2016 Golf Tourney Returns to Twin Hills

Gary Chilton, OCBA Golf Chair, has announced that the 2016 Annual Golf Tournament is returning to one of its favorite venues, Twin Hills Golf and Country Club. The 4-person scramble tournament is scheduled for Monday, May 23, with a 1:30 p.m. shotgun start. Prizes will be awarded in the clubhouse following the tournament. Get your 4-person team together and register early with the OCBA since tournaments at Twin Hills fill up quickly. Chilton said, “It’s exciting to back to Twin Hills. It’s a championship caliber golf course and one of the most beautiful courses in the City. Whenever we hold the tournament at Twin, we have a great turnout. OCBA President Angela Ailles Bahn has promised perfect weather.

Founded in 1923, Twin Hills was designed by legendary golf course architect Perry Maxwell, before Oak Tree hosted the PGA Championship in 1988, and Prairie Dunes (Kansas). Maxwell also made contributions to Augusta National (home of the Masters), and Colonial (P. Worth). Long before Oak Tree hosted the PGA Championship in 1988, Twin Hills hosted the PGA in 1935 which was won by Johnny Revolta in a playoff against Tommy Armour. The entry fee is $185 per player which includes 18-holes at Twin Hills, golf cart, and lunch buffet. Just about everyone is guaranteed to be a winner with three flights, hole-in-one contests, drawings and more. Entry deadline is May 19. You may register online at www.okcbar.org or use the registration form on page 3. Checks should be made payable to OCBA and mailed to 119 N. Robinson, Ste. 240, Oklahoma city, OK 73102. Proceeds benefit Family Junction Youth Shelter.

Spring Training at the United States Supreme Court

On March 27, 2016, my beloved New York Mets were playing the Washington Nationals in spring training. The game ended after nine innings in a 4-4 tie. You might be thinking, wait, baseball games don’t end in ties. Well, they do in spring training. Similarly, as discussed in last month’s column, United States Supreme Court cases are now more likely to end in 4-4 ties. I know I am wearing out the baseball analogies, but it is that time of year.

Last month’s column discussed the possibility of 4-4 ties and outlined a few cases in which ties seemed likely in the wake of Justice Scalia’s death and resulting vacancy on the Court. This is even more certain now since it appears clear that the nomination of Judge Garland to fill Justice Scalia’s seat is not going anywhere fast, and certainly not in time for him to participate in decisions this term.

In the last two weeks, two cases have been “decided” by 4-4 ties. I say “decided” but one could argue that is a misnomer. After all, there is no winner or loser in the event of a tie. Under Supreme Court rules, a tie results in the affirmance of the lower court ruling. But the tie vote has no precedential value. In one of the recent tie cases, the tie probably did not change the ultimate outcome that would have occurred had Justice Scalia still been on the Court. In the other case, however, the 4-4 tie that resulted from Justice Scalia’s absence very likely changed the outcome of the case.

Hawkins v. Community Bank of Raymore. In this case, a company called PHC Development LLC was borrowing money from Community Bank. Hawkins and Janice Patterson to sign guarantees of the indebtedness. Valerie and Janice were married to Gary and Chris, respectively. They had no other involvement with PHC Development. After the company failed to make payments under the loan agreement, Community Bank declared the loans to be in default, accelerated the loans and demanded payment. Not long after that, Valerie Hawkins and Janice Patterson in connection with PHC’s borrowings from Community Bank, the bank required Valerie Hawkins and Janice Patterson to sign guarantees of the indebtedness. Valerie and Janice were married to Gary and Chris, respectively. They had no other involvement with PHC Development. After the company failed to make payments under the loan agreement, Community Bank declared the loans to be in default, accelerated the loans and demanded payment. Not long after that, Valerie Hawkins and Janice filed suit against Community Bank seeking damages and declaratory judgment determining that their guarantees were void and unenforceable as violations of the Equal Credit Opportunity Act.
By President Angela Ailles Bahm

Perhaps I should start calling this column “Your Legislative Update.” The good part is that the legislative session ends on May 27. (Or bad part - depending on how you look at it - Like, what am I going to write about after next month?!?) An important deadline will occur after the publication of this article. April 21 is the deadline for final passage of bills from the opposite house. So for instance, one measure I continue to watch, HB 3162, has to pass out of the Senate by that date, or it is dead. To get the most up-to-date information on any bill you are interested in, sign up for updates emailed to you through the Oklahoma Legislature’s website.

HB 3162 is Speaker Hickman’s bill and significantly changes the appointment process for the Supreme Court and Appellate courts. As you will recall, it passed out of the House and, as of the writing of this article, was moved to the Senate Rules Committee. Interestingly, not to the Senate Judiciary committee. While on the House floor, its original text was significantly amended. It still provides that all layperson serve at the “pleasure” of whoever appointed them. However, now it provides that a candidate for the appellate court or Supreme Court chosen by the Governor “shall be subject to confirmation by a select committee of the Senate and House...” The JNC “may” provide a confidential merit score of ALL qualified candidates when it provides a list to the Governor. The OBA did a great job of keeping everyone informed of this bill and provided us an opportunity to be heard. If this bill is still advancing at the time this article is published, it is still not too late to be heard. Call your Legislator!

One of the few attorneys in the Senate, Senator Clark Jolley, Edmond, spoke last year during the OBA’s Day at the Capital. He is the Chair of the Appropriations Committee and has been on the Committee since he was first elected in 2004. He spoke intelligently and passionately about the business of State governance. One of the subjects he brought up and which really tweaked my interest was to have the legislature work on the budget every year, but on policy every other year. Since they are in session such a short time, the thought is it would give them more time to address State budget issues. Our legislature works in two-year terms. This year, 2016, is the second session of the 55th legislature. Bills which were introduced but not acted on in 2015 are carried over to the next session, this session in 2016 – and so on. According to the Oklahoma Policy Institute site, www.okpolicy.org, the legislature considered 2176 bills in 2015 and 1724 carried over. In 2016, 1698 new bills were filed. I have heard and read a lot of complaints about the legislature not addressing our State’s fiscal woes. No wonder - with that kind of volume? On January 25, 2016, Senator Jolley spoke about the budget and our current fiscal crisis with Fred Morgan, Executive Director of the State Chamber. You can see the interview by searching YouTube “Business Roundtable, Jan 25, 2016 Clark Jolley and Fred Morgan.” I found the conversation very interesting and got some insight into what makes up our State budget. Take a look at it and consider whether the idea of splitting up the sessions is a good one. And again, let your legislator know your thoughts. It strikes me that the more time they have to really study these significant issues, the better off we all are. This year’s Day at the Capital was on March 8th. The OBA organizes this event every year and I strongly encourage your participation. The programming this year, as usual, included a number of speakers and lunch, and then everyone headed over to the Capital. Many of the presenters discussed the bills proposing changes to the JNC and the election of the appellate courts. They included OBA Legislative Liaison, Clay Taylor; Attorney and Author, Bob Burke; and Past OBA President, Cathy Christensen. Ms. Christensen spoke about the update to CourtFacts.org. It has a lot of great information and the site can readily be shared. She also talked about the influence of “dark money” in political campaigns. I also want to thank a reader who provided me some information which helped me understand, at least to some degree, how this “dark money” works. The “dark” part is when campaign contributions are filtered through ostensibly charitable, nonprofit organizations, which are created for this purpose and can collect unlimited sums. These nonprofits then donate the funds to PACs, which only disclose the name of the nonprofit so that no one really knows who contributed, or how much. This kind of scheme ultimately came to light and arguably served as a reason for the resignation of Utah’s attorney general, John Swallow, who was elected in 2012 and resigned in November of 2013. To get a peek into Swallow’s rise and fall, and how “dark money” works, Google the New York Times article dated March 18, 2014, titled “A Campaign Inquiry in Utah is the Watchdogs’ Worst Case.” Bob Burke talked about the Oklahoma Judicial bribery scandal which lead to the creation of the JNC. I cannot fathom the kind of money that would pour into Oklahoma, dark or otherwise, that we should start electing our appellate and Supreme Court judges.

As always, let me know what you think. I cannot thank those of you enough who have expressed your appreciation for these articles. But I have to confess, I’ve been feeling a bit like a “downer” with all of this and I want to state for the record my appreciation to the members of our legislature for what they do! It is no small task, to say the least. I firmly believe they act with their constituents in mind. Do I agree with them all the time? Clearly not. But in a democratic society, discourse is the resource! Send me an email or give me a call at 405-475-9707.
Who Would YOU Nominate* To The U.S. Supreme Court? Part 2

By Geary Walke

Justice Scalia’s dissent in Obergefell decried the lack of diversity on the U.S. Supreme Court. What should we look for in a replacement for Justice Scalia’s position? Should we seek, as he implied, someone more closely reflecting the face of America?

I remind our readers that Justice Scalia’s dissent, that inspired this series, began, “Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.” Then Justice Scalia criticized the lack of representation on the Supreme Court. That is, he spelled out how the current justices were “hardly a cross-section of America.” What was his categorical analysis of the justices?

1. All Attended Harvard or Yale,
2. 8/9ths grew up in “east-and-west-coast States,”
3. 4/9ths were from NYC,
4. Zero were “evangelical Christian(s)!”

It’s obvious that he didn’t dig very deep into the subject once he pointed out who was NOT represented on the Supreme Court. He could have continued by noting there were zero Hindu, zero Buddhists, zero zookeepers, zero CPA’s, and well, you get the idea. (I threw in CPAs because I recently heard a CPA Politician claim that our state legislature needed fewer lawyers and more CPAs because the budget is so difficult to understand.)

Is the concept of diversity on the US Supreme Court even meaningful? After all, there are only nine positions.

How much diversity can we manage with only nine? Because the budget is so difficult to understand.

How much diversity can we manage with only nine positions. Barring mixtures or blends of various religious persuasions, culture or geographic origins doesn’t help much either. According to Business Insider the following are the ethnicities or genders, it’s very easy to see that diversity of the country? Since the eight living justices all relate to the primary driver of the selection process.

