offend those in the legal profession; however, a few may well take offense at some of the pointed observations and challenges cited by these two authors. Rather than being offended, I hope you will accept some challenging material for its potential to change your life and your law practice.

There are many good things about being a lawyer. But one thing you can't do well is put yourself in your clients' shoes, particularly those clients who have never hired an attorney before. Luckily, there is an easy way to remedy that: Ask your clients. Ask them what was good about the attorney-client experience. Ask them where improvements could be made. Meanwhile, I hope you have added one or both of these books to your spring reading list.

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

ENDNOTES

1. Wikipedia, "Admission to the bar in the United States," https://en.wikipedia.org/wiki/Admission_to_the_bar_in_the_United_States.
2. Furlong, *Law is a Buyer's Market,* Prologue page xviii.
3. www.amazon.com/Law-Buyers-Market-Building-Client-First-ebook/dp/B06XPXZY1N.
4. www.law21.ca/wp-content/uploads/2020/04/LAW-IS-A-BUYERS-MARKET-FINAL-PRINT-VERSION.pdf.
5. https://legaltalknetwork.com/podcasts/digital-edge/2021/08/the-rise-of-re-regulation-in-the-legal-industry.
6. www.amazon.com/Client-Centered-Law-Firm-Succeed-Experience-Driven-ebook/dp/B0845P5Z92/ref=sr_1_1.
7. Newton, *The Client Centered Law Firm, Chapter 6.*
8. Newton, *The Client Centered Law Firm,* page 110.
9. www.amazon.com/Client-Centered-Law-Firm-Succeed-Experience-Driven-ebook/dp/B0845P5Z92/ref=sr_1_1.

'The Only One Who Never Makes Mistakes is the One Who Never Does Anything'[1]

By Richard Stevens

LAW, A HUMAN ENDEAVOR, is imperfect. Because it is a human endeavor and imperfect, lawyers make mistakes in the representation of clients. Even the best lawyers make mistakes. ABA Formal Opinion 481 discusses a lawyer's obligations to a client when the lawyer has erred.

IS THE MISTAKE A MATERIAL ONE?

If the mistake is a material one, the lawyer must inform the client. The first question a lawyer must answer is whether the mistake is material. Errors in legal representation occur along a continuum. According to ABA 481, the test to determine if the mistake is material is whether "a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice."

The obligation to inform the client of a material error applies to current clients only. If a material error is discovered after a matter has been concluded and the representation has been terminated, there is no duty under the Rules of Professional Conduct to inform the former client. However, as ABA 481 states, "Good business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client." These decisions are not obligations imposed by the rules.

THE DUTY TO INFORM

The duty to inform arises from ORPC 1.4. As ABA 481 points out: Model rule 1.4(a)(1) requires a lawyer to promptly inform a client of any decision or circumstance with respect to which the client's informed consent may be required. Model Rule 1.4(a)(2) requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Model Rule 1.4(a)(3) obligates a lawyer to "keep a client reasonably informed about the status of a matter."

Further, the client may be entitled to be informed about an error if it is serious enough to create a conflict of interest between the lawyer and the client. Under OPRC 1.7 (a)(2), a conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by … a personal interest of the lawyer." Where such a conflict exists, the client needs to know to be able to discharge the lawyer or consent to the conflict.

Generally, those errors that prejudice the client's rights or claims or those that result in financial loss or material disadvantage to the client's legal position must be disclosed. Failure to file a lawsuit within the statute of limitations would be one example of such an error. Errors that would result in significant changes to strategy, timing or some fundamental aspect of the representation must be disclosed. The client needs that information to make informed decisions about the representation. The lawyer may have to disclose that information to meaningfully advise the client. Non-substantive, typographical errors and those that cause nothing more than delay do not typically require disclosure.

Between those two extremes are errors that may or may not require disclosure. Each such error must be analyzed individually to determine whether a disinterested lawyer would conclude that it is material.

WHEN TO INFORM

A lawyer must notify a client promptly of a material error. What constitutes prompt notification will vary depending on the facts and circumstances. The lawyer must be cognizant of the possibility of harm to the client if notification is delayed. Consultation with other lawyers or the lawyer's professional liability insurer may be appropriate if done promptly. In some cases, it may be reasonable for the lawyer to attempt to correct the error before informing the client. A lawyer should always consider the time necessary to correct the error and be aware of the obligation to keep their client reasonably informed of the status of the representation.

IN SUM

Lawyers have a duty to promptly inform current clients if they have committed a material error in the representation of the client. An error is material if a disinterested lawyer would conclude that it is 1) reasonably likely to harm or prejudice a client or 2) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. Whether notification is necessary or prompt are fact-specific questions.

The opinion contains much more information. I encourage anyone who finds themselves the object of online criticism to read ABA Formal Opinion 481.

Mr. Stevens is OBA ethics counsel. Have an ethics question? It's a member benefit, and all inquiries are confidential. Contact him at richards@okbar.org or 405-416-7055. Ethics information is also online at www.okbar.org/ec.

ENDNOTE

1. Theodore Roosevelt

Meeting Summary

The Oklahoma Bar Association Board of Governors met Dec. 10, 2021.

REPORT OF THE PRESIDENT

President Mordy reported he attended a strategic planning meeting, the OCU School of Law alumni luncheon, OBA Diversity Awards Dinner, Energy and Natural Resources Section meeting, along with other miscellaneous Annual Meeting events and provided the State of the Bar Association report during Annual Meeting. In December, he attended the Board of Governors holiday event.

REPORT OF THE VICE PRESIDENT

Vice President Geister reported he attended the OU College of Law alumni luncheon at Annual Meeting, where he introduced the Outstanding OU Senior Law Student award winner and hosted State Bar of Texas President Sylvia Firth and her husband, Victor. During Annual Meeting, he also attended the OBA Past Presidents' Dinner, OBA Diversity Awards Dinner, other miscellaneous events and read the In Memoriam during the General Assembly. He also attended the Federal Bar Association's judicial reception on Nov. 18 and the Oklahoma County Bar Association's holiday reception on Dec. 2.

REPORT OF THE PRESIDENT-ELECT

President-Elect Hicks reported he attended the Annual Luncheon, General Assembly, Oklahoma Bar Foundation meeting and reception, OBA Diversity Awards Dinner, chaired the House of Delegates and hosted a hospitality suite during Annual Meeting. He also attended funeral services for Judge Joe Morris, registered for the NCBP and ABA House of Delegates in February, completed 2022 committee and board appointments, discussed strategic planning with the Oklahoma Center for Nonprofits, presented the OBA 2022 budget to the Supreme Court, drafted the president's message for the January *Oklahoma Bar Journal* and attended the Board of Governors' holiday party.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the OBA Diversity Awards Dinner, held an Annual Meeting debrief with OBA staff, met with the *Oklahoma Bar Journal* Board of Editors to discuss electronic communications, met with Credentials, Bylaws, and Rules committees, attended Supreme Court Conference for Order on the budget and other meetings related to operations, discussed strategic planning with the Oklahoma Center for Nonprofits, toured Harn Homestead for a joint OBA/OBF event planned for May 2022 and finalized the associated contract and attended the Board of Governors' holiday party.

REPORT OF THE PAST PRESIDENT

Past President Shields reported she attended Annual Meeting events, including the Annual Luncheon, General Assembly, House of Delegates and OBA Diversity Awards Dinner. She also attended the Oklahoma County Bar Association and Board of Governors' holiday party.

