

THE Oklahoma Bar JOURNAL

Volume 79 ♦ No. 7 ♦ March 8, 2008

A man in a white shirt and tie, wearing glasses, sitting at a desk with papers and a pencil in his mouth.

Pretrial Litigation

ALSO INSIDE

- Solo and Small Firm
Conference

Calendar of Events

OBA CLE Seminars

APRIL 3

**Oklahoma Merit Protection Proceedings:
Transition to the Electronic Age - OKC**
6 hrs. of MCLE credit, including 0 hrs. of ethics
Oklahoma Bar Center
1901 N. Lincoln Blvd.

APRIL 4

Spanish for Legal Professionals - OKC
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Healthcare Provider Liability - Tulsa
6 hrs. of MCLE credit, including 1 hr. of ethics
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APRIL 11

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Elder Law Essentials - Tulsa
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APRIL 17

**Hot Topics in Mediation for Advocates
and Mediators - OKC**
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APRIL 18

Elder Law Essentials - OKC
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Reinventing Your Law Practice - Tulsa
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APRIL 25

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April 2008

THE OBA SUMMER GET-A-WAY

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the Fun!**

**June 19-21, 2008
Tanglewood Resort
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Conference**

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Estate Planning, Probate and
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SPRING MEETING

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The 2008 ABA Section of Business Law Spring Meeting will be held April 10-12, 2008, in Dallas at the Hilton Anatole.

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Annual Reviews of Key Business Law Developments

- Alternative Energy and Natural Resources
- Antitrust
- Banking Law
- Business and Corporate Litigation
- Business Bankruptcy
- Corporate Governance
- Cyberspace Law
- Developments in Business Finance
- Employee Benefits & Executive Compensation
- Environmental Law
- LLC Case Law Developments
- Patent Law
- Tax

The Pressing Issues Facing Business Lawyers Today

- Current Tensions in Shareholder and Board Relationships
- Private Equity, Funds and Banks Investing in Financial Institutions
- Anatomy of a Middle Market Private Equity Deal
- Venture Capital and Private Equity Funds – New Issues for GP/LP Negotiation
- Alternative Dispute Resolution Techniques for Use In Commercial Finance Transactions
- Representing Creditors in Consumer Bankruptcies Three Years After BAPCPA
- Consumer Mortgage Industry in the Wake of the Subprime Mortgage Meltdown
- Data Security Breaches and Theft
- Executive Compensation
- Employee Benefits in Mergers & Acquisitions
- Career and Practice Development
- Business Bankruptcy and Corporate Restructuring

Emerging Areas of Global Business Law Practice

- Tax Issues in Cross-Border Acquisitions
- Cross-Border Due Diligence
- Identifying and Mitigating Credit Risk in Cross-Border Financing Transactions
- Secured Transactions South of the Border
- Cross-Border Issues in Internal Investigations
- Selected Aspects of Cross-Border M&A

Important Deadlines:

Meeting Registration: March 20, 2008
Hotel Reservations: March 20, 2008

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THEME:

PRETRIAL LITIGATION

EDITOR: JULIA RIEMAN

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PRETRIAL
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OBA SUMMER GET-A-WAY



Abuses in the Legal Profession Cause Concern

By Bill Conger

As many of you know, I left private practice several years ago to become general counsel for Oklahoma City University and to teach at its School of Law. Many times I have been asked what I miss the least about private practice. Keeping time and the billable hour has to be number one on the list, but the increasing lack of civility and shameful ethical behavior in pretrial practice ranks right up there.

Nothing is more important and central to the litigation process than the search for an ultimate achievement of truth. The search for truth is what lawyers are charged with — and yet lawyers must balance this with the duty to zealously advance the interests of their clients and protect the confidentiality of client information. Balancing these duties is often not easy and the tension can be palpable. Ultimately lawyers must ensure the proper administration of justice; and as officers of the court, we owe important duties to the judicial system, to our colleagues and to the public. To these constituents we owe duties of truth-seeking, courtesy, candor and cooperation while at all times acting in a manner consistent with our clients' legal interests.

How well are we fulfilling and balancing these duties today? Regrettably, a significant number of judges and experienced practitioners will tell you the abuses in the litigation process are more widespread than ever and continue to degenerate. Most of us are sick and tired of it. Indeed, courts are reacting and more decisions and sanctions are being issued to stop this corrupt behavior.

The abuse of discovery, especially in depositions, has resulted in some states establishing strict rules governing the conduct of a deposition. South Carolina has adopted Rule 30(j), SCRCF, which sets forth nine rules of conduct during depositions described by the court as "one of the most sweeping and comprehensive rules on depositions conducted in the nation."

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LAWYER'S CREED

I revere the Law, the System and the Profession, and I pledge that in my private and professional life, and in my dealings with members of the Bar, I will uphold the dignity and respect of each in my behavior toward others.

In all dealings with members of the Bar, I will be guided by a fundamental sense of integrity and fair play.

I will not abuse the System or the Profession by pursuing or opposing discovery through arbitrariness or for the purpose of harassment or undue delay.

I will not seek accommodation for the rescheduling of any Court setting or discovery unless a legitimate need exists. I will not misrepresent conflicts, nor will I ask for accommodation for the purpose of tactical advantage or undue delay.

In my dealings with the Court and with counsel, as well as others, my word is my bond.

I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

I recognize that my conduct is not governed solely by the Code of Professional Responsibility, but also by standards of fundamental decency and courtesy. Accordingly, I will endeavor to conduct myself in a manner consistent with the Standards of Professionalism adopted by the Board of Governors.

I will strive to be punctual in communications with others and in honoring scheduled appearances, and I recognize that neglect and tardiness are demeaning to me and to the Profession.

If a member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, I will not arbitrarily or unreasonably withhold consent.

I recognize that a desire to prevail must be tempered with civility. Rude behavior hinders effective advocacy, and, as a member of the Bar, I pledge to adhere to a high standard of conduct which clients, attorneys, the judiciary and the public will admire and respect.

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EVENTS CALENDAR

MARCH

- 11 **OBA Women in Law Committee Meeting**; 11:45 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Amber Nicole Peckio (918) 549-6747
- 12 **OBA Volunteer Night at OETA**; 5:45 p.m.; OETA Studio, Oklahoma City; Contact: Brandon Haynie (405) 416-7018
- 13 **OBA Bench and Bar Committee Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- Leadership Academy Task Force Meeting**; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Donita Douglas (405) 416-7028
- 14 **OBA Family Law Section Meeting**; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Lynn S. Worley (918) 747-4610
- Lawyers Helping Lawyers Committee Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Tom C. Riesen (405) 843-8444
- 15 **OBA Title Examination Standards Committee Meeting**; 9:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Scott McEachin (918) 296-0405
- 20 **OBA Paralegal Committee Meeting**; 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Joseph H. Bocock (405) 235-9621
- 27 **OBA Legal Intern Committee Meeting**; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: H. Terrell Monks (405) 733-8686
- Oklahoma City Estate Planning Council**; 7:30 a.m.; Crown Plaza Hotel, Oklahoma City; Contact: Joe Womack (405) 840-8401
- 28 **OBA Access to Justice Committee Meeting**; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade A. McClure (580) 248-4675
- OBA Board of Governors Meeting**; Idabel; Contact: John Morris Williams (405) 416-7000

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

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

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THE OKLAHOMA BAR JOURNAL (ISSN 0030-1655) IS PUBLISHED THREE TIMES A MONTH IN JANUARY, FEBRUARY, MARCH, APRIL, MAY, AUGUST, SEPTEMBER, OCTOBER, NOVEMBER AND DECEMBER AND BIMONTHLY IN JUNE AND JULY. BY THE OKLAHOMA BAR ASSOCIATION, 1901 N. LINCOLN BOULEVARD, OKLAHOMA CITY, OKLAHOMA 73105. PERIODICALS POSTAGE PAID AT OKLAHOMA CITY, OK. POSTMASTER: SEND ADDRESS CHANGES TO THE OKLAHOMA BAR ASSOCIATION, P.O. BOX 53036, OKLAHOMA CITY, OK 73152-3036. SUBSCRIPTIONS ARE \$55 PER YEAR EXCEPT FOR LAW STUDENTS REGISTERED WITH THE OKLAHOMA BAR ASSOCIATION, WHO MAY SUBSCRIBE FOR \$25. ACTIVE MEMBER SUBSCRIPTIONS ARE INCLUDED AS A PORTION OF ANNUAL DUES. ANY OPINION EXPRESSED HEREIN IS THAT OF THE AUTHOR AND NOT NECESSARILY THAT OF THE OKLAHOMA BAR ASSOCIATION, OR THE OKLAHOMA BAR JOURNAL BOARD OF EDITORS.



Auto Accidents from the Plaintiff's Perspective: The Client Interview, Prelitigation Investigation & Evaluation

By Derek K. Burch

Benjamin Franklin's famous quote, "By failing to prepare you are preparing to fail," could not be more instructive to the process that should be embraced every time a new personal injury case walks in the door. Effective representation of any personal injury client begins with the initial client interview. In most cases, the initial interview or meeting will set the tone for how the case proceeds. Not only does this interview play a key role in evaluating the client personally, it is the lawyer's first opportunity to begin the process of determining whether time and money should be invested in the case.

After all, most auto accident personal injury cases are handled on a contingency fee basis. If the case does not result in a recovery for the client either by settlement or verdict...everyone loses. So, a properly conducted interview with adequate time spent with the client will help conserve both time and expense which ultimately directly affect the client's recovery and the profitability of a law practice. Whether the case is coming into the law firm as a new case or the case has been handled by another lawyer and is referred, it is difficult to overstate the importance of getting to know the client and finding out **from the client** how the accident happened and facts that give rise to a potential lawsuit. This is also the time and the opportunity to establish the guidelines of the relationship and how the case will proceed.

The initial interview sets the stage for the way you intend to handle a personal injury case.

Most lawyers who don't devote a substantial portion of their practices to personal injury litigation don't fully appreciate the time and expense required to properly prepare, evaluate and successfully litigate a personal injury lawsuit. Before accepting a case, one of the first and most important considerations must be whether the lawyer has available the resources necessary to effectively prosecute the case. Experience has shown that most cases are settled with the best results only after the case is filed and usually close to trial. Because most cases are accepted on a contingency fee arrangement, time management is important, and as in any practice, time is money. The client should be informed in the first meeting how the case

will be handled. The expectations of the client are a driving force in the attorney/client relationship and those expectations should be put into perspective from the onset.

When considering accepting an automobile accident personal injury case, ask yourself: 1) Is this a case I can afford to take? 2) Do I have the resources, both time and money, available to properly prosecute the case? 3) Am I willing to take the case to a jury trial? Keep in mind; it is a mistake to accept a case on the assumption it will settle quickly. If the client is to receive full compensation for the injuries sustained, the case has to be approached from the onset as if it will be filed and litigated.

ESTABLISH A RELATIONSHIP WITH THE CLIENT

The initial client interview is the place to establish a rapport with the client that should continue and grow throughout the case. This time should be used to fully inform the client of the litigation process, and to lay the groundwork for honest communication during the course of the case. A client needs to know that you are genuinely interested in the case and that it will receive the time and attention it deserves. The case is the most important case in the office to that client and the client needs to feel that from the lawyer. At the same time, be just as candid with the client about the potential problems or pitfalls as you are the positive aspects as you discuss the case.

Although some cases may settle with the insurance company before a lawsuit is filed, the initial contact with the client must be approached as if the case will be filed and at some point this client with these facts will be in front of a jury. Preparation of a client for trial begins in this first office conference. You should very carefully explain the procedures that must be followed to get the case to the courtroom. This is essential so that the client will have a complete understanding of the procedures and feel as comfortable as possible with the process.

For example, in filing a personal injury automobile accident case, there exists the possibility of exposing the client's entire medical and mental background to opposing counsel or it becoming public record. Be careful to point out the possibility of exposure of areas a client may consider confidential or sensitive such as medical history, prior history of treatment for mental illness, prior marital history and any crimi-

nal history. Such matters must be discussed and worked out before the case is signed up and money is spent on the case.

Every new client should fill out a questionnaire and provide specific information for your file. The questionnaire should include the following topics in order to assist with the evaluation of a new client and case:

- Family and marital history;
- Prior traffic violations, criminal history, etc;
- Employment history;
- Current employment information including salary, hours, supervisor, etc.;
- Prior injury claims, workers' compensation claims, etc.;
- History of prior lawsuits;
- Specific information about the accident such as:

Date, time, location, how the accident happened, weather conditions, witnesses to the accident, whether law enforcement investigated, whether photographs were taken, whether the client was on the job and/or conducting employment activities at the time of the accident;

- Name, address, insurance carrier and other information specific to any other party to the accident and potential defendants;
- Whether the client has given statements, either by personal interview or telephone, to anyone;
- Types of automobile insurance coverage, including limits of coverage carried by the client; whether the client has major medical insurance coverage, disability coverage or other insurance that would cover the client for injuries suffered in the accident, etc.;
- Description of injuries suffered in the accident, including each and every medical provider whether client was hospitalized, if transported by ambulance, etc.;
- Prior medical history and whether a lawsuit was filed or claim made relating to any prior medical problems;

- Detailed information relating to family physician and all other medical providers during the past five years.

OBTAIN THE CLIENT'S COMPLETE MEDICAL HISTORY

The importance of obtaining a complete history of medical treatment cannot be overstated. The client should be questioned very thoroughly concerning his or her injuries relating to the case, as well as prior injuries and prior medical history. Because it is so important to obtain a detailed medical history as well as a history of other claims filed by the client, we ask the client to take home a multi-page questionnaire to complete at home. This questionnaire provides the client the opportunity to reflect on the discussion in our initial meeting and provide detailed written information for the file. Inevitably, the client omits information in the initial interview that could be important to the evaluation of the case, and this questionnaire provides another opportunity for the client to communicate and provides a ready source of information in the file for future reference.

It is virtually impossible to properly evaluate a case unless the client provides a complete list of all doctors, hospitals or other medical care providers relating to injuries suffered in the accident. In addition, if the client identifies any significant medical history, it is imperative that you learn as much as possible about that history and assess the impact of that history on the current case.

The client should be asked to sign medical authorizations, and each of the medical care providers should be contacted for copies of bills, medical records and reports. Always request your own medical records and bills. Whether the case is referred by another lawyer

or the client brings in a stack of medical records and billing statements... always request your own set of medical records on the client. The only way to know you have all of the medical chart from a particular provider is to submit your own request with the client's signed medical authorization.

SET REASONABLE EXPECTATIONS

Your initial interview is the best time to help the client establish reasonable expectations of the ultimate recovery. The client should be instructed concerning the handling of the case and the time necessary to process the case. One of the most common mistakes made by attorneys in interviewing a personal injury client is to not fully inform the client of the process he or she is about to enter. This should be discussed in the initial conference to determine whether the client is willing to contribute his or her time and participate to the extent necessary to properly prosecute the case. Another common mistake is to

make statements about the value of the case that may prove to be unrealistic once the investigation is underway and other facts come to light. Don't oversell the case. Encourage the client to ask questions and be willing to spend the time to fully answer these questions.



“ It is virtually impossible to properly evaluate a case unless the client provides a complete list of all doctors, hospitals or other medical care providers relating to injuries suffered in the accident. ”

Another important aspect of the case that should be carefully explored when the client is first interviewed is the client's attitude about his or her injuries and the compensation that should be recovered as a result of those injuries. This is part of setting reasonable or realistic expectations. Keep in mind from the initial interview and as the case proceeds your client, as a witness, should simply state his or her case and never exaggerate. Exaggeration has the effect of discrediting the entire testimony and turning the jury against a client. Cases are commonly reported where the jury returned a verdict for the plaintiff, but awarded little or no damages simply because they believed the plaintiff was overreaching and the injuries were exaggerated and the jury did not find him or her believable.

Most clients have never been to a lawyer, they don't know what to expect and they have no experience in the legal arena other than what they see on TV or hear about in the news. They have no idea what to expect once the claim has been turned over to the attorney and time should be taken to carefully instruct the client about the process. They should be instructed not to discuss the case with other people. They should further be instructed not to sign anything or give anyone an oral or written statement about the case. Strongly encourage the client to stay in touch with you or with the legal assistant working the case. The single most common complaint clients make against lawyers arises from a lack of communication. I tell all clients, if they get upset, angry or frustrated or if they feel they don't know what's going on with the case, then they are not calling enough or staying in touch to be informed of how the case is proceeding.

ASSESS CLIENT'S APPEARANCE AND DEMEANOR

Often appearances are as important as what is said. My test in every initial meeting with any prospective client is: "Am I willing to invest my time and money to try this case to a judge and 12 jurors...**with this person sitting next to me?**" If not, then I probably won't take the case. The appearance and demeanor of the client should be very carefully assessed. Is this the type of person that a jury will want to help? My experience has been that a jury will look for a way to return a verdict in favor of my client if they like them and want to help them, even if the facts or liability are difficult. On the other hand, juries will find a way to hurt your client

or find a way to minimize a verdict if they do not believe or do not like the client, even in a case with absolutely clear liability. If you don't like the person or the case for whatever reason, there's a good chance a jury won't either.

PREPARE THE CLIENT FOR CROSS-EXAMINATION

It's never too early to prepare the client for cross-examination. In describing the litigation process and what will take place at trial, describe and start preparing the client for cross-examination. On cross-examination, the client should be willing to admit those adverse facts that are clearly established and explain his or her position as favorably as possible. Play the "devil's advocate" in discussions with the client. Determine in the initial interview whether the client is willing to accept the negative aspects of the case. The client's willingness to accept the negative has an appearance of honesty and will improve other people's impressions.

Many times a witness will hurt his or her credibility when the answer to the question asked by the opposing lawyer, even though harmful to the witness' testimony, is obvious and the witness refuses to give a direct answer to the question. This causes the witness to lose credibility with the jury. Again, some of this should be discussed with the client in the initial interview or at least early on in the case to make sure the client is willing to accept what will take place.

PRESERVE EVIDENCE

It is important to instruct your client in the very first visit how to preserve evidence. The client's testimony at the trial may be greatly enhanced by the preservation of exhibits obtained soon after the injury. Photographs of obvious injuries should be obtained, receipts of all expenses that would not have been incurred except for the injury should be saved and photographs of property damage can be helpful in illustrating severity of impact. If these types of exhibits are not obtained early in the case, the evidence may go away or be destroyed and lost forever.

No matter the type of personal injury case, *all* available photographs and/or videotapes should be preserved. If photographs are not readily available, inquiries should be made as to whether photographs or videotapes were taken by an independent source such as the

police, a newspaper, a television station, a bystander or a relative, and the sources should be contacted as soon as possible in an effort to obtain a copy of any photographs or other evidentiary material.

THE INVESTIGATION

After the initial interview with the client, it's time to begin your investigation. In the case of an automobile accident, I immediately obtain a copy of the accident report; I **always** personally go to the scene of the accident; and I **always** personally interview the investigating officer. In addition, statements should be obtained from all potential witnesses to the incident. Whenever possible, the statements should be recorded so there will be no question concerning the accuracy of the statement. In Oklahoma, it is lawful to record a telephone conversation as long as one of the participants in the call is aware that the conversation is being recorded. An investigator should also obtain photographs of the vehicles and physical damage at the scene.

OBTAINING DOCUMENTS AND DETERMINING COVERAGES

Accident Report. You need to get as much information as you can about the accident itself. It probably goes without saying, but you should always obtain the official Oklahoma traffic collision report if one was prepared. Many times your client will already have the accident report. If not, it can be obtained from the responding police department or from the Department of Public Safety. DPS also may have narrative reports, photographs and officer cam videos that you can request. In any fatality case investigated by the Oklahoma Highway Patrol, get a copy of the "Black Book" material. This information is critical to the evaluation process and in making sure the facts as related by the client are as stated.



“ It probably goes without saying, but you should always obtain the official Oklahoma traffic collision report if one was prepared. ”

the DA's office.

Defendant's Insurance Coverage. Unless the tortfeasor's insurance information is provided by the investigating officer or is listed in the accident report, there's not a lot you can do to obtain the tortfeasor's insurance information short of filing a lawsuit. However, many times the carriers will volunteer this information because they know you will get it from them eventually anyway. See 12 O.S. § 3226(B)(1), effective Nov. 1, 2004, which now makes it clear that *any* liability coverage can be discovered through a request for production of documents:

A party shall produce upon request pursuant to Section 3234 of this title, any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

If you are contemplating a policy limits settlement offer before suit is filed, you should make

911 Calls. In some cases, it may be helpful or necessary to obtain documents relating to the 911 emergency call(s). These will include the actual audio, transcripts of the calls and the dispatch logs. Many times this will lead to witnesses that are not listed on the accident report. There may be numerous calls to 911 by witnesses to the accident and each witness may have seen the accident from a different vantage point. Do not fail to get the 911 documentation for the accident. These tapes are usually destroyed after a certain number of days, so they need to be requested as soon as possible. If the accident involves a criminal investigation, the tapes may be in the hands of the local district attorney, and you will have to try to obtain them from

sure that any representations about the extent of the tortfeasor's coverage include any excess or umbrella policies.

Uninsured Motorist Coverage. You will have to make sure you have the most recent and up to date declarations pages for any policy that might cover your client. Often times you will have to obtain those from the insurance agent or even directly from your client's insurer. Even if the declarations show that there is no uninsured motorist coverage and your client doesn't think they have any UM coverage, **always ask the insurer to provide you with the signed rejection of coverage**, signed by a named insured or the applicant, required under 36 O.S. § 3636(G).

Experts. As soon as possible, you will need to determine what kinds of expert witnesses should be retained. If liability is or may be an issue, you may need an accident reconstructionist. If traffic control is an issue, you may need a traffic engineer, etc. As is obvious, any expert should be selected based on his or her background and knowledge in the area that will be the subject matter of litigation. With the understanding that anything the expert receives is discoverable in a lawsuit, the expert should be furnished with as much detailed information as possible concerning how the incident occurred.

Evaluation. Evaluate, evaluate, evaluate. The case should be evaluated for both liability and damages from the very beginning, at the initial interview and it should continue throughout the case. Evaluation of liability and damages should occur continuously throughout the case, i.e., after the initial meeting, after compiling all of the client's medical records, after interviews with the investigating officer and eyewitnesses, after each deposition, etc. Any case can be lost, but most cases will be favorably resolved, either by voluntary settlement or by a jury, if the proper evaluation is conducted at every stage of the case.

It should be carefully explained to the new client that every case has two parts...liability and damages. If you don't have both, you probably don't have a viable case. When evaluating the case from the onset, careful consideration and evaluation should be given to both liability and damages. Many times a set of facts will be presented in which someone did something terribly wrong but the conduct didn't result in significant injury or damages. Conversely, a bad result does not necessarily mean there was negligent conduct.

CONCLUSION

Lawsuits, for the most part, are won or lost before you ever get to the courtroom, and this is particularly true of auto accident cases. It is the attorney's duty to make a very thorough analysis of the case, to advise his or her client, to thoroughly prepare the client, witnesses, and evidentiary materials and to bring this preparation together in a well-organized presentation to the judge and jury. Thorough utilization of the initial client interview is crucial to successfully begin prosecution of an auto accident case. If thorough analysis and preparation are implemented from the onset, the auto accident case will proceed smoothly and with greater success.

ABOUT THE AUTHOR



Derek Burch received his J.D. from OCU School of Law and was admitted to the Oklahoma bar in 1989. His practice areas include personal injury, wrongful death, product liability, catastrophic injury and medical malpractice cases. Mr. Burch is on the board of directors of the Oklahoma Association for Justice and is a member of the President's Club of the American Association of Justice, as well as the Oklahoma and American Bar Associations.

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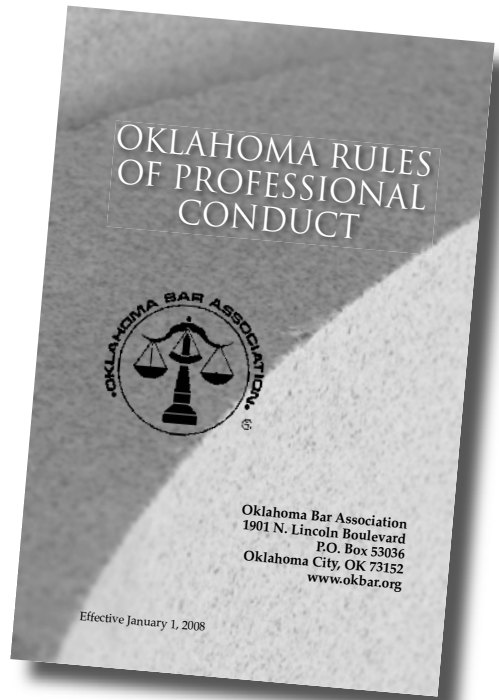
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A General Overview of Jury Instructions and Verdict Forms in Civil Cases in Oklahoma

By Sharon Thomas

Proper jury instructions are essential to a party's case. "Instructions are explanations of the law of a case which enable a jury to understand its duty and to arrive at a correct conclusion."¹ The failure to request an instruction on a key element or affirmative defense may result in the loss of the lawsuit. One of the first things that should be done in working on a lawsuit is to draft jury instructions setting out the key elements of the plaintiff's claims and the defendant's affirmative defenses.

This early preparation will provide you with the guideline for the type of evidence you will need to present at trial and it will focus your efforts in discovery. It also will assist both parties during negotiations, especially in mediation, and will help in explaining the issues to clients.

In Oklahoma state courts, jury instructions are governed by Okla. Stat. tit. 12, §§ 577, 577.2, 578 and 582. In federal court, jury instructions are governed by Fed. R. Civ. P. 51. In both state and federal court, the authorities supporting each requested instruction should be set forth at the end of each requested instruction.

Under Okla. Stat. tit. 12, § 577.2, the Oklahoma courts are to use the Oklahoma Uniform Jury Instructions, unless the court determines that those instructions do not accurately state the law or when the uniform instructions do not contain an instruction on a subject. The Oklahoma Uniform Jury Instructions do not

cover all causes of actions and defenses. For example, the Oklahoma Uniform Jury Instructions do not include instructions governing nuisance. In the absence of a uniform instruction, it will be necessary to draft an instruction using the elements for the cause of action or defense as provided in the statutes and/or case law. You can sometimes find jury instructions that the Oklahoma Supreme Court approved and that are quoted verbatim in the court's opinion. Even when there are uniform instructions that cover the issues in your case, it is advisable to research the case law to determine whether there are definitions or favorable characterizations of certain elements pertaining to issues in your case that the uniform instructions do not fully cover.

In federal court, there are several publications with suggested jury instructions. One such publication is West's *Federal Jury Practice and Instructions*, which contains instructions that cover most federal claims. However, if

your case in federal court is based on diversity jurisdiction, you need to draft your substantive instructions using the applicable state law. It also may be helpful to obtain a set of instructions that the court has previously given in similar claims. You can find these past instructions by asking the judge's law clerk for the case numbers of prior lawsuits in which the court gave similar jury instructions or by searching the online Pacer system at <http://pacer.psc.uscourts.gov>.

In lengthy or complex cases, you need to consider whether it will be helpful to ask the court to give the jury "preinstructions" prior to opening statements and the presentation of evidence. Preinstructions can include a general overview of the issues in the case and rudimentary definitions of key terms. Courts and commentators have suggested that preinstructions serve the interests of justice by focusing the jury's attention on the issues in advance so that they can more effectively integrate the evidence they hear as the case progresses.² However, instructing the jury on a matter not supported by the evidence may constitute reversible error.³ Therefore, the preinstructions must be carefully drafted so as to limit the information provided to only those matters that are certain to be properly submitted to the jury.

Objections to the court's instructions or to the court's refusal to give a requested instruction must be made on the record at trial.⁴ Under Okla. Stat. tit. 12, § 578, the objections are to be made in open court, outside the hearing of the jury, after the instructions are given to the jury, and the party must recite the particular number of the instruction that was given over the party's objection or the particular number of the instruction that was requested by the party, but refused by the court.⁵ Where an objection is



“ Objections to the court's instructions or to the court's refusal to give a requested instruction must be made on the record at trial. ”

not made, any error in the instructions is waived unless the party can establish "fundamental error." Fundamental error has been defined as error that "compromises the integrity of the proceeding to such a degree that the error has a substantial effect on the rights of one or more of the parties."⁶ With respect to instructions, fundamental error occurs if an instruction, on its face, did not correctly state the law.⁷ An instruction that did not accurately reflect the issues tendered by the evidence does not constitute facial or fundamental error.⁸

Similarly, in federal court, under Fed. R. Civ. P. 51(c) and (d), a party is required to state, on the record, its objections to the court's jury

instructions and the grounds for the objection. Under the same rule, in order to raise error in the failure to give an instruction, the party must have requested the instruction and must have objected, on the record, to the failure to give the requested instruction, stating the grounds of the objection. The ground for the objection must be stated plainly, or it must be obvious and unmistakable. A vague or general objection is insufficient.⁹ As in state court, a failure to properly object will waive the objection, unless there is "plain error," which is equivalent to "fundamental error" in Oklahoma.¹⁰ Plain error is error that is clear or obvious under the law and which affected a party's substantial rights and seriously affected the fairness, integrity or public reputation of the proceedings.¹¹

VERDICT FORMS

General and special verdicts are governed by Fed. R. Civ. P. 49 in federal court and by Okla. Stat. tit. 12, §§ 587 — 589 in Oklahoma state courts. A general verdict is one that provides for the jury to find in favor of one party or the other.¹² A special verdict consists of written

findings on each issue of fact.¹³ An example of a special verdict is one relating to comparative negligence, where the jury is asked to find which parties are at fault, to allocate the fault between the parties, and to find the amount of damages, and the judge is to enter judgment according to the jury's findings.¹⁴



Under Okla. Stat. tit. 12, § 588, all verdicts are to be general, but they may be accompanied by special findings of fact made by the jury. Okla. Stat. tit. 12, § 589 provides that when special findings of fact are inconsistent with the general verdict, the special findings control "and the court may give judgment accordingly."

It is ordinarily in the plaintiff's best interest to use a general verdict form because the appellate court will not speculate as to the basis of the jury's verdict. Defendants, however, should consider requesting special verdict forms, special interrogatories accompanying a general verdict form, or general verdict forms on each cause of action. The purpose of such forms would be to enable the parties and the court to determine the specific findings or basis of the jury's award and to be able to more easily challenge the judgment on appeal if any of those findings are not supported by the evidence.¹⁵

In Oklahoma state court, an objection to the "form" of the verdict submitted to the jury must be made at trial and is waived if raised for the first time in a motion for new trial unless there is fundamental error.¹⁶ Also, the court, if faced with the issue, may hold that an objection to the "form" in which the verdict was returned by the jury is waived if the error could have been corrected by amendment and if an objection was not made before the jury was discharged.¹⁷ The Oklahoma appellate courts have not addressed the issue of waiver of inconsistencies between verdicts or within a

“ The Oklahoma appellate courts have not addressed the issue of waiver of inconsistencies between verdicts or within a special verdict form. ”

special verdict form.¹⁸ However, objections to inconsistencies in the verdict have been permitted to be raised for the first time on appeal or in post-trial motions for new trial and motions for judgment notwithstanding the verdict.¹⁹ If there appears to be an inconsistency on the face of the verdict that could be corrected by resubmitting the verdict form to the jury, it is recommended that an objection be raised before the jury is discharged to ensure that the error is preserved for appeal.

In federal court, if there is a problem on the face of the verdict, such as where the jury failed to complete portions of the verdict form or to answer special interrogatories, or

where the verdict is ambiguous, the party must object and request that the issues be resubmitted to the jury before the jury is discharged; otherwise, the error is waived.²⁰ A post-trial motion is too late. An objection to inconsistency in a special verdict may be raised in a post-trial motion after the discharge of the jury.²¹ However, an objection to inconsistent general verdicts or to inconsistencies between a general verdict and the jury's answers to interrogatories must be made before the jury is discharged so that the issues may be resubmitted to the jury. If such an objection is not made before the jury is discharged, the error is waived, "unless the verdict is inconsistent on its face such that the entry of judgment upon the verdict is plain error."²² The U.S. Court of Appeals for the 10th Circuit has held that general verdicts that resolve separate and distinct causes of action in favor of both parties are not inconsistent on their face, but that where several causes of action are identical and defended on the same ground, a verdict for the plaintiff on one cause of action and for the defendant on another is inconsistent.²³

Drafting jury instructions and proposed verdict forms at the beginning of your lawsuit will assist you throughout the various stages of the litigation. It will enable you to focus on the elements of proof that will need to be met and to marshal your efforts toward those ends, particularly in discovery. The instructions that are drafted at the beginning of the lawsuit, along with the legal authorities cited to support those instructions, can be used in briefing and will enable you to determine if the case is appropriate for a dispositive motion. Determining the elements of the claims and defenses will also allow you to analyze the strengths and weaknesses of your case.