We cannot ignore the need for diversity, but it shouldn’t be less, genderless, etc… Now, that’s not to say that nothing beyond some score sheet of education and testing should be used. A person is much more than a grade average, class ranking or the notoriety of the person for whom he or she may have clerked. But, we have to get back to basics. We cannot ignore the need for diversity, but it shouldn’t be the primary driver of the selection process.

We should not allow the SCOTUS to look like it did in the 19th century, which is to say that “all the justices looked alike.” But, a perfect diversity for a contemporary SCOTUS doesn’t exist. It appears that we should approach our nomination with merit in mind. Then, perhaps we can enhance the substance of the nomination with some diversity considerations which will help to acknowledge the differences in life experiences.

Next month, we will examine our “Merit First, But Diversity Considered” analysis for SCOTUS nominees. Until then,* my 2nd and 3rd nominees to the U.S. Supreme Court are Laura McConnell-Corbyn and Rachel Pappy.

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**FORMAT:**

- 4 Player Scramble
  (Lawyers, Judges or Law Clerks)
- 11:30 AM Registration/Lunch
- 1:00 PM Shotgun Start
- Hole-in-one Prizes
- Team and Player Awards
- Total Team Handicap >45
- Only One “A” Player per Team

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**ENTRY DEADLINE—May 19, 2016.**

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Entry Fee: $185 OCBA Members/$195 Non-Members

Mulligans: $5 each – Maximum of 4 per player

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By Jim Croy

April 11, 1916
One Hundred Years Ago

[Excerpted from: Western Union Tel. Co. v. Bank of Spencer. 1916 OK 429, 156 P. 1175.]

The Bank of Spencer sued the Western Union Telegraph Company in the district court of Oklahoma county, for damages for negligently and carelessly failing to transmit and deliver to plaintiff a telegram as follows:

“Texline, Texas, July 24, To Bank of Spencer, Spencer, Okla. Hardin Check fifteen hundred dollars unpaid, we are remitting you eight hundred twenty-five dollars unpaid, we are remitting you eight hundred twenty-six and 2-100 dollars for your account.

“BANK OF TEXLINE.”

The plaintiff alleged that said telegram as transmitted and delivered was made to read “paid,” when it should have read “unpaid,” and that plaintiff did not discover said mistake until the day of August, 1912, that, relying upon the information contained in said telegram, plaintiff permitted said Hardin to check out all money and funds which had been deposited to his credit upon a certain check drawn upon the Bank of Texline by said Hardin and that there did not come back into the hands of plaintiff sufficient funds to reimburse it for the said amount of $1,505 which had been paid to said Hardin; that, after discovering said mistake, plaintiff undertook to collect said amount from said Hardin, but was unable to do so; that plaintiff presented its claim for damages to defendant in February, 1913.

The defendant answered by way of general denial, and further pleaded that the message was written, containing the conditions referred to, was attached to and made a part of the answer. The message was un-repeated. Trial resulted in a verdict for plaintiff, and defendant prosecutes error.

This being true, when Congress, by the Act of June 18, 1910, jurisdiction to regulate interstate communication by telegraph was conferred upon the Interstate Commerce Commission, and that the stipulations in the contract mentioned were reasonable and valid and binding and free from any regulation or control on the part of the state of Oklahoma or any other state. A copy of the printed form upon which the message was written, containing the conditions referred to, was attached to and made a part of the answer. The message was un-repeated. The fact that plaintiff was the sendee of an unrepeated message to be sent from a point in the State of Texas to a point in the State of Oklahoma, and that by reason of the provisions of the act of Congress June 18, 1910, jurisdiction to regulate interstate communication by telegraph was conferred upon the Interstate Commerce Commission, and that the stipulations in the contract mentioned were reasonable and valid and binding and free from any regulation or control on the part of the state of Oklahoma or any other state. A copy of the printed form upon which the message was written, containing the conditions referred to, was attached to and made a part of the answer. The message was un-repeated. Trial resulted in a verdict for plaintiff, and defendant prosecutes error.

The fact that plaintiff was the sendee of the message, and not the sender, can make no difference. The weight of authority is that the sendee is bound by the regulations prescribed by defendant in relation to the time in which a claim for damages shall be presented and which limit liability for negligence in transmitting an unrepeated message. The foundation of plaintiff’s action is the alleged negligence of the defendant in transmitting and delivering the telegram as originally delivered to it. Before plaintiff would be entitled to maintain an action there must necessarily be some duty owing by defendant to him from a breach of which would flow such right. The contract between the sender of said message and the defendant was for the benefit of plaintiff, and, without the delivery of said message to defendant by the sender and without defendant having undertaken to transmit and deliver same to plaintiff, there would have been no duty owing to plaintiff by defendant, and hence no negligence in the absence of such a contract for which plaintiff could maintain an action. It is said by many of the courts that plaintiff would have no cause of action except for the contract, because the duty of the company to the plaintiff arises out of the contract entered into by the sender of the message and the company for plaintiff’s benefit. Can the plaintiff, then, avail himself of this breach of duty owing to him by the company arising out of said contract, and at the same time not be bound by the other conditions thereof? The great weight of authority is to the effect that he cannot.

It is said, however, that the action is one sounding in tort and is not based upon contract, and therefore the act of Congress in question cannot apply, and the decisions cited are not controlling. This, however, does not make any difference. The stipulation in the contract expressly provides that the liability of the defendant for an unrepeated message shall not exceed the price received for the transmission thereof, which in this case was 50 cents, and in addition provides that such message may be repeated upon the payment of an additional rate, the same to be the regular rate plus one-half that amount, and defendant under the act of June 18, 1910, is given authority to prescribe these rules and regulations, which are declared by said act to be deemed reasonable until otherwise determined by the Interstate Commerce Commission, and they are binding upon the sendee though the action sound in tort.

The reasonableness of the regulations prescribed by the defendant is a question the jurisdiction of which to determine is conferred by the act of June 18, 1910, upon the Interstate Commerce Commission, and this court has no jurisdiction in this action.

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to declare said rules and regulations unreasonable; but this question must first be raised before the Interstate Commerce Commission.

The relative supremacy of the state and national governments in the matter of regulating interstate commerce is not now an open question. Where there is a conflict of jurisdiction, the state must give way; that is, where Congress acts in such a way as to manifest a purpose upon its part to exercise its constitutional authority by regulating interstate commerce of any character, the power of the state in the premises ceases to exist.

The plaintiff cites in support of the judgment of the trial court the decisions of this court in the following cases: Western Union Tel. Co. v. Sights et al., 34 Okla. 461, 126 P. 234, 42 L.R.A. (N. S.) 419, Ann. Cas. 1914C, 204; Levy Bros. v. Western Union Tel. Co., 39 Okla. 416, 135 P. 423. These cases, it will be seen upon an examination thereof, were decided prior to the passage of the act here involved, and can have no controlling effect in this action. Congress having taken jurisdiction to regulate telegraphic business of an interstate nature, its authority in the premises is supreme, and the rules and regulations prescribed by the defendant in accordance with the authority conferred by the act, so long as they have not been declared unreasonable, are binding upon the parties hereto.

April 16, 1941
Seventy-Five Years Ago
[Excerpted from Pressley v. State, 1941 OK CR 57, 112 P.2d 809.]

George Pressley, one of the defendants, testified that he had signed the statement to keep Harbolt from killing him. That Harbolt took him into a room by himself, said that a purse had been stolen from his mother, and stated: “You did it.” “I told him I didn’t do it, and Harbolt hit me on the chin and knocked me down, and made me stand up and then slapped me back on the chin and knocked me down, and made me sign the statement. That's what I do to them. I am going to stomp your God-damned guts out right here on the floor. I am going to stomp your God-damned guts out right here on the floor. You snatched my mother’s purse.” “That was in a room without any windows, and that there was blood on the wall. That officer was not in the room. That he was knocked down by the officer three times before he told the officer that he would sign a statement. That the officer then took him out before the clerk, and the officer dictated the statement, and he signed it to keep from being beat up any more. That after he was taken to the county jail, he was brought down to the county attorney’s office and told both Mr. Marlin and Mr. Morris about what Harbolt had done to him; and also called for Mable Bassett and had her come to the jail and told her the same thing. That he is now 18 years of age.

James Williams testified that he is now 17 years old. That he was arrested on this charge on January 27, 1939, and taken to the police station. That Officer Harbolt took him into a room and took a big book and read where a little girl had been knocked down and her money taken, and he said: “Do you know anything about that?” “I said, ‘No.’ He said: ‘You son of a bitch, you did it.’ He took me to a little room with no windows and nothing else, and just two chairs, and said: ‘Go on and tell me everything, and I will be your friend and let you off easy.’ I said that I didn’t have anything to say, and he went out and came back in, and said the other boy signed a confession blaming it all on me. I said I didn’t believe he did. He asked me if I smoked, and I said, ‘No.’ He gave me a cigarette, and I told him that gave me a headache, and he started blowing it in my face and told me he was going to stomp the God damned out of me if I didn’t confess; and he told me, with the suspended sentence, he would send me down for life or to the electric chair; and it scared me and I signed it.”

The defendant Williams further testified that the officer struck at him once, and that he ducked and was not hit. That the statement is false, and would never have been given if he had not been scared of his life by what Harbolt said to him. That there was nobody present but Harbolt when he told him that. That they kept him in jail and would not allow him to talk to anybody for four or five days, until a writ of habeas corpus action was filed.”

After these witnesses testified, the defendants, through their counsel, announced, “That is all.” The state then announced, “That is all.”