BOARD MEMBER REPORTS

Governor Davis reported he attended Annual Meeting and was appointed as an associate bar examiner for the Board of Bar Examiners. **Governor DeClerck** reported he attended Annual Meeting and the Garfield County Bar Association Christmas party. **Governor Edwards** reported he attended the OBA Diversity Awards Dinner, Annual Meeting, General Assembly and the Pontotoc County Bar Association Christmas party. **Governor Hutter** reported he attended Annual Meeting events, including the Delegates Breakfast, General Assembly and House of Delegates, and he also attended a Solo and Small Firm Conference Planning Committee meeting. **Governor McKenzie** reported he attended Annual Meeting and the General Assembly. **Governor Pringle** reported he attended Annual Meeting, the Financial Institutions and Commercial Law Section annual meeting, a meeting to discuss strategic planning with the Oklahoma Center for

Nonprofits and submitted the Legislative Monitoring Committee annual report. **Governor Rochelle** reported he attended Annual Meeting events, including the Delegates Breakfast, General Assembly, House of Delegates, OBA Diversity Awards Dinner, various CLE programs and social events. **Governor Smith** reported she attended Annual Meeting events, including the OCU School of Law alumni luncheon, President's Reception, a plenary session, OBF reception and OBA Diversity Awards Dinner, Delegates Breakfast and House of Delegates. She also presented OBA Awards during the Annual Luncheon and General Assembly and attended the OCU Law Mentorship closing banquet. **Governor Vanderburg** reported he attended an Oklahoma Association of Municipal Attorneys meeting and a Kay County Bar Association meeting focused on advancing the Oklahoma High School Mock Trial program by allowing students to earn academic credit for participating. **Governor White** reported he attended Annual Meeting and presented the Professionalism Moment at the monthly Tulsa County Bar Association board meeting.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Moaning reported she attended Annual Meeting events, including the General Assembly, House of Delegates, Annual Luncheon, OBF reception and OBA Diversity Awards Dinner. She also participated in an OBA Membership Engagement Committee planning meeting, chaired the final 2021 YLD board meeting and drafted an article for the December *Oklahoma Bar Journal*.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported that as of Nov. 30, 2021, there were 208 grievances pending investigation by the Office of the General Counsel for future presentation to the Professional Responsibility Commission. She also said the OBA had been dismissed from a pending lawsuit in the Northern District of Oklahoma and the number of out-of-state attorney new registrations has exceeded 700 in 2021. There were also more than 700 renewal registrations. A written report of PRC actions and OBA disciplinary matters for the month was submitted to the board for its review.

BOARD LIAISON REPORTS

Governor Edwards reported the **Clients' Security Fund Committee** is prepared to report its annual recommendations for fund distributions. Governor DeClerck reported that the **Membership Engagement Committee** leadership met and discussed its scope of work. President-Elect Hicks praised the **Diversity Committee** for its successful work in planning and hosting the Diversity Awards Dinner during Annual Meeting. Governor Hilfiger reported the **Law Day Committee** would meet later in the day. Governor McKenzie and Past President Shields reported the **Lawyers Helping Lawyers Assistance Program Committee** was hosting a suicide prevention program later in the day. Governor Pringle reported the **Legislative Monitoring Committee** has set its next meeting and is gearing up for the 2022 legislative season. Governor Smith reported the **Military Assistance Committee** will meet Dec. 17. Governor Hutter and April Moaning reported the **Solo & Small Firm Conference Planning Committee** met in December to discuss programming and registration costs. Governor Garrett reported the **Women in Law Committee** has completed its transition into an OBA section, enjoyed good member turnout at Annual Meeting and new section officers have been elected.

CLIENTS' SECURITY FUND REPORT

Chairperson Micheal Salem reported the Client's Security Fund Committee considered 29 total claims made against the fund. The committee recommended approval of 19 claims, paying out $176,590; denial of seven claims; and continued three claims to 2022 for further investigation. The board approved a motion to accept the committee's report and approve the recommended claims. The board also approved a motion to distribute

a news release aimed at publicizing the approved claims after the appropriate reviews of the release had been completed.

BOARD OF EDITORS

The board approved a motion to approve President Mordy's appointment of Bryan W. Morris, Ada, to complete an unexpired term from District 8; term expires Dec. 31, 2022.

PRESIDENT-ELECT HICKS' APPOINTMENTS

Board of Editors – The board passed a motion to approve the appointment of Associate Editors W. Jason Hartwig, Clinton (District 4); Evan Taylor, Norman (District 5); and reappointment of Jana Knott, El Reno (District 9); terms expire Dec. 31, 2024.

Clients' Security Fund – The board passed a motion to approve the appointment of members Leslie Brier, Tulsa, and Sawmon Davani, Norman; and reappointment of Dietmar Caudle, Lawton, and Catherine Burton, Oklahoma City; terms expire Dec. 31, 2024.

Oklahoma Indian Legal Services Board of Directors – The board passed a motion to approve the reappointment of Kymberly Cravatt, Ada; term expires Dec. 31, 2024.

YOUNG LAWYERS DIVISION LIAISON APPOINTMENTS TO THE OBA STANDING COMMITTEES

YLD Chair-elect Erwin presented the slate of appointments to the board. He reported that some committees still need to have YLD liaisons appointed. A written list of appointments was submitted to the board for its review.

UPDATES AND IMPROVEMENTS TO OBA DIGITAL PUBLICATIONS

Director Rasmussen described the Communications Department's plan to merge the weekly *Courts & More* digital publication with the biweekly *E-News* publication in an effort to streamline the number of emails members receive from the association. In addition, the *Courts & More* website is being redesigned. The new digital publication plan will go into effect Jan. 1, 2022.

STRATEGIC PLANNING PROCESS BY OKLAHOMA CENTER FOR NONPROFITS

Janetta Cravens, with the center, described her team's work statement and explained the scope of work related to consulting on the development of a strategic plan for the OBA. She explained costs for billable services and processes for work completion. The OBA's organizational mission was discussed. Ms. Cravens took questions from governors related to the executive search process. Discussion took place. The board agreed the next step is decision making and contract review with the center.

SUICIDE PREVENTION PROGRAM

Director Johnson described the programming, sponsored by the Lawyers Helping Lawyers Assistance Program Committee, scheduled to take place later in the day. She invited the board to attend. She said a recorded version of the event may be made available online when a review is complete.

NATIONAL CONFERENCE OF COMMISSIONERS FOR UNIFORM STATE LAWS

President-Elect Hicks proposed to submit the following three candidates to Gov. Stitt for consideration and appointment of two to the conference: Cheryl Plaxico Hunter, Oklahoma City; Laura H. McConnell-Corbyn, Oklahoma City; and Ryan Timothy Leonard, Oklahoma City. Terms will expire June 1, 2026. Names must be submitted to the governor by Feb. 1, 2022.

STRATEGIC PLANNING COMMITTEE

President-Elect Hicks appoints William J. Baker, Stillwater; Matthew Beese, Muskogee; April Moaning, Oklahoma City; Susan Shields, Oklahoma City; and Peggy Stockwell, Norman; to the Strategic Planning Committee. 2022 President-Elect Hermanson appoints April Moaning, Oklahoma City; and Susan Shields, Oklahoma City; to the Financial Planning Subcommittee. Terms expire Dec. 31, 2024.

UPCOMING OBA AND COUNTY BAR EVENTS

President Mordy reviewed upcoming bar-related events, including the annual "Has-Beens" Party for outgoing board members in January, Board of Governors swearing-in ceremony on Jan. 14, 2022, Legislative Kickoff on Jan. 28, 2022, and OBA Day at the Capitol on March 22, 2022.