1. *Johnson v. Ford Motor Co.*, 2002 OK 24, ¶ 9, 45 P.3d 86, 90.
2. See W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 583 (1991) (“The case for giving the jury preliminary instructions at the start of the trial is compelling. . . . [N]ot giving preinstructions is like telling the jurors to watch a baseball game and decide who won without telling them the rules until the end of the game.”); F. Strier, *The Road to Reform: Judges on Juries and Attorneys*, 30 Loy. L.A. L. Rev. 1249, 1256 (April 1997) (benefits of preinstructions include enhancing juror recall, improving juror integration of law and facts, creating more informed verdicts, and increasing juror satisfaction); M. Frankel, *A Trial Judge’s Perspective on Providing Tools for Rational Decisionmaking*, 85 Nw. U. L. Rev. 221, 225 (Fall 1990) (“There is no question in my mind that providing jurors with additional tools such as preliminary instructions . . . enhances the rational aspects of the jury’s fact-finding role.”); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 n. 7 (1989) (in a defamation case, the court can prevent juror confusion by instructing the jury “‘in plain English’ at appropriate times during the course of the trial”); *Taoulaareas v. Piro*, 817 F.2d 762, 807 (D.C. Cir. 1987) (Ruth Bader Ginsburg, J., concurring) (“The challenge for the trial judge demands attention throughout the proceedings. It is not met by allowing the jurors to listen, without education, as the evidence unfolds and then submitting the case for their general verdict after ‘dous[ing] [them] with a kettleful of law during the charge that would make a third-year law-student blanch.’”) (quoting *Skidmore v. Baltimore & O.R.R.*, 167 F.2d 54, 64 (2d Cir.)).
3. See *Digital Design Group Inc. v. Information Builders Inc.*, 2001 OK 21, ¶ 36, 24 P.3d 834, 845.
4. See *Sullivan v. Forty-Second West Corp.*, 1998 OK 48, 961 P.2d 801.
5. The requirements of Okla. Stat. tit. 12, § 578 have been stated to be mandatory. See *Sullivan*, *supra*, ¶ 5, 961 P.2d at 802; *Sellars v. McCullough*, 1989 OK 155, ¶ 6, 784 P.2d 1060, 1062. *But see Johnson v. Ford Motor Co.*, 2002 OK 24, n.8, 45 P.3d 86, 90 (objections to instructions were properly preserved where the party, although not following the steps set forth in § 578, apprised the court of its objections and gave the trial court an opportunity to correct its mistakes).
6. *Sullivan v. Forty-Second West Corp.*, 1998 OK 48, ¶ 7, 961 P.2d 801, 803.
7. See *Sellars*, *supra*, ¶ 9, 784 P.2d at 1062-1063.
8. See *Sellars*, *supra*.
9. See *Reed v. Landstar Ligon Inc.*, 314 F.3d 447, 452 (10th Cir. 2002); *Medlock v. Ortho Biotech Inc.*, 164 F.3d 545, 553 (10th Cir. 1999), *cert. denied*, 528 U.S. 813 (1999).
10. *Royal Maccabees Life Ins. Co. v. Choren*, 393 F.3d 1175, 1179 (10th Cir. 2005); *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1190 (10th Cir. 1997).
11. See *Royal Maccabees Life Ins. Co. v. Choren*, 393 F.3d 1175, 1180 (10th Cir. 2005); *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1118 (10th Cir. 2004).
12. *Id.* at 1143.
13. See *Johnson v. ABLT Trucking Co.*, 412 F.3d 1138, 1142 (10th Cir. 2005). In federal court, a jury may also return a general verdict accompanied by answers to interrogatories. *Id.*

14. *Id.* at 1142.

15. See *Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308, 1319 (10th Cir. 1998) (party who did not object to verdict form that provided only one space for the jury to award actual damages and who did not request a verdict form that divided damages between tort and contract claims waived any error and any claim of ambiguity as to whether punitive damages were properly awarded); *AG Services of America v. Nielsen*, 231 F.3d 726, 731 (10th Cir. 2000), *cert. denied*, 532 U.S. 1021 (2001) (in discussing binding effect of a general verdict in determination of equitable claims in the same case, the court stated: “[W]e must consider what findings are explicit or necessarily implied by the verdict, including examining alternative bases by which the jury could have reached its conclusion.”); *Eversole v. Oklahoma Hospital Founders Ass’n*, 1991 OK 80, ¶ 18, 818 P.2d 456, 461 (argument that verdict finding negligence of hospital was inconsistent with the verdict exonerating the hospital’s nurse was not inconsistent with the evidence, the court pointing out that “[t]here was no request for special findings by the jury,” and that the court “will not reverse a jury verdict if supported by the evidence on any theory of law.”). *But see Digital Design*, *supra*, ¶ 37, 24 P.3d at 845 (giving jury instructions that did not distinguish between contract and libel damages was reversible error where the evidence did not support a contract claim and where it was impossible from the verdict form to determine which damages were attributed by the jury to each claim).

16. *Capshaw v. Gulf Ins. Co.*, 2005 OK 5, ¶ 12, 107 P.3d 595; *Medlock*, *supra*, 2005 OK CIV APP 72, ¶ 14, 122 P.3d at 888.

17. See Okla. Stat. tit. 12, § 586.

18. *Cf. G.H.K. Co. v. Janco Investments Inc.*, 1987 OK CIV APP 68, ¶ 9, 748 P.2d 45 (court held that an “inconsistency” within a single, general verdict form was not waived by a failure to raise the issue until a post-trial motion); *Irwin v. SWO Acquisition Corp.*, 1992 OK CIV APP 48, ¶ 5, 830 P.2d 487 (court held that “inconsistency” within a single, general verdict form was waived by raising the issue for the first time in a motion for new trial).

19. See *Strong v. Allen*, 1989 OK 17, 768 P.2d 369 (no mention of issue having been raised prior to the appeal); *Wright v. Central Oklahoma Milk Producers Ass’n*, 1973 OK 15, 509 P.2d 464 (motion for new trial); *Baker v. Locke Supply Co.*, 1987 OK 27, 736 P.2d 155 (motion for new trial).

20. *Hess Oil Virgin Islands Corp. v. UOP Inc.*, 861 F.2d 1197, 1203 (10th Cir. 1988) (unanswered interrogatories); *Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308 (10th Cir. 1998) (ambiguous verdict); *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1191-92 (10th Cir. 1997).

21. See *Loughridge v. Chiles Power Supply Co.*, 431 F.3d 1268, 1274-75 (10th Cir. 2005) (motion to alter or amend judgment); *Johnson*, 412 F.3d at 1140 (motion for new trial); *Bonin v. Tour West Inc.*, 896 F.2d 1260, 1263 (10th Cir. 1990) (motion for new trial); *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 851 (10th Cir. 2000) (motion for judgment as a matter of law).

22. *Johnson v. ABLT Trucking Co.*, 412 F.3d 1138, 1141-42 (10th Cir. 2005). *Id.* at 1141, quoting *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1545 (10th Cir. 1993).

23. *Diamond Shamrock Corp. v. Zinke & Trumbo Ltd.*, 791 F.2d 1416, 1424-25 (10th Cir. 1986), *cert. denied*, 479 U.S. 1007 (1986). *Cf. Oja v. Houmedica Inc.*, 111 F.3d 782, 791 (10th Cir. 1997) (court found a verdict for plaintiff in negligence and for defendant in strict liability inconsistent on its face, despite the facial differences between the causes of action, because the only two elements contested at trial, product defectiveness and injury causation, “were common to all of Oja’s claims.”).

ABOUT THE AUTHOR



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OBA Insurance Law Section Spring Meeting

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8:40 a.m. to 8:45 a.m.	Welcome and opening remarks, Jon Starr, Section Chairperson
8:45 a.m. to 10:00 a.m.	"Hard Knocks in Little Rock - How to Go from Who's Who to Who's He"
10:00 a.m. to 10:15 a.m.	Break
10:15 a.m. to 11:30 a.m.	"Everyday Ethics - Making the Right, Right Decision"
11:30 p.m.	Lunch
12:30 p.m. to 6:00 p.m.	Golf Cherokee Hills Golf Club was originally designed by Perry Maxwell, who also designed the Southern Hills Country Club course in Tulsa. In April 2007, the Tulsa World ranked the course in the Top Ten public access courses in state.

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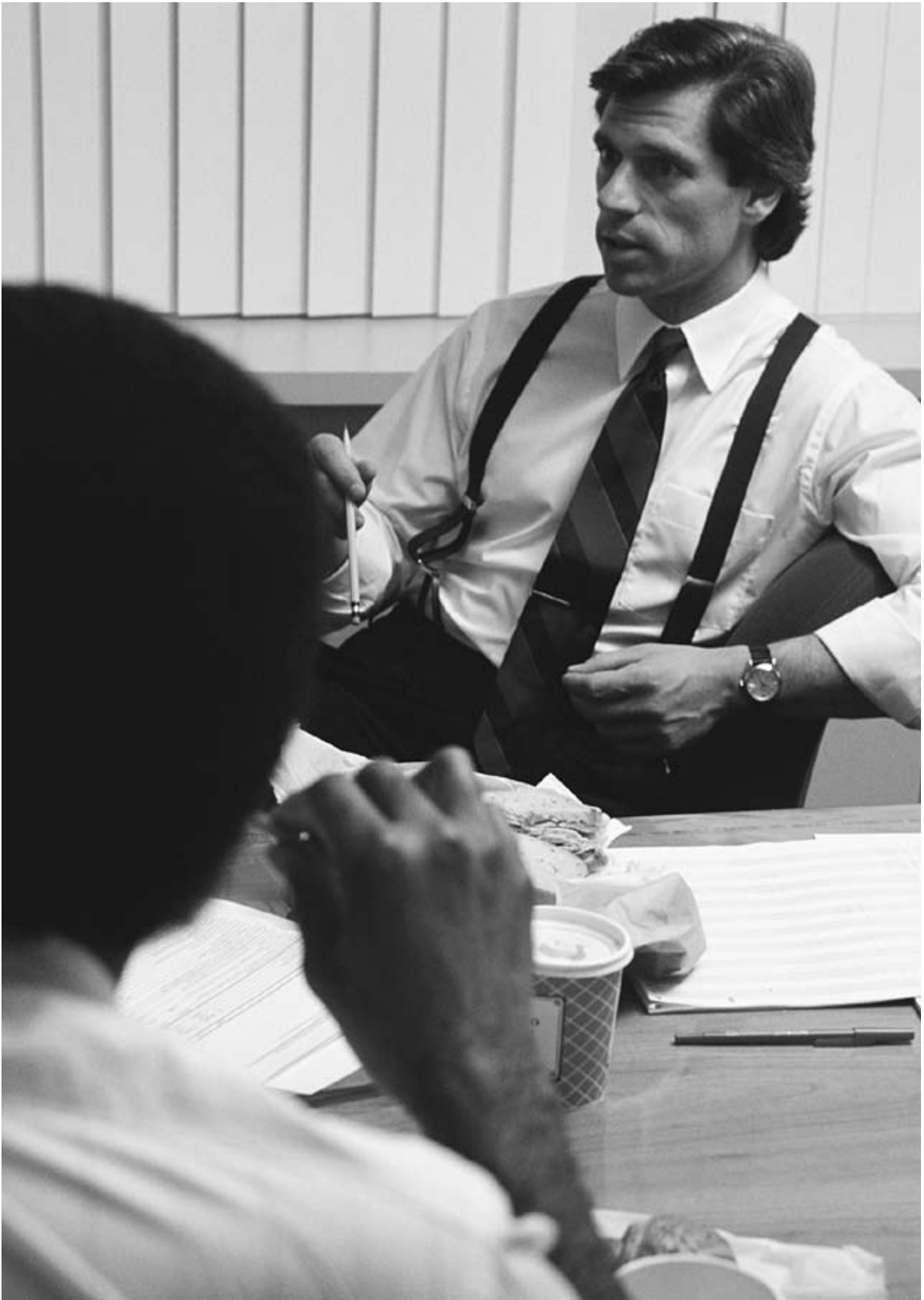
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Discovery Rule 26 — A Practitioner's Guide to State and Federal Rules

By Ed Abel and Lynn B. Mares

With pretrial discovery we have generally eliminated “Perry Mason moments” at trial, but parties are still reluctant to give up too much too soon. The discovery rules prod us to disgorge facts early and often if the matter is relevant to either a claim or defense in the action and is either admissible or “reasonably calculated to lead to the discovery of admissible evidence.”¹ The debate continues over what is “reasonably calculated” to lead to evidence for trial.

In discovery, we try to uncover the true facts and circumstances rather than conceal them.² We are searching for the truth based on full revelations.³ “Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”⁴ Although the theory is clear, the practice is not always. We have found the Federal Advisory Committee Notes very instructive in fleshing out the rules.

INITIAL DISCLOSURES IN FEDERAL COURT

Following the successful experience of courts in Canada and the United Kingdom, Fed.R.Civ. P. 26(a) gives discovery a jump-start, requiring disclosure of some important information without waiting for a request from the adversary, thus eliminating the paperwork formerly involved in making requests. Interestingly, the 1993 Advisory Committee Notes stress the initial disclosures are limited to “disputed facts”: “There is no need for a party to identify potential evidence with respect to allegations that are admitted.”⁵ As a practical matter, however,

it is usually easier to list all potential evidence, whether disputed or not.

At or within 14 days after the Rule 26(f) conference, parties in most cases have a duty, without waiting for a request, to make “initial disclosures,” including identification of potential witnesses in chief (non-impeachment type witnesses) and a description of what discoverable information they might have. The short but informative description should enable the other side to know if they will need to take the person’s deposition. We need to avoid the vague “will testify about liability” designations. What does the person know about liability?

Parties must provide copies or descriptions of all documents, electronic information and tangible items they may use to support their claims or defenses or to deny the other party’s allegations — again, non-impeachment type evidence. “Use” is an important word for the 2000 committee, which defines it as

... any use at a pretrial conference, to support a motion, or at trial. The disclosure

obligation is also triggered by intended use in discovery, apart from use to respond to a discovery request; use of a document to question a witness during a deposition is a common example. ... A party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use.⁶



“Parties must reveal any expert ‘retained or specially employed’ who may be used at trial — including the party’s employees regularly involved in testifying.”

The 1993 committee explained:

[A]n itemized listing of each exhibit is not required, the disclosure should describe

and categorize, to the extent identified during the initial investigation, the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information, sufficiently to enable opposing parties 1) to make an informed decision concerning which documents might need to be examined, at least initially, and 2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests.⁷

It is important to know that complying with the requirement to list and describe a document does not constitute a waiver to object to its production; a party may still object to producing documents protected by privilege, attorney work-product or those that are burdensome and expensive to produce.⁸ We will discuss privilege logs below.

Rule 26(a)(1)(C) requires providing a calculation of damages in which the nature and extent of injuries are to be provided:

This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product. Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person.⁹

Rule 26(a)(1)(E) states initial disclosures must be based on information reasonably available to the party even if it has not fully completed its investigation or even if it objects to the completeness of another parties’ disclosures. As explained in the 1993 committee notes,

“The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances ...”¹⁰ Plaintiffs will probably have conducted a more complete investigation by the time discovery is due, but defendants have to get up to speed pretty quickly to identify potential evidence.

Disclosure of expert opinions is an important feature of Rule 26(a)(2). Parties must reveal any expert “retained or specially employed” who may be used at trial — including the party’s

employees regularly involved in testifying. Unique to the federal rule, the disclosure must be accompanied by a written report containing a complete statement of all opinions, the bases for them, the information considered, any exhibits to be used to support them, a curriculum vitae, a list of publications in the preceding 10 years, fees to be charged and a list of other expert testimony given in the preceding four years. The theory is the report will aid in shortening or maybe eliminating deposition time. A non-retained expert does not have to provide a report. "A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report."¹¹ Treating doctors are both fact witnesses and experts, but they are not "retained" as contemplated by the rules.

The requirement for an expert report is a significant difference between the Oklahoma and federal rules, although some of the same information may be obtained through interrogatories in state court.¹² It has long been our practice not to provide expert reports of any kind since they may be based on incomplete facts until discovery has progressed and all parties have a better understanding of issues. Experts now have to be careful to qualify their statements and make it clear opinions can change if other facts are discovered — even at trial. Evidence rules, 12 O.S. § 2703 and Fed.R.Evid. 703, provide experts may base their opinions on facts or data acquired "at or before the hearing." It is important for experts to be flexible and to have the ability to change their opinions when warranted by the facts. However, it can understandably cause quite a bit of consternation with an opponent.

The 1993 committee notes make it clear that anything furnished to an expert will be subject to discovery:

Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions — whether or not ultimately relied upon by the expert — are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.¹³

LIABILITY INSURANCE POLICIES

As part of initial disclosures, Rule 26(a)(1)(D) requires defendants to provide any insurance policy that could satisfy or indemnify part or all of any potential judgment. Knowledge of

liability insurance limits is, in our experience, very helpful in resolving cases. A major incentive to file in federal court used to be that one could discover whether there was adequate insurance. The policies are also required under Section 3226(B)(1) — a new development in Oklahoma law.

Prior to 1970 when the federal rule was amended to allow discovery of liability limits, there was substantial controversy over whether it was wise. As stated by the committee,

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. ... [D]isclosure does not involve a significant invasion of privacy.¹⁴

Since disclosure depends on whether the insurer may be liable, "... an insurance company must disclose even when it contests liability under the policy, and such disclosure does not constitute a waiver of its claim."¹⁵ However, the insurance application is not discoverable: "The insurance application may contain personal and financial information concerning the insured, discovery of which is beyond the purpose of this provision."¹⁶

SIMILARITY OF FEDERAL AND STATE RULES

After the initial disclosure stage in federal court, Rule 26 is very similar to 12 O.S. §3226. Both allow similar methods: oral or written depositions, written interrogatories and requests for production, requests for admission and physical and mental examinations.

Under the Oklahoma rule, the frequency of using the methods is not limited unless the court sets limits. Rule 26 (b)(2) is more explicit about limiting the amount of discovery permitted so it is not duplicative or burdensome and electronically-stored data may not be discoverable if it is "not reasonably accessible." According to the 1983 committee notes, the provision

...is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. ... [It seeks] to oblige lawyers to think through their discovery activities in advance so that full

utilization is made of each deposition, document request, or set of interrogatories. ... The [rule addresses] the problem of discovery that is disproportionate to the individual lawsuit ...¹⁷

Interrogatories in Oklahoma state courts are limited to 30 by Section 3233(A) unless the court decides otherwise. That also forces lawyers to plan ahead about what should be discovered through interrogatories as opposed to other methods. Our firm rarely sends interrogatories at all. We find it much more productive to issue requests for production or take depositions of those in the know. We realize attorneys will be heavily involved in answering interrogatories and would prefer getting the information directly from actual witnesses. Interrogatories are useful to get basic information such as names of witnesses, important dates and other factual data.

TRIAL PREPARATION MATERIALS: "WORK PRODUCT"

Work product is protected by both Rule 26(b)(3) and Section 3226(B)(2). If documents and things are specifically prepared by or for a party or its representative (including by an attorney, consultant, surety or indemnitor) in preparation for litigation, opposing parties will not be able to obtain them absent a showing of substantial need. Our opponents cannot have the work we have done if they can, without undue hardship, do a similar thing themselves.

The 1970 committee observed:

Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial. ...The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents. In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.¹⁸

The committee stressed, "Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by

this subdivision."¹⁹ A very important point is that parties "... may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable."²⁰ Even when a court orders production of work product, it must be careful to distinguish facts from the attorneys' mental impressions, opinions and strategy.

Rule 26(b)(3) and Section 3226(B)(2) do not protect statements taken of parties (including signed written statements or any type of recording and transcription), which must be produced to the parties. We often request or produce actual tape recordings to compare with written transcripts. All witnesses may request a copy of their own statements without having to show undue hardship or substantial need, but we do not produce witness statements to anyone other than the witnesses themselves. Even if statements were taken soon after the incident at issue, if the other parties can depose them and their memories are not significantly impaired, the other parties will probably not be able to show substantial need for our interviews.²¹

TRIAL PREPARATION: EXPERTS

In Oklahoma courts, Section 3226(B)(3) provides parties may issue a single interrogatory to discover the subject matter, substance of facts and opinions, grounds for the opinions, qualifications, publications authored in the last 10 years, compensation, and other cases in which the expert has testified by deposition or in trial in the past four years. As in federal court, documents provided to experts are not protected by the work-product doctrine.²² Therefore, we give experts only those things they need to learn the facts and form their opinions without revealing our thought processes or conclusions as attorneys. The experts' entire files — including correspondence to and from our firm — are discoverable by the other side.

Both Rule 26(b)(4)(B-C) and Section 3226(B)(3)(c) provide the party requesting discovery pay experts in answering interrogatories and testifying at deposition. Many attorneys in Oklahoma like to be sure they are in charge of getting their own experts paid, so they stipulate each party will pay its own experts. The fees apply only to expert witnesses. Unfortunately, many professionals, such as treating physicians, become fact witnesses in

cases and are not entitled to expert witness fees from an opposing party.²³ If the opponent will not pay them an expert fee, the party calling them should provide compensation.

Under both Rule 26(b)(4)(B) and Section 3226(B)(3)(b), those experts who have been retained or specially employed for a case, but who are not expected to testify are protected from discovery unless the opponent can show “exceptional circumstances under which it is impracticable” to obtain facts or opinions by any other means. The rules protect parties who have consulted with experts who were not helpful to their case, and there is usually no shortage of experts to hire for the other side.

Privilege logs are required under both Rule 26(b)(5) and Section 3226(B)(4), including a description of work-product materials being withheld. Information about the withheld material must be specific enough — without revealing the protected information — for the other parties to judge whether the protection is justified.

Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents. ... Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden.²⁴

As the 1993 committee warns, “To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.”²⁵ The federal Rule 26(b)(5)(B) provides for return or destruction of privileged material or work product inadvertently produced.

PROTECTIVE ORDERS

Many parties ask for agreed protective orders to prevent dissemination of proprietary information except for purposes of a particular lawsuit. In addition, if the parties cannot resolve a discovery issue after conferring (or attempting to confer) in good faith about a discovery dispute, one may move for a protective order in the court in which the action is pending or in whatever court has jurisdiction over a dispute involving a deposition. Upon good cause shown, the court under Rule 26(c)(1) or Section 3226(C)(1) may “... make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or

“Many parties ask for agreed protective orders to prevent dissemination of proprietary information except for purposes of a particular lawsuit.”

undue burden or expense ...” The Oklahoma rule, Section 3226(C)(1), adds “harassment” and “undue delay.” The court may disallow the discovery altogether or limit it to certain aspects, impose specific conditions, require an alternative method, exclude the presence of persons other than those designated by the court, require depositions and other material to be sealed, and protect trade secrets and similar information. If the motion is denied, the court may order discovery to be had and may impose costs pursuant to Rule 26(c)(2) or Section §3226(C)(2).

The Oklahoma rule, Section 3226(C)(4), requires the party obtaining the protective order to be sure the court clerk handles the material properly and that witnesses are informed of its contents. In addition, Oklahoma has particular provisions when a protective order has the effect of removing any material from the public record; just because parties want secrecy is not sufficient.²⁶ According to Section 3226(C)(2), orders must contain

... a statement that the court has determined it is necessary in the interests of justice to remove the material from the public record, ... specific identification of



“ Plaintiffs and defendants have sparred over who needs to present their witnesses first. ”

the material which is to be removed or withdrawn from the public record, or which is to be filed but not placed in the public record, and ... a requirement that any party obtaining a protective order place the protected material in a sealed manila envelope clearly marked with the caption and case number and is clearly marked with the word ‘CONFIDENTIAL,’ and stating the date the order was entered and the name of the judge entering the order.

Also in Oklahoma’s Section 3226(C)(3), protective orders entered after a document has been microfilmed will not require the microfilm to be amended (doubtless a difficult administrative process). It is important to follow the correct procedure when a party insists on confidentiality. We once had confidential settlement documents show up on OSCN because they had not been properly sealed.

Oklahoma’s Section 3226(C)(7) permits the filing of “John/Jane Doe” petitions — clearly designated as fictitious names — when a protective order regarding a party’s identity will be sought. We have used a Doe plaintiff in a case involving infection with HIV from a transfusion and in other cases when it

was justifiable to disguise the name of the party in the public record.

WHO GOES FIRST?

Plaintiffs and defendants have sparred over who needs to present their witnesses first. The 1993 committee notes answer the question in regard to expert depositions: “...[I]n most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue.”⁷⁷ It makes sense to submit the theory of the case and then have it rebutted.

Neither Rule 26(d) nor Section 3226(D) require a certain sequence of discovery to be followed, but the federal rule protects parties from discovery before the Rule 26 conference and provides parties may stipulate or the court may order a specific sequence “for the convenience of parties and witnesses and in the interests of justice...”

The provision was new in the federal rule in 1970. The committee notes stated:

A priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects: First, this priority rule permits a party to establish a priority running to all depositions as to which he has given earlier notice. Since he can on a given day serve notice of taking many depositions he is in a position to delay his adversary’s taking of depositions for an inordinate time. Some courts have ruled that deposition priority also permits a party to delay his answers to interrogatories and production of documents. ... Second, since notice is the key to priority, if both parties wish to take depositions first a race results. ... But the existing rules on notice of deposition create a race with runners starting from different positions. The plaintiff may not give notice without leave of court until 20 days after commencement of the action, whereas the defendant may serve notice at any time after commencement. Thus, a careful and prompt defendant can almost always secure priority. This advantage of defen-

dants is fortuitous, because the purpose of requiring plaintiff to wait 20 days is to afford defendant an opportunity to obtain counsel, not to confer priority. Third, although courts have ordered a change in the normal sequence of discovery on a number of occasions, ... and have at all times avowed discretion to vary the usual priority, most commentators are agreed that courts in fact grant relief only for "the most obviously compelling reasons."²⁸

SUPPLEMENTING RESPONSES

Attorneys typically request opposing parties to supplement their responses to discovery in certain ways. However, the rules require supplementation only under certain circumstances. We typically answer any request to supplement that we will supplement as required by the rules. According to Rule 26(e) and Section 3226(E), the duty only arises if the party learns or obtains information that the response is incomplete or incorrect in some material respect and the additional or corrective information has not otherwise been made known to the other parties. It is especially important to supplement requests for the identity of witnesses or to notify the adversary when an expert's opinion changes materially. A sure way to delay trial is to find witnesses late in the game or to belatedly change expert opinions.

The rule calls for reasonable supplementation, however, as stated in the 1993 committee notes:

Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. ...The revision also clarifies that the obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony [other than experts' testimony].²⁹

AGREEING ON DISCOVERY PLANS

Rule 26(f) makes it the joint responsibility of all attorneys and unrepresented parties to arrange a discovery conference. "The obligation to participate in the planning process is imposed on all parties that have appeared in the case, including defendants who, because of

a pending Rule 12 motion, may not have yet filed an answer in the case."³⁰

The state rule, Section 3226(F), provides for a conference at the discretion of the court or upon a proper motion by a party. Discovery plans or scheduling orders put some pressure on all parties to conduct discovery efficiently. Without them, justice grinds much too slowly in some cases.

CERTIFICATE OF GOOD FAITH

Both Rule 26(g) and Section 3226(G) provide that in signing discovery requests and responses, parties and their attorneys certify the information, to the best of their knowledge, after a reasonable inquiry and in accordance with existing law (or a good faith argument for the extension, modification or reversal of the law), is not offered for an improper purpose and is not unreasonable, unduly burdensome or expensive under the circumstances. If the rules are abused, sanctions may be imposed.³¹

As observed by the 1993 committee:

Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems. ... The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. ... Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake. Given our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay. ... As a result, it has been said that the rules have "not infrequently [been] exploited to the disadvantage of justice." ... These practices impose costs on an already overburdened system and impede the fundamental goal of the "just, speedy, and inexpensive determination of every action."³²

Oklahoma lawyers are generally courteous and aware of the many advantages of cooper-

ating with their adversaries in discovery. The need for sanctions should be rare.

1. Fed.R.Civ.P. 26(b)(1); 12 O.S. §3226(B)(1).
2. See, *City of Edmond v. Parr*, 1978 OK 70, ¶ 7, 587 P.2d 56, 57.
3. See, *State ex rel. Oklahoma Bar Association v. Lloyd*, 1990 OK 14, 787 P.2d 855, 859 (damaging pages of medical records withheld).
4. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).
5. Advisory Committee Notes on Fed.R.Civ.P. 26, 1993 Amendments, Subd.(a)(1).
6. Advisory Committee Notes on Fed.R.Civ.P. 26, 2000 Amendments, Subd. (a)(1).
7. Advisory Committee Notes on Fed.R.Civ.P. 26, 1993 Amendments, Subd.(a)(1).
8. *Id.*
9. *Id.*
10. *Id.*
11. Advisory Committee Notes on Fed.R.Civ.P. 26, 1993 Amendments, Subd.(a)(2).
12. 12 O.S. §3226(B)(3).
13. Advisory Committee Notes on Fed.R.Civ.P. 26, 1993 Amendments, Subd.(a)(2).
14. Advisory Committee Notes on Fed.R.Civ.P. 26, 1970 Amendments, Subd.(b)(2).
15. *Id.*
16. *Id.*
17. Advisory Committee Notes on Fed.R.Civ.P. 26, 1993 Amendments, Subd.(b).
18. Advisory Committee Notes on Fed.R.Civ.P. 26, 1970 Amendments, Subd.(b)(3).
19. *Id.*
20. *Id.*
21. See, e.g., *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 86 F.R.D 160 (E.D. Wis. 1980) (facts could be obtained in depositions or interrogatories); *Wagi v. Silver Ridge Park W.*, 580 A.2d 1093, 1095, 1100 (N.J. Super. 1989) (must first show something inadequate in deposition testimony); *Sullivan v. Smith*, 604 N.Y.S.2d. 304, 305 (A.D. 3 Dept. 1993)(not sufficient if memories "not as clear" as when they gave prior statements); *Castle v Sangamo Weston Inc.*, 744 F.2d 1464, 1467 (11th Cir. 1984)(cannot establish substantial need if have not taken deposition); *Setzers Super Stores of Georgia v. Higgins*, 121 S.E.2d 305, 309 (Ga. 1961)(party seeking statement must first make effort himself to obtain information).
22. *Id.*
23. See, *Oklahoma Orthopedic & Arthritis Foundation Inc. v. Millstead*, 666 P.2d 242, 1983 OK CIV APP 15 (subpoenaed treating doctor not owed expert fee); *Heffron v. District Court Oklahoma County*, 2003 OK 75, 77 P.3d 1069 (unretained expert fire investigator who investigated fire in course of his duties entitled only to ordinary witness fee).
24. Advisory Committee Notes on Fed.R.Civ.P. 26, 1993 Amendments, Subd.(b)(5).
25. *Id.*
26. See, Oklahoma Open Records Act, 51 O.S. § 24A.2 for the public policy involved in keeping public records accessible; see also, 51 O.S. §24A.5; *Nichols v. Jackson*, 2001 OK CR 35, 38 P.3d 228; *Oklahoma Pub. Co. v. District Court*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977) (When court had not ordered delinquency hearing open to public, but

presence of media was known to the court, its order to preclude publication of juvenile's name and picture violated the First and Fourteenth Amendments).

27. Advisory Committee Notes on Fed.R.Civ.P. 26, 1993 Amendments, Subd.(a)(2).
28. Advisory Committee Notes on Fed.R.Civ.P. 26, 1970 Amendments, Subd.(d).
29. Advisory Committee Notes on Fed.R.Civ.P. 26, 1993 Amendments, Subd.(e).
30. Advisory Committee Notes on Fed.R.Civ.P. 26, 1993 Amendments, Subd.(4).
31. *Id.*
32. Advisory Committee Notes on Fed.R.Civ.P. 26, 1993 Amendments, Subd.(g).