The court evidently had the correct view of the matter at that time, as the record shows that he addressed the county attorney as follows: “The Court: Is there anything further? Here is the man here they say did the beating? (Indicating Harbolt, the policeman.) Mr. Black: Comes now the defendants separately and jointly and introduce their objection, and let the record show, that this witness, after the rule having been called for and invoked, has remained in the court room and has remained in the presence of this testimony before the court and in chambers. The Court: The rule was put on and it was said at that time that this man would not be called as a witness. He has been in the court room and has been right here, but I am going to let him testify. Mr. Marlin: If they want to object, that is all right with us. I don’t want to ask him anything in the face of their objection. * * * The Court: All right. There is a conflict in the testimony here, and it will be for the jury to determine under proper instructions. The purpose of taking this testimony was to see whether there was a conflict. There is a conflict, and it is a matter for the jury to determine under proper instructions whether there was any force or threats. Mr. Black: To which the defendants except, and the defendants and each of them request the court at this time to sustain the objection that they have made. The Court: Overruled and exception.”

The jury was recalled. The policeman, Butler, resumed the witness stand; again identified the confessions and the circumstances under which they were made in substantially the same manner he had testified before the court.

After the objections by the defendants had been overruled, the assistant county attorney (Mr. Marlin) read their statements
On March 30, 2016 SandRidge Energy Inc. stated in its securities filing that it is considering a corporate reorganization through a Chapter 11 bankruptcy filing. Given the persistence of lower oil prices, SandRidge’s announcement was not surprising. The impetus for its announcement appears to be that some of SandRidge’s loans are coming due. The Journal Records’ Sarah Terry-Cobo reported that SandRidge must reach an agreement with the Royal Bank of Scotland Group by the end of April or face default. The purpose of the loan was to fund operational expenses, as opposed to capital expenditures, which is a troubling sign for a company that recently sold its most valuable real estate assets for a cash injection.

A Chapter 11 filing could help SandRidge reduce its considerable debt obligations with a plan that would “cram down” the amounts it owes its creditors. A filing by a company as large as SandRidge would be complex and expensive, but may turn out to be the company’s best option. Other oil companies have preceded SandRidge by filing Chapter 11 bankruptcy petitions, for example, PostRock Energy Corp. on April 1, 2016.

We have already observed some of the effects of lower oil prices in Oklahoma County beyond the bankruptcy filings. Thousands of people have lost their jobs, many of which were good high paying jobs. The impact on the Oklahoma economy has yet to take itself out. According to Federal Reserve unemployment numbers, Oklahoma’s unemployment rate in February 2016 rose .1% (to 4.2%) over February 2015; and payroll employment was down .4%. It should be noted that Oklahoma’s unemployment rate remains below that of the national average (4.9% in February) and Oklahoma County’s is even lower at 3.4%. Surprisingly, construction and home prices are up from the previous year.

Industry executives are predicting an uptick in both bankruptcies and mergers and acquisitions in 2016. The Federal Reserve Bank of Kansas City, “Tenth District Energy Survey,” released Jan. 8, 2016 (available at www.kansascityfed.org). In the Survey, respondents opined that “large debt loads would limit M&A activity and would instead lead more firms to defaults/bankruptcies.” One responder noted “Banks will want companies to sell assets and reduce debt levels as the year progresses. Still seems to be a considerable amount of private equity available, this money will be able to purchase assets.” Thus, as a result, banks have yet to settle in the oil industry.

Also contained in the Federal Reserve Survey was a prediction that oil prices will rise in 2016 (“$60 by year-end 2017”). Perhaps this projection is optimistic thinking, but there is some basis to believe that oil prices will rise. One reason is that the amount of new wells being drilled is falling. A data summary published by economist Chad Wilkerson (Vice President of the Federal Reserve Bank of Kansas City), "The Oklahoma Economic Databook: A summary of regional economic indicators for the state of Oklahoma”, noted that the number of active oils and gas drilling rigs in Oklahoma continued to fall sharply over the past year. Nevertheless, the overall crude oil production in Oklahoma actually rose during that timeframe.

The explanation relates to how new drilling techniques, such as horizontal drilling and hydraulic fracturing, work. The new wells may produce for up to 20 years; however, “they release about half their production over the first two or three years.” See Wilmoth, Adam, “Wells drilled in past 2 years provide nearly half of the U.S. oil; Oklahoma rig count down to 63”, The Oklahoman, published March 25, 2016. As companies lack the capital and incentives to drill new wells to replace current wells, the production in the United States and other countries should begin to fall.

How far supply will fall, and how quickly companies will fill that gap is the operative question in the industry. Collin Eaton of the Houston Chronicle reported that at the end of March, oil companies were sitting on a backlog of “drilled-but-uncompleted wells”. As the price of oil inches back up to break even points, cash strapped producers will bring these new wells on-line thereby once again increasing the supply of oil. Some experts believe this is not enough to cap any rally, but there are other factors which may hold oil prices back as well.

Some companies will not make it to their break even points. Luckyer companies may be acquired by larger competitors (or cash rich investors); however, as noted by the survey commenter above, some of these companies have too many debt obligations to make their purchase attractive. Not all companies will be able to take advantage of a Chapter 11 reorganization, and some will be forced into Chapter 7 bankruptcies.

Barring a fundamental change in the oil market, it appears as though a new normal is setting in for oil prices. While the industry overall may benefit from lower production, individual companies are incentivized to increase production and many are in desperate need of the cash. We are a long way from $100+/barrel oil prices. The companies which emerge into this new normal will by necessity be much slimmer with different debt obligations.

Well placed, i.e. non-debt laden, companies will be able to purchase assets from distressed competitors and bankruptcy trustees for pennies on the dollar. These companies need not have vast amounts of cash on hand. Interest rates remain low, and the Federal Reserve has indicated that rates will not increase dramatically in the near to medium timeframe. Companies can still take advantage of these rates. Banks will likely take hair cuts as the collateral that once secured larger loans from now distressed companies will no longer hold at lower values and need to secure smaller loans for new companies.

Smart bankers have been preparing for this inevitability and working with their regulators and borrowers to minimize impacts on the bottom line.
Edward H. Moler

Edward H. Moler, known to all as Ed, passed away on Monday, March 21, 2016, at his home in Nichols Hills, OK. He was surrounded by his family and friends (including his faithful dog “Dodger”). Ed was 92 years of age. He was born in Oklahoma City and educated at Oklahoma City Classen High School, from which he graduated in 1941. Ed thereafter enrolled at the University of Oklahoma, started his classes, and joined the OU Chapter of Phi Gamma Delta social fraternity. Unfortunately, his college education was interrupted by World War II. He left school and served his country between 1943 to 1945 in the capacity of a B-24 Liberator Pilot. Upon his return to the US after the war, he re-entered OU; earned his BA; and ultimately graduated from OU’s College of Law with his LLB in 1948. That same year, he passed the Oklahoma Bar Examination and commenced the active practice of law.

Ed engaged in the private practice of law in Oklahoma City for many years, and counseled some well-known companies such as Dolese Brothers Co., Metropolitan Construction Co., PanAmerican World Airways, and others. However, he was also an expert in Municipal Law. Prior to the private practice of law, Ed served full time for years as the Municipal Counselor for the City of Oklahoma City, and later part time as Municipal Counsel for the City of Nichols Hills.

Ed was also active in both the Oklahoma State and Oklahoma County Bar Associations. He was the president of the Oklahoma County Bar Association in 1968.

In the 1960's, when it became time for Ed to join a law firm, he joined an established Oklahoma City law firm which in the very early days of Oklahoma City had been started by AP Murrah and Luther Bohanon. By the time Ed joined the firm, both Murrah and Bohanon had long been appointed to the Federal Bench, and were already serving as federal judges — one as a Federal District Judge and one as a 10th Circuit Federal Judge. When Ed Moler joined Bert Barefoot, the firm name became Barefoot and Moler. Both men, and particularly Ed, made it a point to hire OU law students to serve as Law Clerks for the firm. Ed, particularly, made a personal effort to mentor and train the young clerks, and provide them with the knowledge that they could not obtain in law school. He wanted them to be much more professionally “court-room ready” than the usual law school graduate. He succeeded. There are at least still a dozen or so lawyers still practicing law in Oklahoma City who owe some of their professional success to Ed Moler. I was one of those particularly lucky young lawyers mentored by Ed. You see, one day, Ed changed the name of his law firm to Barefoot, Moler & Claro.

Larry Brawner

Longtime state government lawyer, Workers’ Compensation Court judge, and Oklahoma City attorney Larry Brawner died on April 3 at the age of 71. Brawner was born in Shawnee where he graduated from high school as editor of the school newspaper and a track star. After graduating with a double major in political science and history from East Central State College in Ada, he received his law degree at the University of Oklahoma.

In college, Brawner was a disc jockey and news anchor at KTEN-TV in Ada. He entered a long career in state government as legal counsel for Governors David Hall and George Nigh, and was general counsel for the Department of Consumer Credit, a judge of the Workers’ Compensation Court, and Associate Provost of the OU Health Sciences Center. Governor David Walters appointed him to the OU Board of Regents.

Brawner was lead attorney for Edward DelBartolo, David Vance, and Robert Schreiber in the effort to bring Remington Park to Oklahoma City. Brawner later spent decades defending employers and insurance carriers in the workers’ compensation system in the firm of Brawner, Lott and Associates.

In his obituary from the Tulsa World, this quote was included: “He detested the Daily Oklahoman newspaper. He was a man of wisdom.”

Gary Mitchell Chubbuck (November 3, 1948 - March 11, 2016)

Gary Mitchell Chubbuck passed away March 11, 2016 in Oklahoma City. He was born on November 3, 1948 in Manhattan, Kansas to Syble and John Chubbuck. The family moved to Silver Spring, Maryland in 1951. Gary graduated from Sidwell Friends School in Washington, DC in 1966 where he held many track and field records. He attended Randolph Macon College on a basketball scholarship and graduated in j 970 with a degree in mathematics. After graduation, he worked all the space night division of Computer Sciences Corporation where he worked on programs that ran unmanned satellites. In 1972. Gary moved to Norman to attend law school at The University of Oklahoma. He met June Lester, a fellow law student and they married on August 9, 1975.

Gary practiced law for 38 years. Specializing primarily in the defense of major product manufacturers in personal injury litigation. Gary and June returned to Oklahoma City in 1981 with Gary joining the firm of Pierce Couch Hendrickson Johnston & Baysinger, where he became a partner. He was a partner in his own firm until his retirement in 2013.