NEXT BOARD MEETING

The Board of Governors met virtually on Friday, Jan 14, 2022. A summary of those actions will be published in the *Oklahoma Bar Journal* once the minutes are approved.

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Save the Date

THURSDAY,
MARCH 17, 2022
Oklahoma Bar Center

IMPAIRED DRIVING SEMINAR

Spring has sprung, but don't get ahead of yourself. Patio time may be calling your name, but we all need to focus on moderation and limitations.

Join us for this interactive program that timely takes place on St. Patrick's Day.

TOPICS WILL INCLUDE:

- Impaired Driving Goggle Demonstration
- Trial Advocacy Skills
- And much more!

MORE TITLES AVAILABLE IN OUR CLE ONLINE ANYTIME CATALOG:

- **Defending the DUI-Drug Case** - MCLE 6.5/1
- **Drug Recognition Evidence: What the Science & Studies Really Support** MCLE 1/0
- **Expungements - What Is In A Criminal Record** - MCLE 1/0

Stay up-to-date and follow us on

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OBF Announces 2022 Housing Protection & Community Redevelopment Grantees

By Candice Pace

THE OKLAHOMA BAR Foundation is proud to announce $203,000 in grants to six nonprofit organizations for fiscal year 2022 program funding. These grantee programs provide legal services to low-income Oklahomans in the areas of foreclosure and eviction, domestic violence, civil legal aid and commutation.

OKLAHOMA BAR FOUNDATION
Law. Education. Justice.

Ms. Pace is OBF director of development & communications.

2022 HOUSING PROTECTION & COMMUNITY REDEVELOPMENT GRANTEES:

Grantee	Area of Service	Funding Amount
Community Action Agency (LASO)*	Canadian and Oklahoma counties	$20,000
Legal Aid Services of Oklahoma – Mortgage Foreclosure Defense	Comanche, Cotton, Pittsburg and Tillman counties	$25,000
OCU School of Law – Pro Bono Housing Foreclosure & Eviction Assistance Program	Oklahoma County	$45,250
Safe Center (LASO)*	Stephens and Jefferson counties	$45,000
South Tulsa Community House (LASO)*	Tulsa	$22,500
Tulsa County Public Defender – Project Commutation	Tulsa County	$45,250
	Total	**$203,000**

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

OKLAHOMA BAR FOUNDATION PRESENTS

Diamonds & Disco 75

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6-10-2022

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- Oklahoma City Association of Black Lawyers
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- OU College of Law
- Valerie & Joe Couch

Balance vs. Harmony

By Dylan D. Erwin

THERE ARE A HANDFUL OF phrases all young lawyers carry with them into practice like bar cards. "It depends" is one – an oft-used phrase when extended family discovers your new professional pedigree and asks you off-the-cuff legal questions around the table at Thanksgiving. "This isn't legal advice" is another and one most commonly paired with "it depends." I've lost count of how many times I've begun a sentence with, "Now, remember, this isn't legal advice; this is just your friend Dylan talking." Yet another phrase, and one that can seem laughable to some and a nefarious incantation to others, is "work-life balance." It's this third phrase where we'll spend the next 500-or-so words.

On Dec. 9, 2021, I became a father. In a single moment, my life became simultaneously more complicated and more straightforward than it has ever been. Complicated because on top of all my professional responsibilities, my family life had just received another adorable variable. Straightforward because becoming a parent, I've learned, helps cull the unnecessary distractions and focuses your attention. Where I once lived a life of distractions, I've now, through the sheer will and brute force of an eight-pound human, begun living a life of intention. Shortly after my daughter's arrival, that old phrase "work-life balance" came creeping out of my subconscious to take stock of the new emotional terrain.

Young attorneys tend to tiptoe around the concept of "work-life balance." For many of us early in our careers, we feel as though balance is something that must be earned rather than something to strive towards. I will be the first to admit this isn't a healthy approach. However, as any good mentor will tell you, identifying a problem is important, but identifying a solution is even more important. As such, being the good millennial lawyer that I am, I turned to the internet for guidance.

On July 30, 2019, the American Bar Association published an article penned by attorney Gabrielle Pelura titled "Our Work-Life Balance Needs an Overhaul." This article stands for the idea that in the age of technology, it has become more and more difficult to differentiate between "work" hours and "life" hours. In light of the blurring of these lines, as Rae Steinbach states in her article "Forget Work-Life Balance – Try Work-Life Harmony Instead," we can "avoid the negative impact of aiming for perfect balance in our lives and competing with misleading social media updates" by focusing on "creating harmony between our work and personal lives, making time for fun, achieving our goals, and acknowledging that the rhythm of our lives." By way of illustration, Ms. Steinbach states, "Instead of being concerned with how taking a midday break to go to a workout class will affect your performance appraisal, be more comfortable in embracing how this is important in maintaining work-life harmony." Both Ms. Pelura and Ms. Steinbach stand for the belief that *integrating* your personal and professional lives and seeing how they *benefit one another* "creates a healthier coexistence that will let you thrive more easily in both aspects of your life."

As Allen Saunders advised us in 1957, "Life is what happens while you're busy making other plans." Lawyers of all ages need not forget this. In our seemingly never-ending effort to plan and bill and push ourselves to excel *professionally*, it's important to ensure we are putting that same effort into excelling *personally*. At the ripe old age of 33, I now know the key to a good life is not balance – it's harmony.

Mr. Erwin practices in Oklahoma City and serves as the YLD chairperson. He may be contacted at derwin@holladaychilton.com. Keep up with the YLD at www.facebook.com/obayld.

For Your Information

COURT OF CIVIL APPEALS JUDICIAL ASSIGNMENTS ANNOUNCED

The Court of Civil Appeals judicial assignments have been announced. John F. Fischer of Tulsa will serve as the chief judge, and E. Bay Mitchell III of Oklahoma City will serve as vice chief judge. The following have been selected to serve as presiding judge for their respective divisions: Robert D. Bell, Oklahoma City, Division I; Deborah B. Barnes, Tulsa, Division II; Thomas Prince, Oklahoma City, Division III; and Jane P. Wiseman, Tulsa, Division IV. These positions are one-year terms that began Jan. 1.

Chief Justice Richard Darby administers the oath of office.

NEW OBA BOARD OF GOVERNORS OFFICERS AND MEMBERS TAKE OATH

Nine new members of the OBA Board of Governors were sworn in to their positions by Chief Justice Richard Darby during a virtual event on Jan. 14.

Officers taking the oath were James R. Hicks, Tulsa, president; Brian T. Hermanson, Ponca City, president-elect; and Miles T. Pringle, Oklahoma City, vice president. Sworn in to the Board of Governors to represent their judicial districts for three-year terms were S. Shea Bracken, Edmond; Dustin E. Conner, Enid; Allyson E. Dow, Norman; and Angela Ailles Bahm, at large, Oklahoma City. Sworn in to one-year terms on the board were Michael C. Mordy, Ardmore, immediate past president and Dylan D. Erwin, Oklahoma City, Young Lawyers Division chairperson.

LHL DISCUSSION GROUP HOSTS MARCH MEETING

"Helping the Lawyer in Need" will be the topic of the next Lawyers Helping Lawyers monthly discussion group. The group will meet March 3 in Oklahoma City and March 10 in Tulsa. Each meeting is facilitated by committee members and a licensed mental health professional. The small group discussions are intended to give group leaders and participants the opportunity to ask questions, provide support and share information with fellow bar members to improve their lives – professionally and personally. Visit okbar.org/lhl for more information.