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Bell Atlantic Corp. v. Twombly: A New Definition of Notice Pleading for Federal Courts

By Charles B. Goodwin

In terms of day-to-day civil practice, the U.S. Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*¹ is, at least on its face, the most significant of the past year and perhaps the past decade. In *Twombly*, the Supreme Court expressed concern that the broad principles which have governed American civil procedure for the last 50 years — liberal pleading standards that make it easy to commence cases, followed by the crucibles of discovery, summary judgment and trial that separate the cases with merit from those without — too often lead to substantial injustice.

In the court's view, liberal pleading standards, while generally laudable, have become increasingly onerous on litigants as the costs of discovery and pretrial litigation have risen. The result of these exorbitant costs has been, in particular, to unduly punish defendants charged with conceivable (*i.e.*, well-pled) but plainly groundless claims by requiring them to either pay to litigate those claims until, at the earliest, they can be disposed of through summary judgment or settle claims they know to be groundless in order to avoid that expense.

Compelled by this concern, the Supreme Court announced a standard of review for motions to dismiss that places stricter burdens on plaintiffs, requiring them to demonstrate the *plausibility* of their claims prior to the expense of litigation. Specifically, the court held that a claim must be dismissed unless the plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face."² In

so holding, the court "retired" the formulation — first articulated by the court in 1957 in *Conley v. Gibson* — that dismissal may not be ordered "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."³

That said, whether the *actual* significance of *Twombly* will match its *facial* significance appears doubtful. To begin, *Twombly* is nuanced (some might say inconsistent): its more extreme statements, those which caused the dissent to label *Twombly* a "dramatic departure from settled procedural law,"⁴ are counterbalanced by repeated qualifications that the court remains committed to liberal notice pleading. Further, even as to *Twombly's* more extreme statements, it is unclear whether there is enough "bright-line" distinction between the plausibility standard announced therein and the standards previously employed to create a real difference

in how judges assess the sufficiency of a complaint. Thus, while *Twombly* presents little good news for plaintiffs, the bad news is not as bad as defendants might hope.

A BIT OF CONTEXT

In 1938, with the adoption of the Federal Rules of Civil Procedure, the United States rejected the technical pleading requirements of English common law and the field code in favor of the liberal standards of notice pleading.⁵ As every first-year law student learns, Fed. R. Civ. P. 8(a)(2) requires only that any pleading asking for relief “contain...a short and plain statement of the claim showing that the pleader is entitled to relief.” In 1957, in *Conley v. Gibson*, the Supreme Court explained that a brief and general complaint will satisfy Rule 8(a) and thus survive a motion to dismiss “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁶

This commitment to liberal pleading standards was confirmed by the Supreme Court as late as 2002. In *Swierkiewicz v. Soreman*, the court unanimously held that an employment discrimination plaintiff need not plead a *prima facie* case of discrimination in order to survive a motion to dismiss.⁷ The court cautioned that the function of Rule 8(a) is not to separate meritorious from unmeritorious claims; rather, the rule “relies on liberal discovery rules and summary judgment motions to define facts and issues and to dispose of unmeritorious claims.”⁸

In 2005, the Supreme Court in *Dura Pharmaceuticals Inc. v. Broudo* indicated that it was thinking anew about the effects of liberal pleading standards. In *Dura*, the court affirmed the dismissal of a claim for violation of Section 10(b) of the Securities Exchange Act of 1934

because the putative plaintiffs had failed to plead loss causation.⁹ The court found that, despite the plaintiffs’ allegations that the price at which they purchased the defendant’s stock had been artificially inflated due to the defendant’s fraudulent misrepresentations and that the plaintiffs had suffered damages thereby, the plaintiffs’ § 10(b) claim should have been dismissed because they failed to allege that their damages were caused by disclosure of the fraud and not any of the lawful events which could in whole or part cause a decline in price.¹⁰ In so holding, the court stated that permitting a claim to go forward absent such specific allegations would allow a “largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence.”¹¹

TWOMBLY’S PROCEDURAL HISTORY

In *Twombly*, a putative class of end-users of local telephone and Internet services brought suit in the U.S. District Court for the Southern District of New York against the four major successors to the “Baby Bell” companies, which collectively control over 90 percent of the market for local telephone service in the contiguous United States.¹² Specifically, the plaintiffs alleged that the defendants had conspired to restrain trade in violation of Section 1 of the Sherman Antitrust Act, both by 1) inhibiting the growth of upstart local telephone/Internet carriers in each defendant’s respective service area, and 2) refraining from competing in each other’s service areas.

The district court dismissed the plaintiffs’ complaint, finding that the facts alleged therein only suggested *parallel* conduct by the defendants and not, as required to state a claim for violation of § 1 of the Sherman Act,



“ This commitment to liberal pleading standards was confirmed by the Supreme Court as late as 2002. ”

an *agreement* to engage in anticompetitive activity.¹³ On appeal, the 2nd Circuit reinstated the claim, holding that it could not “conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.”¹⁴ The Supreme Court reversed, ruling 7-2 that the plaintiffs’ claim must be dismissed because “[w]hen we look for plausibility in this complaint, . . . plaintiffs’ claim of conspiracy in restraint of trade comes up short.”¹⁵

THE NEW PLEADING STANDARD

Writing for the court, Justice Souter explained that a plaintiff must plead “enough facts to state a claim for relief that is plausible on its face.”¹⁶ Although no specific definition of plausibility was given, the court provided the following guidelines:

- The facts alleged “must be enough to raise a right to relief above the speculative level.”
- Allegations that are merely “consistent with” or create a “conceivable” right to relief are insufficient.
- A plaintiff must plead sufficient facts to raise a “reasonable expectation” that discovery will reveal evidence to support the claim.¹⁷

Importantly, the Supreme Court in *Twombly* examined plausibility solely by reference to the *facts* alleged by the plaintiffs. Thus, despite the plaintiffs’ express allegations that the defendants “entered into a contract, combination or conspiracy to prevent competitive entry into their . . . markets and have agreed not to compete with one another,” the court found that dismissal was required because those statements are “merely legal conclusions.”¹⁸ The court cautioned that a plaintiff’s “formulaic” and “naked” recitation of the elements is immaterial, as is “a legal conclusion couched as a factual allegation.”¹⁹ Although *detailed* factual matter need not be set out in a complaint, “Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.”²⁰

The court was direct in its criticism of *Conley v. Gibson*, stating that the “no set of facts” language that has long been used in determining motions to dismiss will no longer be observed.²¹ Justice Souter wrote that this “language has

been questioned, criticized and explained away long enough.”²² Thus, “after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard. . . .”²³ Not exactly a warm farewell.

CONCERN OVER THE HIGH COSTS OF LITIGATION

The Supreme Court was also direct in stating that its adoption of the plausibility standard was motivated at least in part by the increasingly exorbitant costs of modern discovery and pretrial litigation. After repeating *Dura’s* caution against wasting time and money on groundless claims, Justice Souter held that “when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court.”²⁴ Souter further stated, “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”²⁵ While there is little dispute that discovery and pretrial litigation costs have reached staggering levels in complex commercial cases, particularly since the advent of e-mail and electronic document storage, the fact that the Supreme Court is re-examining pleading standards based on those costs must be, at minimum, unsettling to plaintiffs’ attorneys.

Further, the Supreme Court took pains to expressly reject the principal argument made in rebuttal to complaints about high litigation costs, namely that active and effective district judges can keep such costs in control. Departing from *Swierkiewicz*, the Supreme Court flatly discounted the ability of trial courts to limit such costs in any significant way. Even when abuse is not an issue, discovery in large cases involving large corporate defendants is “a sprawling, costly, and hugely time-consuming undertaking.”²⁶ And when abuse is an issue, “the success of judicial supervision . . . has been on the modest side.”²⁷ Further, because summary judgment generally occurs upon completion of discovery and pretrial litigation, it offers little assistance in lessening costs because the damage is already done. Thus, “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”²⁸ Again, these are not new concerns; what is new is that they are

impelling action by the Supreme Court on such a fundamental precept as notice pleading.

THE BAD NEWS FOR PLAINTIFFS IS NOT AS BAD AS IT MAY FIRST SEEM

Despite the apparent significance of the Supreme Court's pronouncements in *Twombly* regarding plausibility, can litigators expect a substantial difference in how judges assess the sufficiency of pleadings? Probably not. It seems doubtful that trial courts will be able to draw a functional difference between a party alleging sufficient facts to state a claim for relief that is plausible on its face and that party providing a statement with sufficient facts to support a conceivable inference of a valid claim. There are differences between these standards, but they are ones of degree and not likely to cause a major (or minor) shift in how motions to dismiss are resolved.

Moreover, there is ample material in *Twombly* to counterbalance its more extreme statements. For example, the Supreme Court cautions that it remains the case that in determining a motion to dismiss, all factual allegations in a complaint must be presumed to be true. Thus, the court in *Twombly* explains that its decision cannot be read as permitting a district judge to dismiss a claim simply because he or she doubts the probability of the plaintiff proving the facts alleged.²⁹

Most notably, the Supreme Court throughout *Twombly* reaffirms its commitment to notice pleading.³⁰ Indeed, only weeks after *Twombly* was decided, the court in *Erickson v. Pardus* reversed the dismissal of a civil rights complaint which the 10th Circuit had found to be "conclusory."³¹ Citing *Twombly* for the proposition that under Rule 8(a)(2) "the statement [of a claim] need only give the defendant fair notice of what the...claim is and the grounds upon which it rests," the court reinstated the plaintiff's claims.³²

APPLICATION BEYOND ANTITRUST CASES

Some early commentators on *Twombly* suggested that its application is limited to antitrust cases. However, that conclusion is contradicted by *Twombly* itself, wherein the Supreme Court

states that its analysis is based solely on an interpretation of Rule 8(a)(2) and not any heightened pleading standard.³³ Thus, *Twombly's* interpretation of Rule 8(a)(2) applies to all pleadings governed by that rule. Further, the suggestion that *Twombly* only applies to anti-trust cases has found little support among the federal district and circuit courts to consider it, which have applied *Twombly's* plausibility standard across the broad spectrum of civil claims.³⁴

“ It seems doubtful that trial courts will be able to draw a functional difference between a party alleging sufficient facts to state a claim for relief that is plausible on its face and that party providing a statement with sufficient facts to support a conceivable inference of a valid claim. ”



EFFECT ON PLEADING IN OKLAHOMA

In instances where an Oklahoma procedural rule is identical to its federal counterpart, Oklahoma courts view the decisions of federal courts interpreting that rule as persuasive.³⁵ Although there are variations between the rules, Okla. Stat. tit. 12, § 2008(a)(1) is identical

to Fed. R. Civ. P. 8(a)(2) in its requirement that all pleadings contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Likewise, Okla. Stat. tit. 12, § 2012(b)(6) is in pertinent part identical to Fed. R. Civ. P. 12(b)(6).³⁶ Thus, prior to *Twombly*, Oklahoma courts called upon to decide motions to dismiss frequently did so by reference to the "no set of facts" formulation prevalent in federal jurisprudence.³⁷

Oklahoma courts will now have to choose whether to continue to apply that standard or, like the U.S. Supreme Court in *Twombly*, retire it in favor of a new plausibility standard. To date, no Oklahoma appellate court has discussed *Twombly* or directly confronted the question of whether the U.S. Supreme Court's new interpretation of the pleading rules will be applied in Oklahoma. However, notwithstanding the identity of the Oklahoma and federal rules, there is an increasing possibility that Oklahoma courts may decline to follow *Twombly*. In the months since *Twombly* was decided, the Oklahoma Supreme Court has, in three opinions and as late as Jan. 29, 2008, invoked the "no set of facts" formulation as the controlling standard for a motion to dismiss.³⁸ Because no mention of *Twombly* is made in any of those decisions, it remains to be seen whether the Oklahoma Supreme Court's continued use of the "no set of facts" formulation is a rejection of *Twombly*'s plausibility standard or a preservation of the status quo while awaiting full consideration of that standard.

1. 127 S. Ct. 1955 (2007).

2. *Id.* at 1974.

3. 355 U.S. 41, 45-46 (1957).

4. *Twombly*, 127 S. Ct. at 1975.

5. See Charles E. Clark, The New Federal Rules of Civil Procedure: The Last Phase — Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure, 23 A.B.A. J. 976, 977 (1937) ("There is certainly no longer reason to force the pleadings to take the place of proof, and to require other ideas than simple concise statements, free from the requirement of technical detail."). Judge Clark was the principal drafter and proponent of the Federal Rules of Civil Procedure.

6. 355 U.S. 41, 46-47 (1957).

7. 534 U.S. 506, 508 (2002).

8. *Id.* at 512.

9. 544 U.S. 336, 347 (2005).

10. *Id.*

11. *Id.* (internal quotation marks and citations omitted).

12. The four defendants, known as incumbent local exchange carriers ("ILECs"), are BellSouth Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc. *Twombly*, 127 S. Ct. at 1962, n. 1.

13. 313 F.Supp.2d 174, 179 (2003).

14. 425 F.3d 99, 114 (2d Cir. 2005).

15. *Twombly*, 127 S. Ct. at 1970.

16. *Id.* at 1974.

17. *Id.* at 1965, 1966, and 1974.

18. *Id.* at 1970.

19. *Id.*

20. *Id.* at 1965 n. 3 (disagreeing with the dissent's argument that notice pleading dispensed with the necessity of pleading facts and citing WRIGHT & MILLER that Rule 8(a)(2) "contemplates the statement of circumstances, occurrences, and events in support of the claim presented").

21. *Id.* at 1969.

22. *Id.*

23. *Id.*

24. *Id.* at 1966 (internal quotation marks omitted).

25. *Id.* at 1967.

26. *Id.* at 1967, n. 6.

27. *Id.* at 1967.

28. *Id.*

29. *Id.* at 1965.

30. *Id.*

31. 127 S. Ct. 2197 (2007) (per curiam).

32. *Id.*

33. *Twombly*, 127 S. Ct. at 1973, n. 14.

34. See, e.g., *Ton Servs. v. Qwest Corp.*, 493 F.3d 1225, 1236 (10th Cir. 2007) (claims for violation of the Telecommunications Act of 1996); *The Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (claim to vacate or modify an arbitration award); *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (claims for invasion of privacy and intentional infliction of emotional distress).

35. See, e.g., *Shores v. First City Bank Corp.*, 689 P.2d 299, 301 (Okla. 1984).

36. One caveat is that the 1993 Committee Comment to § 2012 expressly states that "a petition should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The significance of this statement would appear to be small given that it is made in the commentary and not the rule, and the support provided is pre-*Twombly* federal jurisprudence and specifically the now-overruled *Conley v. Gibson*.

37. See, e.g., *Dyke v. Saint Francis Hospital, Inc.*, 861 P.2d 295, 298 (Okla. 1993) ("The applicable test for appraising the sufficiency of a pleading challenged for failure to state a claim upon which relief may be granted teaches that no dismissal may be effected unless it should appear beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle her to relief."). Notably, an argument could be made that a specific provision of the Oklahoma Antitrust Reform Act makes *Twombly*'s plausibility standard applicable to Oklahoma antitrust claims. The Act provides that it shall be interpreted in a manner consistent with federal antitrust law "and the case law applicable thereto." Okla. Stat. tit. 79, § 212. Consequently, specific application of *Twombly* to Oklahoma antitrust claims would depend upon whether, notwithstanding its procedural nature, *Twombly* falls within the scope of § 212.

38. See *Gens v. Casady School*, ___ P.3d ___, 2008 WL 223301, *2 (Okla. Jan. 29, 2008) (not released for publication at time of publication of this article); see also *Darrow v. Integris Health, Inc.*, ___ P.3d ___, 2008 WL 187389, *2 (Okla. Jan. 15, 2008) (not released for publication at time of publication of this article); *State ex rel. Wright v. Oklahoma Corp. Com'n*, 170 P.3d 1024, 1040 (Okla. 2007).

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Making Sure You Can Use the ESI You Get: Pretrial Considerations Regarding Authenticity and Foundation

By Eric S. Eissenstat

In the modern litigation world, a trial lawyer often requests, assimilates, produces and generates vast amounts of computer data, computer models, computer-generated charts and timelines, animations, e-mails, spreadsheets, digital recordings, Web site materials, instant messages, digital photographs, chat room transcripts, metadata, etc. This information is useful, however, only if one can get it into evidence.

Much has been written about the new “e-discovery” amendments to the Federal Rules of Civil Procedure. However, there has not been nearly as much literature on the requirements to use and admit electronically stored information (ESI) at pretrial proceedings (such as summary judgment) or at trial. The Federal Rules of Evidence and the Oklahoma Evidence Code will govern basic ESI requirements. Yet, while the Federal Rules of Civil Procedure were amended to address specific issues relating to ESI, the Federal Rules of Evidence, for the most part,¹ have remained stagnant.² This article will focus on one discrete ESI evidentiary issue — authenticity/foundation — and the best pretrial practices to prepare to meet those requirements.

INTRODUCTION TO ELECTRONIC EVIDENCE ISSUES

Digital or electronic evidence is typically in the form of either computerized business records or computer-generated evidence. Computerized business records involve the use of

the computer through arranged or compiled objective data, while computer-generated evidence uses the computer to analyze objective input data and generate conclusions based on assumptions contained in the program being run.³

With respect to ESI, “no additional authenticating evidence is required just because the records are in computerized form rather than pencil and pen.”⁴ Yet, computerized data does raise unique issues concerning accuracy and authenticity.⁵ Accuracy can be compromised by incomplete data entry, mistakes in output instructions, programming errors, damaging and contamination of storage media, power outages and equipment malfunctions.⁶ The integrity of data can be impaired in the course of discovery by improper search and retrieval techniques, data conversion or mishandling.⁷ This has led some courts to mandate more stringent authenticity requirements for ESI.⁸ Indeed, some courts have expressed skepticism about electronic evidence, finding it “inherently untrustworthy.”⁹

Professor Imwinkelried cautions:

There are many common, comforting myths about digitized evidence. However, we must come to grips with the harsh realities: Electronic evidence can be modified, it is vulnerable to hackers, the alteration of electronic evidence is difficult to detect, and technicians need additional training in its use. Judges and attorneys alike need to develop a healthy skepticism towards evidence produced by digital technology.¹⁰

Courts and trial attorneys should address upfront the accuracy and reliability of computerized evidence, including any necessary discovery during pretrial proceedings so that challenges to the evidence are not made for the first time at trial.¹¹ When the evidence is voluminous, it may be necessary to verify the evidence by sampling the data and, if errors are made, by stipulating or agreeing to the effect of the observed errors on the entire compilation. Statistical methods may also be used to determine the range and probability of error.¹² Computer evidence generated by a standard publicly available software may be more easily admitted than evidence generated by customer proprietary software.¹³ Simply put, an attorney must make reasonable pretrial inquiries into the validity and source of digital information prior to attempting to use that information in court.¹⁴

In order to ensure ESI is actually admitted at trial requires the trial attorney to focus in pretrial proceedings to satisfy basic evidentiary concerns such as foundation and authenticity. This process is complicated by the fact that ESI comes in “multiple evidentiary flavors.”¹⁵

INTRODUCTION TO ESI AUTHENTICITY ISSUES

Authenticating ESI poses many of the same issues as authenticating other evidence; however, introducing ESI may be more complicated because of the different format in which the record is maintained.¹⁶ The degree of foundation required to authenticate ESI depends on the completeness and quality of the data input, the complexity of the computer processing, how routine the computer operation is, and the ability to test and verify results of the computer processing.¹⁷

Under both the Federal Rules and the Oklahoma Evidence Code, authenticity or identification as a condition precedent to admissibility

is generally satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. The requirement ensures the evidence is trustworthy which can be especially important when a hearsay objection is raised.¹⁸ Judge Weinstein notes that a party seeking to admit an exhibit need only make a prima facie showing that it is what he or she claims it to be.¹⁹ One court addressed the admissibility of e-mails by stating:

The question for the court under Rule 901 is whether the proponent of the evidence has “offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is.” ... The Court need not find that the evidence is necessarily what the proponent claims, only that there is sufficient evidence that the jury ultimately might do so.²⁰

(Emphasis in original.)²¹ Thus, it is critical for the trial attorney to assimilate in advance of trial the necessary evidence to establish this basic fact and identify the witnesses who can provide the necessary testimony.

While this basic fact appears on its face easily satisfied, the reporters are littered with cases²² where counsel has failed to make even this minimal showing, resulting in what has been called a “self-inflicted injury.”²³

Courts often demand that the proponents of ESI pay more attention to foundational requirements than has been customary for introducing evidence not produced from electronic sources.²⁴ Judge Weinstein, in his treatise on evidence, explains that issues regarding the admissibility of electronic records is a fact-intensive issue. If the records are merely stored in a computer, they raise no computer-specific authentication issues. On the other hand, if the computer processes data rather than storing it, authentication issues may arise depending on the complexity and novelty of the computer processing. Because there are many stages in the development of computer data where error can be introduced that can adversely affect the accuracy and reliability of the input, greater scrutiny may be required. Inaccurate results occur often because of bad or incomplete data input but can also happen when defective software programs are used or stored data media becomes corrupted or damaged.²⁵ Thus, Judge Weinstein concludes the degree of foundation required to authenticate computer-based evidence depends on the quality and

completeness of the data input, the complexity of the computer processing, the routineness of the computer operation, and the ability to test and verify results of the computer proceedings. "Determining what degree of foundation is appropriate in any given case is in the judgment of the court. The required foundation will vary not only with the particular circumstances but also with the individual judge."²⁶

Federal Rules of Evidence 901(b)(1)-(10) provide many examples of how authentication may be accomplished and should be consulted and used as ESI is being gathered in discovery. The 10 methods²⁷ identified by Rule 901(b) are non-exclusive.²⁸

At bottom, the requirement of authentication is an implicit function of applying Rule 402, which excludes from admission irrelevant evidence.²⁹ To add probative value under Rule 401, evidence must bear some connection to the case. Without authenticating the evidence by showing that it is genuine and what it purports to be, a mandatory first step in determining whether the evidence is relevant has been overlooked. The Advisory Committee Notes to Rule 901 describe it as "inherent, logical necessity." If the evidence is not what a proponent claims to be, it is irrelevant and inadmissible.³⁰

USING CASE LAW UNDER THE FEDERAL RULES OF EVIDENCE 901(b) TO GUIDE PRETRIAL DISCOVERY

Rule 901(b)(1) - Testimony by a Witness with Personal Knowledge

In *United States v. Kassimu*,³¹ the court held copies of a post office's computer records could be authenticated by a custodian of the records, even though the witness neither personally entered the data nor had knowledge sufficient to testify about its accuracy. The court found the witness laid the proper foundation for introduction of the evidence because he was familiar with the procedure by which the records were generated. With respect to Web

site printouts, one court found that a printout showing what a Web site looked like at various dates in the past was properly authenticated by an affidavit of the administrative director of the Internet archive.³² The director's affidavit verified that copies were accurate reflections of the Web site on the particular dates stated in the Internet archive's records and described in detail the process used to allow visitors to search the archives.

One court, while noting that e-mails may be authenticated by a witness with knowledge that the exhibit is what it is claimed to be, held that authentication may not be made by individuals who are not personally familiar with the e-mail.³³ Likewise, authentication of Web sites by testimony or affidavits of individuals who are not personally familiar with how the Web site is maintained is generally not permitted.³⁴ These cases illustrate that in order to use the ESI you obtain through discovery, you must also identify, depose and/or list the witnesses who can testify with the requisite

personal knowledge that the ESI is what the proponent says it is.

Rule 901(b)(3) - Comparison by Trier of Fact or Expert Witness

Several courts have found that ESI could be authenticated by comparison to other ESI or evidence which had already been authenticated. For example, in *Safavian*, the court allowed e-mails, which were not clearly identifiable on their own, to be compared to other e-mails alleged to be from the same sender, which had been authenticated under Rule 901(b)(4).³⁵ The court found the arguments that the trustworthiness of these e-mails could not be demonstrated, particularly ones forwarded by others, went to the weight of the evidence and not authenticity.³⁶ This rule teaches that lawyers should focus in pretrial proceedings on identifying ESI, such as e-mails, which will be easily admitted and then analyzing and strategizing

“ One court, while noting that e-mails may be authenticated by a witness with knowledge that the exhibit is what it is claimed to be, held that authentication may not be made by individuals who are not personally familiar with the e-mail. ”

how such evidence can be used to admit more difficult ESI into evidence.

Rule 901(b)(4) - Evidence Containing Distinctive Characteristics

Evidence of distinctive characteristics is frequently used as a method of authenticating e-mails and other electronic documents. What must be shown in order to authenticate ESI under this rule appears to be largely up to each individual judge; however, the courts have identified some common factors to consider such as e-mail addresses and the use of names and nicknames throughout the correspondence.

In an 11th Circuit case, the court held that e-mails allegedly sent by the defendant were properly authenticated under Rule 901(b)(4).³⁷ The circumstantial evidence presented included the presence of the defendant's known work e-mail address, the discussion of details the defendant would have been personally familiar with, use of the defendant's nickname, and a conversation with the recipient that was consistent with the e-mail conversation.³⁸ In *Safavian*, the district court allowed authentication of e-mails under Rule 901(b)(4) relying on nearly identical circumstantial evidence.³⁹ And another court allowed an instant message conversation to be authenticated under similar circumstantial evidence, including the presence of a known screen name, use of correct first name and content the alleged participant was familiar with.⁴⁰

Two other distinctive characteristics used to authenticate ESI under 901(b)(4) are "hash marks" and metadata. Hash marks are a unique numerical identifier which can be assigned to documents and groups of documents. Commonly used hash mark algorithms can reduce the chances of two documents having the same hash marks to less than one in a billion. Hashing can be used as the digital equivalent of the Bates stamp.⁴¹ To date, it does not appear that many courts have directly addressed authentication by "hash marking," but it has been discussed in the literature.⁴²

Metadata refers to the data surrounding the creation and use of a document, such as file name, format, location, dates and permissions. Courts have addressed metadata more frequently in discovery; however, it can provide useful information for authentication purposes. Nevertheless, since metadata is not a perfect source of information, it alone may not be

enough to properly authenticate an electronic document.⁴³ Thus, pretrial discovery of metadata can be helpful when authenticating important ESI.

Simply put, Rule 901(b)(4) places many tools in the pretrial arsenal to allow a trial attorney to use the ESI he or she gets. A trial attorney should have a very good understanding of the rule and its construction well in advance of trial to ensure the presentation of the case is seamless.

Rule 901(b)(7) - Evidence That a Writing Authorized by Law is from a Public Office where Items of a Similar Nature are Kept

Courts have permitted authentication of electronic records by proof that the document was obtained from the legal custodian of those records. In *United States v. Meienberg*,⁴⁴ the 10th Circuit held that print outs of approval numbers by the Colorado Bureau of Investigation for defendant's business were properly authenticated.⁴⁵ The court found authentication of electronic public records only required a showing of custody by the bureau and did not require a showing of accuracy as would be required by Rule 901(b)(9).⁴⁶ Thus, the burden of authenticating is substantially less under Rule 901 (b)(7), than under 901(b)(9).

There is a lot of valuable publicly available information relevant to a case on governmental Web sites. Courts have shown a tendency to trust this information making it easy to get into evidence. Always consider these sources in advance of trial and list them on exhibit lists with authenticating witnesses on the witness list.

Rule 901(b)(9) - Evidence Describing a Process or System Used to Produce a Result and Showing that the Process or System Produces an Accurate Result

This rule was specifically designed to encompass computer generated evidence.⁴⁷ The 9th Circuit Bankruptcy Appellate Panel applied a demanding eleven-step test for authenticating an electronic record under Rule 901(b)(9).⁴⁸ Under the test, developed by Professor Imwinkelried, a proponent of ESI must show: 1) the business uses a computer; 2) the computer is reliable; 3) the business has developed a procedure for inserting data into the computer; 4) the procedure has built-in safeguards to ensure accuracy and identify errors; 5) the business keeps the computer in good state of repair; 6)

the witness had the computer read out certain data; 7) the witness used the proper procedure to obtain the readout; 8) the computer was in working order at the time the witness obtained the readout; 9) the witness recognized the exhibit as the readout; 10) the witness explains he or she recognizes the readout; and 11) if the readout contains any strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.⁴⁹ The *Vinhnee* court found the foundational witness had not met all steps of this test because he had no knowledge about the computer's processes and could not assure the accuracy of the results.⁵⁰ While it does not appear that any other cases have adopted this test, it is a standard that attorneys should be prepared to meet. Thus, it would be a good pretrial practice for lawyers to use this test as a guide to ensure that they have discovered and are prepared to introduce the evidence and witnesses necessary to establish each of these requirements.

PRETRIAL PRACTICES RELATED TO SPECIFIC TYPES OF ESI

E-mails

Most of us have become so familiar with e-mails that we now consider them like business letters, to be admitted into evidence just as easily. However, e-mails may be more prone to problems of authenticity (and hearsay) than one might consider at first blush. E-mails are often written casually and may be fraught with jokes, informality, poor grammar and little care given to context. Signatures and names may be



“ For example, counsel should always be prepared to submit evidence in the form of affidavits to support the authenticity of any e-mail that one intends to introduce. ”

omitted. Thus, authenticating e-mails presents issues not faced with traditional letters containing letterhead, paragraph structures, signatures, etc. Moreover, e-mail messages are more susceptible to after-the-fact alteration.

For example, most e-mail systems allow one to edit to a forwarded e-mail message. Generally, such alteration is not obvious to the recipient.

E-mail chains present hearsay within hearsay problems. Such chains attach to an e-mail every e-mail that came before it in a discussion. The problem arises when it is necessary to authenticate all the other prior e-mails in order to get the important “link” to the chain admitted.

Authentication is necessary not only at trial but also at the summary judgment stage. For example, counsel should always be prepared to submit evidence in the form of affidavits to support the authenticity of any e-mail that one intends to introduce. Courts have excluded e-mails at the time of the

dispositive motion, not because the e-mails were clearly inauthentic, but because evidence was not submitted to support their authenticity in the face of a challenge.⁵¹

Because of the spontaneity and informality of e-mails, courts seem to think people are “more themselves” for better or worse, than they are when using other deliberative forms of written communication.⁵² Thus, e-mail evidence often figures prominently in cases where state of mind, motive and intent must be proved.⁵³ E-mails are often authenticated under

Rules 901(b)(1) (person with personal knowledge), 901(b)(3) (expert testimony or comparison with authenticated exemplar), 901(b)(4) (distinctive characteristics, including circumstantial evidence), 902(7) (trade inscriptions) and 902(11) (certified copies of business record).⁵⁴

Because it can be difficult to prove authorship of an e-mail, *i.e.*, who actually wrote the message, other means may be necessary. There are several technical means by which such evidence can be traced to its origins. This can be done through Internet service providers, cellular phone companies, password or access codes, etc. However, identifying the actual person that wrote the message may not be easy because all one has to do to gain access to that person's computer, cell phone, etc., is obtain the password or pass code. Indeed, access to the other person's actual device is not even necessary as he or she can log in from another computer.

The point is obvious. Rule 901(b)(4) permits authentication by "distinctive characteristics." This authentication method is authentication by "circumstantial evidence,"⁵⁵ and has been successfully used to authenticate e-mails.⁵⁶ The *Lorraine* court suggested any electronic document can be authenticated under 901(b)(4) using metadata. Metadata is "data about data."⁵⁷ "Because metadata shows the date, time, and identity of the creator of an electronic record, as well as all changes made to it, metadata is a distinctive characteristic of all ESI that can be used to authenticate it under Rule 901(b)(4)."⁵⁸ Again, pretrial discovery of metadata can be crucial to ensure important ESI gets into evidence.

Because electronic mail can contain critical evidence, it is imperative to consider these authenticity issues at the start of the case and prepare a discovery plan to ensure that such evidence is actually admitted. Finally, it should



“ There are several technical means by which such evidence can be traced to its origins. ”

internal patterns and other distinctive characteristics taken in conjunction with the circumstances.⁶⁰

However, instant messages and text messages also present additional problems not encountered with other types of ESI. With e-mails, a party exchanges messages with a person who is likely known to him personally or whose identity is likely known to the owner or operator of the e-mail server, such as a school or business. In a telephone conversation, a party may be identified by his voice or locution, and there is a presumption that if a party picks up the phone and identifies himself as the person listed at that number in the phone book, he is indeed that person.⁶¹

Those who have teenagers know of the prevalent use of instant messages and text messages. The top five instant messaging services have nearly 170 million active users among them.⁶² More than 50 percent of workers use instant messaging software and U.S. Internet users between 12 and 17 years of age prefer instant messaging to e-mail.⁶³ Many jurors will have used and be conversant with "IM." Thus, use of this type of evidence will become more frequent. The issues surrounding instant mes-

be noted that access to private e-mail and voice mail is regulated by Title 2 of the TCPA commonly known as the Stored Communications Act.⁵⁹ There is no exclusionary rule under that act so that voice mail or e-mail, even when accessed through a violation of the act, is still admissible.