In addition to Gary’s work as a products liability litigator, he provided pro bono representation to death row inmates during the appeals process. Gary was preceded in death by his parents; and his son, Travis Mitchell Chubbuck. He is survived by his wife, June Lester Chubbuck, of Edmond; his brother, Lyndon Chubbuck and wife, Ivana Chubbuck, of Los Angeles, CA; his son, John Robert Chubbuck and wife, Stacey Sheely Chubbuck, of Oklahoma City; and grandson, Mitchell Chubbuck. of Oklahoma City. The family requests that any donations be made to the Bella Foundation, Langston Wesley Foundation. Caring Voice Coalition. or beneficiary of choice.
NORMAN — In a record year, the University of Oklahoma College of Law’s Black Law Students Association (BLSA) won both the regional and the national Chapter of the Year Award for 2015-2016 among small chapters. The awards were presented by the National Black Law Students Association (NBLSA). This year marks the group’s fourth consecutive win for Regional Small Chapter of the Year.

“The regional and national recognition earned by our BLSA students makes OU Law extremely proud,” said OU College of Law Dean Joseph Harroz Jr. “Our students have devoted extensive time outside the classroom to build an engaged and active chapter focused on supporting our minority groups and increasing diversity at the school. We’re proud of their efforts and grateful they have received such a well-deserved honor.”

To be eligible for the award, a chapter must demonstrate social-political awareness, and a commitment to community service, education and career development. Examples of this year’s activities include leadership in OU Law’s diversity programs, service in Oklahoma City’s Make a Will Program and providing legal assistance to veterans. OU Law’s BLSA Chapter is named in honor of Ada Lois Sipuel Fisher, the first African-American admitted to the OU College of Law.

“It’s an honor and privilege to serve as president of a BLSA chapter that exhibits the zeal of our national founder, attorney Algernon Johnson (“AJ”) Cooper,” said OU Law BLSA President Marcelo Pendleton-Moreno. “The 2015-2016 Ada Lois Sipuel Fisher Chapter stands on the shoulders of the giants that came before it. We are honored to receive these awards.”

In addition to the recent awards, OU Law’s Ada Lois Sipuel Fisher BLSA Chapter has a strong history of success, including ten consecutive years of placing in the Regional Moot Court Competition and a number of qualifications for the national competition.

Founded in 1909, the OU College of Law is Oklahoma’s premier law school. OU Law offers small sections and class sizes that encourage a strong sense of community; accomplished faculty with international expertise; and a state-of-the-art facility equipped with the latest technology. The OU College of Law is the academic home of more than 500 students enrolled in the juris doctor program, the John B. Turner Master of Laws Program, the master of legal studies program and various dual degree programs. For more information about OU Law, visit law.ou.edu.

OCBA member Elaine Schuster was honored by Metro Tech for her 34 years of service on their Board at a special ceremony on April 5.
The district court granted summary judgment in favor of Community Bank holding that Valerie and Janice were not “applicants” within the meaning of ECOA and therefore they had no claims for discrimination based on their gender or marital status. The Court of Appeals for the Eighth Circuit affirmed² and the Supreme Court granted certiorari.

During oral argument, Justice Scalia sharply criticized and questioned the lawyers for Valerie and Janice. When their lawyer was arguing that they were required to sign the guarantees, Justice Scalia interrupted saying, “Wait, wait, wait. You say she was required to sign. She wasn’t required to sign. Somebody put a gun to her head? She wanted her husband to get the loan and this was the deal.” Then, later in the oral argument, he more specifically questioned Valerie and Janice’s status as applicants drawing an analogy to writing a letter of recommendation for a candidate to law school and suggesting that the person making that recommendation is not an applicant. Thus, at least from oral argument, it appeared clear that Justice Scalia was prepared to side with Community Bank.

On March 22, 2016, the Court issued a one-sentence per curiam order stating, “[T]he judgment is affirmed by an equally divided court.” How the votes of the eight justices were divided was not disclosed in the per curiam order. Since the Eighth Circuit had ruled in favor of Community Bank, and it appears likely that Justice Scalia would also have ruled in favor of Community Bank, the ultimate outcome of this case likely did not change as a result of Justice Scalia’s absence.

Friedrichs v. California Teachers Association. This is the second 4–4 tie so far this year. This case questions whether teachers who choose not to join the California Teachers Association, which is the California teachers union, can nevertheless be forced to pay a “fair share service fee” sometimes called an “agency fee” to offset the cost of collective bargaining. The idea is that the non-union teachers benefit from the collective bargaining efforts of the union and therefore should be required to pay a “fair share” fee. The non-union teachers had challenged the “fair share service fee” on the theory that it violates their first amendment rights of association and speech. The Court of Appeals for the Ninth Circuit affirmed the District Court ruling that held that the fee did not violate of the non-union members’ constitutional rights. The Ninth Circuit did so summarily, without oral argument, finding that “the questions presented in this appeal are so insubstantial as not to require further argument, because they are governed by controlling Supreme Court and Ninth Circuit precedent.” The Supreme Court precedent to which the Ninth Circuit was referring was Abood v. Detroit Bd. Of Ed.³ In Abood, a unanimous Supreme Court had upheld the very type of fee challenge in Friedrichs. Abood was decided in 1977. The Friedrichs case was specifically design to seek reversal of Abood.

Once again in oral argument, Justice Scalia’s views seemed clear. He asked one of the lawyers, “[i]s it okay to force somebody to contribute to a cause that he does not believe in?” On March 29, 2016, the Court entered the same one-sentence per curiam order as it did in the Hawkins case. And like in Hawkins, the votes that constitute the “equally divided Court” were not disclosed. In this case, unlike Hawkins, it is pretty clear that Justice Scalia’s absence changed the outcome of this case. It is very likely that Justice Scalia would have voted with the four unidentified justices who voted to reverse the Ninth Circuit and overruled Abood. This is different from Hawkins in that in that situation, I believe, Justice Scalia would have voted to affirm the Eighth Circuit’s opinion. So in Friedrichs it is very likely that Justice Scalia’s absence changed the outcome of the case.⁴

The likely alignment in both cases is set forth below.

Both cases, I believe, were likely divided along ideological lines with Justice Kennedy joining the Chief Justice, Justice Thomas, and Justice Alito on the “right,” and Justices Breyer, Ginsburg, Sotomayor, and Kagan aligned on the “left.” So if I am right that Justice Scalia would have joined the other conservative justices, Hawkins would still have been affirmed, but Friedrichs very likely would have been reversed and Abood would have been overruled.

By the time this column is published in mid-April, the regular season in baseball will be two weeks old and there will be no more 4–4 ties. However, because of the stalled status of Judge Garland’s nomination to fill Justice Scalia’s seat, it is likely that “spring training” at the United States Supreme Court will continue for the foreseeable future and more 4–4 ties are likely.

² Hawkins v. Community Bank of Raymore, 761 F.3d 937(8th Cir. 2014)
³ 431 U.S. 209, 232 (1977)
⁴ Lawyers representing a conservative advocacy group involved in Friedrichs have said they plan to ask the Court for rehearing, presumably after the Court is fully staffed. As of the deadline for this month’s column, the time for filing a motion for rehearing has not expired.
Crowe & Dunley adds four attorneys

Crowe & Dunley recently announced the addition of J. Blake Johnson, Harry “Skeeter” Jordan and Melissa McDuffey as attorneys in the firm’s Oklahoma City office and Alexandra Shipley as an attorney in the Tulsa office.

A member of the firm’s Litigation & Trial, Indian Law & Gaming and Product Liability Practice Groups, Johnson received his Juris Doctor from the University of Oklahoma College of Law and holds several honors including Order of the Coif, Order of the Barristers and Law Review. He also is an American Bar Association Appellate Advocacy National Championship quarterfinalist and has received the National Order of Scribes Legal Writing Award.

Johnson received his bachelor’s degree in political science from the University of Oklahoma, where he became the National Champion of College Debate in 2007. He founded the Bay Area Urban Debate League in 2008, a nonprofit organization creating debate teams in inner-city high schools in the San Francisco bay area.

Jordan has joined the firm’s Intellectual Property and Litigation & Trial Practice Groups. He received his Juris Doctor from the University of Oklahoma College of Law, where he was on the Dean’s List, a member of Phi Delta Phi Legal Honor Society, served as special projects editor for the American Indian Law Review, was treasurer for the Intellectual Property Society and was honored with the American Jurisprudence Award in Constitutional Law and Writing I.

Jordan was also an award winner in the school’s Negotiation Competition, a 2015 American Bar Association Regional Mediation Competition champion and a 2015 American Bar Association National Mediation Competition champion. He received his bachelor’s degree from the University of Oklahoma.

McDuffey is a member of the Labor & Employment and Litigation & Trial Practice Groups. She graduated from the University of Oklahoma College of Law with honors. During law school, McDuffey was on the Dean’s List, a member of Phi Delta Phi and served as a note and comment editor for Oklahoma Law Review. She received several honors and awards, including selection into Order of the Coif and Order of Solicitors. She also earned American Jurisprudence Awards for Academic Excellence in Constitutional Law, Comparative Law and Family Law.

Additionally, McDuffey competed in the American Bar Association Representation in Mediation competition, where her team won both the regional and national titles in 2015. She received her bachelor’s degree from Cameron University in Lawton, Oklahoma.

An attorney in the firm’s Tulsa office, Shipley is a member of the Energy, Environment & Natural Resources and Litigation & Trial Practice Groups. She received a Juris Doctor from the University of Oklahoma College of Law, graduating with highest honors and as a member of the Order of the Coif.

During law school, Shipley served as an assistant managing editor for the Oklahoma Law Review, earned a place on the Dean’s Honor Roll and was the recipient of the American Jurisprudence Award in Legal Research & Writing I, Civil Procedure II, Federal Courts and Professional Responsibility. As an undergraduate at Indiana University, she studied ballet, business studies and Spanish.