MARK YOUR CALENDARS FOR DAY AT THE CAPITOL MARCH 22

Oklahoma lawyers, let your voices be heard! The OBA will host its annual Day at the Capitol Tuesday, March 22. Registration begins at 9:30 a.m. at the Oklahoma Bar Center, 1901 N. Lincoln Blvd., and the agenda will feature speakers commenting on legislation affecting various practice areas. There will also be remarks from the judiciary and bar leaders, and lunch will be provided before heading to the Capitol for the afternoon. Watch for more details soon at www.okbar.org/dayatthecapitol.

IMPORTANT UPCOMING DATES

Don't forget, the Oklahoma Bar Center will be closed Monday, Feb. 17, in observance of Presidents' Day. Also, be sure to docket the 2022 Solo & Small Firm Conference at the Choctaw Casino Resort in Durant June 23-25.

ASPIRING WRITERS TAKE NOTE

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

CONNECT WITH THE OBA THROUGH SOCIAL MEDIA

Have you checked out the OBA LinkedIn page? It's a great way to get updates and information about upcoming events and the Oklahoma legal community. Follow our page at www.linkedin.com/company/OKBarAssociation and be sure to check out the OBA on Twitter, Facebook and Instagram.

ON THE MOVE

Christopher J. Wilson was appointed interim U.S. attorney for the Eastern District of Oklahoma by U.S. Attorney General Merrick B. Garland and was sworn in by Chief U.S. District Judge Ronald A. White. The appointment became effective Dec. 26 and will continue for 120 days. Mr. Wilson has served as acting U.S. attorney for the Eastern District since March 1, 2021, and has been an assistant U.S. attorney for the district since 2006. As a federal prosecutor, he handled a variety of criminal matters, including terrorism, violent crime, firearms, white collar, public corruption, narcotics and child exploitation.

Eric Odom has been elected a member of the Oklahoma City law firm of Blaney, Tweedy, Tipton & Hiersche PLLC, now known as Blaney, Tipton, Hiersche & Odom PLLC. **Chris Tweedy** has left the firm. Mr. Odom has been with the firm since graduating from the OU College of Law. He practices in the areas of business, commercial and real estate law.

Robert K. Campbell, **Jessica N. Cory** and **C. Eric Davis** have been named directors of Phillips Murrah. Mr. Campbell practices in family law, specifically focusing on divorce, legal separation and custody issues. He received his J.D. from the OCU School of Law. Ms. Cory practices in tax law, including general tax planning, business succession planning and the structuring of complex transactions. She received her LL.M. in taxation from the New York University School of Law. Mr. Davis is a member of the firm's Clean Energy, Healthcare and Government Relations and Compliance practice groups. He received his J.D. from the University of Michigan Law School and also serves as a prosecutor for the Oklahoma Construction Industries Board.

Zachary Stuart has joined the Oklahoma City office of Conner & Winters LLP as an associate attorney. He practices primarily in the areas of commercial litigation, real estate and public utility regulatory matters. Mr. Stuart received his J.D. with distinction from the OU College of Law in 2015 and began his legal career at the Tulsa County District Attorney's Office as an assistant district attorney.

Logan James and **Cathleen McMahon** have joined the Tulsa office of Hall Estill as associates. Mr. James practices in the areas of trusts and estate litigation, banking, construction and complex commercial litigation. He received his J.D. with highest honors from the TU College of Law. Ms. McMahon practices in civil litigation, specifically cannabis, insurance defense and professional liability law. She received her J.D. from the TU College of Law and serves as a member of the Emergency Infant Services Young Professionals Board of Directors.

Rodney L. Cook has joined the Oklahoma City office of Crowe & Dunlevy as a director, and **John T. Stone** has joined as an associate attorney. **Randall J. Yates** has joined the firm's Tulsa office as a director. Mr. Cook practices in product liability, warranty, insurance and fraternity law. Mr. Stone, a member of the Litigation & Trial and Insurance practice groups, represents clients in a range of commercial transaction and business litigation matters. Mr. Yates is a member of the Appellate, Litigation & Trial and Indian Law & Gaming practice groups.

Molly Carson has been named a partner of McCall Parkhurst & Horton's Dallas office. Ms. Carson will serve as bond counsel, disclosure counsel and underwriters' counsel for a variety of Texas entities.

The Helton Law Firm has added three new attorneys and has relocated to the Ashton Creek Office Park, 9125 S. Toledo Ave., Tulsa, OK 74137. **Minon Frye** joins the firm as of counsel with over 10 years of experience in the areas of family law, international and domestic adoptions, guardianships, business organizations and transactions, estate planning and probate. **Andrew Mihelich** joins the firm as an associate attorney. He practices in the areas of mergers and acquisitions, business transactions and consulting, real estate title and transactions and estate planning. **Elizabeth Iobst** joins the firm as an associate attorney and practices in the areas of probate, trust administration, estate planning, real estate title and transactions and guardianships.

Christian Rinehart joined the Oklahoma Municipal League in August 2021 as an associate general counsel. Mr. Rinehart received his J.D. from the OCU School of Law in 2021.

ON THE MOVE

Michael A. Dial has joined the Oklahoma City office of Hall Booth Smith PC as an associate. He practices in the areas of medical malpractice defense, health care, aging services and general liability. Previously, Mr. Dial was an attorney at other firms in Oklahoma and Texas, where he focused on personal injury, wrongful death and underinsured/uninsured motorist cases. He also has more than a decade of experience working in healthcare as a radiologic technologist.

Kyle D. Evans, a litigation attorney in GableGotwals' Oklahoma City office, has been named shareholder of the firm. **Andrew J. Hofland**, **Justin A. Lollman**, **Timothy J. Sullivan Jr.** and **Michael R. Scoggins**, members of the firm's Tulsa office, have also been named shareholders. Mr. Evans represents corporate and individual clients in a range of commercial matters, including professional liability, health care, aviation, bad faith, breach of contract, class actions, negligence and business torts. Mr. Hofland focuses on white-collar defense and corporate investigations, healthcare litigation and general civil litigation. Mr. Lollman focuses on appeals, complex commercial litigation, employment law, governmental liability and civil rights defense. Mr. Sullivan represents companies in complex commercial and civil litigation, with a focus on the oil and gas industry. Mr. Scoggins practices in the areas of corporate and commercial law, energy law, mergers and acquisitions and real estate transactions.

Melissa J. Cottle, **Harrison M. Kosmider**, **Allison C. McGrew**, **Andrew J. Morris**, **Micah J. Petersen**, **William T. Silvia** and **Anna E. Wolfe** have been elected shareholders of McAfee & Taft. Ms. Cottle focuses on employee benefit matters, including retirement plans, health and welfare plans and executive compensation. Mr. Kosmider represents management in all aspects of employment law and litigation, and a portion of his practice is devoted to general civil and business litigation. Ms. McGrew represents clients in matters involving the buying, selling, leasing, financing and registration of aircrafts. Mr. Morris practices in the area of general civil litigation, including complex commercial litigation and appeals at the state and federal levels. Mr. Petersen practices in complex business litigation, employment litigation, products liability, professional liability, personal injury and insurance defense. Mr. Silvia focuses on a range of business and commercial matters, including contract negotiations, mergers and acquisitions, divestitures, securities, corporate financing, energy industry transactions and real estate transactions. Ms. Wolfe practices in general civil litigation, including insurance litigation, ERISA litigation and complex business litigation. She is a member of the firm's Cybersecurity and Data Privacy Group.