Instant Messages and Text Messages

Like e-mails, instant messages and text messages can be authenticated by evidence sufficient to support a finding that the matter in question is what its proponent claims. They can also be admitted based on distinctive characteristics such as appearance, content, substance,

saging are complex. Those who have an especially knotty instant messaging evidentiary issue should consider Grossman's Law Review article cited above which contains an excellent 26-page discussion surrounding these issues.

Web Sites

Internet Web sites have often been viewed with much skepticism.⁶⁴ While some courts have taken a permissive approach,⁶⁵ most hold that Web sites are not self-authenticated under Rule 902.⁶⁶

Web site authentication issues include the possibility that third persons, other than the sponsor of the Web site, were responsible for the content of the postings, such as a hacker (without the owner's consent) or a third party (with the owner's consent). Further, Web sites have become increasingly interactive. Individuals can shop and make purchases, participate in surveys, sign contracts, post comments, provide videos, music, pictures — all on other people's Web sites. When this conduct becomes relevant to a dispute, Web site information becomes evidence.

Rule 901(b)(1) (testimony from a witness with knowledge) is often used to authenticate Web sites, but the courts differ on how much knowledge is necessary. For example, the 7th Circuit excluded evidence of Web site postings because the proponent failed to show that the sponsoring organization actually posted the statements, as opposed to a third party.⁶⁷ In that case, the court required proof to ensure that the information was not "slipped onto the group's Web sites by the [defendant] herself, who was a skilled computer user."⁶⁸ In *St. Luke's*, the court excluded Web site postings because the affidavit used to authenticate the exhibits was factually inaccurate and the author lacked personal knowledge.⁶⁹

Three questions must be answered explicitly or implicitly with Web sites: 1) what was actually on the Web site; 2) does the exhibit or testimony accurately reflect it; and 3) if so, is it attributable to the owner of the site?⁷⁰ Judge Weinstein also identifies several factors courts should consider in admitting evidence of Internet postings.⁷¹

A witness may be able to authenticate Web site data by showing 1) the witness typed in URL (the www. address), 2) logged into the site, 3) reviewed what was there, and 4) testified that the printout or other exhibit fairly and

accurately reflects it. Web pages also involve HTML (hyper text markup language) codes, a document used on the Internet that provides that text and extra information about the text, *i.e.*, its structure and presentation. Web pages are built with HTML tags or codes imbedded in the text and define the page layout, fonts and graphic evidence as well as hyper-text links to other documents on the Web.⁷²

Chat Rooms

Many of the same foundational issues present in addressing e-mails and text messages are present in chat room content. Further, the fact that chat room messages are posted by third parties often using "screen names" means that it cannot be assumed the content found in a chat room is posted with the knowledge or authority of the Web site host.⁷³ Thus the transcript is almost always authenticated under Rule 901(b)(4) by using circumstantial evidence.⁷⁴ Saltzburg suggests the following foundational requirements must be met to authenticate chat room evidence:

- 1) Evidence that the individual used the screen name in question when participating in chat room conversations (either generally or at the site in question);
- 2) [e]vidence that, when a meeting with the person using the screen name was arranged, the individual ... showed up;
- 3) [e]vidence that the person using the screen name identified [himself] as the [person in the chat room conversation];
- 4) [e]vidence that the individual had in [his] possession information given to the person using the screen name; [and]
- 5) [e]vidence from the hard drive of the individual's computer [showing use of the same screen name].⁷⁵

Discovery to uncover evidence to meet these basic foundational steps will allow the trial attorney to meet most chat room authenticity objections.⁷⁶

Voice Mail, Tape-Recorded Conversations, Digital Video and Audio Recordings

Generally, the foundation for this type of evidence can be shown by a witness who is familiar with the objects seen or sound heard in the recording, the witness then explains the basis for his or her familiarity and testifies that the recording is a fair, accurate, true or good depiction of what it purports to be at the relevant time. Other factors include showing that the recording device was capable of making the

recording and was operational; showing that the operator of the device was competent; establishing the authenticity or correctness of the recording; showing that changes, additions or deletions had not been made; showing the manner of the preservation and identifying speakers (if relevant) and other similar factors.

Because such recordings are now “digitized,” *i.e.*, made from images and can be loaded on the computer, they present unique authentication problems as they are a form of electronically-produced evidence that may be manipulated and altered. Digital recordings and photos may be “enhanced,” such as removing, inserting or highlighting an aspect that the technician wants to change.⁷⁷ Professor Imwinkelried identifies numerous problems with digital photographs which also apply to all other types of digital recordings.

Original digital recordings may be authenticated the same way as other such evidence, *i.e.*, by a witness with personal knowledge of the scene depicted who can testify that the recording or photo fairly and accurately depicts it. If the recording or photograph has been digitally converted, authentication requires an explanation of the process by which it was converted to a digital format. This would seem to require a witness with personal knowledge that the conversion process produces accurate and reliable images and perhaps expert testimony. For digitally enhanced images, it is likely that an expert will be required. Professor Imwinkelried’s article on digital photos is an excellent resource on these issues. The point is again basic. Careful pretrial planning regarding your ESI is essential to a litigant’s success.



“ Nevertheless, many sources suggest that more care is required to authenticate these electronic records than traditional ‘hard copy’ records. ”

or her familiarity with the computer-stored records and explain the basis for his or her familiarity; 2) that the witness recognizes the paper records as being a printout of the computer-stored records; and 3) that the paper records accurately reflect the computer-stored records. “In general, electronic documents are records that are merely stored in a computer and raise no computer-specific authentication issues.”⁷⁹ Nevertheless, many sources suggest that more care is required to authenticate these electronic records than traditional “hard copy” records.⁸⁰

Computer-Generated Records

Computer-generated records differ from computer-stored records in many ways. For example, graphs, tables, animations, slide shows and spreadsheets are all computer-generated records. Thus, issues arise such as whether the computer that generated the records was functioning properly.⁸¹ Establishing the reliability of a system or process does not necessarily require the testimony of an

Electronically-Stored Records and Data

Judge Weinstein observes there are a limitless variety of records stored or generated by computers in the modern age. “[M]any kinds of computer records and computer-generated information are introduced as real evidence or used as litigation aids at trials. They range from computer printouts of stored digital data to complex computer-generated models performing complicated computations. Each may raise different admissibility issues concerning authentication and other foundational requirements.”⁷⁸

With respect to electronically-stored records, the attorney should locate and prepare a witness who can testify 1) regarding his

expert.⁸² Moreover, the witness who testifies concerning the authenticity of computer-generated records does not need to have programmed the computer himself or even understand the maintenance and technical operation of the computer.⁸³ It should be remembered the computer can only process the data given to it; so, if that data is in error and the error goes undetected, the output would also be in error. Likewise, the computer can only process the data as it is instructed to process; so, if that data is incomplete or inaccurate, the output would be error. If there is a deficiency in the manner in which the computer is told to process the data, the output would likewise be in error. Good results are obtained when programs are carefully prepared by trained professionals who understand how programs work and use them accordingly.⁸⁴

Among the factors courts apply in determining whether a proper foundation for admission of computer-generated evidence include whether the computer was standard and in good working order, whether the operators of the equipment were qualified, whether proper procedures were followed, whether reliable software was used, whether the program operated properly, and the exhibit (if any) derived from the computer.⁸⁵ In one case, the court stressed that “these factors represent an approach to the admissibility of computer generated evidence and are not a mechanical, clearly defined test with a finite list of factors to consider.”⁸⁶ Discovery relating to each of these factors is necessary in the pretrial stage to permit effective use of your computer-generated information.

Computer Animations and Computer Simulations

Computer animations and computer simulations also raise unique evidentiary issues.⁸⁷ Because of the persuasive power of demonstrative evidence, such as animations and simulations, courts are obligated to make a thorough foundational inquiry into its reliability before admitting it, given the potential that it may mislead, confuse, divert or otherwise prejudice the trial if not reliable.⁸⁸ In *Sayles*, the court explained the difference between computer animations and computer simulations as follows:

Computer generated evidence is an increasingly common form of demonstrative evidence. If the purpose of the computer evidence is to illustrate and explain a witness'

testimony, courts usually refer to the evidence as an animation. In contrast, a simulation is based on scientific or physical principles and data entered into a computer, which is programmed to analyze the data and draw a conclusion from it, and courts generally require proof to show the validity of the science before the simulation evidence is admitted.⁸⁹

The *Lorraine* court reviewed numerous cases and observed that courts have generally allowed the admission of computer animations if authenticated by testimony of a witness with personal knowledge of the content of the animation, upon a showing that it fairly and adequately portrays the facts and that it will help illustrate the testimony given in the case.⁹⁰ In *Friend v. Time Mfg. Co.*,⁹¹ the court held that, at a minimum, the proponent must show the computer simulation fairly and accurately depicts what it represents, whether through the computer expert who prepared it or some other witness who is qualified to so testify. The opposing party must then be afforded an opportunity for cross-examination.

Computer simulations are treated as a form of scientific evidence offered for a substantive, rather than demonstrative, purpose.⁹² Courts often treat such simulations like other scientific tests and condition admissibility upon showings that 1) the computer is functioning properly; 2) the input and underlying equations are sufficiently complete and accurate (and disclosed to the opposing party so that they may challenge them); and 3) the program is generally accepted by the appropriate community of scientists.⁹³

The *Swinton* case⁹⁴ adopted these factors but observed that the key to authenticating computer simulations is to determine reliability. The court noted the problems that could arise with such evidence include 1) the underlying information itself could be unreliable; 2) the entry of the information in the computer could be erroneous; 3) the computer hardware could be unreliable; 4) the computer software programs could be unreliable; 5) the execution of the instructions which transforms the information in some way — for example, by calculating numbers, sorting names or storing information or retrieving it later — could be unreliable; 6) the output of the computer, such as the printout transcript or graphics, could be flawed; 7) the security system used to control access to

the computer could be compromised; and 8) the user of the system could make errors.⁹⁵

CONCLUSION

Aside from good facts, trials are often won by hard work, advance planning, a thorough understanding of the law applicable to the case combined with creative presentation. Preparing to authenticate ESI at the start of the case will go a long way to ensuring the ESI discovered will actually be admitted to help win the case.

1. See, however, proposed Fed. R. Evid. 502 relating to privilege issues surrounding the inadvertent production of electronic evidence.
2. For sake of uniformity, the Federal Rules of Evidence will be most often referred to in this paper, although the same analysis will often apply equally to the companion rules, such as the Oklahoma Evidence Code.
3. See *Novartis Corp. v. Ben Venue Labs, Inc.*, 271 F.3d 1043, 1054 (Fed. Cir. 2001) (holding that the foundation and methodology of computer programs must be disclosed to satisfy evidentiary requirements and allow meaningful cross-examination).
4. Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* at § 901.08 (Joseph M. McLaughlin ed., Matthew Bender 2d ed.1997).
5. See *Manual for Complex Litigation* (Fourth), § 11.446.
6. *Id.*
7. *Id.*
8. See *In re Vee Vinhnee*, 336 B.R. 437, 444-45 (B.A.P. 9th Cir. 2005) (adopting Professor Imwinkelried's 11-step process for authenticating computer records, stating "[t]he paperless electronic record involves a difference in the format of the record that presents more complicated variations on the authentication problem than for paper records.").
9. *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774 (S.D. Tex. 1999) (referring to information taken from the internet as "voodoo"). See also *Terbush v. United States*, 2005 WL 3325954 at *5 (E.D. Cal. Dec. 7, 2005) ("Information on internet sites presents special problems of authentication.").
10. Imwinkelried, *Digitized Evidence* (Nat'l L. J. Mar. 7, 2005).
11. *Manual for Complex Litigation* (Fourth), § 11.446.
12. *Id.*
13. *Id.*
14. See *Jimenez v. Madison Area Tech. College*, 321 F.3d 652, 658 (7th Cir. 2003) (imposing Rule 11 sanctions on plaintiff and plaintiff's attorney where court found that e-mails were "obviously fraudulent").
15. See *Lorraine v. Markel Amer. Ins. Co.*, 241 F.R.D. 534, 538 (D. Md. 2007) (perhaps the most expansive and detailed opinion addressing admissibility of electronically stored information and an excellent resource for this paper) (hereinafter referred to as "*Lorraine*").
16. *In re Vee Vinhnee*, 336 B.R. 437 (B.A.P. 9th Cir. 2005).
17. *Lorraine*, 241 F.R.D. at 544.
18. See Weinstein at § 901.02[2].
19. *Id.* at § 901.02[3].
20. *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006).
21. See also *United States v. Meienberg*, 263 F.3d 1177, 1180 (10th Cir. 2001) (computer records printouts); *United States v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000) (chat room conversations); *United States v. Reilly*, 33 F.3d 1396, 1404 (3d Cir. 1994) (radio telegrams); *Telewizja Polska USA, Inc. v. EchoStar Satellite Corp.*, 2004 WL 2367740 at *16 (N.D. Ill. Oct. 15, 2004) (website content).
22. See *In re Vee Vinhnee*, *supra* (proponent failed properly to authenticate exhibits of electronically stored business records); *United States v. Jackson*, 208 F.3d 633, 638 (7th Cir. 2000) (proponent failed to authenticate exhibits taken from an organization's Web site); *St. Luke's Cataract & Laser Inst. P.A. v. Sanderson*, 2006 WL 1320242 at **3-4 (M.D. Fla. May 12, 2006) (excluding exhibits because affidavits used to authenticate exhibits showing content of Web pages were factually inaccurate and affiants lacked personal knowledge of facts); *Uncle Henry's Inc. v. Plaut Consulting, Inc.*, 240 F. Supp. 2d 63, 71-72 (D. Me. 2003), *aff'd* 399 F.3d 33 (1st Cir. 2005) (failure to authenticate e-mails); *Rambus Inc. v. Infineon Tech. AG*, 348 F. Supp. 2d 698 (E.D. Va. 2004) (proponent failed to authenticate computer-generated business records); *Wady v. Provident Life & Accident Ins. Co. of America*, 216 F. Supp. 2d 1060 (C.D. Cal. 2002) (sustaining an objection to affidavit of

witness offered to authenticate exhibits that contained documents taken from defendant's Web site because affiant lacked personal knowledge); *Indianapolis Minority Contractors Ass'n Inc. v. Wiley*, 1998 WL 1988826 at *7 (S.D. Ind. May 13, 1998) (proponent of computer records failed to show that they were from a system capable of producing reliable and accurate results and, therefore, failed to authenticate them).

23. *Lorraine*, 241 F.R.D. at 542 (dismissing cross motions for summary judgment for failure to authenticate).
24. *Lorraine*, 241 F.R.D. at 543.
25. Weinstein at § 900.06[3].
26. *Id.*
27. See Committee Note to Fed. R. Evid. 901(b) ("The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.").
28. See also *United States v. Simpson*, 152 F.3d 1241, 1249 (10th Cir. 1998) (evaluating methods of authenticating a printout of the text of a chat room discussion between the defendant and an undercover detective in a child pornography case stating examples of authentication in the rule are "merely illustrative" and "are not intended as exclusive enumeration of allowable methods of authentication.").
29. See Weinstein at § 900.06[1][a].
30. See *United States v. Meienberg*, 263 F.3d 1177, 1181(10th Cir. 2001) ("The rationale for the authentication requirement is that the evidence is viewed as irrelevant unless the proponent of the evidence can show that the evidence is what its proponent claims.").
31. 2006 WL 1880335 (5th Cir. July 7, 2006).
32. *Telewizja Polska USA Inc. v. EchoStar Satellite Corp.*, 2004 WL 2367740 (N.D. Ill. Oct. 15, 2004).
33. *Safavian*, 435 F. Supp. 2d at 40.
34. See *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 2006 WL 1320242 (M.D. Fla. May 12, 2006); *Wady v. Provident Life & Accident Ins. Co. of America*, 216 F. Supp. 2d 1060 (C.D. Cal. 2002).
35. *Safavian*, 435 F. Supp. 2d at 40.
36. *Id.* at 40-41.
37. *United States v. Siddiqui*, 235 F.3d 1318, 1322-23 (11th Cir. 2000).
38. *Id.*
39. 435 F. Supp. 2d at 39-41.
40. *In re F.P.*, 878 A.2d 91, 94 (Pa. Super. Ct. 2005) (interpreting state rule similar to the federal rule 901(b)(4)); see also *United States v. Jackson*, 208 F.3d 633 (7th Cir. 2000) (finding that web postings were not properly authenticated under Rule 901(b)(4)); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1153 (C.D. Cal. 2002) (finding website postings were properly authenticated using circumstantial evidence such as correct dates and web address).
41. *Lorraine v. Markel Amer. Ins. Co.*, 241 F.R.D. at 546-47 (quoting Federal Judicial Center, *Managing Discovery of Electronic Information: A Pocket Guide for Judges* (2007), at 24).
42. See Hash, *The New Bates Stamp*, 12 j. tech. l. & pol'y 1.
43. See *Fenell v. First Step Designs, Ltd.*, 83 F.3d 526, 530 (1st Cir. 1996) (discussing how saving files in different locations and not changing the text may cause change in metadata markers).
44. *Supra*.
45. *Meienberg*, 263 F.3d at 1180-81.
46. *Id.*
47. Fed. R. Evid. 901(b)(9) Advisory Committee Note.
48. *In re Vee Vinhnee*, 336 B.R. at 446-47.
49. *Id.* at 446.
50. *Id.* at 448.
51. See *Bouriez v. Carnegie Mellon Univ.*, 359 F.3d 292 (3d Cir. 2004).
52. See *Lorraine*, 241 F.R.D. at 554.
53. See *Safavian*, 435 F. Supp. 2d 36.
54. *Lorraine*, 241 F.R.D. at 554.
55. Weinstein at § 901.03[8].
56. See *Siddiqui*, 235 F.3d 1318; *Safavian*, *supra* (where e-mails frequently contained the name of the sender and recipient in the bodies of the e-mails, in the signature blocks of the e-mail, in the "to" and "from" headers, and by the signature of the sender and often referred to various professional and personal matters known to the defendant).
57. See *Network LLC v. Centraal Corp.*, 242 F.3d 1347, 1354 (Fed. Cir. 2001); see also Fed. R. Civ. P. 26(p) Advisory Committee Note (describing metadata); THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES AND COMMENTARY FOR MANAGING INFORMATION AND RECORDS IN THE ELECTRONIC AGE.
58. *Lorraine*, 241 F.R.D. at 547-48.
59. 18 U.S.C. §§ 2701-2711.
60. See Fed. R. Evid. 901(b)(4).
61. See Fed. R. Evid. 901(b)(6).

62. See Grossman, *No, Don't IM Me - Instant Messaging Authentication of the Best Evidence Rule*, 13 GEO. MASON L. REV. 1309 at fn. 11.

63. *Id.*

64. See *St. Clair*, 76 F. Supp. 2d 773 (S.D. Tex. 1999) (holding that there is a presumption that information discovered on the Internet is inherently untrustworthy and "voodoo" information as Web sites are not monitored for accuracy and nothing contained on the Web site is under oath or even subject to independent verification absent underlying documentation).

65. See *Perfect 10*, 213 F. Supp. 2d at 1153-54 (finding that Internet Web site postings were authenticated because of circumstantial indicia of authenticity and a failure of the defendant to deny their authenticity).

66. See *Sun Protection Factory, Inc. v. Tender Corp.*, 2005 WL 2484710 (M.D. Fla. Oct. 7, 2005); *Ashworth v. Round Lake Beach Police Dep't.*, 2005 WL 1785314 (N.D. Ill. Jul. 21, 2005).

67. *Jackson*, 208 F.3d at 637-38.

68. *Id.*

69. See also *Novak v. Tucows, Inc.*, 2007 WL 922306 at *5 (E.D.N.Y. Mar. 26, 2007) (Web site printouts are not authenticated because plaintiff offered no testimony or sworn statements by employee of company hosting the sites); *Illusions-Dallas Private Club, Inc. v. Steen*, 2005 WL 1639211 at *10 (N.D. Tex. Jul. 13, 2005), *rev'd on other grounds*, 482 F.3d 299 (5th Cir. 2007) (attorney affidavit insufficient to authenticate Web site because no personal knowledge that studies were what they claimed to be); *Costa v. Keppel Singmarine Dockyard PTE, Ltd.*, 2003 WL 24242419 at *7 (C.D. Cal. Apr. 24, 2003) (same result on affidavit by downloading witness).

70. Weinstein at § 901.02[21].

71. Weinstein at § 901.02[22].

72. See *ACTONet, Ltd. v. Allou Health & Beauty Care*, 219 F.3d 836 (8th Cir. 2000).

73. See Saltzburg at § 901.02[12].

74. See *United States v. Tank*, 200 F.3d 627 (9th Cir. 2000); *United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998).

75. Saltzburg, § 901.02[12].

76. See also *United States v. Simpson*, 152 F.3d at 1249; *United States v. Tank*, 200 F.3d at 629-31.

77. See Edward J. Imwinkelried, *Can This Photo Be Trusted at Trial* (October 2005) at 48.

78. Weinstein at § 900.06[3].

79. Weinstein at § 900.06[3].

80. See *Manual for Complex Litigation* at § 11.447; Imwinkelried, *Evidentiary Foundations* at § 4.03[2] ("[F]ollowing the recommendations of the Federal Judicial Center's *Manual for Complex Litigation*, some courts now require more extensive foundation [for computer-stored records]. These courts require the proponent to authenticate a computer record by proving the reliability of the particular computer used, the dependability of the business's input procedures for the computer, the use of proper procedures to obtain the document offered in court,

and the witness's recognition of that document as the readout from the computer.").

81. See 2 *McCormick on Evidence*, § 294 at 286 (John William Strong, et al., 4th ed. 1992); Saltzburg at p. 370.

82. See *United States v. Salgado*, 250 F.3d 438, 453 (6th Cir. 2001).

83. See *United States v. Moore*, 923 F.2d 910, 915 (1st Cir. 1991).

84. See Roberts, *A Practitioner's Primer on Computer-Generated Evidence*, 41 U. Chi. L. Rev. 254, 263-64 (1974).

85. See *State v. Swinton*, 847 A.2d 921, 942-43 (Conn. 2004).

86. *Id.*

87. See Imwinkelried, *Evidentiary Foundations* at § 4.09[4][a].

88. See, e.g., *Taylor v. United States*, 759 A.2d 604, 608 (D.C. 2000); Hanon, *Computer Generated Evidence: Testing the Envelope*, 63 Def. Couns. J. 353, 361 (1996).

89. *State v. Sayles*, 662 N.W.2d 1, 9 (Iowa 2003).

90. 241 F.R.D. at 559-60 (citing cases).

91. 2006 WL 2135807 at *7 (D. Ariz. July 28, 2006).

92. Weinstein at § 900.03[1]; Imwinkelried, *Evidentiary Foundations* at § 4.09[5][a], [c].

93. See *Commercial Union Ins. Co. v. Boston Edison Co.*, 591 N.E.2d 165, 168 (Mass. 1992).

94. *Supra*.

95. 847 A.2d 921, 942-43.

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Taking an 'Expert' Witness' Deposition

By Robert D. Hart and Christopher D. Wolek

Ask 10 lawyers about the strategy they employ when taking an "expert" witness' deposition and you will get 10 different answers. The question, "what should I do during an expert deposition?" might commonly draw the answer, "it just depends." Although somewhat equivocal, it is actually the correct answer. This article will identify several styles and an overall game plan that can be used to take an expert witness' deposition. It must be remembered, however, that every attorney is different and every expert is different.

An effective litigator must be able to adapt. One must adapt to the witness, to the judge and to the jury—no matter what may arise. The deposition of an expert is no different. The witness might be timid and shy, having only given three other depositions and never having been before a jury. Contrast that deposition to the examination of the "hired gun" who is a veteran of 225 depositions and has testified in trial 100 times. The former deposition presents the opportunity to obtain useful admissions through a process akin to cross-examination. In the latter, the average to above-average attorney should concentrate on a fundamental virtue that should be passed on to every young lawyer: "Impeach their expert and win the case with your expert." Thus, the goal in questioning the "hired gun" is to gather as much information from them to use as an effective counter-punch at trial.¹

How do you effectively counter-punch at trial with an expert witness' deposition? The answer is relatively simple: hard work and creativity. Learn enough about the science (whether medicine or another technical specialty) so you are not buffaloed during the deposition.

Good experts testifying solely about their specialty can outwit attorneys as a matter of course. That is why attorneys pay them good money to explain scientific, technical and other specialized fields to the jury. Therefore, the first rule for an expert deposition is simple - prepare, prepare and prepare some more. Study the scientific or technical field as much as you can. In the case of a physician, pore over the pertinent medical records until you have complete command of them before the deposition. Know your case including the law regarding expert testimony so you can maneuver on the fly if an opening arises.

Experts "buffaloing" attorneys leads to a second virtue to consider when deposing experts: Never take an expert's word for granted. The word "expert" is quoted in the title of this article for a reason. In the vast majority of cases, the expert sitting across from you is just another advocate for your opponent. They are hired to express their "opinions" about the case. Experts will lurk in gray areas because "opinions" are seldom either "right" or "wrong." Experts are flexible and malleable and this often opens them up to impeachment.

This is not easily accomplished, as experts would quickly become dinosaurs if they were to cave to the most elementary cross-examination.

The fact that most cases do not result in a trial underscores the importance of exposing the opponent's expert as an advocate during their deposition. Some attorneys believe expert work (both preparation of your own and deposing the other's) can only be done while holding their nose. For others, experts are a necessary part of the challenge when it comes to winning the case. Regardless of the philosophy, you can hardly go wrong by approaching the expert's deposition with the basic premise that they are all full of baloney. Pardon the vernacular, but that basic premise reflects the reality that experts typically are highly compensated advocates. Exceptions do exist, but they are a rare bird. For example, some treating physicians will not advocate on behalf of their patients, but even that is a dying breed. No professional expert witness is worth his or her exorbitant fee unless their opinions are somewhat "malleable," and it is the malleability of the expert that good attorneys can expose during a deposition.²

WRITTEN DISCOVERY

Start with the basics — remember that as with any other witness, laying the foundation is the key to a successful expert deposition. Begin with a comprehensive set of written discovery requests regarding your opponent's experts. Utilize an interrogatory under 12 O.S. § 3226(B)(1) requesting the name and address of any expert to be called. If the opposing party follows the Discovery Code, you will garner the name of their expert either immediately or when they timely supplement as required by 12 O.S. § 3226(E)(1)(b). An interrogatory following 12 O.S. § 3226(B)(3)(a)(3) allows discovery of "the subject matter on which each expert witness is expected to testify; the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion; the qualifications of each expert witness, including a list of all publications authored by the expert witness within the preceding 10 years; the compensation to be paid to the expert witness for the testimony and preparation for the testimony and a listing of any other cases in which the expert witness has testified as an expert at trial or by deposition within the preceding four years."

In this same vein, a request for production should follow seeking each document or

resource reviewed by the expert. Under § 3226(B)(3)(a)(2), if your adversary provides documents to a disclosed expert witness, those documents lose work product protection and it waives any privilege associated with those documents.³ It is often surprising the types of privileged information that is mistakenly given to experts with the thought that some non-existent privilege applies. Although it only happens every now and again, a request for production with some follow-up questions to open the deposition can unearth an errant letter or e-mail disclosing some strategy or other privileged information that the other side would rather be kept hidden.

SETTING UP THE DEPOSITION

When it comes time for expert depositions, the better practice is to reach an agreement with opposing counsel that every expert will bring all documents received, reviewed and generated by the expert to their deposition. Your adversary should have already provided this information in response to a proper request for production described in the preceding section, but it never hurts to cover all the bases. In terms of notice, the typical practice does not include issuing a subpoena to an expert. From a literal reading of 12 § 3226(B)(3)(a)(2) it appears that a notice should be issued, but the law is not clear if the notice is sufficient to compel an expert to attend a deposition. Presumably, however, an attorney who fails to cooperate with scheduling their own experts would have a hard time surviving a motion to strike due to discovery abuse.

In terms of costs, Oklahoma law dictates that if you want to depose the opposing party's expert, your client is going to have to pay for it. 12 O.S. § 3226(B)(3)(c). If the amount the expert charges is unreasonable, an attorney can seek court intervention to assess a "reasonable" fee.⁴ This issue tends to arise with either exorbitant hourly rates or an unreasonable "minimum" numbers of hours.

CONDUCTING THE DEPOSITION

As previously mentioned, an expert deposition must be approached from the standpoint that the expert will not tell the truth. Just like a good reporter tackles a story, an attorney should ask the expert seven essential questions regarding every topic: who, what, when, where, how, why and how much? Furthermore, these questions will always give you a general outline that you can build upon during the deposition.

For instance, if the opposing expert has done a site inspection, expanding on the seven essential questions would give you a plethora of information:

When did you go? Why did you go? Why did you go on that date? Where did you meet? Where all did you go? Who was there with you? Who did you speak with at the scene? (With whom did you speak?) Who did you speak with the three days before and three days after?

What did you review before you went? What did you and (anyone listed above) talk about?

What did you do at the scene? Why did you do each of those things? How did you do each of those things? What authority did you rely upon to determine that was the proper technique?

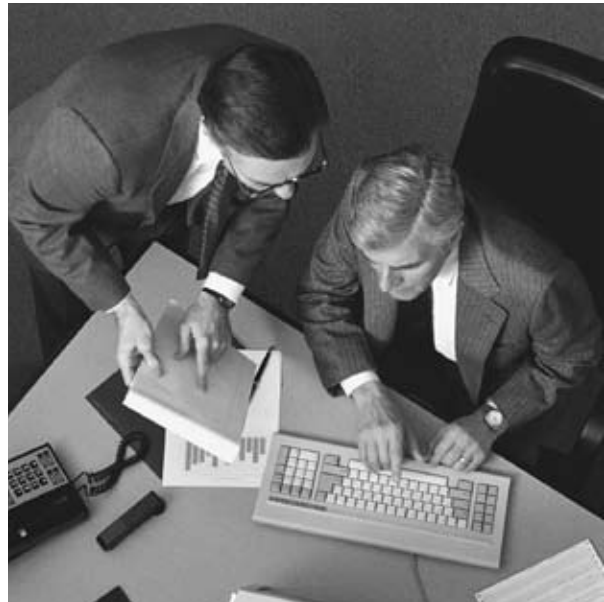
How much time did you spend at the scene? How much were you compensated for going to the scene?

Until comfortable conducting expert depositions, there is no shame in writing those seven questions at the top of every page of an outline to emblazon them in the interrogator's mind. Of course, depending upon the answer to any of the above examples, you might be looking at 30 minutes of deposition time.

The remainder of the article offers a brief outline to use when conducting a deposition. This general outline and the specifics have been included because many attorneys fail to get answers to the questions listed. The primary thing to remember for the new practitioner is that the outline should be tailored to your particular case. This is merely a starting place for an effective deposition.

BACKGROUND OF EXPERT

As a general rule, do not try to challenge the credentials of the expert you are deposing. Instead work on getting information that will assist you with impeaching the expert at trial. From your pre-deposition preparation, have you learned that the expert has a mail-order doctorate? Remember that all you need to do is get the facts to confirm that the degree is from the sham institution and then you are free to discredit them with it at trial.



“ Just like a good reporter tackles a story, an attorney should ask the expert seven essential questions regarding every topic: who, what, when, where, how, why, and how much? ”

Along those same lines, be careful about qualifying the opponent's expert for trial. Try and take the expert's deposition so that it cannot be used against you if the expert somehow becomes unavailable for trial. If the expert was not qualified during your examination or during the cross, use of his or her deposition will be virtually impossible. In this regard, it is usually better not to even mark the curriculum vitae during a deposition. You should not neglect to ask an expert what his or her "claimed" areas of expertise are.

BIAS QUESTIONS

The principal safeguard against errant expert testimony, as with all other witnesses, is the opportunity to cross-examine, which includes the opportunity to probe bias, partisanship or financial interest. The following questions provide a framework for doing just that.