Four OU Law Alumni Inducted Into Hall of Fame

Last night the University of Oklahoma College of Law honored four distinguished alumni at its annual Order of the Owl Hall of Fame ceremony. The Order of the Owl recognizes OU Law graduates who demonstrate leadership and service through outstanding accomplishments in their legal careers.

Class of 2016:

• Lawton businessman and entrepreneur Bill W. Burgess Jr., whose public service to higher education spans two decades
• The Honorable Tom Colbert, the first African-American to serve on the Oklahoma Supreme Court and to be sworn in as Vice Chief Justice and Chief Justice, and the first African-American to be appointed to the Oklahoma Court of Civil Appeals
• Jim Gallogly, an industry leader who transformed companies experiencing challenges into successful international businesses
• The Honorable Noma D. Gurich, a leader in the legal profession and only the third woman in history to serve on the Oklahoma Supreme Court

For more than 20 years, Bill W. Burgess Jr. (’80) has invested time and energy to address the needs of Oklahoma higher education, serving first as a State Senator in Oklahoma Higher Education for 18 years and currently serving a seven-year term as an OU Regent. Burgess is a member of the board of the investment corporation Vortex; owner and publisher of The Lawton Constitution; and senior partner of Burgess and Highwater Law Firm. As chairman and principal owner of Techzoriz, Burgess developed the enterprise into one of the largest Oklahoma software engineering companies.

A pioneer in the legal profession, The Honorable Tom Colbert (’82) became the first African-American appointed to the Oklahoma Court of Civil Appeals, where he served as Chief Judge prior to serving on the Oklahoma Supreme Court. He served several years in the U.S. Army and taught in the public school system in Chicago prior to attending the OU College of Law. He also has served as assistant dean at Marquette University Law School in Milwaukee, Wisconsin, and assistant district attorney in Oklahoma County.

Jim Gallogly (’77) has had a highly successful career in oil and gas, holding many executive positions with Phillips, Chevron Phillips Chemical and ConocoPhillips before being named Chief Executive Officer of LyondellBasell Industries. He led the company out of Chapter 11 bankruptcy, transforming it into what is now one of the world’s largest plastics, chemical and refining companies. Since his retirement from LyondellBasell, Gallogly has served on the Board of Directors at DuPont, where he provides leadership on corporate governance and strategic planning, and on a number of other charity boards.

A leader in the legal profession for more than 30 years, The Honorable Noma D. Gurich (’78) is only the third woman in history to serve on the Oklahoma Supreme Court, being appointed in 2011. After spending 10 years as a litigator, Gurich was appointed to the Oklahoma Workers’ Compensation Court where she served as a judge for 10 years, including four as Presiding Judge. Later, she was appointed and elected to serve as a District Judge in Oklahoma County, where she served for 12 and a half years, including two as Presiding Judge.


Lytle, Soule & Curlee, P.C. has announced new Shareholder

Lytle, Soule & Curlee, P.C. is pleased to announce that Stan Koop has been named a Shareholder with the firm.

Over the last twenty years, Mr. Koop has developed a broad-based complex civil litigation practice involving personal injury, insurance defense and litigation, products liability, employment law, aircraft title and finance, oil and gas litigation and construction law.

An Oklahoma native, Mr. Koop graduated with a Bachelors of Business Administration degree in Economics from the University of Oklahoma in 1991 and received his Juris Doctorate from the University of Oklahoma College of Law in 1994.

He has been a frequent speaker on a variety of topics such as uninsured and underinsured Motorist law, bad faith litigation issues and the handling of personal injury cases from both plaintiff and defense perspectives.

Founded as Shartel & Wells on January 1, 1902, Lytle Soule & Curlee, A Professional Corporation, is the oldest firm in Oklahoma City and one of the oldest firms in the State. The firm represents corporations, partnerships, limited liability companies and individuals in all aspects of general, civil, business practice.

Lytle, Soule & Curlee announces new associates

Lytle, Soule & Curlee is pleased to announce the addition of Chantel James and Erin Smith, recent graduates of the University of Oklahoma College of Law, as associates.

Chantel James is a trial lawyer whose practice will include complex civil litigation in both state and federal courts in the areas of insurance defense and bad faith litigation, civil rights and constitutional law, bankruptcy and creditor law and construction litigation.

Ms. James graduated Cumn Laude with a Bachelor of Arts degree in political science from the University of North Texas in 2012. She received her Juris Doctor with Honors from the University of Oklahoma College of Law in 2015. While in law school, Ms. James was on the Oklahoma Law Review and, in the summer of 2015, her comment, “Windsurfing and the Accommodation Doctrine: Should Oklahoma Follow in the Steps of the Lone Star State?” was published therein.

In addition, she has twice studied overseas, at the University of Strathclyde in Glasgow, Scotland in 2012 and at the University of Aberdeen, in Aberdeen, Scotland in 2014.

Erin Smith’s trial practice will also include complex civil litigation in both Public Defender.
By Roscoe X. Pound

Dear Roscoe: The movie Batman v. Superman troubled me somewhat. How does the doctrine of mutual combat come into play? Also, to the extent the combatants acted under duress, would that absolve the victim of criminal liability? S.D., OKC.

Dear S.D.: SPOILER ALERT – WHILE I’VE TRIED TO AVOID THEM, SPOILERS MAY WELL BE GLEANED FROM THIS ANSWER.

I’m not surprised to have a superhero and law question. We’ve had them before. And given that the title of this flick itself is styled like a lawsuit, small wonder to see a question here about it. What does surprise me, however, is that you apparently sat through this movie and these are the only questions to trouble you.

Okay, let’s assume Gotham City and Metropolis are in Oklahoma. As a civil matter, where parties engage in mutual combat in anger with deadly weapons (including heat vision?), each is civilly liable to the other for any physical injury inflicted by him during the fight. While it is unquestionably true that crimes against the laws of the state usually constitute torts for the commission of which persons thereby injured may maintain actions for the recovery of damages, yet this general rule is qualified by the equally general rule and universal rule that where parties to an immoral or illegal transaction are in pari delicto with each other, each is estopped, as to the other, to take advantage of his own moral turpitude, illegal act, or criminal conduct for the purpose of recovering damages for injury sustained as a consequence of their joint wrong.

Let’s take it one step further. Let’s assume Batman wins and Superman dies as a result. Let’s say that Lois Lane is the spouse of Superman. Is a wrongful death suit viable? Again, based upon Oklahoma law, the answer is once more in the affirmative. The Oklahoma Supreme Court has long held the position that the fact that the parties voluntarily engaged in such a combat with deadly weapons is no defense to an action by the widow of one to recover damages for the death of her husband, caused by the other. For all of the foregoing see Colby v. McClendon, 206 P. 207 (1922) and its numerous subsequent progeny.

Now, as played out in the movie, the parties may not be exactly in pari delicto. A fair argument could be made casting one in the role of the defendant and the other as the aggressor, at least initially. One who is assaulted or interfered with by another without provocation may use sufficient force to repel the attack without being guilty of assault even though he may not believe himself to be in danger of great bodily harm. Boston v. Muncy, 233 P.2d 300 (1951). On the other hand, even acting in self-defense, a person may be liable for injury inflicted upon the aggressor. This is the case when the defendant is not justified in his belief that he was in danger, or when the defendant uses excessive force, or when the defendant continues to exert force after the aggressor is rendered disarmed or helpless.

Criminal liability shakes out pretty much the same way. Writing for the Court of Criminal Appeals in 2009, Judge Lumpkin put it this way: “self-defense is not available to a person who was the aggressor or provoked another with the intent to cause the alteration or who voluntarily entered into mutual combat; a person who was not the aggressor and did not provoke another with intent to cause an alteration or did not voluntarily enter into mutual combat has no duty to retreat, but may stand firm and use the right of self-defense; and a person is an aggressor when that person by his wrongful acts provokes, brings about, or continues an alteration.” Jones v. State, 2009 OK CR 1, 201 P.3d 869. Earlier, in Teeters v. Frost, the Supreme Court set out the policy as follows: “There are three parties here: one being the state, which for its own good does not suffer the others to deal on a basis of contract with the public peace. The rule of law is therefore clear and unquestionable that consent to an assault is no justification. The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order, such as slight batteries in play or lawful games-such unimportant injuries as, even when they constitute technical wrongs, may well be overlooked and excused by the party injured, if not done of deliberate malice.”

Now, one might argue that duress enters into the picture at some point in the movie. However, common law recognized early on that duress should have no application to the intentional taking of an innocent life by the threatened person. Oklahoma retains that limitation. Tully v. State, 1986 OK CR 185.

Assuming both the combatants survive, Batman would probably better afford a top flight lawyer unless, of course, the Daily Planet ponied up Superman’s fees. I’d suggest bringing in a hotshot from NYC like Matt (Daredevil) Murdock. He’d be marvelous.

***

My relatively quiet Monday morning ended when a seriously chill blast of March blew in the front door carrying Captain Joe Innocente of the Secaucus P.D. with it. He didn’t need the acceleration or the chill. He came in with enough frost and fury of his own.

“We need to talk,” he declared.

“Fine,” I said. “Grab some coffee before you sit.”

This threw off balance for a second. I guess he expected something cowed and contrite. He did, however, grab a cup. Then he said “Is this nut ring for anyone?”

“Yes,” I answered. “But it’s Saturday’s.”

Thus fortified, he took a seat in one of my visitors’ chairs. “Jesus, Roscoe, is this cake an heirloom?”

“Dunk it in your coffee. That’s what it’s there for.”

Let’s say that Lois Lane is the spouse of Superman. Is a wrongful death suit viable? Let’s assume that duress should have no application to the injury. Superman troubled me somewhat. How does the doctrine of mutual combat enter into play?

By all accounts, he saved some lives that night. “Lives his presence put at risk to begin with.”

“We can go round on that into tomorrow, but what purpose would it serve?”

He stared for a moment, silent and baleful. I liked the tirade better.

“So that’s it? That’s all you got to say?”