AT THE PODIUM

Judge David Lewis was a featured speaker at the 25th Anniversary Midwest City Dr. Martin Luther King Jr. Prayer Breakfast. This year's prayer breakfast celebration, themed "Midwest City 25th Anniversary - Celebrating the Life and Legacy of Rev. Dr. Martin Luther King Jr.," was held Jan. 17 at the Sheraton Midwest City Hotel.

KUDOS

Justice Noma Gurich was inducted as a Fellow of the College of Workers' Compensation Lawyers at the college's annual meeting in Orlando, Florida, on Dec. 12. The college honors judges, attorneys, administrators and regulators who have made substantial contributions to the nation's workers' compensation system. Justice Gurich was a workers' compensation defense attorney before she was appointed an Oklahoma Workers' Compensation Court judge. She is one of only two state Supreme Court justices in the nation who previously served as a workers' compensation judge.

Judge Brad Benson was appointed to the Committee on Judicial Elections by Chief Justice Richard Darby. The nine-member committee hears complaints against judicial candidates and takes appropriate enforcement action to maintain the independence, integrity and impartiality of the Oklahoma judiciary. He has served on the Oklahoma Judicial Conference Executive Board since 2012 and was president of the conference in 2017. Judge Benson has served 12 years as a Tillman County judge and received an Award of Excellence from former Chief Justice Noma Gurich in 2021.

Sara Hill and **Adria Berry** were named among Tulsa World's People to Watch in 2022. Ms. Hill is the attorney general for the Cherokee Nation. Ms. Berry is the new Oklahoma Medical Marijuana Authority director.

Roger Rinehart was appointed to serve as the Yukon city attorney, effective Jan. 1. He has served as city attorney for El Reno since 2001 and practices with the El Reno law firm of Rinehart, Rinehart & Rinehart in the areas of probate and estate planning, real estate transactions, oil and gas and general civil litigation. Mr. Rinehart has served as a member of the Oklahoma Board of Bar Examiners since 2012 and serves on the Character and Fitness Committee for the National Conference of Bar Examiners.

Benton Wheatley co-authored the article "Private Equity in the Real Estate Development and Construction Industries," which was published in the State Bar of Texas' *Construction Law Journal*, winter 2021 issue, Volume 17, Issue 2. Mr. Wheatley is a partner at the Austin, Texas, law firm of Duane Morris

HOW TO PLACE AN ANNOUNCEMENT:

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

Submit news items to:

Lauren Rimmer
Communications Dept.
Oklahoma Bar Association
405-416-7018
barbriefs@okbar.org

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

In Memoriam

Benjamin P. Abney of Tulsa died Dec. 9. He was born June 5, 1945, in Columbia, South Carolina. After graduating from Rogers High School in 1962, Mr. Abney attended TU on a tennis scholarship. He received his J.D. from the TU College of Law. **After law school, he served in the National Guard and as a public defender in Tulsa.** In 1972, he cofounded what is now known as Riggs Abney Law Firm, where he practiced for 23 years. He then joined Case & Associates as general counsel. Mr. Abney also served on the Tulsa Chamber of Commerce Board of Directors and as chair of the Tulsa Sports Commission. In 2016, he was inducted into the TU College of Law Alumni Hall of Fame and received TU's Distinguished Alumnus Award in 2018. Memorial contributions may be made to the Benjamin P. Abney Scholarship in Law Endowment Fund at the TU College of Law.

Robert H. Arthur of Houston died June 18, 2021. He was born Jan. 20, 1935. Mr. Arthur received his J.D. from the University of Texas School of Law in 1962.

Kelly R. Bickerstaff of Sherman, Texas, died Nov. 28. He was born Feb. 26, 1959, in Lawton. Mr. Bickerstaff was raised in Marlow, where he was class president and president of Future Farmers of America at Marlow High School. He received his J.D. from the OCU School of Law and began his legal career at the Lubbock, Texas, law firm of McCleskey, Harriger, Brazil & Graf. After moving to Dallas to establish his own law firm, he ultimately relocated to Sherman in 1993. Mr. Bickerstaff was a member of the First United Methodist Church, where he frequently taught middle school, high school and adult Sunday school classes. He also served as a board member and past president of the Boys & Girls Club of Sherman, the Lions Club and the Texoma Exposition and Livestock Show Inc. Memorial contributions may be made to the First United Methodist Church Youth Group, Sherman Education Foundation or the church or charity of your choice.

William E. Boswell Jr. of Norman died Dec. 27. He was born Aug. 2, 1937, in Henderson, Texas. Mr. Boswell graduated from Henderson High School and attended OU, where he was a RUF/NEK. **Upon graduation, he served in the U.S. Navy and worked as a shore patrol officer for NATO forces in northern Italy.** He received his J.D. from the OU College of Law in 1969 and served as the state's first legal intern. Mr. Boswell practiced law for over 30 years, mainly as an assistant prosecutor for Cleveland, McClain and Garvin counties. Memorial contributions may be made to the Norman Veterans Center Benefit Fund.

Darrel G. Camerer of Tulsa died April 25, 2020. He was born April 10, 1930, in Guthrie. **Upon earning his bachelor's degree from Oklahoma A&M in 1952, he served in the U.S. Air Force.** Mr. Camerer received his J.D. from the OU College of Law in 1957 and worked as an accountant for Amoco Production Company before retiring in 1986.

Charles Robert Cox of Tulsa died Dec. 11. He was born Aug. 27, 1949. Mr. Cox received his J.D. from the OU College of Law in 1974.

Edward R. Dick of Katy, Texas, died Aug. 24. He was born April 4, 1924, in Enid. In high school, Mr. Dick was active in scouting – he was an Eagle Scout and earned the Order of the Arrow. He also participated in his school's honor society debate club, which led to his desire to pursue a degree in law from the OU College of Law. **Before going to college, he trained as a bomber pilot in the U.S. Army Air Corps at the rank of second lieutenant but did not see combat in World War II. He was a reservist in the Air Force until his final discharge in 1962.** After working for a short time in the U.S. Attorney's Office in Durango, Colorado, Mr. Dick began a long and successful career with Gulf Oil. He started as a landman, negotiating drilling rights with landowners across the United States. Later, he was promoted to international agreements, negotiating with governments and multinational corporations in Europe, Africa, Russia and the Pacific Islands. Memorial contributions may be made to the Alzheimer's Association.

Toby G. Flowers of Norman died Dec. 23. He was born June 30, 1975, in Oklahoma City. Mr. Flowers received his J.D. from the OU College of Law in 2001 and began his legal career with the law firm of C. Craig Cole & Associates. He served as counsel for the David Stanley Auto Group for many years, recently stepping away from that position in the summer of 2021.

Roger W. Foster of Clinton died May 13, 2021. He was born Sept. 3, 1945, in Ringwood. **Mr. Foster joined the U.S. Army in 1966 and served for six years. He began his career in artillery but was quickly chosen for flight school. He earned his commission in 1967 and served as a helicopter pilot through the Vietnam War and in South Korea.** In 1988, he received his J.D. from the OCU School of Law and practiced family law and criminal defense in Clinton. He was a fierce champion of children's welfare, fought for equal rights for all parents and touched the lives of many. Memorial contributions may be made to the Old Paws Rescue Ranch in Enid.