1. Find out all you can about the expert's consulting business.

- Pending cases/past cases and percentage of total business.
 - Percentage for plaintiffs/defendants.
 - Hourly rate. Same in all cases?
 - Nature of business. Number of employees, office space.
2. Experience as expert/consultant on cases with same or similar subject matter and same side.
 - Name of case.
 - Name of attorneys.
 - Investigative work performed.
 - Opinions and conclusions.
 3. Cases for opposite side.
 - Name of case.
 - Name of attorneys.
 - Investigative work performed.
 - Opinions and conclusions (in the rare case can yield good impeachment).
 4. Present and past cases with plaintiffs counsel's firm.
 - Number, type, facts.
 - Opinions and conclusions.
 - Ever turn one down from this firm (get all the facts).
 - Ever testified against a client of the retaining firm.

WORK PERFORMED TO DATE/WORK ANTICIPATED

1. Mark and review the entire file.
2. All contacts with law firm. Don't forget e-mail.
3. All information regarding case. What were they told? Get to bottom of any assumptions.
4. What was expert asked to do?
5. Work done to date:
 - Inspection
 - Testing, measurements, calculations.
 - Documents reviewed. Ask how each contributed to opinions.
 - Persons talked to regarding case.
6. Literature, treatises, etc. and reliance on each.

7. Further work or investigation to be performed.

OPINIONS

A good expert deposition is a thorough expert deposition. Take your time and get each opinion and conclusion in detail. Recall that an expert witness opinion is not admissible unless it will assist the trier of fact to understand the evidence or to determine a fact in issue. 12 O.S. § 2702. Ask the seven questions relentlessly until it is clear that the expert's opinion will not help the jury understand the evidence or determine the facts in issue.

“ The expert has to be pinned down before you walk out of the room. ”

The expert has to be pinned down before you walk out of the room. The worst mistake to make with an expert is to allow him or her to squirm out of an opinion at trial because of a question not asked at deposition. It is never effective to impeach an expert at trial by pointing out that the testimony has changed when the response to the question is, “You didn't ask me that.” Always ask for all of the opinions the expert has and get a laundry list. At that point, repeat them back to the expert and ask if those are all of the opinions. If not, get the others. Only then will they be sufficiently “boxed in” for cross-examination at trial.

Also, make sure you do not get buffaloed. You have to understand the opinion as well today as you will at trial or you will be in trouble. Almost every expert will try to give double talk answers during depositions. Only the effectively prepared and thorough attorney can prevent this situation with a firm grasp of the science involved.

DAUBERT CHALLENGES

One of the goals in an expert deposition is setting up a motion to strike the expert or to strike a significant portion of his or her opinions. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993),⁵ the United States Supreme Court suggested four nonexclusive questions for judges to consider when admitting scientific evidence:

1. Is the opinion testable and has the expert (or anyone else) tested it?
2. Has the opinion been subject to peer review?
3. What is the potential rate of error?
4. Is the technique widely accepted in the relevant scientific community?

In this regard, there are several red flags⁶ that one should be aware of when conducting an expert deposition in order to properly support a *Daubert/Chrisitan* motion:

- **Improper Extrapolation:** Has the expert leapt from an accepted scientific premise to an unsupported conclusion?
- **Reliance on anecdotal evidence:** Has the expert based an opinion on the expert's own experience or on a few case studies?
- **Reliance on temporal proximity:** Has the expert looked at all possible causes for the complaining person's condition? Many experts will leap to conclusions regarding cause and effect based upon the condition of the person before and after the complained of activity. This is not based on scientific methodology as other possible causes should be explored.
- **Insufficient information about the case:** Has the expert relied upon proper scientific methodology but used incorrect facts or assumptions in the analysis? Are there additional facts that might change the expert's mind?
- **Lack of testing:** Has the hypothesis that the expert relies upon been tested for the proposition cited?
- **Subjectivity:** The scientific method must be an objective one. If an expert's methodology cannot be explained in objective terms and is not subject to be proven incorrect by objective standards, then the methodology is presumptively unreliable.

CONCLUSION

With hard work and a little creativity, you can set up an expert for a fall at trial. Make sure to follow up on any of the leads you get regarding other attorneys for whom the expert has

worked as well as other opinions given. Review the literature, if any, that the expert relied upon. Ask your expert whether there is material contradicting the opposing party's expert opinions. And if you have done all of this, you are on the road to effectively cross-examine an expert at trial.

1. This, of course, excludes the "lucky moment" that happens to all attorneys at one time or another where in a deposition he or she looks brilliant simply due to luck. There is no reason to bore the reader with war stories or lull the new attorney into a false sense of security that "luck" will strike during each and every expert deposition.

2. As a fundamental matter, it is somewhat questionable whether the concept of the "expert witness" is good for the adversarial system as a whole or whether it has degenerated into some kind of perverted jousting match. By outlining a few ways to play the game, this article does not delve into the application (or non-application) of *Daubert* by courts in general.

3. See, e.g., *J.B., ex. rel Palmer v. Asarco, Inc.*, 225 F.R.D. 258, 261 (N.D. Okla. 2004) (reaching same result under Fed. R. Civ. P. 26 (a)(2)(B)).

4. *Fuller v. Pacheco*, 21 P.3d 74, 81 (Okla. Civ. App. 2001); *Drake v. Wal-Mart, Inc.*, 876 P.2d 738, 742-43 (Okla. Civ. App. 1997).

5. The Oklahoma Supreme Court adopted the *Daubert* standards in *Christian v. Gray*, 65 P.3d 591, 598 (Okla. 2003).

6. These "red flags" are taken from *Downs v. Perstop Components, Inc.*, 126 F.Supp.2d 1090, 1127-1128 (E.D. Tenn. 1999).

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Relevance and Reliability: What All Expert Testimony Needs

By Michael Woodson

Civil trials without some expert testimony are becoming rare. Some believe jurors view experts as hired guns and discount their testimony. Others believe a polished expert will “carry the day,” even in a questionable case. Regardless of your school of thought, the debate is moot if the expert never takes the stand. A general understanding of the evidentiary standards applied to the admissibility of expert testimony is helpful when deciding to retain an expert. It is also helpful when advising a client whether their resources are well spent on efforts to “exclude” the opponent’s expert. Hopefully, this article will provide that general overview.

BACKGROUND

Courts have long recognized expert witnesses’ potential to persuade, confuse and even mislead a fact finder and have attempted to craft safeguards against “junk science.” In 1923, the Federal District Court for the District of Columbia issued its opinion in *Frye v. United States*, acknowledging a receptiveness to expert testimony if deduced from well-organized scientific principle.¹ In *Frye*, the defendant attempted to use an expert to establish that truth is spontaneous and the “utterance of a falsehood requires a conscious effort, which is reflected in the blood pressure.”² (We litigators would likely have much less to do if this methodology was found reliable.) The court held that expert testimony on scientific matters will be admitted if based on “generally accepted” standards in a particular field.³

In 1993, the U.S. Supreme Court rejected the “generally accepted” standard for scientific evidence.⁴ The court found the adoption of the

Federal Rules of Evidence, specifically Rule 702, required a new analysis.⁵ In *Daubert v. Merrell Dow Pharmaceuticals*, the court installed the trial judge as a “gatekeeper” responsible for determining the relevance and reliability of expert testimony.⁶ The trial court must conclude that the proposed testimony will “assist the trier of fact.”⁷ If so, the court must then determine whether the expert’s methods are reliable.⁸ (This inquiry should not be confused with whether the expert’s opinions are credible or believable.)

The U.S. Supreme Court further expanded use of the standard in *Kumho Tire Co. v. Carmichael*.⁹ While the *Daubert* analysis focused on “scientific knowledge,” *Kumho Tire* held that the reliability requirement applied to all expert testimony, including opinions based on “technical” or “other specialized knowledge.”¹⁰

It did not take long for the *Daubert* analysis to reach Oklahoma’s criminal courts. In 1995, the

Oklahoma Court of Criminal Appeals adopted the *Daubert* standard in *Taylor v. State*.¹¹ *Taylor* involved the admissibility of complex analysis of DNA matching. The Court determined trial judges, not jurors themselves, would act as gatekeepers ensuring that scientific evidence is both reliable and relevant.¹² The court found the *Daubert* standard provided the necessary structure to consistently make these determinations, while giving the trial judge the flexibility to address the unique facts of individual cases.¹³ In 2000, the Oklahoma Court of Criminal Appeals again followed the U. S. Supreme Court's lead and expanded the *Daubert* analysis to expert testimony involving "technical" or "other specialized" knowledge.¹⁴

The *Daubert* analysis was not so quickly embraced in the civil arena. It was not until 2003 that the Oklahoma Supreme Court adopted the *Daubert* standard.¹⁵ In doing so, the court noted the similarities between the Oklahoma Evidence Code and the Federal Rules of Evidence.¹⁶ The court found that the trial judge's gatekeeper function was inherent in Rule 702 and *Daubert* is "but a refinement of this role."¹⁷ The court also found that the Evidence Code did not distinguish between "scientific," "technical" or "other specialized knowledge," and therefore, the standard would apply to all expert testimony.¹⁸

RELEVANCE

The first step in the *Daubert* analysis is "relevance." Rule 702 permits expert testimony when it will "assist the trier of fact."¹⁹ As a practitioner, it may be easy to overlook this step when it comes to an otherwise qualified expert. However, it can be critical.

Take the example of a qualified toxicologist in a "dram shop" case. The toxicologist has access to the results of a blood alcohol test conducted after an automobile accident. However, the test did not happen until two hours after the driver left the defendant's bar. From the test results and other known variables, the expert is able to "extrapolate back" and opines that the driver had a blood alcohol

level of 0.21 two hours before the post-accident test. The driver was legally intoxicated when he left the bar.

The blood test seems reliable. The toxicologist's methodology in performing his "extrapolation" is tried and tested. However, in deposition, the expert testifies that alcohol affects people differently and he can not testify to a reasonable degree of certainty how the driver would have behaved with a 0.21 blood alcohol level.



“The inquiry is not whether the driver was legally intoxicated when he left the defendant’s bar, it is whether he ‘appeared’ intoxicated.”

At first glance the expert's testimony may seem relevant. He is quantifying alcohol consumption and the plaintiff claims the defendant served the driver too much alcohol. The testimony establishes the driver had a blood alcohol level exceeding the legal limit when he left the bar and when the accident happened. But does the testimony really "assist the trier of fact to determine a fact in issue"? After all, what is the critical fac-

tual issue in a "dram shop" case? The inquiry is not whether the driver was legally intoxicated when he left the defendant's bar, it is whether he "appeared" intoxicated. While the expert's opinions about blood alcohol levels

may be reliable, they really don't assist the jury with the critical issue. If the expert cannot reliably correlate the blood alcohol level with this particular driver's "appearance," the testimony may not "assist the trier of fact" and may even mislead the trier of fact. It is always important to analyze the specific issue the expert is addressing.

RELIABILITY

If the court determines expert testimony will assist, the court must still conclude the expert's methodology is reliable. Courts look to the following factors when determining reliability: 1) whether the theory or technique can be or has been tested; 2) whether the expert or technique has been subjected to peer review and publication; 3) whether there is a known or potential rate of error and whether there are standards controlling the technique's operation; and 4) whether the relevant scientific community generally accepts the technique or theory.²⁰ The court is not required to give each factor equal weight.²¹ The court may base its decision on a single factor or consider all the specific factors in determining reliability.²² Most importantly, the test is designed to be "flexible" and *Daubert's* list of factors neither necessarily, nor exclusively, applies to every expert or in every case.²³ Trial courts have broad latitude in wrestling with how to determine reliability and the ultimate determination of *what* is reliable.²⁴

By its very nature, the reliability determination will be factually intensive. For the practitioner, this will obviously be the focus of significant discovery efforts once an expert is designated. While potentially expensive, the pursuit of written reports and expert depositions is indispensable in conducting the *Daubert* analysis.²⁵

While an analysis of case law applying the *Daubert* standard is beyond the scope of this article, it would not take long to digest the published Oklahoma civil cases. There are not many. Fortunately Oklahoma's civil appellate courts find persuasive value in Federal decisions applying similar federal rules. Further,

while not bound by a Court of Criminal Appeals decision, the *Christian* court agreed with several decisions in the overall application of *Daubert* by the Oklahoma Court of Criminal Appeals. Therefore when confronted with issues regarding admissibility of expert testimony, guidance is available.

CONCLUSION

The decision to retain or oppose an expert will be factually intensive. However, there is some guidance on what is required for admissible expert testimony. Best of luck and may an unqualified, unreliable or unnecessary expert never cross your client's path.

1. 293 F.1013 at 1014 (DC Cir. 1923).
2. *Id.*
3. *Id.*
4. 509 U.S. 579 (1993).
5. *Id.* at 587-588.
6. *Id.* at 589.
7. *Id.* at 591.
8. *Id.* at 593-594.
9. 526 U.S. 137 (1999).
10. *Id.* at 147.
11. 1995 OK CR 10, 889 P.2d 319.
12. *Id.* at 328.
13. *Id.* at 329-330.
14. 2000 OK CR 14, 8 P.3d 883.
15. *Christian v. Gray*, 2003 OK 10, 65 P.3d 591.
16. *Id.* at 597.
17. *Id.* at 599.
18. *Id.*
19. Fed. Rules of Evidence 702 and 12 O.S. §2702.
20. 509 U.S. 579, 595 (1993).
21. 526 U.S. 137, 141-142 (1999).
22. *Id.*
23. *Id.*
24. *Id.*
25. See 12 O.S. §3226(B)(3).

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Using Focus Groups to Improve Trial Presentations: A Cost Effective Approach

By Ted Sherwood

Over the last 20 years I have used many forms of focus groups or mock juries to prepare for trial. Focus groups, whether conducted internally or by professional consultants, inevitably yield good information about how “the average person” reacts to a trial story. However the cost can be prohibitive. Professionally conducted focus groups can run upwards of \$35,000. When the case, or your checkbook, does not justify such an expenditure, let me show you how you can conduct an effective focus group for under \$1,000.

TYPES OF FOCUS GROUPS

My first exposure to a focus group was while attending a National Institute for Trial Advocacy trial practice program. At the end of the 10-day event, the participants tried a mock trial using volunteer jurors whose deliberations we watched on open circuit television. Watching the jury wrestle with jury instructions and credibility of witnesses was one of the most fascinating experiences of my legal education. Indeed any lawyer would benefit from the reality check obtained from hearing his performance reviewed by a group of jurors. Since then I have conducted dozens of focus groups myself, used professionally run focus groups, participated in short mock trials using witnesses and exhibits and used simplified “issue” focus groups or town halls. I have never been disappointed with the information I gleaned.

WHY USE FOCUS GROUPS?

The best thing about using a focus group before a trial is to see how non lawyers react to the basic trial story. The questions people ask, the personal experience they bring to bear in deliberations, even the words they use to describe key issues are incredibly valuable. Focus groups can be used to test voir dire questions, rehearse an opening statement, prepare witness testimony, contrast the credibility of witnesses, test demonstrative evidence, study jury deliberations and identify important questions or objections to the thrust of a case.

DOING YOUR OWN FOCUS GROUP FOR UNDER \$1,000

I believe it is beneficial to do a focus group before every case likely to go to trial. Using professional consultants on every case can be cost prohibitive. The seminal work on assembling a focus group without professional

consultants is *How to Do Your Own Focus Groups, A Guide for Trial Attorneys*, by David Ball, Ph.D.¹ In his book, Dr. Ball describes precisely how to conduct your own focus group. He also provides forms for gathering background information on the “jurors” and questionnaires for soliciting written feedback after presentation of the plaintiff’s and defendant’s respective cases. While there are things I like about Dr. Ball’s approach, I will offer some variations that seem to work well.



“ In order to get the most out of the deliberations you should arrange to tape it with a video camera...” ”

First, obtain six to eight prospective jurors. They should be varied in age, sex and of course be eligible for jury duty. If possible, it is wise to use jurors from the same jurisdiction in which you expect to try the case.² An employment agency can gather the mock jurors.³ In my experience, the agency will charge a flat fee per hour, usually about \$15, with a three hour minimum. Set the date for the focus group in the evening so people can come after work. As to location, any conference room will do, although most of the law schools will let you use the moot courtroom for a nominal fee.

As to presentation, I prefer to use what has been described as a “clopening”. One lawyer presents a scaled-down combination opening and closing, perhaps about 20 minutes. Another lawyer presents the same for the defense, with a short rebuttal from the plaintiff. I recommend that the lawyer who has worked up the

case present the opposite side so as not to skew the results. Remember that the point of the exercise is not to win but to identify weaknesses in your case. Also, I do not present evidence likely to be hotly contested or evidence with a high risk of being excluded. Lastly, I encourage you not to reveal which side you actually represent lest some of the jurors be inclined to try to please the paying side with their opinions.

After the presentations, Dr. Ball would propose that each juror fill out a questionnaire summing up his or her views about who should win and why. I presume he recommends this because some jurors tend to be less assertive during deliberations and thus you have each person’s opinion set down in writing. Or it may be that he wants each juror’s individual impressions first, before they are adulterated by others. In any event, I prefer to let jurors deliberate with just a few instructions.

In order to get the most out of the deliberations you should arrange to tape it with a video camera and, if possible, run a live feed to a television in a separate room. That way you can watch the jurors deliberate in real time. Tell the jurors what the video camera is for; I can assure you they will ignore it within the first five minutes of deliberations. This is important because it will help you immensely in debriefing the jurors and asking follow up questions to know who said what during the deliberations. Also, by taping the deliberations you create a record that you or your client can review later. For example, while handling a product liability case recently we empaneled a focus group before mediation, testing certain issues related to the plaintiff’s conduct and damages. During the mediation we played part of the juror deliberations for our clients so they could appreciate how prospective jurors might react to some of the evidence they heard. The power-

ful effect of watching how prospective jurors talked about the case helped our clients appreciate the risk associated with going to trial and helped us manage their expectations.

I finish by debriefing the jurors and exploring their opinions. This might be an appropriate time to ask questions about whether or how their opinions might be affected if they knew certain additional facts. And of course I thank them for their service, pay them and send them on their way. One final thought — Dr. Ball believes focus groups are more useful on the issue of liability as opposed to the amount of damages a jury would likely award, and I agree. However that does not make their consideration of damages useless. I recently tried a case involving the sudden death of an elderly woman. The case was set in a rural jurisdiction known for its conservative values. One of our concerns was how much money could we ask for without offending the jury. The focus group we conducted gave us valuable guidance in assessing that concern.

THE ISSUES OR TOWN HALL FOCUS GROUP

Another form of focus group which is even easier to pull together is what has been called the issues or “town hall” focus group. This method aims at eliciting the significant issues that come to the jurors’ minds. It is more informal and does not involve deliberations by the jurors. Essentially mock jurors are brought into a conference room and the process is briefly explained. Then the attorney tells the jurors a little bit about the case and asks “What questions do you have?” The questions get brisk and free-ranging, not unlike a typical town

hall. It is the questions that are asked, and the commentary thereon, that provides value to the practitioner. Dr. Ball suggests that this method is best used early in the case and can provide guidance for discovery.

CONCLUSION

Focus groups, even when conducted by non-professionals, can yield a treasure trove of valuable information and help any lawyer present a better case. I encourage you to try your hand at conducting your own focus group, you will not be disappointed.

1. This book can be obtained through the National Institute for Trial Advocacy
2. You must be careful gathering mock jurors in rural jurisdictions as you could have a juror in your actual case show up in the jury pool. Before trying a case in a rural county in Iowa, we convened a mock jury from a neighboring county with good results.
3. My friend, Tony Laizure, recently used a local marketing research firm to gather mock jurors and furnish the facilities which included three separate deliberation rooms. The jurors could be secretly observed and their deliberations were piped into the observation rooms. The cost was not inexpensive however, roughly \$ 7,000.

ABOUT THE AUTHOR



and his J. D. from the University of Oklahoma College of Law.

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Preparing for Trial, or What I Didn't Get to Do on My Spring Break

By Bradley C. West

The old saying “failure to plan is planning to fail” may sound cliché but it is at least as true in the trial preparation setting as in any other. Failure to adopt and implement a trial plan in a practice emphasizing litigation will invariably result in many sleepless nights and above average marital stress. This trial plan does not need to be overwhelming; in fact, it can and should be quite simple so that it is easy to use. Utilizing the following simple steps, all keying on the trial date, will make your trial practice and your personal life much more enjoyable and result in the highest quality of service to your clients.

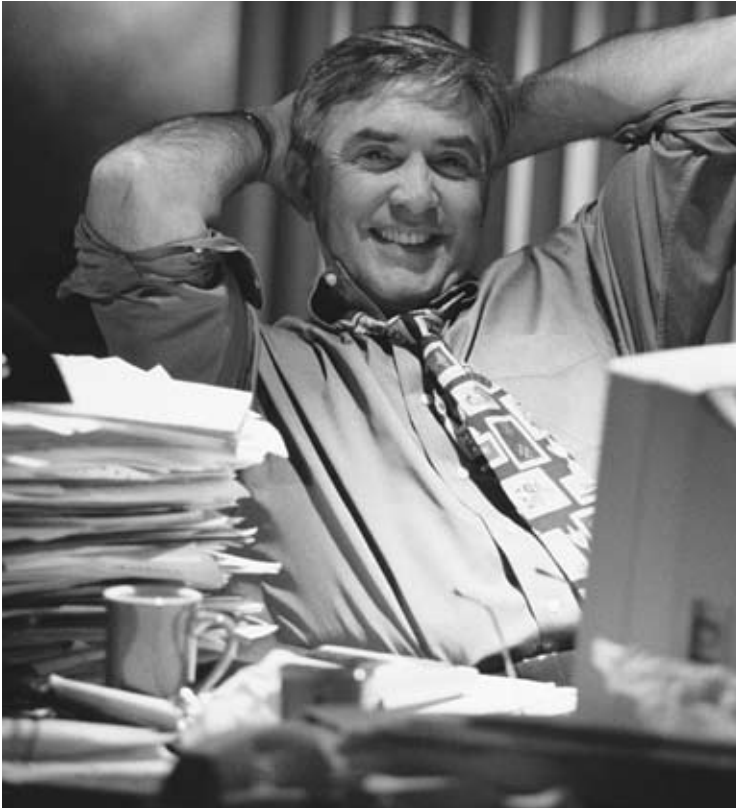
Most of us have several cases at any given time that are set for trial. We all know that most of these cases will settle eventually but we generally don't know which ones until the case has progressed through the discovery process. Assuming a case will settle is a failure to plan and most often leaves an attorney in a tactically challenged position, thus the importance of adopting and using a trial plan. The plan I prefer sets out deadlines of one week, 30, 60 and 120 days, calculated from the trial setting, to complete various assignments. These dates can be easily incorporated into your docketing or calendaring software so that you are gently reminded as they approach.

120 DAYS BEFORE TRIAL

Because failure of a witness, particularly an expert, to appear at trial tops my list of trial fears, at 120 days out from trial I make sure that I have informed all witnesses I anticipate call-

ing at trial of the trial setting. Should anyone have a conflict that cannot be resolved, plenty of time remains at this point to schedule trial depositions or make other arrangements. Experts in particular should be contacted to verify travel arrangements, local accommodations and particular needs at trial. This is also an appropriate time to review the discovery that has been done or, more importantly what has not been done. Time still remains to schedule that deposition that you initially thought you could get by without.

There is never a bad time to discuss settlement in a case and hopefully by this point you already have. If not, this is an appropriate time to discuss with opposing counsel the possibilities of settlement. As the trial nears litigants have a tendency to become more entrenched in their respective positions and this can lead to hesitancy to broach the subject of settlement. Start exploring the prospects of settlement



early and, despite what you may have been told, it is not a sign of weakness to initiate the conversation.

If the case warrants the expense this is a great time to conduct a focus group or mock trial. You should have a good handle on both sides of the case and, depending on your results, you still have time to make changes in your strategy.

60 AND COUNTING

At this point discovery should be completed, or very close. This is the time to identify and pre mark those exhibits you intend to use at trial. Doing this now will get it out of the way and help you as you continue your preparations later. Also, if you intend to use any demonstrative aids at trial now is the time to prepare them, either in house or with the help of a professional service. Provide samples of these aids to experts or other technical witnesses first to verify their accuracy and usefulness. If you intend to use a PowerPoint or other electronic presentation of the evidence now is a time to make the decision whether to attempt this yourself or hire someone less technically challenged to handle the job. I suggest the latter; there is plenty to

do during trial besides solve the inevitable technical glitch.

Sixty days from trial is also a good time to conduct your courtroom reconnaissance. If you have not appeared in the court where your trial is set, visit it. How is it laid out? Where is the jury box in relation to the witness stand? How are the acoustics? Is their audio/visual equipment available? These are all things you will want to know and better not to learn them on the first day of trial. If you know a colleague in the area call them and inquire about the court, the judge and the way trials are handled there. At this time you may also consider the benefits of a jury trial versus trying your case to the bench.

30 TO GO

The month before trial sees an increase in trial preparation but this plan should still allow you to handle the day to day operations at the office while continuing to prepare. In these

“ Once you have refreshed yourself on the facts, it is the appropriate time to develop your trial outline. ”

30 days you should begin to read all of the depositions that have been taken in the case and prepare short summaries of each. A summary is not of much use if it is as long as the deposition itself so remember to keep it brief, only referencing the most important testimony necessary to assist your witness or cross examine an opposing witness. By reading

two or three depositions a day you should still have plenty of time to get through them without affecting your other work. Make sure that each of the witnesses is sent a copy of their deposition and strongly suggest that they read it during this 30 day time frame. Once you have done this you should have, fresh in your mind, virtually all of the testimony that will be presented at trial.

Once you have refreshed yourself on the facts, it is the appropriate time to develop your

trial outline. This outline is intended to be the playbook for the remainder of your preparations and for the trial itself. Nothing fancy, the outline sets out each faze of the trial, the order of the witnesses that will be called, those expected to be called by opposing counsel and the exhibits, by number, that you intend to use with each. This outline should be reviewed often during trial as a checklist to verify that you have called those witnesses and introduced those exhibits that you intended.

Next, prepare the direct examination of each witness you intend to call, with references to those exhibits you will introduce. I prefer to write all of the questions I intend to ask of my witnesses, which helps to prepare the witness later and serves as a reference during trial should I lose my train of thought during trial. Similarly, you should develop a list of those points you intend to make on cross examination, again with reference to those exhibits you may use. Finally, during this time complete any remaining legal research and prepare motions in limine.

ONE WEEK BEFORE TRIAL

By now, most of us know whether our case is going to settle. If you have made it this far after having explored the possibility of settlement, odds are you are going to trial. At this point in the plan you should prepare your opening statement. Again, I suggest writing the entire opening. I understand that part of being a trial attorney is improvising and thinking on your feet and I do not at all advocate reading to the jury from a script. But, reducing your opening, as well as the other parts of the trial to writing help you to get a feel for how your presentation sounds and its length. And let's face it, we all sometimes forget. Anyone who has ever experienced that feeling of coming up blank halfway through a perfectly marvelous (and memorized) argument will appreciate having the written version at the podium to refresh their memory. Prepare your *voix dire* and closing in the same manner. Closing is a little

different and frequently you may prepare it during trial, as the evidence develops.

During this week before trial you should meet your witnesses and go over their proposed testimony. Using your previously written questions, go over each with the witness. Avoid the urge to give the witness a copy of your questions as they will invariably attempt to memorize them and most likely destroy the sincerity of their testimony. Show your witnesses the exhibits they will be asked to comment on and explain the process of introducing these exhibits at trial.

“ Avoid the urge to give the witness a copy of your questions as they will invariably attempt to memorize them and most likely destroy the sincerity of their testimony. ”

Preparing for trial serves four major purposes. First, it shows your opposing counsel you are on the ball and will be ready for trial if necessary. It also forces you to know about your case sooner rather than later, putting you in a better position to adapt or change your game plan. Next, a well prepared case is a case much more likely to settle, since both sides know and understand the issues. And finally, being prepared when it becomes apparent your case is going to trial results in a much better feeling than you will get calling your spouse or friends on Friday afternoon to cancel the weekend fun.

ABOUT THE AUTHOR



Brad practices with The West Law Firm in Shawnee, Oklahoma, where his practice is limited to plaintiff's trial work, including products liability, medical negligence, bad faith and class action litigation. He has a BA from Oklahoma Baptist University and graduated from the OU College of

Law in 1990. Brad is past President of the Oklahoma Trial Lawyers' Association and is a Leaders Forum member of the American Association for Justice (formerly the Association of Trial Lawyers of America), a member of the American Board of Trial Advocates and has served on the Board of Governors of the Oklahoma Bar Association.

Healthcare Provider Liability

DATES & LOCATIONS:	Tulsa April 4, 2008 Renaissance Hotel 6808 S. 107 th E. Ave.	Oklahoma City April 11, 2008 Oklahoma Bar Center 1901 N. Lincoln Blvd.
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CLE CREDIT: This course has been approved by the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for 6 hours of mandatory CLE credit, including 1 hour of ethics. For course approval in other states, contact the CLE Registrar.

TUITION: \$150 for early-bird registrations received with payment at least four full business days prior to the seminar date; \$175 for registrations received within four full business days of the seminar date. Register online at www.okbar.org/cle. The Oklahoma City program will be webcast. For details, go to www.legalspan.com/okbar/webcasts.asp

CANCELLATION POLICY: Cancellations will be accepted at any time prior to the seminar date; however, a \$25 fee will be charged for cancellations made within four full business days of the seminar date. Cancellations, refunds, or transfers will not be accepted on or after the seminar date.

Program Planner/Moderator

Jo L. Slama, Slama Legal Group, Oklahoma City

Program:

- 8:30 a.m. **Registration and Continental Breakfast**
- 9:00 **Screening Medical Malpractice Cases**
Ben Butts, Butts & Marrs, Oklahoma City
- 9:50 **Break**
- 10:00 **Legal Ethics in Healthcare Provider Liability (ethics)**
David Branscum, Foliart Huff Ottoway & Bottom, Oklahoma City
- 10:50 **“Tort Reform Wars”: Legislation Affecting Healthcare Provider Liability (and the Courts’ Responses)**
Larry Tawwater, The Tawwater Law Firm, PLLC, Oklahoma City
- 11:40 **Networking lunch (included in registration)**
- 12:10 p.m. **Specialty Hospitals in Medical Malpractice Litigation: Standards and Regulations Affecting Specialty Hospitals**
Rod Ramsey, Ramsey and Gray, Oklahoma City
- 1:00 **The Lost Art of Trying Medical Liability Cases**
Oklahoma City Program
John Wiggins, Wiggins Sewell & Ogletree, Oklahoma City
Terry West, The West Law Firm, Shawnee
Tulsa Program
W. Michael Hill, Secrest, Hill & Butler, Tulsa

- 1:50 **Break**
- 2:00 **Mediating the Medical Malpractice Case: ADR Resolution of Complex Healthcare Liability Cases**
Dennis Caniglia, Caniglia Litigation Consulting, Atlanta
- 2:50 **Adjourn**

Healthcare Provider Liability

Tulsa
 April 4, 2008
 Renaissance Hotel

Oklahoma City
 April 11, 2008
 Oklahoma Bar Center

Materials only \$80

Register online at www.okbar.org/cle

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NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following four judicial offices: All positions are for a six-year term: July 1, 2008 – June 30, 2014.

Judge, Oklahoma Workers' Compensation Court, Position 1
Judge, Oklahoma Workers' Compensation Court, Position 2
Judge, Oklahoma Workers' Compensation Court, Position 3
Judge, Oklahoma Workers' Compensation Court, Position 10

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

Application forms can be obtained by contacting Tammy Reaves, Administrative Office of the Courts, 1915 North Stiles, Suite 305, Oklahoma City, Oklahoma 73105, (405) 521-2450, and should be submitted to the Chairman of the Commission at the same address **no later than 5:00 p.m., Friday, March 21, 2008. If applications are mailed, they must be postmarked by midnight, March 21, 2008.**

Glenn Devoll, Chairman
Oklahoma Judicial Nominating Commission

NOTICE OF JUDICIAL VACANCY

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

Associate District Judge
Twenty-sixth Judicial District
Canadian County, Oklahoma

This vacancy is created by the retirement of the Honorable Gary E. Miller on March 1, 2008.