“Well, I’m probably not as good as I think I am, nobody could be. And I know I’m not the law and that you are. That’s why I have dozens of options that, ethically and legally, you don’t.” But, what else can I say but “welcome to the team?”

“Save the cowboy crap for your pals in Oklahoma. I ain’t on your team. In fact, if you or any of your playmates get cross-ways with me on this for any reason, you’ll be celebrating your hundredth birthday in Rahway. We’re through.”

“Fine. But first tell me what you learned from the Feds.”

I think I genuinely shocked him with that one. “Are you that arrogant or that thick?”

“Most likely the latter,” I answered.

I pulled a micro-cassette recorder from my desk drawer, and played the recording I’d made at the meeting in the Bronx. When it was finished I said: “Now you’ve got several counts and RICO. But, in the immortal words of The Boss ‘the ride ain’t free.’”
The Court of Indian Offenses – The “Other” Tribal Court

By Robert Don Gifford III

Since the founding of the Colonies, the court system is critical in any form of government. Tribal governments are no different. Before the first Europeans arrived on this continent, the native inhabitants resolved issues between members through a variety of practices and customs. After arrival of the settlers and the later-named agenda of “Manifest Destiny,” the methods of resolution of dispute within a tribe were not given credence and later were discouraged or outlawed (e.g. Sun Dance).

The first modern tribal courts were the “Courts of Indian Offenses,” or “Courts of Federal Regulations” (CFR Courts) established by the Department of the Interior in 1883. These courts were established for minor crimes and to resolve tribal disputes. Many of the judges in the CFR courts were also non-native superintendents from the Bureau of Indian Affairs (BIA) whose objective was to assimilate Indians into the culture of the western society.

With the passage of the Indian Reorganization Act in 1934, tribes were finally allowed to demonstrate “inherent sovereignty” of self-government. For the first time, each tribe was allowed to develop not only their own tribal constitution, but to also develop within their own code of laws to govern their tribe. More significantly, each tribe had the option to operate its own tribal court system.

Today, tribal justice systems vary. Some tribes have chosen to operate their own tribal courts within their tribes. Many resemble what a lawyer may see in Oklahoma County as an adversarial process, and some may incorporate some customary practices resembling dispute resolution. Some tribes have opted to not build their own tribal court system, but to utilize the still existing “CFR courts” as run by the BIA.

The first Court of Indian Offenses in was to become the State of Oklahoma was originally established in 1866 in the “Indian Territory.” The original Court of Indian Offenses in western Oklahoma was created to provide law enforcement for the Kiowa, Comanche, and Apache (KCA) Reservation, and several prominent tribal leaders such as the Kiowa’s Lone Wolf served as judges for the court. Elected Comanche Chief Quanah Parker served as the first presiding judge in the territory. Quanah Parker’s term as judge was controversial due to his practice of polygamy (Chief Parker agreed he would settle with one wife only if the Commissioner of Indian Affairs would tell the other wives they had to leave).

After the reservations in Oklahoma were finally opened by land runs to non-Indian homesteading, and federal Indian policy sought to weaken tribal governments and break up the tribal landholdings, the Courts of Indian Offenses eventually lost their funding and ceased to function. With the void in law enforcement, the state began to assert its authority over the remaining tribal and allotted lands even though no jurisdiction properly existed. In recent decades, the tribes of Oklahoma regained their jurisdiction over these lands and many have re-established their own respective tribal court systems.

Since few tribes had operating judicial systems in place in the late 1970s when tribal jurisdiction was re-affirmed, the modern Court of Indian Offenses for the Anadarko Area Tribes was created to fill the gap in addressing tribal justice and access to courts. Another CFR court was opened in 1991 for the eastern half of the state in Muskogee. State law does not have an appreciable role over Indians or tribes for offenses committed in Indian Country. This has been true since the Tenth Circuit decision in Ross v. Neff. Not only do Tribes have responsibility in the area of criminal jurisdiction, but under the Indian Child Welfare Act, the tribes have jurisdictional responsibilities in certain child custody proceedings and Indian Child Welfare matters arising in Indian country, except for private custody proceedings.

The modern “CFR Court” is held in Anadarko and Red Rock, Oklahoma before a BIA Magistrate judge with any appeals taken to the Court of Indian Appeals. The court may hear misdemeanor case (as charged under the Code of Federal Regulations, 25 CFR Part 11) involving Indians in “Indian Country.” Non-native defendants are subject to either federal or state court jurisdiction (depending in the crime in question). Defendants in criminal cases have the right to counsel, trial by jury, and other elements of due process under the tribal constitutions and the Indian Civil Rights Act. The CFR courts will also hear civil matters that include divorce, child support, custody determinations, guardianships, adoptions, guardianship, personal injury, probate (non-trust property), and a variety of other civil disputes.

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### Mort’s Playlist

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<tr>
<th>Song</th>
<th>Artist</th>
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<tbody>
<tr>
<td>Blackbird</td>
<td>Beatles</td>
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<tr>
<td>Only The Lonely</td>
<td>Roy Orbison</td>
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<tr>
<td>God Only Knows</td>
<td>Beach Boys</td>
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<tr>
<td>Hey Joe</td>
<td>Jimi Hendrix</td>
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<tr>
<td>Church (Guilty Pleasure)</td>
<td>Lyle Lovett</td>
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<tr>
<td>Good Lovin</td>
<td>The Rascals</td>
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<tr>
<td>Take Five</td>
<td>Dave Brubeck Quartet</td>
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### Sherry’s Playlist

<table>
<thead>
<tr>
<th>Song</th>
<th>Artist</th>
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<tbody>
<tr>
<td>Mainstream Kid</td>
<td>Brandi Carlile</td>
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<tr>
<td>Take Me to the River</td>
<td>Eva Cassidy</td>
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<tr>
<td>The Weight</td>
<td>Joe Cocker</td>
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<tr>
<td>All Along the Watchtower</td>
<td>Eddie Vedder &amp; The Million Dollar Bashers</td>
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<tr>
<td>Angel Mine</td>
<td>Cowboy Junkies</td>
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<tr>
<td>Should I Stay or Should I Go</td>
<td>The Clash</td>
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<tr>
<td>My Love For Your Will Not Fade</td>
<td>Caitline Canty</td>
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<tr>
<td>Dr. Frankenstein</td>
<td>Jack Savoretti</td>
</tr>
<tr>
<td>Cowgirls Don’t Cry (Guilty Pleasure)</td>
<td>Brooks &amp; Dunn</td>
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state and federal courts but will focus in the areas of product safety and liability; insurance defense and litigation; employment and labor law; construction, architectural and engineering litigation and commercial law.

A native of Oklahoma City, Oklahoma, Ms. Smith graduated with a Bachelor of Arts degree in both Letters and Economics from the University of Oklahoma in 2012 and earned her Juris Doctor degree from the OU College of Law in 2015. While in law school, Ms. Smith was a member of the American Indian Law Review. In addition, Ms. Smith studied overseas at the Universita’ di Bologna in 2011.

**Litigation Counsel of America names five Crowe & Dunlevy attorneys as senior fellows**

The Litigation Counsel of America (LCA) recently named Crowe & Dunlevy attorneys Kevin D. Gordon, Jack M. Morgan III, Judy Hamilton Morse, Terry M. Thomas and John M. Thompson as senior fellows, and attorney Brooke S. Murphy is a fellow. The LCA, an invitation-only trial lawyer honorary society, is composed of 3,500 fellows nationwide.

Fellowship in the LCA is highly selective and by invitation only. Fellows are selected based on excellence and accomplishment in litigation, both at the trial and appellate levels, and superior ethical reputation. Senior fellow status in the society is reserved for advanced commitment to and support of the LCA, Diversity Law Institute and Trial Law Institute.

The Litigation Counsel of America (LCA) is aggressively diverse in its composition. Established as a trial and appellate lawyer honorary society reflecting the American bar in the twenty-first century, the LCA represents the best in law among its membership. The number of fellowships has been kept at an exclusive limit by design, allowing qualifications, diversity and inclusion to align effectively, with recognition of excellence in litigation across all segments of the bar. Fellows are generally at the partner or shareholder level, or are independent practitioners with recognized experience and accomplishment. In addition, the LCA is dedicated to promoting superior advocacy, professionalism and ethical standards among its fellows. For more information, visit [http://www.litcounsel.org](http://www.litcounsel.org).

**OU Law Jumps In U.S. News & World Report Rankings**

The University of Oklahoma College of Law jumped seven spots in the latest U.S. News & World Report 2017 Ranking of Best Law Schools to #60. The ranking once again reflects the OU College of Law as Oklahoma’s top law school.

In combination with OU Law’s status as a Top 20 Best Value Law School, and as the No. 7 Most Court Program in the country, the latest ranking from U.S. News and World Report demonstrates the OU College of Law is one of the nation’s leading public law schools.

One of the many criteria considered by the group’s fourth consecutive win for Regional Small Chapter of the Year. To be eligible for the award, a chapter must demonstrate social-political awareness, and a commitment to community service, education and career development. Examples of this year’s activities include leadership in OU Law’s diversity programs, service in Oklahoma City’s Make a Will Program and providing legal assistance to veterans. OU Law’s BLSA Chapter is named in honor of Ada Lois Sipuel Fisher, the first African-American admitted to the OU College of Law.

In addition to the recent awards, OU Law’s Ada Lois Sipuel Fisher BLSA Chapter has a strong history of success, including ten consecutive years of placing in the Regional Moot Court Competition and a number of qualifications for the national competition. National estate law group names Crowe & Dunlevy attorney Cynda C. Ottaway president

Crowe & Dunlevy attorney Cynda C. Ottaway has been named president of the American College of Trust and Estate Counsel (ACTEC), the leading trust and estate organization of peer-elected trust and estate lawyers. Ottaway has held several other leadership roles with ACTEC, including serving on the Executive Committee and as secretary, treasurer and most recently as president-elect.