George Patrick Garrett of Edmond died Jan. 2. He was born Oct. 18, 1949, in Liberty, Missouri. **Mr. Garrett was a member of the U.S. Air Force Reserves.** He attended college at the University of Central Missouri in Warrensburg, Missouri, and received his J.D. from the OCU College of Law in 1978. Licensed to practice law in Oklahoma, Texas and Missouri, Mr. Garrett ran a successful law office in Edmond and retired as an administrative law judge for Oklahoma's Department of Human Services.

Dianne Barker Harrold of Fort Gibson died Dec. 11. She was born April 20, 1951, in Tulsa. Ms. Harrold was a 1969 graduate of Stilwell High School and became a single mother in the early 70s before child support laws existed. She received her bachelor's degree in social work from Northeastern State University and joined the founding mothers of Help-In-Crisis to help protect victims of domestic violence. As an advocate for these victims, she saw the inadequacies for victims' rights and was determined to make a difference. In 1987, she received her J.D. from the TU College of Law. While working as an assistant district attorney, Ms. Harrold became one of the first Native American women to serve as district attorney in Oklahoma and the only woman to serve as district attorney of District 27. She continued advocating for victims across Indian country, serving in various roles for multiple tribes, including her own, the Cherokee Nation. She was a judge, professor, mentor, advocate and trailblazer.

Kenneth M. Hemry of Oklahoma City died Sept. 18, 2021. He was born May 5, 1942, in Oklahoma City. Mr. Hemry graduated from Northwest Classen High School in 1960 and earned his bachelor's degree in English from OU. He received his J.D. from the OU College of Law in 1967. **Upon graduation, he entered the U.S. Army, where he served as a first lieutenant in the Vietnam War and was awarded the Bronze Star Medal.** In 1972, he returned to Oklahoma City and practiced at the family law firm of Hemry & Hemry until 2015. He then took a job riding the Oklahoma district court circuit as a senior attorney for the law firm of Shapiro and Cejda until his retirement in 2021.

Barbara S. Holder of Vancouver, Washington, died Jan. 16, 2021. She was born Nov. 13, 1944, in Oklahoma City. Ms. Holder received her bachelor's degree in journalism in 1968 from OSU and her J.D. from the OCU School of Law in 1979. Before retiring in 1996, she served as an administrative law judge for the Oregon Bureau of Labor & Industries. Memorial contributions may be made to the Sierra Club Loo Wit Group.

Gary Lynn Jarrard of Edmond died July 27, 2021. He was born May 2, 1948, in Ardmore. Mr. Jarrard received his J.D. from Baylor Law School. Memorial contributions may be made to Hope is Alive Ministries, Wish for Our Heroes or Crossings Community Church.

John J. Martens of Arlington, Virginia, died Jan. 3, 2020. He was born May 8, 1940, in Liberal, Kansas. Mr. Martens received his J.D. from the OU College of Law, an LL.M. from the University of Virginia School of Law, an associate degree in real estate from Northern Virginia Community College and a certificate in financial planning from the George Washington University. **He served as a U.S. Marine, a U.S. Navy attorney and staff judge advocate, and a Department of Defense civilian. He also served 21 years in the Navy with both combat and non-combat assignments.** Mr. Martens was laid to rest at Arlington National Cemetery. Memorial contributions may be made to the Wounded Warrior Project.

Steven Donald Moore of Texarkana, Texas, died Sept. 7. He was born Dec. 12, 1971, in Altus. Mr. Moore graduated from Paris High School in Texas, where his team won the state championship high school football game in 1988. He received his bachelor's degree

from Texas A&M University, master's degree from Texas Tech University and J.D. from the Texas Tech University School of Law in 1997. He served as the operator of New Horizons, an organization of group homes for individuals with developmental disabilities in Texarkana. Memorial contributions may be made to the Elk's Lodge in Texarkana.

Stephen Mark Morris of Colorado Springs, Colorado, died Dec. 10, 2019. He was born May 17, 1959. Mr. Morris received his J.D. from the OU College of Law in 1984.

Z. Faye Martin Morton of Choctaw died Dec. 7. She was born Oct. 31, 1951, in Maysville. Ms. Morton graduated from OSU in 1973 with a bachelor's degree in family relations and childhood development. She taught at Red Rock Public Schools for four years before attending law school. In 1981, she received her J.D. from the OU College of Law, where she was a member of the *Oklahoma Law Review*. After a few years she began her 37-year career as an attorney for the Oklahoma Department of Securities and ultimately retired as general counsel. During her career, she was involved in all areas of securities regulation and helped to draft the rules to implement the Oklahoma Uniform Securities Act of 2004. In 2019, she was awarded the Mona Salyer Lambird Spotlight Award. Memorial contributions may be made to the Stillwater Church of Christ University Center Foundation Building Fund.

Jeffrey Blaine Noble of Edmond died Dec. 25. He was born Nov. 14, 1953, in Great Bend, Kansas. Since his father was an engineer for an oil and gas company, he lived in Texas, California, Colorado and Nevada before settling in Tulsa his senior year in high school. He graduated from Tulsa Memorial High School in 1972 and earned his bachelor's degree with distinction in accounting from OU in 1976. Mr. Noble received his J.D. from the OU College of Law in 1979. For 39 years, he served as senior vice president and general counsel for Old Republic Title Company of Oklahoma until retiring in 2020. He was a member and past president of the Oklahoma Land Title Association and past chairman of the OBA Real Property Law Section. Memorial contributions may be made to the Alzheimer's Association.

Oscar P. Peterson Jr. of Lawrence, Kansas, died March 31, 2021. He was born Dec. 26, 1935. After an early career at IBM, he graduated from the Washburn University School of Law and practiced for 40 years in Kansas City. Mr. Peterson's concern for community and humanity led him to serve at Kiwanis, the Lied Center, First Presbyterian Church of Lawrence and Habitat for Humanity. Memorial contributions may be made to the Lawrence Habitat for Humanity.

Elora M. Piatt of Corpus Christi, Texas, died July 16, 2021. She was born June 13, 1931, in Springfield, Missouri. Ms. Piatt received her J.D. from the OU College of Law in 1980 and worked for Woods Petroleum.

Robert N. Sheets of Oklahoma City died Dec. 8. He was born June 16, 1954, in St. Louis. Mr. Sheets received his J.D. from the OCU School of Law in 1979. He was a founding partner of the law firm of McFall, McVay, Sheets, Lovelace and Juras, known now as Phillips Murrah. He was a member of the firm's commercial litigation practice group and received the Outstanding Law Review Alumni Award from the OCU School of Law in 2007, the *Journal Record's* Leadership in Law Award in 2008 and the OBA's Alma Wilson Award in 2011. Upon retiring from the firm in 2020, he became an adjunct professor of law at OCU. Mr. Sheets, aka "the Reading Man," was also dedicated to volunteering on behalf of children and his community.

Jonathan Paul Tomes of Kansas City, Kansas, died Jan. 20, 2021. He was born Oct. 24, 1945, in Chicago. Mr. Tomes graduated from the University of Cincinnati and was awarded an ROTC scholarship. **Upon graduation, he was commissioned as a second lieutenant in the Military Intelligence Corps of the U.S. Army, where he served as an infantry platoon leader in Vietnam. He then entered military intelligence school and served as a military intelligence officer in Germany, commanding a counterintelligence unit. He eventually became the east German branch chief.** He received his J.D. from the OCU School of Law in 1975 and served as a military prosecutor, defense counsel and a military judge with JAGC. Mr. Tomes retired in 1988 after 20 years with the rank of lieutenant colonel. He then became dean of students at the Illinois Institute of Technology Chicago-Kent College of Law and taught several classes. He also served as a lawyer and defense counsel from 1988 until 2019 and as an expert witness in many complicated military and health-care-related cases. Memorial contributions may be made to World Revival Church.