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

Application forms can be obtained by contacting Tammy Reaves, Administrative Office of the Courts, 1915 North Stiles, Suite 305, Oklahoma City, Oklahoma 73105, (405) 521-2450, and should be submitted to the Chairman of the Commission at the same address **no later than 5:00 p.m., Friday, March 21, 2008. If applications are mailed, they must be postmarked by midnight, March 21, 2008.**

Glenn Devoll, Chairman
Oklahoma Judicial Nominating Commission

OBA Solo and Small Firm Conference 2008

A Great Tradition Just Keeps Getting Better

By Jim Calloway, Director, OBA Management Assistance Program

Registration is now open for the 2008 OBA Solo and Small Firm Conference, YLD Midyear Meeting and Estate Planning, Probate and Trust Section Midyear Meeting. The conference dates are June 19-21, 2008, and the location is again Tanglewood Resort. For Friday night entertainment, back by popular demand, we have the Bar and Grill Singers.

And, once again, we have another outstanding set of programs, social events and networking opportunities for the Oklahoma small firm lawyer.

Our special out-of-state expert guests this year are Catherine Sanders Reach and Reid Trautz. Catherine is the director of the American Bar Association Legal Technology Resource Center, www.abanet.org/tech/ltrc, a member of the ABA

TECHSHOW Planning Board and a frequent speaker at technology conferences and bar meetings across the country. (On a personal note, Catherine is also on my very short list of "go to" experts when I get stumped on an issue.) I promise you that you will enjoy both her engaging style and encyclopedic knowledge.

Reid Trautz has been a guest at our Solo and Small Firm Conference in a prior year when he was the practice management advisor for the District of Columbia bar. Now Reid is the director of the Practice & Professionalism Center for the American Immigration Lawyers Association.

He publishes *Reid My Blog*, a law practice management blog, at reidtrautz.typepad.com. Reid is another frequent lecturer nationwide in legal ethics, law office management and legal technology. He also promises to visit every hospitality suite.

Catherine and Reid will join me with the opening session at the conference, the ever-popular, always enlightening 50 Tips in 50 Minutes. Catherine will also give us presentations on "Going Paperless in 2008," "Adobe® Acrobat® Tips and Tricks" and "Internet Legal Research: Tips to Zero in on the Good Stuff... and Then Find it Again!" Reid will give us "Tips for the Mobile Lawyer" and then will join with me for a program called "Plan for Success: Managing Your Business in a Changing World."



OBA SOLO and SMALL FIRM CONFERENCE

Young Lawyers Division Midyear Meeting • Estate Planning, Probate and Trust Section Midyear Meeting

JUNE 19-21, 2008 • TANGLEWOOD RESORT • LAKE TEXOMA

Given the expertise we have available with law office technology this year, we are going to end the conference a little differently. Reid, Catherine and I will have an afternoon session Saturday titled "Small Firm Technology Guide: What You Need to Buy — What You Need to Trash." Finally we will end with our traditional "What's Hot and What's Not in Running Your Law Practice" where we balance audience participation, questions to our panelists and hot technology tips with drawings for many fabulous prizes. If you thought you might want to sneak out early, maybe you should think again.

But we have much more expertise at our conference on a wide variety of topics. For example, we have Dr. Dwight E. Adams appearing at our conference. Dr. Adams is director of the University of Central Oklahoma's Forensic Science Institute. He is also the former director of the FBI Laboratory in Quantico, Va., and is noted by the FBI as the first FBI Agent to testify in court on DNA analysis. His topic will be "You Know CSI, But Do You Know FSI? The Changing Landscape of Forensic Science in Oklahoma." He plans to be available for the entire conference so that you will have a chance to meet and visit with him.

One of our "home grown" experts is Oklahoma City criminal defense lawyer Jack Dempsey Pointer who will give a presentation titled "Nowhere to Live: Sex Offender Registration." We've been hearing more and more about the impact of these laws and thought

that our conference attendees would want to know more about this area.

Another topic that has been in the news in Oklahoma is immigration law, so we have invited Oklahoma City lawyer T. Douglas Stump to join AILA's Reid Trautz for a program "Hot Topics in Immigration Law for the Nonspecialist."

One cannot turn on the news on TV or pick up a newspaper without hearing about the mortgage foreclosure crisis in America. We've asked Norman attorney David Sisson for some help in this area with programs titled "Is Chapter 13 the Answer to Foreclosure?" and "Defending the Common Foreclosure Case." David has studied extensively in this area and has a wealth of information not easily gleaned from a law library.

Many are aware that we need to spend more time and attention to taking care of ourselves and our fellow lawyers. We have a special plenary session entitled "Lawyers Helping Lawyers: Confronting a Crisis in Our Profession," which has important information for all of us.

Our sponsor, the OBA Estate Planning, Probate and Trust Section is having their midyear meeting with us once again. They are generously sharing their expertise with us. Their special guest is Steven B. Gorin from the St. Louis, Mo., firm of Thompson Coburn LLP. This is a very well-known law firm, and I'm betting this is his first solo and small firm conference. His topic is "Insurance LLC Helps Busi-

ness Owners." Apparently a recent IRS private letter ruling has blessed an interesting estate planning strategy.

Another advanced estate planning topic is "Safe Harbors for Stormy Times: An Overview of Available Preservation Alternatives" with Tulsa lawyers Lesa Creveling and Philip Feist.

For those of you who are interested in estate planning at a little different level, we have "The ABC's of Estate Planning" with Tulsa attorney Gale Allison. Gale is a former staff lawyer with the Internal Revenue Service who now limits her boutique practice to estate planning issues. She invites one and all to bring their questions as she wants this to be an interactive session with lots of audience participation. Young Lawyer Division attendees should take note of this one.

Also directed to the young lawyers, but of interest to all, is a program called "I Have an Office — Now What Do I Do?" This presentation will be from Weatherford attorney Donna Dirickson. Donna is a former chair of the OBA Law Office Management and Technology Section. Donna will discuss a variety of topics, including how she manages and organizes her law office.

Oklahoma City lawyer (and CPA) Ken Klingenberg will help us with some financial advice in his program "Income and Tax Issues for the Small Firm Lawyer."

The OBA Family Law Section returns to the conference as a sponsor with its great hospitality suite and some great programming for all of

us. One of these programs is from Tulsa attorney David A. Tracy and is called "What is Collaborative Law & Why Should I Care?" We were still finalizing the other program at press time.

"Problems, Pitfalls & Punting: What Not to Do in Your General Practice" is the title of a program by Eufaula attorney Deborah Reheard,

“ For Friday night entertainment, back by popular demand, we have the Bar and Grill Singers. ”

Shawnee lawyer James Stuart and Tecumseh lawyer Kimberly Warren. Our panelists assure me that they are all experts in all three of these areas. It's always been my theory that some of the most important decisions you make are cases and clients you decide not to take.

Speaking of experts, we will also have Kraettli Q. Epperson speaking to us on title examination standards and OBA General Counsel Dan Murdock speaking to us Friday on legal ethics issues.

OBA Ethics Counsel Gina Hendryx will have a special "Ask the Ethics Counsel" feature where conference attendees can sign up for 30-minute private ethics question and answer sessions during the day Friday. She will also give all of us a presentation titled "Trust Account Check Up" Safe-keeping Client Funds While Maintaining Proper Business Records." I'll also be doing a program at the same time on building a small law firm Web site.

But of course, there's a lot more to the OBA Solo and Small Firm than the programming. There is the chance to meet other lawyers and exchange ideas. You get to take your family to a nice resort and have some time to relax. There are the hospitality suites. You get to satisfy your MCLE obligation for the year. There are children's activities and several swimming pools. There's great food and fun. Again, there are the hospitality suites.

But if you've been before, you know all of that, and, if you have been planning to go, but never made it, then maybe 2008 should be your year to attend the OBA Solo and Small Firm Conference.

**Come & Enjoy
the Fun!**

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OBA SOLO and SMALL FIRM CONFERENCE

JUNE 19-21, 2008 TANGLEWOOD RESORT LAKE TEXOMA

DAY 1 • Friday June 20

**Come
& Enjoy
the Fun!**

8:25 a.m.	Welcome William Conger OBA President		
8:30 a.m. - 9:20	50 Tips in 50 Minutes Catherine Sanders Reach, Reid Trautz and Jim Calloway		
9:20 a.m..	Break		
9:30 a.m. - 10:20 a.m.	Income and Tax Issues for the Small Firm Lawyer Ken Klingenberg	Title Exam Standards Kraettli Q. Epperson	ABC's of Estate Planning Gale Allison
10:20 a.m..	Break		
10:30 a.m. - 11:20 a.m.	Hot Topics in Immigration Law for the Nonspecialist Reid Trautz & Douglas Stump	Internet Legal Research: Tips to Zero in on the Good Stuff... and Then Find it Again! Catherine Sanders Reach	Insurance LLC Helps Business Owners Steven B. Gorin
11:20 a.m..	Break		
11:30 - noon (30 min session)	Should I Have a Website? Jim Calloway	"Trust Account Check Up" Safekeeping Client Funds While Maintaining Proper Business Records Gina Hendryx	Is Chapter 13 the Answer to Foreclosure? David Sisson
Noon	LUNCH BUFFET		
1:00 p.m. - 1:50 p.m..	Ethics Topic Dan Murdock		
1:50 p.m.	Break		
2:00 p.m. - 2:50 p.m..	Family Law Topic TBA	Problems, Pitfalls & Punting: What Not to Do in Your General Practice Deborah Reheard, James Stuart & Kimberly Warren	Going Paperless in 2008 Catherine Sanders Reach

DAY 2 • Saturday June 21 • Tanglewood Resort

8:30 a.m. - 9:20 a.m.	It's Your Business: Managing Success in a Changing World Reid Trautz and Jim Calloway	Adobe Acrobat Tips and Tricks Catherine Sanders Reach	No Where to Hide: Sex Offender Registration Jack Dempsey Pointer
9:20 a.m..	Break		
9:30 a.m. - 10:30 a.m.	What is Collaborative Practice and Why Should I Care? David A. Tracy	Defending the Common Foreclosure Case David Sisson	I Have an Office — Now What Do I Do? Donna Dirickson
10:30 a.m.	Break		
10:40 a.m. - 11:30 a.m.	Lawyers Helping Lawyers: Confronting a Crisis in Our Profession		
11:30 a.m.	Break & Lunch • Hotel Check Out		
12:30 p.m. - 1:20 p.m.	You Know CSI, But Do You Know FSI? The Changing Landscape of Forensic Science in Oklahoma Dr. Dwight E. Adams	Safe Harbors for Stormy Times: An Overview of Available Wealth Preservation Alternatives Lesa Creveling Philip Feist	Tips for the Mobile Lawyer Reid Trautz
1:20 p.m.	Break		
1:30 p.m. - 2:20 p.m.	Small Firm Technology Guide: What You Need to Buy — What You Need to Trash Catherine Sanders Reach, Reid Trautz and Jim Calloway		
2:20 p.m. - 3:20 p.m.	What's Hot and What's Not in Running Your Law Practice Catherine Sanders Reach, Reid Trautz and Jim Calloway	 <p style="font-size: 2em; font-weight: bold; text-align: center;">Plan a get-a-way with the OBA!</p>	

Spend some vacation time with your family
and still get all your CLE for the year

The OBA Summer Get-A-Way

OBA Solo & Small Firm Conference
and YLD Midyear Meeting
June 19-21, 2008 • Tanglewood Resort – Lake Texoma

Register online at www.okbar.org or return this form.

Registrant's Name: _____ OBA#: _____

Address: _____ City/State/Zip: _____

Phone: _____ Fax: _____ E-Mail: _____

List name and city as it should appear on badge if different from above: _____

Registration Fees: Registration fee includes 12 hours CLE credit, including one hour ethics. Includes all meals Thursday evening Poolside Buffet; Breakfast Buffet Friday & Saturday; Buffet lunch Friday & Saturday; Friday evening Ballroom Buffet.

Circle One

Early-Bird Attorney Registration (**on or before May 30, 2008**) \$175

Late Attorney Registration (**May 31, 2008 or after**) \$225

Early-Bird Attorney & Spouse/Guest Registration (**on or before May 30, 2008**) \$275

Late Attorney & Spouse/Guest Registration (**May 31, 2008 or after**) \$325

Spouse/Guest Attendee Name: _____

Early-Bird Family Registration (**on or before May 30, 2008**) \$325

Late Family Registration (**May 31, 2008 or after**) \$375

Spouse/Guest/Family Attendee Names: **Please list ages of children.**

Spouse/Guest: _____ Family: _____ Age: _____

Family: _____ Age: _____ Family: _____ Age: _____

Materials on CD-ROM only Total: \$ _____

Thursday, June 19 • Golf With the BOG • 18 Hole Golf (_____ of entries @ \$50 ea.) Total: \$ _____

Friday, June 20 • Nine Hole Golf (_____ of entries @ \$35 ea.) Total: \$ _____

Total Enclosed: \$ _____

**Make check payable to the Oklahoma Bar Association. MAIL Meeting Registration Form to:
CLE REGISTRAR, P.O. Box 53036, Oklahoma City, OK 73152. FAX Meeting Registration Form to (405) 416-7092**

For payment using ___VISA or ___Master Card: CC: _____

Expiration Date: _____ Authorized Signature: _____

No discounts. Cancellations will be accepted at anytime on or before May 30, 2008 for a full refund; a \$50 fee will be charged for cancellations made on or **after May 31, 2008. No refunds after June 17, 2008.**

Call 1 (800) 833-6569 for hotel reservations. Ask for the special OBA rate.