Ottaway is a director at Crowe & Dunlevy and is chair of the firm’s Private Wealth & Closely-Held Business Practice Group in the Oklahoma City office. She focuses her practice on estate planning, trust and estate administration and litigation and planning for closely-held family businesses. She has experience in wealth transfer techniques and assists individuals and businesses with succession planning.

Her professional honors include being recognized as the 2014 and 2010 Oklahoma City Lawyer of the Year by Best Lawyers in the field of Trusts and Estates and in 2012 in the category of Non-Profit/Charities. She has been listed by Best Lawyers in the categories of Closely Held Companies and Family Business Law, Non-Profit/Charities Law, Tax Law, Trusts and Estates since 1989. Ottaway was named to the 2013 Top 25 Women Oklahoma Super Lawyers and has been listed by Oklahoma Super Lawyers in Estate Planning and Probate since 2006.

An active member of the community, Ottaway serves on the Boards of Visitors at the University of Oklahoma Law School and the Honors College at the University of Oklahoma, is a graduate of Leadership Oklahoma City Class XV, is a member and officer of Rotary Club 29 and serves on the board of directors for United Way and the Oklahoma City Museum of Art.

Ottaway received her Juris Doctor with honors from the University of Oklahoma College of Law and bachelor’s degree from the University of Oklahoma.

**Gable Gotwals Announces New Of Counsel Attorney**

Daniel A. Nickel has joined GableGotwals as an Of Counsel attorney in the firm’s Oklahoma City office where his practice will focus on oil and gas law and commercial law. Nickel previously served as in-house counsel to the opera-
OUIO from PAGE 5

to the jury. In reading the confession of the defendant Williams to the jury, the defendants interposed an objection to the following statement which appeared in the confession.

As a general rule, all confessions are prima facie admissible in evidence. Unless an objection is interposed, the practice has been to receive confessions without question. If an objection to the admissibility of a confession is interposed by the defendant, a question of law is presented to the court and should be determined in the absence of the jury, preliminary to allowing the confession to go to the jury. The burden is on the defendant to show that it was procured by such means or under such circumstances as to render it inadmissible, unless the evidence on the part of the state tends to show that fact. The trial court, in ruling upon the question of law which was presented to him, stated: “There is a conflict in the testimony here, and it will be for the jury to determine under proper instructions.”

There may be a conflict in the testimony, and yet the trial court could find that the confessions were improperly obtained and inadmissible. Where a direct conflict appears in the evidence as to whether the confessions were voluntary, trial courts generally have adopted the practice of submitting the facts and circumstances surrounding the giving of a confession to the jury; not that the jury may pass upon its admissibility, but for the purpose of enabling them to judge what weight and value should be given to the confessions as evidence, and the jury may disregard it if they are not satisfied that it is voluntary.

The error that arises here is in the assumption by the court that there is a conflict in the evidence as to whether the confessions were obtained by force or threats. It is true that Officer Butler testified that there were no force or threats to his knowledge. But he also testified that Officer Harbolt talked to the defendants in the “consultation room” when he was not present. The two defendants, as hereinafter set forth, testified positively that Harbolt threatened and abused them; and each of them testified that at the time the threats and abuse occurred they were alone in the torture room with Harbolt. The only person who could testify and present a conflict in the evidence as to what occurred is Officer Harbolt, and he was not used as a witness. The defendants did not contend that threats or abuse were used at the time the statements were signed, but that they had been abused in the torture chamber before they were taken before the clerk and Butler to sign the statements.

The county attorney in the hearing before the court on the admissibility of the confessions did not offer Harbolt as a witness; and the court stated at the conclusion of the evidence upon that proposition: “Is there anything further? Here is the man here they say did the beating.”

The attorney for the defendants arose and objected to Harbolt testifying, for the reason that he had not been placed under the rule. The court properly overruled that objection, as that is a question which only goes to the weight to be given to the testimony of the witness and does not affect the admissibility of his evidence. But after the court had overruled the objection of the defendant to Harbolt testifying, the county attorney still refused to place Harbolt on the witness stand.

Another significant incident in connection with the contentions of the defendants that they were beaten and abused in connection with the securing of the confession is the testimony of the defendant, Pressley, that he told Mr. Marlin and Mr. Morris in the county attorney’s office what Harbolt had done to him, and had called for Mable Bassett and related to her about the beating which he sustained. None of these parties refuted his statements, although Mr. Marlin, the assistant county attorney, was sworn as a witness and testified in connection with another incident, which occurred during the trial.

Under the record before the court, at the time an objection on behalf of the defendants was interposed to the admissibility of the confessions, the confessions were inadmissible as a matter of law, for the reason that there is no evidence to dispute the testimony of the defendants that they were abused by Policeman Harbolt at a time when Butler was not present.

April 26, 1966
Fifty Years Ago
[Excerpted from Swanson v. Zameda, 1966 OK 80, 414 P.2d 287.]

This cause is lodged here as an appeal in simplified form authorized by Chapter 464, pp. 908-909 Session Laws of Oklahoma, 1965, Title 12 § 990 O.S.Supp. 1965, as implemented by Rules 1-20 of this court. Defendants in error move to dismiss the appeal for the reason that no motion for new trial was filed by plaintiff in error in the trial court.

The judgment was entered in the trial court on December 10, 1965. No motion for new trial was filed by plaintiff in error. He filed notice of appeal on December 20, 1965. He instituted this appeal by the filing of a petition in error on January 10, 1966. Defendants in error contend that the filing of a motion for new trial is not a prerequisite for the prosecution of an appeal under the provisions of Title 12 § 990, supra, and that such appeal may be prosecuted direct from the “final order or judgment appealed from.”

Title 12 § 990, supra, specifically provides that:

“(a) For the filing of cross-appeals;

(b) The procedure to be followed by the trial courts or tribunals in the preparation and authentication of transcripts and records in cases appealed under this act; and

(c) The procedure to be followed for the completion and submission of the appeal taken hereunder.”

Pursuant to the authority so delegated by the legislature this court adopted Rule 19, which reads:

“Rules applicable. All the rules of this court and all provisions of the law not in conflict with these rules shall apply to appeals in Simplified Form.

“When a problem not covered by the rules of this Court shall arise in a Simplified Appeal, the appeal in the interest of justice, on motion of a party, or on its own motion, may make an order concerning it, or may refer the matter with directions to the tribunal.

The statutes of this state and the rules and decisions of this court requiring the filing of a motion for new trial as a condition precedent to the prosecution of an appeal to this court in all cases involving contested questions of law and facts are not in conflict with Title 12 § 990, supra, and implementing rules of this court.

The filing of a motion for new trial is a mandatory requirement in the prosecution of appeals to this court from all judgments of the trial court. . . .

The basic purpose for requiring the filing of a motion for new trial is to afford the trial court an opportunity to review the correctness of its judgment. No sound reason exists for applying a different rule to appeals prosecuted under the simplified procedure authorized by Title 12 § 990, supra. We therefore hold that the filing of a motion for new trial is a jurisdictional requirement for the prosecution of an appeal to this court under the provisions of Title 12 § 990, supra. The motion of defendants in error to dismiss the appeal is sustained.

April 16, 1991
Twenty-Five Years Ago

Appellant, Bozarth, McCord and McCrary, is a partnership engaged in the business of erecting and maintaining outdoor advertising signs. It leases billboards to advertisers. Appellant acquired two locations for billboards by lease from the Oklahoma, Kansas & Texas Railroad. The locations are on the railroad right-of-way where it crosses Interstate Highway 235, approximately 2 miles north of Interstate Highway 40 near downtown Oklahoma City.

Pursuant to the requirements of the Oklahoma Highway Advertising Control Act of 1972, 69 O.S. 1981 §§ 1271-1285 , (The Act), Appellant made application for sign permits from Appellee Oklahoma Department of Transportation (DOT). DOT issued the permits. The City of Oklahoma City then issued building permits for the two signs confirming that the locations were “in zone district: I-3,” which is an industrial use classification.

Approximately a year later DOT recalled the permits, stating: “the reason for this cancellation is as follows: The information submitted on the zoning (from the City) was incorrect.” Apparently DOT learned the State of Oklahoma and the Oklahoma City Urban Renewal Authority now own the property surrounding the right-of-way. As state property, it is unzoned.

When DOT refused to reconsider cancellation of the permits, Appellant petitioned the district court for a Writ of Mandamus to order DOT to grant the permits. The case was submitted to the trial court.

Quote of the MONTH

The hardest thing about any political campaign is how to win without proving that you are unworthy of winning.

— Adlai Stevenson, governor, ambassador (1900-1965)
on stipulated facts. In addition to the above stated facts, the stipulation contained the following facts, as summarized:

Erection of the signs is subject to the Act, and it is a criminal offense to erect the signs without permits. The Act permits signs of the type proposed by Appellant in areas zoned for commercial or industrial uses.

Railroad property is not subject to municipal zoning regulations in Oklahoma.

A railroad company may lease its property which is not required for railroad operations to other parties for commercial use. Although the railroad’s land is not subject to zoning, the use of the land for non-railroad purposes must be consistent with the character of the surrounding area and with its zoning, if it is zoned. If the land surrounding the property were not State property it would be zoned for industrial use and the signs would be permitted.

The State of Oklahoma is not subject to the enforcement of municipal zoning and use restrictions in its use of the land owned by it.

The trial court denied the Writ of Mandamus based on its finding that granting permits under the Act is discretionary and that DOT’s denial of the permits was not fraudulent, capricious or arbitrary and thus not an abuse of discretion. Appellant appeals to this Court, arguing DOT does not have discretion to revoke a sign permit which satisfies all statutory standards.

DOT claims the granting or denial of billboard permits is a totally discretionary act. Thus, it maintains, the trial court did not err in denying the Writ of Mandamus. Such is not the case. When an applicant has complied with all the provisions of the statute, issuance of the permit is a purely ministerial act. If an act is ministerial in nature, mandamus is the proper remedy to require DOT to issue the permit. Magnolia Petroleum Co. v. City of Tonkawa, 189 Okl. 125, 114 P.2d 474 (1941). . . .