Charles A. Voseles of Tulsa died April 14, 2021. He was born March 1, 1943. Mr. Voseles received his J.D. from the TU College of Law in 1972.

EDITORIAL CALENDAR

2022 ISSUES

MARCH
Impact of *McGirt v. Oklahoma*
Editor: Aaron Bundy
aaron@bundylawoffice.com
Deadline: Oct. 1, 2021

APRIL
Wellness
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Feb. 1, 2022

MAY
Energy
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Feb. 1, 2022

AUGUST
Gaming
Editor: Scott Jones
sjones@piercecouch.com
Deadline: May 1, 2022

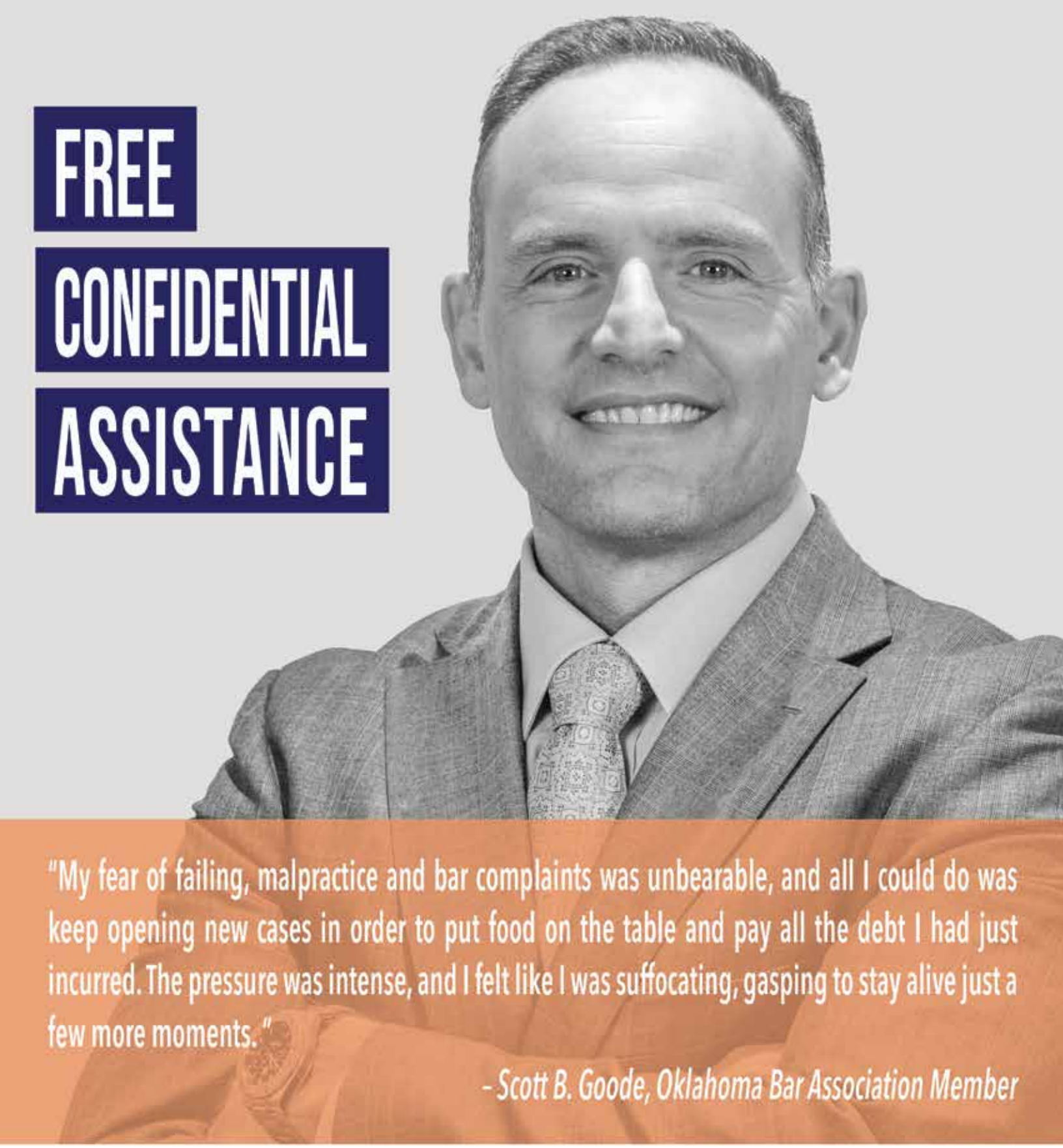
SEPTEMBER
Civil Procedure
Editor: Jana Knott
jana@basslaw.net
Deadline: May 1, 2022

OCTOBER
Education
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: May 1, 2022

NOVEMBER
Municipal Law
Editor: Roy Tucker
RTucker@muskogeeonline.org
Deadline: Aug. 1, 2022

DECEMBER
Ethics & Professional Responsibility
Editor: Casandra Coats
cassandracoats@leecoats.com
Deadline: Aug. 1, 2022

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



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ASSOCIATE POSITION AVAILABLE: 2-5 years of experience; research and writing skills; top 30% graduate; law review or federal judicial clerk experience desired; complex litigation experience and detail oriented preferred. Salary negotiable. Submit resume to Federman & Sherwood, 10205 N. Pennsylvania Avenue, OKC 73120, or wbf@federmanlaw.com; trp@federmanlaw.com.

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OKC AV RATED DOWNTOWN LAW FIRM seeks attorney to do oil and gas title examination and related work. Oil and gas title examination or oil and gas related experience preferred, but not required. Pleasant working atmosphere with benefits provided. Send cover letter and resume to robin@eliasbooks.com.

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Associate General Counsel

At Saint Francis Health System (SFHS), we offer a wide variety of medical specialties at locations throughout eastern Oklahoma. From the tiniest premature newborns to end-of-life support to all the needs in between, the physicians and staff of all SFHS facilities are committed to treating each patient with dignity and integrity.

At SFHS, our employees are our most precious resource and our greatest strength. As the healthcare leader in eastern Oklahoma, we focus on hiring not only the most qualified team members but hiring and retaining people who "fit" into our culture of caring.

JOB SUMMARY: This position provides legal services as a practicing counsel, which includes interpreting laws, rules, and regulations, as well as advising company personnel on legal rights, obligations, and privileges. This position is also accountable for preparing and submitting legal documents, including new government applications, required governmental reports, contracts, and internal legal memos, as well as monitoring laws or regulations affecting SFHS.

Education: Juris Doctor degree from an ABA-accredited law school.

Licenses/Certifications: Admission to practice in Oklahoma (which can be obtained post-hire).

Experience/Knowledge/Skills:

- Minimum of five (5) years' experience in healthcare law, or five (5) years of transaction work, healthcare preferred.
- Superior writing skills.
- Excellent communication ability.
- Ability to work accurately in fact-paced environment and maintain a sense of urgency.
- Independent judgment in making decisions from many diversified alternatives that are subject to general review in final stages only.