HOTEL REGISTRATION FORM

Registrant's Name: _____ Phone: _____

Address: _____ City/State/Zip: _____

Spouse/Guest/Family Attendee Names: _____

Name	Age, if under 21
Name	Age, if under 21
Name	Age, if under 21

~~~~~ HOTEL INFORMATION ~~~~~

Arrival Day/Date: _____ Departure Day/Date: _____ No. of People: _____

Please check room preference: _____ Single Condo \$99 _____ New Hotel Room \$123 _____ Tower Suite \$134
 _____ Smoking Room _____ Non-Smoking Room Special Requests: _____

FRIDAY, JUNE 20, 2008

CHILDREN ACTIVITIES (3 yrs. & up)

- 9:30 am - 11:30 am: Age Appropriate Crafts
 _____ No. \$12.50 each child \$ _____
- 11:30 am - 1 pm: Story Time (lunch included)
 _____ No. \$12.50 each child \$ _____
- 1 pm - 3 pm: Supervised Swimming
 _____ No. \$12.50 each child \$ _____
- 7:30 pm - 10:30 pm: Movies & Popcorn
 _____ No. \$12.50 each child \$ _____

SATURDAY, JUNE 21, 2008

- 9:30 am - 11:30 am: Age appropriate games
 _____ No. \$12.50 each child \$ _____
- 11:30 am - 1 pm: Story Time (lunch included)
 _____ No. \$12.50 each child \$ _____
- 1 pm - 3 pm: Supervised Swimming
 _____ No. \$12.50 each child \$ _____

TOTAL for Children \$ _____

*Private babysitting available for children
 3 and under \$10 per hour, arrange at front desk.*

SPOUSE/GUEST ACTIVITIES

FRIDAY, JUNE 20, 2008

- 9:30 am: Golf
 9/\$35, 18/\$50 (call for tee time)
 _____ No. Golfers 9/\$35 \$ _____
 _____ No. Golfers 18/\$50 \$ _____

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Call 1(800) 833-6569 Ext. 2664
 before June 18 to make spa appointment.

**See www.tanglewoodresort.com for more hotel
 recreational activities and spa information.**

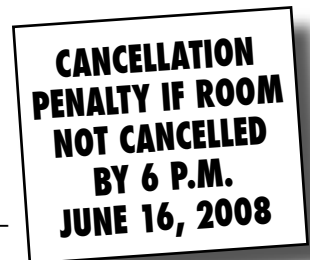
Cancellations of activities will be accepted 48 hours before arrival date.

Mail or fax entire page to: Tanglewood Resort

Attn: Teresa, 290 Tanglewood Circle, Pottsboro, TX 75076
 Fax (903) 786-2128.

Make check payable to the Tanglewood Resort. If paying by credit card please complete:

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 Credit Card No. _____ Authorized Signature: _____
 Expiration Date: _____ HOTEL DEADLINE: MAY 30, 2008



The Muscogee (Creek) Nation District Court

Presents the 6th Annual

Doing Business in Indian Country®

Continuing Legal Education Seminar

13 Hours of OBA CLE Credit including 1 hour of Ethics

Thur. & Fri., March 13th-14th, 2008

Tribal Mound Building Great Auditorium
Okmulgee, Oklahoma

“Stop thinking in terms of limitations and start thinking in terms of possibilities”

*Co-Sponsored by: Office of Principal Chief, Muscogee (Creek) National Council and the
Muscogee (Creek) Nation Supreme Court*

Outline of Day One: Thursday, March 13th, 2008

- 8:30** Registration & Complimentary Continental Breakfast
- 8:40** Ceremonial Opening Exercise
- 8:50** Welcome & Introductions by District Court Judge Patrick E. Moore & Comments by Principal Chief A.D. Ellis
- 9:00** Jurisdiction in Indian Country - Melissa Tatum, Professor of Law, University of Tulsa
- 10:00** Break
- 10:10** Tribal Financing - Townsend Hyatt, Orrick Law
- 11:50** Complimentary Lunch – Culinary Arts Chefs, OSU
- 1:15** Ethical Considerations with Indian Tribes - Shelly Grunsted, JD, LL.M. – Professor, University of Oklahoma
- 2:20** Break
- 2:30** Class II vs. Class III Gaming - Phil Hogan, National Indian Gaming Commissioner
- 3:30** Preservation of Sovereignty and Protecting Tribal Property – Shannon Prescott, JD, Glendening, McKenna & Prescott
- 4:30** Question & Answer Period – Entire Panel
- 5:00** Muscogee (Creek) Nation Bar Swearing-In Ceremony - Justices of the Muscogee (Creek) Nation Supreme Court
- 5:30** Complimentary Barbecue Dinner at the Okmulgee Casino

Outline of Day Two: Friday, March 14, 2008

- 8:30** **Opening Remarks** – District Court Judge Patrick E. Moore
 - 9:00** **Issues with Tribal Restricted and Trust Property** – Casey Ross-Petherick,
Professor of Law, Oklahoma City University
 - 10:00** **Break**
 - 10:00** **Indian Gaming Industry Report** – Alan Meister, Ph.D. - Vice Pres., Analysis Group
 - 11:00** **Updates on Federal Indian Law Cases** – Timothy Posey, Hall Estill
 - 12:00** **Complimentary Lunch – Culinary Arts Chefs, OSU**
 - 1:30** **Sports and Entertainment on Tribal Property** – Frank Marley, Jr., JD. Seminole
Nation of Florida Tribal Attorney
 - 2:20** **Break**
 - 2:30** **Enterprise Development** – Frank Marley, Jr. Seminole Nation of Florida Tribal Attorney
 - 3:20** **Economic Development on Tribal Property** – Dr. Jerry Bread, Professor, University of
Oklahoma
 - 4:30** **Closing Comments and Evaluations**
- Adjourn

2008 Doing Business In Indian Country

March 13th-14th, 2008

Tuition: \$150 for all attendees who pre-register on or before March. 7, 2008

Late & Walk-Ins: \$175 (if space available)

13 hours of CLE credit ♦ Includes 1 hour of Ethics

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Address _____

City _____ ***State*** _____

Zip _____ ***OBA Mbr? Yes*** ***No*** ***OBA#*** _____

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Okmulgee, OK 74447

Contact Information:
918-758-1400
mvsokoke@aol.com

FROM THE PRESIDENT

cont'd from page 492

Particularly noteworthy under the South Carolina rule is a prohibition of counsel and witnesses engaging in off-the-record private conferences during depositions or during breaks regarding the substance of testimony at the deposition. Texas has also promulgated court rules similar to South Carolina, although the restriction on private conferences is slightly less severe than in South Carolina. Frankly, I think it is unfortunate that states have found it necessary to adopt these rules to address appropriate conduct in depositions, and I am glad we have not done so in Oklahoma.

I agree with my friends Jack Dawson and Charlie Alden, both of whom have written in the Oklahoma County Bar Association newspaper, *The Briefcase*, criticizing the South Carolina rule. As Charlie said, "The Discovery Code in Oklahoma ... has withstood the test of time and experience." In addition to federal and state discovery rules, we are also bound by the Model Rules of Professional Conduct. Model Rule 3.4 (adopted verbatim as Rule 3.4 of the Oklahoma Rules of Professional Conduct) is the operative rule relating to fairness to the opposing party and counsel and sets forth the discipline which lawyers should operate in the discovery process.

So much of pretrial proceedings are done outside the scrutiny of the court, which is the way most courts would have it. Judges are not interested in dealing with spats between counsel and, in fact, are mostly annoyed by it. Doing what is right more often than not, best serves the interest of one's client and the interest of the judicial process. The rules are not complicated, and our conduct is not governed solely by the Code of Professional Responsibility but also by standards of fundamental decency and courtesy. I think it is well for all of us to remember the principles of the Lawyer's Creed that was adopted by the OBA Board of Governors on Nov., 17, 1989.

Colleagues, I believe these statements still ring true almost 20 years later.



Print or Electronic?

You now have a choice.

Continue receiving your printed *Oklahoma Bar Journal* court issues (two per month) in the mail – **or** receive an e-mail with a link to the electronic version instead. Mailed copies stop. There's no dues reduction, but you save some trees.

If you want the electronic version of the court issues and didn't indicate that on your dues statement e-mail the OBA Membership Dept. at jennyb@okbar.org.

Want the print version?
No need to do anything.

Effective March 1, 2008

Do Not Become a Frequent Flier

By John Morris Williams

Feb. 15 was an important day at the Oklahoma Bar Association. It was the deadline for dues payment and MCLE reporting. To all of you who paid timely and are in compliance with MCLE rules, we thank you.

We do everything we can to help members meet those deadlines. We cut out MCLE reporting for many of you by tracking your credits and notifying you that you are in compliance — eliminating the need to file a report. (It used to be that late filing of the report in and of itself carried a penalty even if you had the credits.) We mail out dues statements early. We have online dues payment. In short, we have committed many resources to ensure that it is easy to stay in compliance with these two requirements.

Today in a staff meeting I learned that around 500 members are now delinquent on their dues and about the same number have failed to meet MCLE requirements. The next step will be sending certified letters to those tardy parties to show cause why they should not be suspended from the practice of law. We will spend the next few months helping a good many of these folks get their dues paid and their

MCLE requirements met. Of course, there is now a penalty that attaches.

Staff will try to call or make other contacts right up until the time the Supreme Court issues the order suspending their licenses. In the end we will spend a fair amount of time and money in collecting the late dues and assisting with late MCLE compliance. The penalties help offset the additional costs. They are not just a punishment for paying or filing late. We really would rather have our members keep the penalty money and follow the rules.

“Dues payment and MCLE compliance are Supreme Court rules.”

I am at a loss of how to improve this situation. The numbers each year are about the same. Some of you are what I refer to as “frequent fliers.” These are the members who every year go down to the wire and end up paying penalties and costing us money and staff time to prevent their suspension

from the practice of law. Dues payment and MCLE compliance are Supreme Court rules. They are as much an obligation of your practice as is meeting filing deadlines in pending cases.

The OBA staff is committed to good member service. We are committed to enhancing the professional lives of our members. However, this is one piece that eludes me. I am mystified that our members would jeopardize their licenses by being late in paying their dues or not being in compliance with MCLE. We do understand that unusual and even catastrophic things happen and try our best to work with members who need our best assistance. We hear lots of stories, and on a few occasions we can help. Generally, there is not much we can do at this point, but we will always listen and help where we can.

Here are some suggestions that might help:

- ✓ Right now put on your calendar or docket that your dues need to be mailed and MCLE compliance completed before Jan. 1, 2009. While we do give a grace period until Feb. 15, the dues are really due by Jan. 2 and MCLE is to be satisfied before the end of the year.

- ✓ If you are short on cash, pay us by credit card. The penalties for paying late are much greater than the interest you will pay on your credit card.
- ✓ If you know you are going to have a problem, contact the OBA early so staff can assist you.
- ✓ Pay online the minute you get your dues statement. This will keep the dues statement from going to the bottom of the stack.
- ✓ If you receive notice of insufficient credit in November 2008, make sure you earn your required credit by Dec. 31, 2008.

We at the OBA sincerely appreciate each of you as members and appreciate the opportunity to serve you. It is our job to give you our best assistance. To those of you who always pay on time and follow the MCLE rules, we are thankful to you. Please let us know what we can do to help you not become a frequent flier.



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

Oklahoma Bar Journal Editorial Calendar

2008

- April
Law Day
Editor: Carol Manning
- May
Work/Life Balance
Editor: Jim Stuart
jtstuart@swbell.net
Deadline: Jan. 1, 2008
- August
Insurance Law
Editor: Judge Lori Walkley
lori.walkley@oscn.net
Deadline: May 1, 2008
- September
Bar Convention
Editor: Carol Manning
- October
Guardianship
Editor: Stephen Barnes
barneslaw@alltel.net
Deadline: May 1, 2008
- November
Technology/Practice Management
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Aug. 1, 2008
- December
Ethics & Professional Responsibility
Editor: Martha Rupp Carter
mcarter@tulsa-health.org
Deadline: Aug. 1, 2008

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

2009

- January
Meet Your OBA
Editor: Carol Manning
- February
Immigration
Editor: John Munkacsy
johnmunk@sbcglobal.net
Deadline: Oct. 1, 2008
- March
Privacy
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Oct. 1, 2008
- April
Law Day
Editor: Carol Manning
- May
Oil & Gas and Energy Resources Law
Editor: Julia Rieman
rieman@enidlaw.com
Deadline: Jan. 1, 2009
- August
Bankruptcy
Editor: Judge Lori Walkley
lori.walkley@oscn.net
Deadline: May 1, 2009
- September
Bar Convention
Editor: Carol Manning
- October
Criminal Law
Editor: Pandee Ramirez
pandee@sbcglobal.net
Deadline: May 1, 2009
- November
Family Law
Editor: Leslie Guajardo
lguajardo@swolaw.net
Deadline: Aug. 1, 2009
- December
Ethics & Professional Responsibility
Editor: Jim Stuart
jtstuart@swbell.net
Deadline: Aug. 1, 2009

Spring into Action

By Dan Murdock, OBA General Counsel

The thoughts are the same each year. I keep thinking that the warmth of the sun and the gentle rains of the season will soon restore the garden world around each of us, once again bringing the flowers and wonderful smells of the season. Oh, I enjoyed the fall, Christmas and the beginning of a new year, but I have grown weary of the cold and long for a change once again. March seemed so far away in January, but now it is here — and the world seems to begin anew once again.

You may wonder at this point what the month of March has to do with the issue of ethics, professional responsibility and even lawyers in general. It is not necessarily the month of March itself that has something to do with these topics, but it is more of what happens in March that causes me to make the connection. As I review our Web site at www.okbar.org and its front page, it becomes as Jack Nicholson and Tom Cruise discussed in the movie, *A Few Good Men*, “crystal clear.” We see where the headlines announce details about the Solo and Small Firm Conference and the winners of the High School Mock Trial Championship. It is that time of year.

It is the time when OBA volunteers answer the calls at OETA. I may have missed only one year in the past 20,

and the evening is always a fun time. More importantly, it is for a good cause and is in the public interest. The Preamble to the Rules Creating and Controlling the OBA tells all that our association is created, in part, in the public interest to foster and maintain on the part of those engaged in the practice of law high ideals of public service. Our Web site specifically lists 25 areas where lawyers can provide service to the public.

March brings back many great memories. As I watched OETA the other night and listened to the program about the music of the ‘60s, those memories just seemed to continue on and on. I saw musical groups as they were in that era and then as they performed today. Eric Burdon of The Animals was young, slender and dark haired. His hair was not long but longer than you see today. Remember it was the ‘60s. As I watched him perform and observed his appearance now, I was amazed. Others looked very similar, but Eric was heavier with much less hair that was gray or even white. He looked grandfatherly, but his voice was unmistakable. Next week I will work at OETA for the 19th time. Why? It’s fun. It is for a good cause. It is public service.

Oklahoma City University recently held its Pro Bono and Public Interest Fair to

encourage law students to participate during their summers working, mostly unpaid, for public interest groups locally and nationwide. An auction to raise money to assist the program is being held to provide stipends to cover students’ expenses. It is never too early to start that tradition.

Late last month I spoke at a noon luncheon meeting at the request of Oklahoma City attorney and long time friend, Bill Burkett. I spoke too long. I was talking about the great things that the OBA and the OBF did for the community, and it just took me more time than I realized. But I was proud of my associations for doing the things they are. Maybe I got a little carried away, but my mission was clear. I wanted others to know. We do not have television advertisements or radio spots. The newspapers always seem to have more interest in other stories, but our public service is there — and we can demonstrate that to all who will listen.

The strategic plan of the Oklahoma Bar Association includes as one of its goals to promote activities and programs that serve the public. That can be done in many ways. Use March as a time to start to do so.

OBA/CLE presents

Spanish for Legal Professionals

DATE & LOCATION:	Oklahoma City April 4, 2008 Oklahoma Bar Center 1901 N. Lincoln Blvd.
CLE CREDIT	This Course has been approved by the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for 6.5 hours of mandatory CLE credit, including 0 hour of ethics.
TUITION:	\$225 tuition for early-bird registrations with payment received at least four full business days prior to the seminar date; \$250 for registrations with payment received within four full business days of the seminar date. No discounts.
CANCELLATION POLICY:	Cancellations will be accepted at any time prior to the seminar date; however, a \$25 fee will be charged for cancellations made within four full business days of the seminar date. Cancellations, refunds, or transfers will not be accepted on or after the seminar date.

Samantha Snow Cardwell-Ward is a dynamic attorney, professional speaker and trainer. She received her J.D. from the University of Missouri-Columbia School of Law in 1999, and her B.A. in Spanish and Political Science from Central Methodist University in 1996.

She has taught and presented for the Association of Continuing Legal Education Professionals (ACLEA), The Missouri Bar, The Missouri Department of Revenue, Central Methodist University, Moberly Area College, Mineral Area College, Columbia Career Center, and William Woods University.

She has also interpreted and translated for several Missouri courts and for the Bootheel Migrant Farmworker's Project. She recently served as the Assistant Director and CLE Programs Attorney at The Missouri Bar. Samantha practiced law for a number of years in Federal Bankruptcy Court in Missouri and Kansas.

Samantha's international experience includes a study abroad with Duke University in Spain, and a language exchange in Mexico City, Mexico. Samantha is a licensed attorney in Texas and Missouri.

Reasons that Spanish should be an integral part of any law practice:

1. There are more than 30 million Spanish-speakers in the United States today. It is predicted that in 50 years, Spanish will be the spoken language in over half of all American households.
2. Spanish is the native language of almost 350 million people, the official language in 21 countries and an official language of the European Union and other international organizations.
3. Spanish is one of the most frequently used business languages, and Spain and Latin America are very important areas for emerging businesses.
4. Learning Spanish will help legal professionals increase revenue by adding bilingual employees and accepting Spanish-speaking clients.

8:30 a.m. Registration & Continental Breakfast

9:00 Pronunciation, Basic Vocabulary, and Greeting Your Clients

9:50 Break

10:00 Basic Grammar and Legal Phrases (Civil and Criminal)

10:50 Civil Law Vocabulary and Crafting Sentences

12:10 p.m. Networking lunch (included in registration)

- 12:40 **Criminal Law Vocabulary and Creating Dialogs**
- 1:30 **Break**
- 1:40 **Using Spanish in Real Life Legal Situations**
- 2:30 **Counseling Your Client and Explaining the Legal System**
- 3:20 **Adjourn**

Spanish for Legal Professionals

Oklahoma City

April 4, 2008

Materials only

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Register online at www.okbar.org



Samantha Snow Cardwell-Ward

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PRESENT

THE SEX CRIME ACCUSATION – FIGHTING FOR YOUR CLIENT’S LIFE
THURSDAY, MAY 15TH AND FRIDAY, MAY 16TH, 2008

@ The Marriott Hotel, 3233 N.W. Expressway, Oklahoma City, 1-800-228-9290
(Seminar Rate of \$109)

Approved for 15 Hours CLE (includes 1 hr. Ethics)

THURSDAY

FRIDAY

<p>8:00 – 8:30 REGISTRATION & OPENING. REMARKS. Andrea Miller, President OCDLA, Cynthia Viol, President, OCCDLA</p> <p>8:30 – 9:00 PRETRIAL & TRIAL MOTIONS. Cynthia Viol, Oklahoma City</p> <p>9:00 – 9:50 2413 & 2414 LEGISLATION & COCA. David Ogle and James Hankins, Oklahoma City</p> <p>10:00 – 11:50 VOIR DIRE: THE MARRIAGE OF COLORADO AND WYOMING. David Smith, Norman, & Cynthia Viol, Oklahoma City</p> <p>11:50 – 12:40 (ETHICAL ASPECTS OF) THE CHILD INTERVIEW. Jamie Vogt, M.S., L.P.C., Forensic Interviewer, Tulsa</p> <p>LUNCH ON YOUR OWN</p> <p>1:40 – 2:30 CROSS EXAMINING THE CHILD WITNESS. Stanley G. Schneider, Houston</p> <p>2:30 – 3:20 THE MEDICAL EXAMINATION. Jamie Ferrell, R.N., SANE, Houston</p> <p>3:30 – 4:20 THE SEX OFFENDER EVAL; EVERYTHING YOU WANTED TO KNOW ABOUT PPGS. Richard Kishur, Ph.D., Oklahoma City</p> <p>4:20 – 5:10 TECHNICAL & LEGAL ASPECTS OF KIDDIE PORN. Robert A. Manchester, Oklahoma City.</p> <p>5:10 - ? RECEPTION @ THE MARRIOTT</p>	<p>8:00 – 8:50 HOW TO EVALUATE THE DNA. Mary Long, Oklahoma City.</p> <p>8:50 – 9:40 HOW TO WIN WHEN THE STATE HOLDS ALL THE CARDS. Tracy Schumacher, Norman.</p> <p>9:50 – 10:40 SEX OFFENDER REGISTRATION; & YOU THOUGHT PRISON WAS BAD. Jack Dempsey Pointer, Oklahoma City.</p> <p>10:40 – 11:10 THE FEDERAL “SEXUALLY DANGEROUS PERSON” & CIVIL COMMITMENT. Julia Summers, Oklahoma City.</p> <p>11:10 – 12:00 DEATH FOR SEX IN LOUISIANA: THE KENNEDY CASE. Jelpi Picou, New Orleans.</p> <p>LUNCH ON YOUR OWN</p> <p>1:30 – 4:10 WHAT ARE YOUR TROUBLING ISSUES? SUBMIT YOUR CASE FOR PANEL DISCUSSION: 1 page synopsis, deadline for submission is April 21. PANEL: Stanley Schneider, Jelpi Picou, David Smith, Tracy Schumacher, Mary Long, David Ogle, Jim Hankins, Robert Manchester, Jack Pointer, Tony Lacy, Cynthia Viol, and Julia Summers.</p> <p>4:10 - ? RECEPTION @ THE MARRIOTT</p>
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REGISTRATION

Cost: OCDLA/OCCDLA Member \$285.00 Nonmember \$375
Public Defender \$225.00 Public Defenders in block of 10 or more \$200.00 per person

NAME: _____ BAR # & STATE: _____

ADDRESS: _____

E-MAIL: _____ PHONE: _____

Check payable to OCDLA, \$ _____
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Card Number : _____ Exp. Date: _____
Signature: _____

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Signature: _____

MAIL REGISTRATION TO: OCDLA, PO BOX 2272, OKLAHOMA CITY, OK 73101-2272

The Oklahoma County Bar Association's



1st Annual Las Vegas Seminar 2008

Thursday, April 24th – Sunday, April 27th

The 1st Annual Spring Seminar by the Oklahoma County Bar Association will be held in Las Vegas, Nevada on April 24 - 27, 2008. The price for this exciting educational and exhilarating experience is \$944 per person (double occupancy) for a three-night package. Included in the package are:

- Roundtrip non-stop airfare from Oklahoma City to Las Vegas
- Deluxe Accommodations at the **MANDALAY BAY RESORT**, hotel tax and bellman gratuities for three nights.
- Transportation between airport and hotel (when using group air schedule)
- Six hours of approved CLE credit

For persons not attending the CLE seminars, the cost is \$789. For more information or to register for the seminar, call the OCBA at (405) 236-8421 or go to the OCBA Web site at:

www.okcbar.org

Your Mom Always Said
Nothing In Life Is Free...



Sorry Mom.

Get your FREE listing on the
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Family & Divorce Mediation Training

OKC • March 26-29
Tulsa • April 2 - 5



Approved for 40 hours of MCLE credit

This course is lively and highly participatory and will include lecture, group discussion, and simulated mediation exercises

Cost: \$625 includes all materials

The Course for Professional Mediators in Oklahoma

This course fulfills the training requirements set forth in the District Court Mediation Act of 1998

Contact:

The Mediation Institute

(405) 607-8914

James L. Stovall, Jr.

13308 N. McArthur
Oklahoma City, OK 73142

Oklahoma Merit Protection Proceedings: Transition to the Electronic Age

DATE & LOCATION:	Oklahoma City April 3, 2008 Oklahoma Bar Center 1901 N. Lincoln Blvd.
CLE CREDIT	This Course has been approved by the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for 6 hours of mandatory CLE credit, including 0 hours of ethics.
TUITION:	\$150 tuition for early-bird registrations with payment received at least four full business days prior to the seminar date; \$175 for registrations with payment received within four full business days of the seminar date.
CANCELLATION POLICY:	Cancellations will be accepted at any time prior to the seminar date; however, a \$25 fee will be charged for cancellations made within four full business days of the seminar date. Cancellations, refunds, or transfers will not be accepted on or after the seminar date.

Program:

Program Planner

Susan Bussey, Executive Director, Oklahoma Merit Protection Commission, Oklahoma City

8:30 a.m. Registration & Continental Breakfast

9:00 **Electronic Pleadings and Technology History: The Federal Model and Overview of Courtroom Technology**
Rhonda Reynolds, Chief Deputy Court Clerk, United States District Court for the Western District, Oklahoma City

9:50 **Break**

10:00 **Preparing Your Case For a Hearing**
Sam Anderson, Legal-Graphics, Oklahoma City
Janice Fowler, Legal-Graphics, Oklahoma City

10:50 **Legal Pleadings and Practice in the Federal Courts: A Litigator's Perspective on Online Filing and Court Room Technology**
Robert D. Evans, Jr., U.S. Attorney's Office, Oklahoma City

11:40 **Networking lunch** (included in registration)

12:10 p.m. Oklahoma Merit Protection Online Filing System: An Overview of How it Works with Courtroom Technology

Austin Gilley, Deputy Director, Oklahoma Merit Protection Commission, Oklahoma City

1:00 Oklahoma Merit Protection Commission: Judges' Perspectives on Online Filing - How it Will Change Practice Before the Commission

Judge P. Kay Floyd, Administrative Law Judge, Oklahoma City

Judge Annita Bridges, Administrative Law Judge, Oklahoma City

Judge Lydia Lee, Administrative Law Judge, Edmond

1:50 Break

2:00 Oklahoma Merit Protection Commission: Judges' Perspectives on Use of Courtroom Technology

Judge P. Kay Floyd

Judge Annita Bridges

Judge Lydia Lee

2:50 Adjourn

Oklahoma Merit Protection Proceedings: Transition to the Electronic Age

Oklahoma Bar Center

April 3, 2008

Materials only \$80

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Improving Access to Justice and Legal Education for Oklahomans

Cy Pres Awards to the Oklahoma Bar Foundation

WHAT ARE CY PRES AWARDS?

Cy pres awards are made from final surplus funds in class action cases, and sometimes others types of court proceedings, when for any number of reasons those funds cannot be distributed to the class members or beneficiaries who were the intended recipients, such as when it has become difficult or impossible to identify those to whom damages should be assigned or distributed. Courts may authorize a cy pres distribution to appropriate charitable organizations under the trust doctrine of cy pres, and the courts' broad equitable powers to permit such funds to be used by educational, charitable and other public service organizations for public interest purposes. Cy pres funds may be used to support current programs or, where appropriate, to create endowments and future income for long-range programs that can be used in conjunction with other funds.

WHY CONSIDER THE OKLAHOMA BAR FOUNDATION FOR CY PRES AWARDS?

The OBF's mission of "advancing education, citizenship and justice for all" makes it a perfect match for class action cy pres awards because

the underlying premise for class actions is to make access to justice a reality for "the little guy" who otherwise would not be able to obtain the protection of the court system.

Through the OBF's comprehensive grants award process, applicants for grants and a panel of diverse individuals with a wide range of expertise come together to objectively and strategically discuss and allocate resources to support law-related programs and initiatives. This makes OBF an attractive charitable investment choice for cy pres awards.

The OBF has the flexibility of using cy pres awards to expand its comprehensive programs or to apply funds to specific projects and initiatives. Moreover, OBF's mis-

sion, as cited above, of advancing education, citizenship and justice for all is as American as apple pie. Further, corporate and institutional defendants involved in class actions need not be concerned about cy pres funds going to a party that is possibly antagonistic to their interests.

The OBF is a proven organization that has been helping people for more than 60 years. To date, more than \$7.5 million has been awarded to aid citizens throughout Oklahoma. OBF holds an important place in the philanthropic community and public interest law and works hard to address legal aid needs and to eliminate systemic barriers to access to justice.

"...Sometimes our judicial system is taken for granted and we may forget the many sacrifices and battles over centuries that led to its creation and evolution. It is important that our hard-won rights are preserved and prosper and that we are able to pass them on to future generations. In these days when our court system is under attack, it is important to do our utmost to educate the public and provide the best possible structure within the system so that it can be respected and appreciated. We know that the OBF is helping perform these vital functions and will help in a way that will ensure the availability of the judicial process to all..."

Allan DeVore,
DeVore Law Firm, Oklahoma City

OBF CAN DO GOOD WORKS WITH CY PRES AWARDS

Over the past two years, the Oklahoma Bar Foundation has been fortunate in receiving some generous cy pres awards. These cy pres funds are key components in the growth and outreach of OBF's charitable mission, and will enable the OBF to increase the overall amount of grant awards it makes, as well as increase its capacity for new initiatives. Cy pres awards to the Oklahoma Bar Foundation can and will make a tremendous difference benefiting law-related programs throughout Oklahoma. Please contact Nancy Norsworthy at (405) 416-7070 or nancyn@okbar.org to arrange for a member of the foundation Board of Trustees to discuss details of cy pres awards with you.

WHAT WE DO

The Oklahoma Bar Foundation was created by lawyers for lawyers to accomplish a very worthy goal — the attainment of legal justice, service and education for all Oklahomans. One way the foundation can help accomplish this goal is to ensure that qualified legal service organizations have adequate money to operate. Giving away money thoughtfully, however, is not always an easy task, and the foundation trustees work hard to consider all aspects of the charitable programs to which foundation dollars are pledged. Through careful analysis, the foundation is able to assist a variety of organizations that are providing legal resources to Oklahomans and to improve access to legal justice and education throughout our state. OBF invests in organizations and initiatives that have

proven to be effective in providing quality legal assistance to less fortunate citizens and serves a diverse group of interests through one convenient charitable choice.

Specifically, OBF carries out its mission of

... Advancing education, citizenship and justice for all through our support of:

- The delivery of legal aid services for lower income citizens in all 77 counties
- Programs that educate Oklahoma school children about the American system of justice and rule of law
- Children's legal aid services and child advocacy programs
- Victims' programs and projects
- Legal resource projects and educational programs for our more senior citizens
- Promotion of broader community support for access to justice through ancillary support of court projects and public education and awareness programs

WHO WE ARE

The Oklahoma Bar Foundation is a Section 501(c)(3) organization that works to improve access to justice for people in our state who are impacted by poverty, abuse and discrimination. Incorporated in 1949, OBF is the third-oldest state bar foundation in the United States, an achievement of which all Oklahoma attorneys can be proud. All lawyers duly licensed to practice law in Oklahoma are members, and can become more involved as Fellows through annual contributions of only \$100 over a 10-year

period. Fellows contributions, IOLTA trust account revenues, earnings on investments, planned gifts, income from other sources — and now cy pres awards — have enabled the OBF to invest more than \$7 million in law-related charitable projects in just the last 21 years.

The OBF mission recognizes that access to justice and legal education is central to our democratic society, and that the legal community has a duty to lead in making justice and education accessible to the less fortunate. The OBF provides concerned professionals with an opportunity to come together in a concerted effort of support that can make an important difference in the lives of many. If you have the opportunity, please consider the OBF for future cy pres awards.

OTHER WAYS YOU CAN HELP

Attorneys and other interested parties can help provide legal services to Oklahomans through membership in the OBF Fellows program and other general contributions. Become an OBF Fellow today and your single voice becomes over \$7.5 million strong!



A view of workers beneath the Lady of Justice bronze statue located at the entrance of the Oklahoma Bar Center.



FELLOW ENROLLMENT FORM

Attorney Non-Attorney

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

Firm or other affiliation: _____

Mailing & Delivery Address: _____

City/State/Zip: _____

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

- I want to be an OBF Fellow **now** – Bill Me Later!
- Total amount enclosed, \$1,000
- \$100 enclosed & bill annually
- New Lawyer 1st Year*, \$25 enclosed & bill as stated
- New Lawyer within 3 Years*, \$50 enclosed & bill as stated
- I want to be recognized as a **Sustaining Fellow** & will continue my annual gift of **at least \$100** – *(initial pledge should be complete)*
- I want to be recognized at the leadership level of **Benefactor Fellow** & will annually contribute **at least \$300** – *(initial pledge should be complete)*

YES –
I support charitable good works & agree to become a member of the OBF Fellow Program.

Signature & Date: _____ OBA Bar #: _____

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

OBF SPONSOR: _____

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

Many thanks for your support & generosity!

Pretrial Litigation in Consumer Advocacy

By A.D. Sanderson

Owning a consumer advocacy firm can vary from delicately tricky to downright outrageous. The cases that walk through the door span the array from defending debtors in suits regarding old debts to helping people involved in Nigerian fraud schemes, with an assortment in between. Cases ranging from plaintiff suits involving the Fair Debt Collection Practices Act to helping consumers with discrepancies on repossessions consume a large portion of the practice, but the pretrial litigation varies depending upon which side of the fence the client sits.

DEBT COLLECTION SUITS

A debt collection suit generally involves a potential client seeking representation when they are being sued on a debt. The type of debt is generally credit card debt, but I have seen everything from gym memberships to check kiting as the basis for litigation.

Pretrial litigation remains relatively the same regardless of the type of debt central to a debt collection suit. The demand for a defense attorney in this arena is so high that the debt is placed

into one of three categories before determining what tactic to approach the problem with. First, the client is assessed to determine what the worst case scenario would be in the pending litigation; this involves determining if the client is "judgment proof" or, in the event of a loss, the client would stand to lose anything should a judgment be entered against them.

Once it is determined that a client is not, in fact, judgment proof, the next step is to determine the viability of the debt. Has the statute of limitations run on the debt? Has the plaintiff complied with all of Oklahoma's statutes in regard to collection on the debt? Has there been proper service? Are jurisdiction and venue proper? What affirmative defenses are available? Often clients are unable to help in the process of their own defense. Many clients cannot remember or do not keep accurate records to enable the attorney to determine the answer to most of the aforementioned questions immediately.

Oklahoma Statutes provide a modicum of protection where there was secured

property involved. The defendant must have received notification of pending and post sale, right to redeem, and the property must be sold in a "commercially reasonable" manner.¹ The arguments that these statutory requirements were not met provide affirmative defenses for a client that have resulted in the dismissal of pending litigation.

Oklahoma statutes provide few other defenses. Counterclaims, on the other hand, where legitimate, can be helpful in offsetting any reasonable amount owed (or not owed). The third step in assessing a case lays in potential counterclaims against the plaintiff and/or the collection attorney. All debt collection practices involving household or consumer debts are regulated by the Fair Debt Collection Practices Act² (FDCPA), up to and including litigation, subjecting debt collection attorneys to the safety provisions provided by the act.

COUNTERCLAIMS

Counterclaims arise when a third party collector, and/or the collection attorney, violates provisions of the FDCPA. The counterclaims

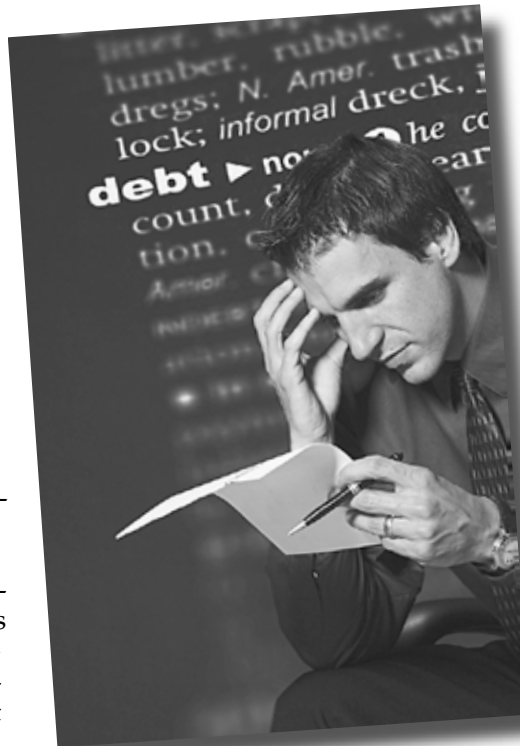
that arise are not compulsory counterclaims, which may be filed in the pending litigation, or may give rise to a separate suit, best filed in federal court. Generally speaking, FDCPA attorneys nationwide have found federal courts to be more receptive of FDCPA litigation than state courts.

The FDCPA can, and is violated in many, many ways; the most common of which involve suing the wrong debtor, filing suit in the wrong county, not providing proper validation and failing to cease communication with a debtor once the debtor is represented. Familiarity with the FDCPA is advised before handling of debt collection suits, and some technical violations of the act can easily be missed, foregoing potential claims a client might have.

PRETRIAL LITIGATION

Once the client has been determined not to be judgment proof and defenses are assessed, the remaining litigation is relatively the same regardless of the type of debt. The FDCPA provides debt verification provisions, as does standard litigation practices. Many times, a debt collection attorney cannot get their client to provide the proper documentation, and the case can be quickly dismissed.

Standard discovery requests are submitted, but often one or more motion to compel is required to either force the hand of the plaintiff into dismissal or presentation of proper documentation. More and more frequently, third-party debt collectors are the named plaintiffs in litigation, and said plaintiffs do not have enough documentation to verify that the person being sued is the correct debtor, that the debt is properly assigned, that the amount in controversy is accurate and that the statute of limitations has or has not run on the debt.



SUMMARY

Debt collection litigation is a growing business; while some firms maintain excellent track records regarding compliance with state and federal laws, some debt collectors inevitably find that violations of said laws are the 'cost' of doing business. The cost is at the sake of those often least able to help themselves. The result of a judgment against the wrong person or for the wrong amount can lead to many lost opportunities, including lost employment and credit rejection.

As more suits are filed involving debt litigation, the consumer advocacy section lags woefully behind in representing debtors. More and more attorneys should be encouraged to help those going through difficult financial situations.

1. See 12A O.S. §§ 1-9-601 - 628.
2. See 15 U.S.C. § 1692 et seq.

A.D. Sanderson owns a consumer advocacy firm in Del City. As the concern and need for consumer advocacy increases, A.D. is willing to help any attorney willing to step into the consumer advocacy arena. Contact her at (405) 632-8500. She wrote this column at the request of the Access to Justice Committee.

YLD MEMBERS ENCOURAGE BAR CANDIDATES

YLD members passed out “survival kits” and words of encouragement to applicants taking the February bar examination in both Oklahoma City and Tulsa. Under the direction of Julia Tiller, chair of the Bar Exam Survival Kit section of the New Attorney Orientation YLD Committee, survival kits were assembled for distribution. The kits contain items such as ear plugs, water, snacks, pencils, erasers and stress balls for candidates to use while taking the exam.



Jennifer Kirkpatrick, Joe Vorndran and Lindsey Andrews were among those who participated in the passing out of the survival kits to bar hopefuls.

YLD Chair-Elect Rick Rose and board members Jennifer Kirkpatrick, Joe Vorndran and Lindsey Andrews passed out the survival kits to Oklahoma City test takers. YLD Treasurer Molly Bircher and Board Member Amber Peckio Garrett passed out the kits to Tulsa test takers. The Board of Bar Examiners, representatives from all three Oklahoma law schools and the test takers themselves expressed their gratitude for the young lawyers and the survival kits they provided.

MARK YOUR CALENDARS FOR THE YLD MIDYEAR MEETING

The YLD Midyear Meeting is scheduled for June 19-21, 2008, at Tanglewood Resort on Lake Texoma. The Midyear Meeting is a terrific opportunity for young lawyers to satisfy their CLE requirements, attend the YLD Midyear Board Meeting and enjoy extensive networking opportunities with other attorneys. All young lawyers are encouraged to attend.

IMPORTANT UPCOMING DATES

NEW ATTORNEY ADMISSION CEREMONIES

April 25, 2008

9, 10 and 11 a.m.

House of Representatives,
State Capitol

‘THE NEW LAWYER EXPERIENCE’ CLE FOR ALL YOUNG LAWYERS

May 6, 2008

9 a.m. - 4 p.m.

Oklahoma Bar Center

Calendar

March



- 11 OBA Women in Law Committee Meeting;** 11:45 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Amber Nicole Peckio (918) 549-6747
- 12 OBA Volunteer Night at OETA;** 5:45 p.m.; OETA Studio, Oklahoma City; Contact: Brandon Haynie (405) 416-7018
- 13 OBA Bench and Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- Leadership Academy Task Force Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Donita Douglas (405) 416-7028
- 14 OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Lynn S. Worley (918) 747-4610
- Lawyers Helping Lawyers Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Tom C. Riesen (405) 843-8444
- 15 OBA Title Examination Standards Committee Meeting;** 9:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Scott McEachin (918) 296-0405
- 20 OBA Paralegal Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Joseph H. Bocoek (405) 235-9621
- 27 OBA Legal Intern Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: H. Terrell Monks (405) 733-8686
- Oklahoma City Estate Planning Council;** 7:30 a.m.; Crown Plaza Hotel, Oklahoma City; Contact: Joe Womack (405) 840-8401
- 28 OBA Access to Justice Committee Meeting;** 1:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade A. McClure (580) 248-4675
- OBA Board of Governors Meeting;** Idabel; Contact: John Morris Williams (405) 416-7000



April

- 9 OBA Awards Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Gary Clark (405) 385-5146
- 10 OBA Work/Life Balance Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Melanie Jester (405) 609-5280
- OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Sharisse O'Carroll (918) 584-4192

apr. cont'd

- 11 OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Lynn S. Worley (918) 747-4610
- 15 Civil Procedure Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- 16 OBA Clients' Security Fund Committee Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Micheal Salem (405) 366-1234
- 17 OBA Legal Intern Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: H. Terrell Monks (405) 733-8686
- 24 OBA Bench and Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- 25 OBA Board of Governors Meeting;** Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- 26 Young Lawyers Division Meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Kimberly Warren (405) 239-7961
- 29 The Law-related Education Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Debra Jenkins (405) 416-7028



May

- 8 OBA Bench and Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Sharisse O'Carroll (918) 584-4192
- 9 OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Lynn S. Worley (918) 747-4610

This master calendar of events has been prepared by the Office of the Chief Justice in cooperation with the Oklahoma Bar Association to advise the judiciary and the bar of events of special importance. The calendar is readily accessible at www.oscn.net or www.okbar.org.

Current Federal Regulatory Issues for Financial Institutions and Technology Service Providers

DATE & LOCATION: Oklahoma City
May 15, 2008
Oklahoma Bar Center
1901 N. Lincoln Blvd.

CLE CREDIT: This course has been approved by the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for 8 hours of mandatory CLE credit, including 1 hour of ethics. For course approval in other states, contact the CLE Registrar. Texas credit pending.

TUITION: \$225 for early-bird registrations received with payment at least four full business days prior to the seminar date; \$250 for registrations received within four full business days of the seminar date. Register online at www.okbar.org/cle. This program will be webcast. For details go to www.legalspan.com/okbar/webcasts.asp. **No discounts.**