DOT has never claimed Appellant’s proposed signs fail to meet any of the statutory standards set forth in § 1275 of the Act. To the contrary, DOT stipulated the signs would be permitted except for the fact the State owned adjacent land. Therefore the dispositive issue is whether the State’s ownership of land adjacent to the proposed billboard sites deprives the railroad company and Appellant of the right to use or lease its land for billboard construction in the same manner as if the neighboring land was privately owned. We hold that it does not.

The Oklahoma Supreme Court long ago established the right of railroads to use or lease their rights-of-way for non-railroad uses, consistent with the use of other land in the area. McCurley v. City of El Reno, 138 Okl. 92, 280 P. 467 (1929). Prior to purchase of the adjacent land by the State to construct Interstate 235, the land was indeed zoned industrial, which, DOT acknowledges, permits construction of billboards. The area is still industrial. The State has made no showing of an attempt, nor does the State contend there ever will be an attempt by the State, to develop the land for any other purpose that could be construed as inconsistent with the generic industrial character as it exists now.

DOT premises its absolute discretion to refuse billboard permits on § 1277 of the Act. This section authorizes DOT to enact and adopt rules and regulations for the issuance of licenses and permits for other than on-premise outdoor advertising structures. To give an administrative body the right to pass rules violating it with absolute discretion to grant or refuse permits would be a violation of our Constitutional proscription against the taking of private property for public use without just compensation. OKLAHOMA CONSTITUTION, art. 2 § 24. Acting authorities are not vested with personal or arbitrary power, but are subject to the control of the courts when it appears they have acted arbitrarily.

DOT stipulated that Appellant had satisfied every requirement for the permits. Contrary to DOT’s vague arguments, there has been no attempt to zone the State’s adjacent property. This case does not involve the rights of the State to use land that it owns. DOT does not point to any basis for its contention that acquisition of the adjacent property by the State somehow changes its nature to something other than industrial or commercial. Construction of billboards is not inconsistent with the character of the surrounding area. Denial of the permits merely because the State had acquired the property for construction of the highway, long since completed, is an abuse of discretion. The trial court erred in denying the Writ of Mandamus.

BAR OBSERVER from PAGE 13

Ryan Duffy Elected to Shareholder of Andrews Davis

Ryan Duffy joined the Firm of Andrews Davis in 2010 bringing with him experience in estate planning and administration, federal and state tax, corporate organization, transactional law, real estate, securities, non-profit organizations, commercial litigation and probate. His practice continues to focus on these areas with a specific concentration on tax controversies and business development. Ryan has presented seminars for the Oklahoma Society of CPAs, the Oklahoma Tax Commission, and the National Business Institute on various topics including state and federal tax practice, business organization, estate planning, finance, succession planning, business valuation, and ethics. Ryan also has an article entitled, "Simple Estate Planning for Your Clients Children," published in the Oklahoma Bar Journal, Volume 81, No. 27, October 9, 2010.

Ryan is admitted to practice in the Oklahoma Supreme Court and all Oklahoma District Courts, as well as the United States District Court for the Western District of Oklahoma and the United States Tax Court. He is a member of the Oklahoma Bar Association and the Oklahoma County Bar Association. He is also a member of the Oklahoma Bar Association Tax and Estate Planning sections. Ryan is an active member of the Executive Council for the Oklahoma Sports Hall of Fame, currently serving on its Board of Trustees, as well as its Honors Committee and Jim Thorpe Award Committee. Ryan has been named a Rising Star by Super Lawyers in the area of tax and received a BV Distinguished Peer Review Rating by Martindale-Hubbell.

Raised in Guymon, Oklahoma, Ryan graduated from Oklahoma State University with a Bachelor’s Degree in Business Administration, with a major in Accounting. He received his Juris Doctorate degree in 2006 from the University of Oklahoma College of Law. While attending law school, Ryan received the Academic Achievement Award on Constitutional Law and served as Vice President of his class.

Ryan and his wife, Erin, enjoy spending their time with their son, Nathan. His family arrived in Oklahoma for the Land Run of 1889 and his family still proudly owns the original claim.

Michael L. Brooks Joins The Brooks Law Firm

Michael L. Brooks has become a partner in The Brooks Law Firm, LLC, formerly Gary L. Brooks & Associates, PLLC.

Mr. Brooks received his J.D. in 2010 from the University of Oklahoma College of Law, where he graduated first in his class and served as Editor-in-Chief of the Oklahoma Law Review. Other law-school accomplishments and honors include the Joel Jankowsky Outstanding Graduate Award, the Nathan Scarritt Prize for the graduate with the highest academic record, and fifteen American Jurisprudence Awards for the highest grade in a class.

After graduation, Mr. Brooks served as a law clerk to the Honorable David M. Ebel of the United States Court of Appeals for the Tenth Circuit. Mr. Brooks spent the last four and a half years with the Oklahoma City law firm Hartzog, Conger Cason & Neville, practicing primarily in the areas of appellate advocacy and complex commercial litigation.

Mr. Brooks has been selected by Super Lawyers as a Rising Star in Appellate Practice each of the past two years. Since 2013, he has represented indigent criminal defendants on appeal as a member of the Tenth Circuit Justice Art Panel. Mr. Brooks is currently the Chair-Elect of the Oklahoma Bar Association Appellate Practice Section.

As a member of The Brooks Law Firm, Mr. Brooks will continue to focus on appellate practice and constitutional matters, in addition to representing plaintiffs in medical-malpractice and other personal-injury cases.

Oklahoma County Bar Association ATTORNEY PLACEMENT SERVICE

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A GREAT WAY for law firms to find qualified attorneys!

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WHAT DO LOWER PASS RATES FOR THE BAR EXAM REALLY MEAN?

By Michael W. Brewer

Like many of you, I have not thought about bar passage rates or the bar exam for several years, exactly thirty years this summer for me. However, I do recall reading many articles, blog posts and Facebook posts over the past few years debating the meaning of increasingly lower bar passage rates nationwide. This issue seemed to explode on the scene after the summer 2015 bar exam results became public. Mind you this is not an Oklahoma law school or Oklahoma bar exam issue but is a nationwide debate.

After all, the students take the exam and the students pass or fail the exam. Is it a lack of preparation on part of the law students? The decision to attend law school and take a bar exam is on the individual, not an institution or board of examiners. Therefore, all law students must decide whether the rigors of law school are something they are willing to take on and devote the time to passing the bar exam. Many 3L students are investing in multiple bar preparation courses at extensive costs to themselves and their families in order to support their efforts to pass the bar on the first take.

You can find article after article pointing the finger at the law schools. These articles suggest the institutions are facing financial pressure due to the low enrollment rates. Between 2010 and 2014, 1L enrollment fell by 28%, a record low since 1988. Therefore, some theorize law schools are lowering their admission standards in fear of losing money.1 Those who blame the law schools argue if you want students to pass the bar, heighten your admission standards and allow for smaller classes, even if this means the closing of some law schools.

Perhaps, it is more effective to examine why enrollment is down. Maybe less students are attending law school because it is no longer a sound financial decision. After the economic downturn in 2008, corporations have tightened their belts on legal matters, and law firms, in turn, had no choice but to reduce hiring rates.2 Law students find themselves in a position where the average debt is $140,616 per average law school graduate.3

In fact, according to a U.S. & News article, most students spend a prospective year’s salary on just one year of law school.4 As to Oklahoma, one survey estimates the average debt for 71% of the 2015 graduating class of Oklahoma City University School of Law was $121,607. Oklahoma University was $140,616 per average law school graduate.4

I recall being told, many years ago, there are too many lawyers, not enough jobs and that the lawyer market simply was not large enough to take in all the graduates of the then four law schools located in Oklahoma. Now there are three. That should not deter a young Atticus Finch from living their legal profession dream. But can this problem really be addressed by the states Supreme Court, the ABA or even the National Conference of Bar Examiners?5

According to a popular legal blog, the American Bar Association is taking steps to address the bar passage rates.6 The ABA Section of Legal Education and Admission to the Bar have proposed new accreditation standards that will soon be public for comment. These standards include ending the ban on paid externships, new bar passage standards for institutions, and new attrition limitations.

According to the National Conference of Bar Examiners, the average score on the multiple-choice portion of the July bar exam fell 1.6 points in 2015 from the previous year, reaching record lows.7 When the bar passage rates were surprisingly low in July 2014, many placed the blame on the software “glitch” that affected many test takers. Now, that the results continue to decline, is it the exam itself? What about the administration of the exam?8

Beginning in February 2015, civil procedure was added to the multiple-choice section, MBE, of the bar exam. Is adding a seventh subject on the bar exam making the exam more difficult? Most states had already incorporated civil procedure into the state questions.

Is having a rigorous test really a problem? Not according to Oklahoma Supreme Court Justice Steven Taylor, “the purpose of the bar examination is to screen applicants in such a way to protect the public and to protect the reputation of the legal profession. The bar examination should not be easy . . .” So maybe the test isn’t to blame, maybe the test is working and performing what one articles calls “a consumer protection” function, guaranteeing the “quality” of attorneys.

On March 7, 2016, in a split 5-4 decision, the Oklahoma Supreme Court made a move that apparently lowers the bar exam standards.9 10

Events & Seminars

APRIL 28, 2016
Ask A Lawyer Program
9 a.m. – 9 p.m., OETA Studios

APRIL 29, 2016
Law Day Luncheon
12 Noon, Skirvin Grand Ballroom

MAY 2, 2016
Lawyers in the Library
5 – 7 p.m., Downtown Metro Library

MAY 23, 2016
OCBA Annual Golf Tournament
Twin Hills Golf Club

JUNE 10, 2016
Annual Awards Luncheon
12 Noon, Oklahoma Sports Museum

JULY 9, 2016
OCBA Night at the Dodgers
7 p.m., Bricktown Ballpark

SEPTEMBER 16, 2016
Annual Dinner Dance
6:30 p.m., Skirvin Hotel Grand Ballroom