Primary Duties and Responsibilities:

- Assists the General Counsel with a wide variety of projects requiring legal expertise, including preparing and reviewing corporate documents and contracts, reviewing and revising hospital policies to achieve legal compliance, reviewing proposed filings with federal and state agencies, and advising and assisting with legal disputes relating to contractual obligations.
- Assists in protecting SFHS's legal interests and maintaining its operations within the scope established by law.
- Identifies and analyzes legal issues, drafts key documents, presents clear recommendations, and assures legal compliance.
- Provides support to General Counsel pertaining to operations including but not limited to changes in laws and regulations, which may impact the health care industry in general and SFHS specifically.
- Assists the General Counsel with corporate compliance with a wide variety of federal and state laws and regulations.
- Provides general legal advice and support as requested by various departments, as approved by the General Counsel, within SFHS.
- Timely and accurately reviews or drafts contracts as requested by SFHS, with particular emphasis on human resources and benefit contracts, real estate and equipment leases, managed care, purchasing software and hardware licensing/support, training contracts and HIPAA related contracts.
- Provides legal support and guidance with respect to all clinical research activities within SFHS, ensuring that all clinical research activities within SFHS comply with applicable laws and regulations.
- Acts as the HIPAA privacy officer for SFHS, with responsibility for ensuring the organizations compliance with the HIPAA privacy standards. Develops and implement education and training for the workforce with respect to the HIPAA privacy standards.
- Develops and maintain a systematic process to monitor ongoing compliance with the privacy standards. Communicate/collaborate as necessary with the organization's HIPAA security officer.
- Drafts and revises corporate minutes and bylaws. Prepares and coordinates filings with the secretary of state. Ensures that corporate records and data are prepared and maintained in compliance with legal regulatory accreditation standards. Accepts and coordinates service of process.
- Provide legal support and guidance to the patient accounting department and outside collection agencies and attorneys with respect to efforts to collect outstanding patient balances.
- Develop and recommend improvements for standard contractual documents, templates and clause libraries.
- Participate in the definition and development of corporate policies, procedures and programs and provide continuing counsel on legal matters and on legal implications of all matters.

To apply, email JPerez-Hicks@saintfrancis.com.

Mock Trial Brings Out the Best

By Dan Crawford

AS THE TITLE SUGGESTS, the Oklahoma High School Mock Trial program does indeed bring out the best, but in whom? The attorneys judging and scoring? The coaches? The students themselves? The answer is simple: Mock Trial brings out the best *in everyone!*

Every year, hundreds of Oklahoma high school students gather together in teams to compete in the OBA state tournament. Months of preparation go into this endeavor. Most schools not only have teachers involved but local attorneys as well who volunteer their time to teach fundamentals.

Each team must prepare and then be ready to perform as the prosecution as well as the defense. Through the early rounds of competition, each team will alternate being the prosecution, and then in later rounds, must switch to the defense. (Think how difficult this would be in real life as practicing attorneys!)

As a former judge from a rural county, I had to deal with the weekly juvenile docket. I not only handled juvenile cases, but the "boot camp" program for the worst repeat offenders was also assigned to me. You might say I was seeing the "worst of the worst" in juvenile behavior, and I began to wonder where all the "best of the best'" were. I FOUND THEM!

They were all participating in mock trial! After being invited to attend my first MLK Tulsa Tournament many years ago, I instantly realized these students were and are our best future. Over the past 14 years, I have personally judged over 100 rounds of competition. I have seen students blossom from nervous ninth graders into seniors with confidence. Each year, there are a handful of "standouts" who actually perform better in trial than some attorneys I have dealt with (by far).

Tulsa lawyer Dan Crawford presides during a recent Mock Trial competition.

I personally know mock trial students who, after graduating from high school, received scholarship offers from schools such as Harvard, Duke, Pepperdine, Southern Methodist University, Stanford and TU, just to name a few. I have judged these rounds for enough years to have seen students make it through law school. A few are now practicing locally here in the Tulsa area.

As we attorneys begin to "age out" of the profession, it behooves us to ensure that those who come after us are, in fact, the best of the best, not just intellectually but ethically as well. I always end each round by reminding the students that, "A legal education will unlock the shackles of ignorance but then handcuff you to responsibility." Mentoring these students is not just a pleasure to me but a privilege as well. The opportunity to help shape and mold the next generation of attorneys is one of the most rewarding projects I have ever been involved with. We are always looking for attorneys who want to judge and score the competition, so if you want to be a part of something great, join us! Learn more about the program, including how to volunteer, at www.okbar.org/mocktrial.

Mr. Crawford practices in Tulsa.

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LOGIC SERIES

FEATURED PRESENTER:

Lenne' Espenschied

Lenné Eidson Espenschied has earned her status as one of the two most popular contract drafting speakers in the U.S. by continually striving for excellence and providing innovative, practical skills-based training for transactional lawyers. She practiced law in Atlanta, Georgia for 25 years, focusing on corporate and transactional representation of technology-based businesses. She is the author of two books published by the American Bar Association: Contract Drafting: Powerful Prose in Transactional Practice (ABA Fundamentals, 3rd Ed. 2019) and The Grammar and Writing Handbook for Lawyers (ABA Fundamentals, 2011). After graduating from the University of Georgia School of Law magna cum laude, Ms. Espenschied began her legal practice at the firm now known as Eversheds Sutherland; she also served as Senior Counsel in the legal department of Bank of America before eventually opening her own law office. As a law professor, Ms. Espenschied taught commercial law, contracts, and contract drafting. Her passion is helping lawyers acquire the skills they need to be successful in transactional practice.

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LOGIC AND ARGUMENTATION FOR LAWYERS

Release Date: March 8, 2022

The purpose of this powerful new series is to help lawyers develop a practical, working knowledge of the principles of logic, argumentation, and persuasion. "Logic" is a study of the principles of sound reasoning; "Argumentation" is the process of reasoning systematically to support a proposition; "Persuasion" is the process by which a person's attitudes are influenced by communications from other people. In Part 1, we'll focus on ten common informal logical fallacies, discussing how they are formulated; how to recognize them; how to use them; and how to refuse them in legal arguments and in contract negotiations.

IS THAT A FACT?

Release Date: March 25, 2022

Classical logic is built upon premises that are presumed to be true, but what exactly is "true" and how does it differ from fact? A recent Pew Survey revealed that 64% of knowledgeable, savvy Americans could not distinguish properly between five factual statements and five opinion statements; the unknowledgeable, unsavvy Americans fared far worse. In this fascinating program, Part 2 of Logic, Argumentation, Persuasion, we'll examine the differences between facts, inferences, beliefs, opinions, and norms. We'll use this information to help you construct more convincing, logical arguments and enhance your credibility in litigation and transactional practice, as well as in casual conversations.

CONVINCE ME

Release Date: April 5, 2022

How convincing are you? From time to time, all lawyers have to convince someone of something, whether in contract negotiations or litigation. In this program, Part 3 of Logic, Argumentation, and Persuasion, we'll show you how to use classical logical syllogisms to construct more compelling arguments. We'll consider formal logical fallacies that undermine your proposition and reduce your chances for success. We'll review convincing syllogisms from several recent SCOTUS cases. We'll use this information to help you construct more convincing, logical arguments and enhance your credibility in litigation and transactional practice, and even in casual conversations.

4 KEY ELEMENTS OF SUPERPOWER PERSUASIVENESS

Release Date: April 22, 2022

If you could choose your own superpower, what would it be? The power of persuasion enables virtually all other pursuits, so it ranks high on the list of preferred superpowers for lawyers. In this program, Part 4 of Logic, Argumentation, and Persuasion, we'll showcase four different methods to enhance your power of persuasion. We'll consider four classical rhetorical strategies and when to use them. We'll provide specific phrases to effectively articulate your position and practical techniques to connect your ideas. We'll use this information to help you construct more convincing, logical arguments and enhance your credibility in litigation and transactional practice, and even in casual conversations.

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