CANCELLATION POLICY: Cancellations will be accepted at any time prior to the seminar date; however, a \$25 fee will be charged for cancellations made within four full business days of the seminar date. Cancellations, refunds, or transfers will be accepted on or after the seminar date.

Program Planner/Moderator
Laura Pringle, Pringle & Pringle, Oklahoma City

Program:

- 8:30 a.m. Registration and Continental Breakfast**
- 9:00 Current Compliance Issues**
Jane Ann Batjer, Assistant Counsel, Federal Reserve Bank of St. Louis, MO
- 9:50 Break**
- 10:00 Current Issues for National Banks and Related Entities**
Randy Ryskamp, District Counsel, Office of the Comptroller of the Currency, Dallas
- 10:50 Break**
- 11:00 Information Technology Rules and Guidances**
Hub Thompson, Southern District Lead IT Expert, Office of the Comptroller of the Currency, Dallas
- 11:50 Networking lunch** (included in registration)
- 12:10 p.m. Federal Regulatory Issues Impacting Banks and Technology Service Providers**
Steve Zachary, Regional Counsel, Federal Deposit Insurance Corporation, Dallas

- 1:00 Contracting and Information Security Issues**
Lynn Pringle, Pringle & Pringle, Oklahoma City
- 1:50 Break**
- 2:00 Current Intellectual Property Issues in the Business of Banking**
Neal Rogers, Attorney at Law, Oklahoma City
- 2:50 Break**
- 3:00 Ethics for Lawyers Who Represent Financial Institutions and Related Organizations**
(ethics)
Laura Pringle
Dean Lawrence Hellman, Oklahoma City University School of Law, Oklahoma City
- 3:50 Break**
- 4:00 Controlling State Law/Federal Preemption Issues**
Dudley Gilbert, Legal Counsel, Oklahoma State Banking Department, Oklahoma City
- 4:50 Adjourn**

Current Federal Regulatory Issues for Financial Institutions and Technology Service Providers

Oklahoma City
May 15, 2008
Oklahoma Bar Center

Materials only \$80

Register online at www.okbar.org/cle

Full Name _____

Firm _____

Address _____

City _____ State _____ Zip _____

Phone () _____ E - Mail _____

Are you a Member of OBA? Yes No OBA Bar# _____

Make Check payable to the Oklahoma Bar Association and mail entire page
to: CLE REGISTRAR, P.O. Box 53036 Oklahoma City, OK 73152

For Visa or Master Card Fax (405) 416-7092, Phone +(405) 416-7006
or Mail

Credit Card# _____ Exp. date _____

Authorized Signature _____

USE OF DEMONSTRATIVE AIDS IN ENVIRONMENTAL LITIGATION:

IS A "PICTURE" REALLY WORTH A THOUSAND WORDS?

The OBA Environmental Law Section invites you to attend our Spring 2008 meeting with experts in the area of graphical data presentations and distinguished Federal Judges from the United States District Court for the Northern District of Oklahoma. Attendees will have the opportunity to consider various types of demonstrative aids and hear observations from the Northern District Federal Bench on use of demonstrative aids. This is a rare opportunity to gain a wealth of information on use of demonstrative aids and learn more about how you can participate in the Environmental Law Section and support the OBA.

Location: ONEOK Plaza Cafeteria Conference Room

Date: March 27, 2008

Time: 11:30 to 1:30 – Registration 11:15 to 11:30

Cost: 20.00, including lunch (one hour of CLE credit applied for)

Please RSVP to: sarah.penn@deq.state.ok.us

Space limited to first 50 confirmations. Preference given to members of Environmental Law Section members (including bar members who join NOW in order to attend this excellent presentation).

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Joe Womack, senior vice president and manager of the Oklahoma City office, stand left, Alysa Kaiser, assistant vice president, and vice president Cameron Turner and John Austin.

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- Two Warren Place, 6120 South Yale, Suite 1900, Tulsa, OK 74136 • 918/744-0553
- 1924 South Utica, Suite 500, Tulsa, OK 74104 • 918/745-2400
- 215 State Street, Muskogee, OK 74401 • 918/683-6761 • www.trustok.com

THE TRUST COMPANY OF OKLAHOMA

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Bar Center Renovations Coming Together

Crews are hastily making progress on the renovations to the Oklahoma Bar Center's east side. The walls have been framed, sheetrock is up and a new elevator shaft will soon be installed in the building's south-east corner. Demolition began in July and is on schedule to be completed in May. More construction photos are online at www.okbar.org.



Mock Trial Champion Named

Del City's Christian Heritage Academy defeated Clinton High School in the final round of competition to claim the Oklahoma High School Mock Trial Championship. Christian Heritage Academy will represent Oklahoma in the



Christian Heritage Academy celebrates its first place finish in the state mock trial championship.

national competition, to be held in Wilmington, Del., in May. The competition was held March 4 in the Bell Courtroom at the OU Law Center in Norman. The two teams argued a criminal case of first degree murder in which the defendant claims she was acting in self-defense in shooting her abusive husband. The annual competition is sponsored by the OBA Young Lawyers Division and the Oklahoma Bar Foundation. Teams are paired with volunteer attorney coaches. Christian Heritage Academy's attorney coach is Chris Box, and the attorney coaches for Clinton High School are Mark Hendrickson and Julie Strong.

Judicial Pictorial Directory Available Online

The Administrative Office of the Courts has posted the updated 2008-2009 Judicial Pictorial Directory on its Web site. The exact address is www.oscn.net/applications/oscn/start.asp?viewType=COURTS, or you can go to www.okbar.org and link to the directory from there. The directory will be offered in pdf format, which can be printed out.

OBA Member Resignations

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

Mary E. McLaughlin Aikman
OBA No. 11050
P. O. Box 1015
Kilgore, TX 75663-1015

John Richard Albert
OBA No. 14069
P. O. Box 450, Courthouse
Friendship, WI 53934

Caroline E. Appis
OBA No. 18532
5955 SE Federal Highway,
Ste. 65
Stuart, FL 34997

Gregory Robert Bordelon
OBA No. 19307
14707 Harvest Chase Court
Cypress, TX 77429-1588

Thomas Mason Butler
OBA No. 1383
4000 Whispering Pines
Trail, NW
Conyers, GA 30012-1420

James Franklin Carpenter
OBA No. 1502
959 Stefani
Dallas, TX 75225-1725

Pamela G. Eatherly-Legate
OBA No. 11821
2410 Forest Ave.
Austin, TX 78704

Gary Clayton Frost Jr.
OBA No. 16652
705 Ross Ave.
Dallas, TX 75202-2007

James M. Gaitis
OBA No. 3206
12851 E. Nighthawk Ranch Pl.
Tucson, AZ 85749

Orvan Jerome Hanson Jr.
OBA No. 3822
843 S. 76th Pl.
Mesa, AZ 85208-6025

John Forrester Hicks
OBA No. 4177
3120 E. 4th Pl.
Tulsa, OK 74104

Wayne Jett
OBA No. 4655
535 S. Orange Grove Blvd.,
No. 12
Pasadena, CA 91105

Alinda Frances Jones
OBA No. 15847
5932 E. 43rd St.
Tulsa, OK 74135

Carlton T. King
OBA No. 5024
4004 Grand Ave., No. 402
Des Moines, IA 50309

Merry Cathryn Lynch
OBA No. 19163
P. O. Box 181
Orlean, VA 20128

Steven Dennis Patrick
OBA No. 12884
555 W. Fifth St., Suite 1400
Los Angeles, CA 90013-1011

Ronny D. Pyle
OBA No. 7361
2741 Walnut Road
Norman, OK 73072

Kimberly McMillen Rickard
OBA No. 19678
1510 N. 56th Terrace
Fort Smith, AR 72904

Stacy L. Smith
OBA No. 17640
1417 Hunting Wood Road
Annapolis, MD 21403

William Patrick Wasson
OBA No. 19266
5609 NW 163rd Terr.
Edmond, OK 73013

James H. Wilton
OBA No. 16163
3225 N. Rockfield Dr.
Wilmington, DE 19810

Kudos

The Dean Peterson Legal Studies Scholarship Fund is being established through the East Central University Foundation Inc. to honor **Dean Peterson's** commitment to ECU's Legal Studies Program. Dr. Peterson is the retired director of ECU's program, the only such program in the state accredited by the American Bar Association. Dr. Peterson, who had directed the program since 1993, came to ECU as an adjunct professor in 1992. She previously had been engaged in private law practice and had been the vice president of a petroleum company. She is a graduate of the OCU School of Law where she was ranked in the top third of her class. She is involved in several civic, professional and honorary organizations, such as the American Bar Association's Standing Committee on Paralegals and the Oklahoma Bar Association's Paralegal Committee.

At its annual meeting in January, the local chapter of the American Board of Trial Advocates elected the following officers: **John R. Woodard III**, president; **K. Clark Phipps**, president-elect; **Mary Quinn Cooper**, secretary/treasurer; **Charles F. Alden III**, immediate past president. National

board representatives are **Tom E. Mullen** and **Monty B. Bottom**. Attendees were addressed by **Chief Justice James R. Winchester**. **Judge Edward C. Cunningham** was acknowledged as Judge of the Year.

An article titled "SCADA—Beyond the Technical Issues" co-written by **Chris A. Paul** of Joyce & Paul PLLC in Tulsa, was published in the *Global Pipeline Monthly* (January 2008), and in the *Journal of Pipeline Engineering* (January 2008). The article discussed the convergence of regulatory, security and operational issues in Supervisory Control and Data Acquisition systems which are the nerve center of pipelines, utilities, and certain types of manufacturing processes. Companies operating SCADA systems are increasingly faced with compliance issues, to include rapidly evolving security compliance requirements, and the article provides information regarding the issues and how they are best managed while still facilitating operational needs.

Robert C. Margo joined the National Arbitration Forum's national panel of independent and neutral arbitrators and mediators. Panelists subscribe to standards of professional conduct; they follow explicit rules to ensure that parties' rights are protected and all ethical principles are upheld.

Mr. Margo was added for his experience in healthcare, contract and employment law.

The law firm of Hall, Estill, Hardwick, Gable, Golden & Nelson PC has added a new electronic discovery practice area as part of the litigation section of the firm. The need to provide specialized services in this area arises from a significant increase in the amount of electronic information produced during the discovery phase of litigation. The practice group is comprised of eight attorneys and four paralegals, and receives support from Hall Estill information technology and library services specialists. **Sarah Jane Gillett**, a shareholder of the firm, heads the new group.

Sharisse O'Carroll was selected to the board of the American Bar Association Center for Professional Responsibility Professionalism Consortium at the ABA Midyear Meeting in Los Angeles. She will serve as chair of the consortium's Membership/Outreach Committee.

On The Move

Riggs, Abney, Neal, Turpen, Orbison & Lewis PC announces that **Patrick Mensching** has joined the

firm as an associate. Mr. Mensching is a 1982 graduate of the TU College of Law and has practiced in the areas of entity formation and creditors rights, including commercial collections for 25 years. Prior to joining the firm, he practiced with the Tulsa firms of Barrow & Grimm PC and Lyons, Clark & Mensching Inc.

Devon Energy Corp. has named **David G. Harris** as the company's associate general counsel. He will focus on mergers and acquisitions, corporate finance, SEC reporting, corporate governance and compliance. Mr. Harris previously was a partner specializing in corporate and securities matters for Thompson & Knight. Mr. Harris holds a bachelor of arts degree in political science from TU and a J.D. from OU.

Lorrie A. (Corbin) Lewis has been named general counsel for Petra Industries Inc. in Edmond. Ms. Lewis, a 1995 graduate of OCU Law School, cum laude, spent 12 years in private practice, part of which was with Michael Paul Kirschner and The Kirschner Law Firm, focusing on commercial litigation, contract law and general business law. She can be reached at Petra Industries, 2101 S. Kelly, Edmond, 73013, (405) 216-2100 ext. 294; llewis@petra.com.

Gary W. Brownsworth announces the opening of the Brownsworth Law Office in Hugo. He was formerly employed with Legal Aid Services of Oklahoma in

Hugo. Mr. Brownsworth's practice will consist of a general civil law practice. He can be reached at 201 W. Jackson, Hugo, 74743, (580) 326-0400; Fax: (580) 326-0403; gary.brownsworth@sbcglobal.net.

GableGotwals announces that **David D. Hunt II** has joined the firm as a shareholder in the firm's Oklahoma City office. The firm's Tulsa office announces that **Sara Barry** and **Steven G. Heinen** have been elected shareholders, and **Jennifer Hurley** joins as an associate. Mr. Hunt has represented the oil and gas industry for the past 25 years in regard to title examinations, exploration agreements and the acquisition and sale of oil and gas properties. His practice also has emphasized representation of lenders in commercial real estate financing transactions, particularly in the area of SBA 504 lending. Mr. Hunt received his J.D. in 1982 and his undergraduate degree in journalism in 1979, both from OU. Ms. Barry received her J.D., summa cum laude, from Baylor University in 2000 and her undergraduate degree in psychology, with honors, from OSU in 1997. Her legal practice is in the areas of banking and financial regulation, corporate and business organizations, trusts and estates, commercial law, securities and corporate finance, mergers and acquisitions, and employee benefits. Mr. Heinen received his J.D. from Harvard Law School in 1991. He earned an M.B.A. and an undergraduate degree in political science, summa cum laude, from OU in 1991 and 1987,

respectively. In 1986, he attended Georgetown University's Institute of Comparative Political and Economic Systems. His practice areas are commercial law, mergers and acquisitions, securities and corporate finance, and corporate and business organizations. Ms. Hurley received her J.D., cum laude, from Southern Methodist University in 2007 where she was the articles editor of the *International Law Review*, chief counsel for the Criminal Justice Clinic (Student Attorney) and a member of the William "Mac" Taylor Inns of Court. She earned a master's degree in church-state studies and dual undergraduate degrees in political science and religion from Baylor University in 2006 and 2002, respectively. Her legal practice is in the area of litigation.

Mutual Assurance Administrators Inc. has named **Judy A. Walraven** as general counsel. She joins Mutual after practicing in the fields of insurance law, business litigation and corporate transactions. She is a 1999 graduate of OCU School of Law and holds a bachelor's degree from Southern Nazarene University. Ms. Walraven's office is located at 3121 Quail Springs Parkway, Oklahoma City, 73134; (405) 607-2627; judywalraven@maa-tpa.com.

The Hunsucker DUI Defense Firm announces that **Amy Ellingson** has associated with the firm. She was an associate legal counsel to the Department of Public Safety primarily serving as

an administrative hearing officer deciding license revocation matters. The focus of Ms. Ellingson's practice will be defending those charged with DUI. She may be reached at 1-877-DUI-Lady.

GlassWilkin PC in Tulsa announces that **Kurston P. McMurray** has become a shareholder in the firm. Mr. McMurray is an honors graduate from the TU College of Law. He received his undergraduate degree in business administration and finance from San Diego State University. He has expertise in civil litigation, banking and commercial law, business transactions, contracts, real estate, foreclosure and construction law. The firm also announces that **Amy E. Hampton** has joined the firm as an associate. Ms. Hampton graduated from TU with a bachelor of arts degree in English literature. She received her J.D. from TU in 2004. Ms. Hampton practices in general civil litigation and appellate matters.

Deborah J. Bruce has been appointed as the executive director of the Oklahoma Board of Osteopathic Examiners. Ms. Bruce was formerly a deputy director for the Oklahoma Board of Nursing. She has previously served as the director of continuing legal education for the Oklahoma Bar Association and as the director of judicial education for the Oklahoma Supreme Court. She may be reached at 4848 N. Lincoln, Suite 100, Oklahoma City, 73105; (405) 528-8625; Fax: (405) 557-0653; dbruce@osboe.ok.gov.

Todd Ramsey announces he has moved to join Payne Mitchell Law Group LLP in Dallas, Texas. He practices plaintiff's personal injury law focusing on aviation, truck wreck and product's liability cases all over the nation. He can be contacted at 2911 Turtle Creek Blvd., 14th Floor, Dallas, Texas, 75219; (214) 252-1888; Fax: (214) 252-1889; todd@paynemitchell.com.

Love's Travel Stops & Country Stores has named **Morris Collie** as corporate legal counsel. Mr. Collie earned a B.B.A. in finance from Stephen F. Austin State University and received his J.D. from the OCU School of Law in 1999. His practice will focus on commercial transactions in a variety of practice areas including fuel trading, supply and distribution. Prior to joining Love's, he served as an attorney-advisor with the NASA Office of Chief Counsel in Houston.

Mitchel, Gaston, Riffel & Riffel PLLC announces the addition of **Philip J. Outhier** to the firm's Enid office. He will continue his practice in civil litigation, personal injury, family law, criminal defense and mediation. He will also service clients from the Woodward, Fairview and Alva offices.

L Christopher Tweedy announces the opening of his law firm, L. Christopher Tweedy PLLC located at 1821 E. Imhoff, Suite 103, Norman, 73071. His practice is concentrated

in the areas of real estate, finance, healthcare, technology, corporate and commercial transactions law. He represents clients in a wide variety of business areas, providing general corporate and transactional advice. He received his bachelor's degree in 1996 and his J.D. in 2005, both from OU. He may be contacted at (405) 360-9700 or by e-mail at ctweedy@tweedylaw.net.

Newton, O'Connor, Turner & Ketchum P.C. announces that **Dan Morgan** has joined the firm as a shareholder and **Jeff M. Bonds** has become associated with the firm. Mr. Morgan concentrates his practice in labor and employment law, regularly representing employers in wrongful termination lawsuits, National Labor Relations Board matters, Office of Federal Contract Compliance Programs affirmative action plan audits, as well as other employment law matters. He received a B.A. from Vanderbilt University in 1972, his J.D. from Memphis State University in 1978, and earned his LL.M. in labor law from the University of Pennsylvania in 1979. Mr. Bonds concentrates his practice in commercial, real estate and corporate law, general litigation, and is trained as a civil and business mediator. He earned his B.A. from Westminster College and his J.D. from OCU. He previously practiced law in Muskogee for 13 years, where he also served as a member of the City of Muskogee Character

Counsel and as the liaison for Legal Services of Eastern Oklahoma to the United Way.

At The Podium

P. Scott Hathaway of Conner & Winters LLP was a presenter at the Construction SuperConference '07, held in San Francisco in December. He presented on a variety of issues as they relate to construction contracts, including a presentation titled "Contract Documents That Lead to Changes, Change Orders and Disputes," which provided detailed information for industry professionals to help them navigate the complex issues surrounding construction contract documents.

Amir M. Farzaneh, Attorney for Hall, Estill, Hardwick, Gable, Golden & Nelson PC, participated in a panel discussion at the Moore Norman chapter of the Oklahoma Business Ethics Consortium in February. The discussion focused on the immigration issue and Oklahoma's new immigration law, HB1804. Specifically, Mr. Farzaneh addressed how HB1804 has changed procedures, what to do to comply with the bill and the cost or impact of legal immigrant employment.

The OCU School of Law and Political Science Department chapters of Phi Alpha Delta Law Fraternity co-hosted a panel discussion titled "Careers in Law" in January. **Dara Wanzer** and **Mark Folger** with McAfee & Taft, **Edward Blau** of the Oklahoma County District Attorney's office and **Nathan Weems** of Debrah & Weems participated as speakers for the event. OCU professors and attorneys, **Laurie Jones** and **Jerry Magill**, serve as faculty advisors to the Phi Alpha Delta chapters.

John W. Mee Jr. was the featured speaker at the Integris Foundations' 10th annual Advanced Estate Planning continuing education seminar held in December at the University of Central Oklahoma. His topic was "2007 Update: Selected Estate and Charitable Planning Issues." Mr. Mee is with the Oklahoma City law firm of Mee, Mee, Hoge & Epperson.

Charles Pankey recently presented a certification program on juvenile law at a district workshop for the Oklahoma Municipal Court Clerks Association. The presentation was at the Piedmont Municipal Center. Mr. Pankey has been the municipal judge for the City of Piedmont for over 30 years.

David J. Hyman of Tulsa recently spoke on hospital and medical staff governance to both the American Health Lawyers Association's Physicians and Hospitals

Law Institutes in Orlando and the Georgia Hospital Association in Atlanta. His topic for both was the Joint Commission's intricate and controversial new standards for hospital and medical staff bylaws and regulations, including explanation of the new standards and suggested methods of implementing of them.

Chris A. Paul of Joyce & Paul PLLC in Tulsa gave a presentation on "Managing Pipeline Integrity Programs in a Litigious Society" at the 20th International Pipeline Pigging & Integrity Management Conference in Houston. Mr. Paul also made a presentation to the Tulsa Chapter of the National Association of Corrosion Engineers during February titled "Legal Issues in Pipeline Integrity Programs."

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

Melissa Brown
Communications Dept.
Oklahoma Bar Association
P.O. Box 53036
Oklahoma City, OK 73152
(405) 416-7017
Fax: (405) 416-7001 or
E-mail: barbriefs@okbar.org

Articles for the Apr. 12 issue must be received by Feb. 24

James Doyle Bare of Oklahoma City died Feb. 19. He was born Dec. 25, 1921, in Gerty and grew up in Wetumka. **He joined the U.S. Navy shortly after the beginning of World War II. He earned an array of awards for his courage and his skill flying F6F "Hellcats" in several engagements in the Pacific Theater, including the Marianas Turkey Shoot.** He returned to Oklahoma at the end of the war and studied at Oklahoma A&M, later graduating from OU with a J.D. He practiced law before finding his true calling as the director of the Arthritis Foundation of Oklahoma, where he committed leadership to raising money to fight arthritis for more than 35 years. His efforts helped to increase the number of physical therapists in Oklahoma from two in 1950 to several hundred by the time he retired in 1986. He also volunteered with the Boy Scouts of America and Quail Springs Baptist Church. Memorial donations may be made to the Arthritis Foundation, Oklahoma Chapter, or to the Quail Springs Baptist Church.

Joseph (Joe) Francis of Tulsa died Jan. 28. He was born April 26, 1921, in Chicago. He was raised in Norman and graduated from OU and later received his J.D. from Georgetown University. **He was an**

Army captain during World War II and was recognized with a Bronze Star for his work in military intelligence, specifically in cryptanalysis devising a method for breaking enemy codes. He also served in the military during the Korean War. He began a private law practice in Tulsa, working mostly in property law. He was a part owner and attorney for Southland Associates, the group that built the Tulsa Promenade Mall. In 1960, his family became the third owners of the Parriott Mansion in Tulsa, a home now on the National Register of Historic Places. He was active in the Tulsa community as a member of the St. John Medical Center Foundation and the Tulsa Club. Memorial donations may be made to Sojourn Care Tulsa.

John Dean Gassett of Tulsa died Feb. 2. He was born Jan. 10, 1924, in Kay County. **Upon graduating from Webb City High School in 1942, he joined the U.S. Navy, serving as an officer from 1943-1946.** Upon his honorable discharge, he obtained an engineering degree from OU. He continued his education at TU, earning a J.D. in 1952. He worked as a patent attorney for Jersey Production Research Company and later Amoco until 1984 when he entered private practice. He volunteered for the

Boy Scouts of America, youth baseball and Whiteside Park's Run For Your Life program. He authored the book *Little John, The Webb City Kid*, a collection of short stories about his childhood experiences. He was a resident of Tulsa for over 50 years and a member of the Lutheran Church of Our Savior. Memorial contributions may be made to the American Stroke Association.

James J. Gray of Oklahoma City died Feb. 10. He was born Jan. 21, 1928, in Marlow. **He served in the Navy, enlisting at age 17.** He earned a law degree from OCU and practiced law for more than 20 years. He was employed by the Traveler's Insurance Co. and retired as the regional manager for the Commercial Casualty Division. He was a proud Mason and member of Siloam 76, Valley Lodge 6, India Temple Shrine, the Royal Order of Jesters and Jesters on Wheels.

James Howard Gungoll of Enid died Jan. 16. He was born May 28, 1937, in Enid. He attended Enid Public Schools before graduating from high school at the Oklahoma Military Academy in Claremore in 1955. He received a bachelor's degree from OSU in 1960, a bachelor of divinity from the Church of the Divinity School of the Pacific in 1969

and a law degree from OU in 1972. He was a businessman and lawyer, and up until the time of his death was the managing partner of Henry Gungoll Associates LLC, oil and natural gas producers. He served as an Oklahoma state legislator from 1962-1964 and as an Oklahoma highway commissioner from 1975-1980. His community activities included being a member of Gideons International. He also served on the boards of First National Bank of Enid and St. Mary's Hospital. He was president of the Great Salt Plains Boy Scout Council. Memorial contributions may be made to Gideons International, the Cimarron Council Boy Scouts of America or the Enid Mennonite Brethren Church.

Betty Jayne Latshaw Jones of Edmond died in January 2008. She was born July 17, 1927, in Hobart. At age 16, she graduated from Hobart High School as drum major and salutatorian of her class. She went on to attend Lindenwood College of Women in St. Charles, Mo., later receiving a B.B.A. from OU in 1959. She was admitted to the OU Law School, but eventually earned her J.D. from George Washington University in 1962. She was admitted to both the Oklahoma and the District of Columbia bars. During her legal career, she held federal judiciary positions in the U.S. Court of Claims, the U.S. District Court and the U.S. Court of Appeals for the D.C. Circuit. Severe heart problems

stemming from a childhood illness compelled her to close her legal career in 1985. She had a passion for music, playing the piano and organ, singing, shoes and line dancing. Up until her move to Edmond in 2004, she lived on the East Coast.

Larry Burton Lucas of Poteau died Feb. 22. He was born Aug. 8, 1939, in Glendale. He attended school in Poteau and graduated from high school in 1957. He attended Poteau Community College from 1957 to 1958, later receiving his B.S. from OU. He completed his education from the OU College of Law in 1963. After school, he spent the summer of 1964 managing the Oklahoma exhibit at the New York City World's Fair. He moved back to Poteau where he established his law practice, began a career in the ranching business and became a board member of the Spiro State Bank. One of his favorite activities was the time he spent with the Boys Scouts of America where he had attained the rank of Eagle Scout in his youth and later the Silver Beaver. He continued work throughout his life in scouting and has given many others opportunities to grow and learn in the scouting traditions. He served on the Indian Nation Council Boy Scouts of America Board and Executive Committee in Tulsa, as well as the boards of many other church and community organizations. Memorial contributions may be made to the First Christian Church of Poteau or Indian

Nations Council Boy Scouts of America in Tulsa.

Inez Manning of Lawton died Feb. 4. She was born Feb. 5, 1912, in Grandfield. She grew up in Lawton, graduating from Lawton High School and Cameron State Agricultural College. She went on to graduate from the Oklahoma College for Women and the Oklahoma Law School. She was an English teacher for Elgin High School and Lawton High School. **During World War II, she worked for civil service at Ft. Sill.** She was admitted to the Oklahoma bar in 1952 and practiced law in Lawton until her retirement. She also served as county judge for Comanche County. She was a member of the Pioneer Club and First Baptist Church. Prior to her retirement, she was active in many community organizations, including the Lawton Business and Professional Women's Club, the Women's Forum and the American Business Women's Association. Memorial contributions may be made to the First Baptist Church, P.O. Box 1409, Lawton, 73502.

W.M. (Speedy) Morrison of Prague died Jan. 27. He was born July 2, 1911, in Noble. He received a bachelor's degree in 1930 from OU and earned a law degree in 1933. After law school, he moved to Prague and opened a law practice in an office above the First National Bank. In 1936, he joined the bank and soon became an integral part of the bank, serving as vice president, loan officer

and insurance department manager. In 1975, he was named president. He retired from the bank in 1976. He was very involved in the Prague community. Of his contributions to the town, he helped establish the Parks Memorial Golf Course, the Kolache Festival, was responsible for bringing Boy Scouting to Prague and served on the Prague Hospital Board for more than 15 years. In 1982, he was awarded the Chamber of Commerce Citizen of the Year award, and in 2002, he received the chamber's Lifetime Achievement Award.

Bert R. Reed Jr. of Oklahoma City died Feb. 13. He was born March 26, 1934, in Oklahoma City. He attended Harding Junior High and Classen High School. He went on to earn a B.B.A. and J.D. from OU. He was active in many student activities in clubs, serving in the Student Senate. **He served in the U.S. Air Force Judge Advocate General's Office, both in the United States and Europe.** He held a real estate broker's license, an insurance license and had worked in the bank-

ing business and practiced law in and around Oklahoma City. He taught classes at the business school and law school at OCU. He was a member of many community organizations, including the Men's Dinner Club, Downtown Kiwanis, Oklahoma Zoological Society and Kirkpatrick Colleagues. Memorial contributions may be made to Nichols Hills United Methodist Church or the charity of your choice.

Kenneth Jesse Robertson of Norman died Jan. 25. He was born Aug. 14, 1928, and grew up in Rexroat. He went on to become an attorney in Los Angeles, working for Union Oil. He later returned to Oklahoma and was a world traveler who never lost his zeal for learning and adventure. His passion was education and he instilled this desire in everyone who knew him.

Charles Winfield Selby of Bartlesville died in January 2008. He was born Feb. 22, 1911, in Sapulpa. He attended schools in Sapulpa, where he played football and baseball.

He attended OU until the Depression and the need to join the workforce forced him to put his studies aside. After roughnecking in the oil fields and working construction, he returned to OU in 1933 and graduated from law school in 1937. He entered a law practice with J. Robert Ray in Bartlesville. **In 1943, he was inducted into the U.S. Army and after completing officers candidate school, he was commissioned as a Second Lieutenant. He was assigned to the Judge Advocate General's Office in Washington, D.C., serving there until his discharge in 1946.** He returned to Bartlesville to practice with Mr. Ray until Mr. Ray retired in 1952. He subsequently continued a law practice until his retirement in 2006, at which time he was the senior partner of Selby, Connor, Maddux and Janer. He was active in the Bartlesville community, serving on the boards of numerous organizations. Memorial contributions may be made to your favorite charity in his name.

MIS DIRECTOR, ADMINISTRATIVE OFFICE OF THE COURTS

Supreme Court of Oklahoma, State Office — Oklahoma City, The beginning date is Monday, Feb. 25, 2008 and the **Ending date Applications are requested by April 15, 2008.** Immediate opening for the position of Director of Management Information Systems for the Oklahoma Supreme Court. A successful applicant will possess a relevant B.A. and computer related expertise and experience, at least two years of which should be in a supervisory capacity. Advanced degrees and certifications, as well as more relevant experience, especially experience working with legal professionals, is preferred. Must have an exceptional ability to communicate with and build consensus among both IT professionals and users of the system including judicial officers and staff, court clerks and staff, lawyers, and the general public. Salary will be commensurate with experience, abilities, and knowledge. At the direction of the Chief Justice and the Court Administrator, the MIS Director plans, directs and coordinates activities of information services to ensure that goals or objectives of this service are accomplished within prescribed time frame and funding parameters. The MIS department is responsible for planning, developing, and managing systems that support case flow, office automation, special programs, and management operations. The Department designs and administers system configuration and architecture including hardware and software, network operations, desktop systems, and system security. The MIS Director coordinates statewide Court information technology and business life-cycle management activities, including building and maintaining an information technology infrastructure, directing future IT investments including the selection and implementation of a new statewide case management system, providing leadership for the Court's IT planning, and ensuring interoperability of the Court's systems. The MIS Director will advise the Court on IT planning, acquisition, management, use, control, and alignment with organizational strategies and priorities. The MIS Director will also provide overall executive leadership for the MIS Department.

Salary will be commensurate with experience, abilities, and knowledge. Please direct resume, letter of application, and professional references by regular mail to The Administrative Director of the Courts, 1915 N. Stiles, Suite 305, Oklahoma City, OK 73105, or by fax to (405) 521-6815, or by email to executivejobs@oscn.net. All applications must be received by April 15, 2008.

General Counsel, Administrative Office of the Courts (A.O.C.)

The Administrative Director of the Courts, Michael D. Evans, is seeking an attorney to serve as General Counsel for the A.O.C. under the supervising control of the Oklahoma Supreme Court. The salary range is \$70,000 to \$85,000, depending upon the training and experience of the party selected. The General Counsel is entitled to a generous benefits plan including medical, dental, life and disability insurance products, as well as defined benefit and defined contribution retirement plans. Employees earn 3 weeks paid annual and 3 weeks sick leave in the first year as well as enjoy 10 paid holidays annually, flexible work hours, and longevity pay.

Experience in one or more of the following categories is preferred:

- State Court litigation
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- Knowledge of state purchasing procedures

Applicants should have exceptional communication skills and a willingness to work with court clerks, judicial officers and staff, and other affiliates statewide.

Send a resume with at least five (5) references and a writing sample to the address below on or before April 12, 2008.

Michael D. Evans
Administrative Office of the Courts
1915 N. Stiles Ave., Suite 305
Oklahoma City, OK 73105

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POSITIONS AVAILABLE

THE OKLAHOMA COMMISSION ON CHILDREN AND YOUTH, an agency of the State of Oklahoma is accepting applications for Director. This is an unclassified position with the State of Oklahoma and serves at the will of the Commission on Children and Youth for a two-year term and may be reappointed. THE DIRECTOR is responsible for a staff of 27 FTEs and an annual budget of approximately \$3.5 million. With advice and approval of the Commission, the Director shall prepare an annual State Plan for Services to Children and Youth, an Annual Report, and other reports as necessary and appropriate. THE DIRECTOR shall have completed curriculum requirements for a law degree or a master's degree in business or public administration, social work, corrections, guidance and counseling, psychology, sociology, criminal justice, or shall have the requirements for a master's degree in a closely related field. Preference may be given to applicants holding a doctorate degree in one of the listed fields. Salary for this position will be \$60,000 to \$67,000 per year, depending on experience. For a complete and detailed job description please visit WWW.OKKIDS.ORG. Interested applicants are to submit a resume and three letters for recommendation to: Oklahoma Commission on Children and Youth, Attn: Director Search Committee, 500 N. Broadway Ave., Suite 150, Oklahoma City, Oklahoma 73105, Telephone (405) 606-4913, Fax (405) 524-0417. Applications will be accepted until April 15, 2008.

NE OKLAHOMA LAW FIRM seeks an attorney experienced in Criminal and Family Law. Send salary requirements and resume to: Box "FF," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

AV, SELF-SUFFICIENT ATTORNEY with banking and commercial practice seeks of counsel or similar association. Prefer NW/Edmond. Contact attorneyreply@sbcglobal.net.

WORKERS' COMPENSATION DEFENSE FIRM seeks new associate with 5 years experience. Please mail resume and salary requirements to Box "T," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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ASSOCIATE with 3-7 years defense litigation experience needed by AV-rated Tulsa firm. Insurance defense a plus. Competitive salary, firm-paid health/life/disability insurance, 401-k, etc. Send resume, writing sample (10 pg. max) and salary requirements via fax to (918) 582-5504 or E-mail lawofficerecruit@yahoo.com. All inquiries will be kept strictly confidential.

POSITIONS AVAILABLE

COLLINS, ZORN & WAGNER, P.C., an AV rated Oklahoma City firm seeks competent & confident trial attorney with 2 - 5 years experience. Firm specializes in civil rights employment law and insurance defense cases. Position will emphasize trial prep; must be able to conduct discovery, take depositions and attend court proceedings throughout the state. Please submit resume and salary requirements to 429 N.E. 50th St., Second Floor Oklahoma City, OK 73105.

OKLAHOMA CITY OIL AND GAS COMPANY seeking outside counsel with Arkansas title experience to prepare oil and gas title opinions. For further information and details, please respond to Box "U," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

ESTABLISHED TULSA SUBURB FIRM seeks self-motivated associate with 2-5 years experience in civil litigation, personal injury and/or family law. Responsibilities include depositions, court appearances, research, discovery and trial work. Send resume with references, writing sample and salary requirements to Box "O", Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

POSITION WILL REPORT TO AND ASSIST THE FINANCE OFFICER as assigned in detailed and confidential administrative functions. Will coordinate/maintain Director's calendar, process travel claims, schedule conferences/meetings, provide support to the agency's governing commission by acting as the commission's secretary, other duties as assigned. Salary \$34K-\$36K. Send resume to the Oklahoma Aeronautics Commission, 3700 N Classen, Suite 240, OKC, OK 73118. Phone (405) 604-6911, Fax (405) 604-6919. Application deadline: March 10, 2008. This is an unclassified position and will be considered an at-will employee with the State of Oklahoma. EOE.

INTELLECTUAL PROPERTY LEGAL ASSISTANT — McAfee & Taft, the largest law firm in Oklahoma with more than 130 practicing lawyers in Oklahoma City, is searching for an experienced intellectual property legal assistant to start immediately. Successful candidates should possess at least 3 to 5 years of transactional intellectual property paralegal experience relating to patents, trademarks, licensing and other IP matters. Must have excellent writing skills, a strong work ethic and the ability to manage many deadlines and multitask. Must be a quick learner, highly motivated, determined and very detail- and project-oriented. Knowledge of MS Word, Computer Patent Annuities ("CPA") docketing software and extensive computer and searching experience required. Bachelor's degree and paralegal certificate preferred. The successful candidate will spend the bulk of his / her time with transactional IP matters, as opposed to IP litigation. We offer competitive compensation & comprehensive benefits, including medical, cafeteria plan, 401(k) savings plan, vacation & personal/sick plan, and opportunities for professional development & growth.

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OSAGE NATION CONGRESS SEEKS ATTORNEYS TO PROVIDE LEGAL COUNSEL. The Osage Nation Congress is establishing a data base of licensed Osage, Native American and regional attorneys interested in contracting to provide legal services from time to time for the Legislative Branch of the Osage Nation. Interested individuals/firms should send a letter of interest outlining the individual's/firm's qualifications and areas of expertise, fee requirements, Osage membership/tribal affiliation, and other pertinent information by March 14, 2008 to: Osage Nation Congress, Attn: Executive Committee Chair, P.O. Box 779, Pawhuska, OK 74056.

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More Cool Little Old Ladies

By Mark S. Darrah

"Now she was a cool little old lady," Bill Cosby once said, "you see, that's the only way you get to be a little old lady — by being a cool little old lady."

Beatrice was born in Oklahoma's No Man's Land a few months after our state was admitted to the union. She had out-lived her husband by more than a decade.

As Beatrice approached her 100th year, she hired me to meet with her and her two children to explain to them how she wanted her final affairs handled and her estate distributed. A gentle woman with skin that looked like wrinkled alabaster, Beatrice had no patience for nonsense and wanted none after she was gone.

Her son had flown into town from Chicago. He had retired a number of years before from a Fortune 500 company, but not before rising to its upper management and wealth beyond most people's imagination. Beatrice's daughter lived near her mother and had recently ended her work as a human resources manager at a local manufacturing company.

Beatrice, her son, daughter and I sat down around a table in my conference room. I did what Beatrice had asked me to — explain how she wanted her affairs handled and her estate distributed. And that she wanted no nonsense.

Beatrice remained after her son and daughter left. "Did you notice the look on my son's face when you were speaking?" she asked. "Today was the first time he had ever considered my mortality."

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Bob was Hazel's second husband. Like many men, he liked to build things with his hands and he liked to fish. When Bob retired after years of hard work, he and Hazel had a choice. Bob wanted to build another room onto their house. Hazel wanted to buy a bass boat.

They bought the bass boat and just about every day they could for the following year, they went fishing.

Then Bob had a stroke.

For the next eight years, Bob lived in a nursing home, unable to care for even his most basic needs.

Now Bob has passed onto the other side, and Hazel says this, "If Bob had started building that room onto the house, it wouldn't have gotten finished before he had his stroke. He would have never gotten to enjoy it. We had so much fun with that bass boat, the two of us. That time together, I'd never trade. So, if you have a choice between buying a bass boat and building a room onto your house, always choose the bass boat."

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Bonita Jane lives alone in a white wooden house on 40 acres of farm land in Okfuskee County. Her husband, Buddy, has now been gone for the last eight years. Until his last day of life, he wondered why he had survived the Battle of the Bulge when so many good men had perished.

Bonita Jane has never been over five feet tall and as the years pass, she seems to shrink. Her eyes shine as clear as a teenager's. She has never had a broken bone, and she's never taken any prescription medications. Her skin is the color of fresh cut lumber with about as many narrow little lines. Bonita Jane remembers picking cotton when she was 8 years old with her sharecropper parents. She won't forget how hot the sun shone on them and that river bottomland.

"I am the only one of my family still living," she tells me. "My husband and my only son are gone. My parents died so many years ago. My sister, my older brother, and now my younger brother — my best friend — have all passed on."

"The next time your family gets together for Thanksgiving or Christmas or for any reason at all, look around the table and remember that someday there will be only one of you remaining."

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The stories shared here are true, although the names have been changed. The first stories about cool little old ladies were published in 79 OBJ 80 (Jan. 12, 2008).

*Mr. Darrah practices in Tulsa.*

*Editor's Note: Have a short funny, intriguing or inspiring story to share? E-mail submission to carolm@okbar.org.*

