By Benjamin Grubb

As Central Oklahoma finds itself in the throes of the COVID-19 Pandemic, an Oklahoma City Attorney is involved in an effort to deliver critical supplies to medical providers and first responders on the front lines. Amber Hunsucker, a Yukon resident, first began manufacturing face masks for area hospitals last month. With the help of her daughter, Lanie, Hunsucker initially made hundreds of masks, which were delivered to Clinics in Yukon, OU Medical Center, and the VA Hospital.

Attorney John Branum was inspired by Amber’s initiative. After hearing about her cottage mask-making industry, Branum set his sights on increasing its scale. “Amber started making the masks herself,” said Branum. “After hearing about her operation, I got in touch.” Branum and Hunsucker put their heads together and devised a way to optimize supplies, volunteers, and equipment, setting an ambitious goal of manufacturing 10,000 masks in a period of less than a week.

The goal was not only met, it was exceeded. “We were able to secure a church facility and recruit volunteers; Amber networked with hospitals, medical providers, and community leaders. Together, we’re able to meet a critical need during a critical time,” said Branum.

So far, masks have been provided to Oklahoma hospitals, firefighters, police officers, and first responders. "Together, we’re able to meet a critical need during a critical time." Attorney John Branum

See HOMESPUN, PAGE 7
From the President

Today’s World As We Know It

By Michael W. Brewer, OCBA President

Counting down the months of 2020 is a more arduous task than ever imagined. We are fast approaching the 90-day return limit. I have a vivid memory of complaining about the time change, a full moon and Friday the 13th. COVID-19 was around because I had just cancelled a trip to Scottsdale, Arizona. The reality of COVID-19 has since hit like a ton of bricks. It seems like it was months ago but we are just getting started. Remember, I’m writing this in late March about two weeks before the April print publication, and on a day I was to leave for a week in the desert. We all now know that in the midst of a global public health crisis things change daily and hourly so we will see how this all goes. What we planned for tomorrow doesn’t necessarily occur the way we thought, at all. I write this on a 95-degree day in March sitting in the Pergola on the Prairie without Thunder and Sooner flags flying because there are no athletic activities now. I will get them out soon anyway. International vacations became interstate driving trips became staycations and is now STAYHOMEOKC.

One of my concerns for our profession during this time is for each other’s mental health. Lawyers in isolation is not a good thing. We work best in groups, teams or a pack. Lawyers must have someone to argue with, advocate for, or vent to. We need an antagonist for survival. Every hero needs a villain and vice-versa. Otherwise, we have in the past turned to depressive and addictive behaviors. Well, the OBA has your back. OBA President Susan Shields did a fantastic job on Facebook live on Sunday, March 22, 2020 discussing mental health issues for lawyers. You can watch it on the OBA site. Apparently, Lawyers Helping Lawyer resources at 800-364-7886; http://www.okbar.org/whl.

My second concern was keeping our businesses going during a nationwide shut down of businesses and social distancing. However, I should not be concerned there because we are now deemed “essential”. There was a 24-hour period during which everyone was trying to figure out who was essential and who was not. So sort of first class versus coach on the Titanic, right? But again, the OBA and President Shields came to the rescue pursuing the State for a finding of “essential” status for lawyers and law firms. I mean liquor stores, pet dispensaries and golf courses first made the cut, why wouldn’t the legal profession. Well we did make the second cut, and many lawyers continue working hard representing clients and supporting the rule of law while adhering to the new rules. Lawyers doing their best work, week after week. Some of the effects of this health crisis are upon us. I’ve noticed many are using some of this stay at home time to calm themselves with meditation and others are using it for prayer. Don’t do nothing! I threw my back out doing online home Pilates on Monday. Don’t do that either.

We know that Rudy didn’t wash his hands before touching everything in the locker room and the microphones at that press conference. Rudy washed his hands about 20 times, took help if you need it, and when this social distancing is over, we should gather at an OCBA event and rejoice. Michael W. Brewer is an attorney, founder, and partner of Hilgen & Brewer, P.C. in Oklahoma City, Oklahoma. To contact Mike, email mbrewer@hbokc.law, call (405) 605-9000 or tweet him @atrymkieb. For more information, please visit http://www.hbokc.law.

Endnotes
2. Id.
4. Garrett, Thomas, see endnote 1 supra (“Unfortunately, a 2005 report suggests that the United States is not prepared for an influenza pandemic.”).
I have a question for you. People keep asking me if you could see someone who gave them a severe virus. What would you tell them? Proud Port County Practitioner

Dear Proud: Don’t get your pedigree in an uproar. While I make my literary home on these Oklahoma County pages, my “sagacity” is open to all. First thing I would tell them, of course, is that I’m not actually a lawyer, but in all probability I’m the next best thing. Then I’d get into the meat of the matter.

Of course, everything about the current state of affairs is largely unprecedented. No doubt it will spawn a great deal of litigation on all judicial fronts. With history as a guide, and with due consideration given to what one would hope to be anomalies such as Dr. Phil’s “toilet licker”, though, I’d have to answer “yes.”

Over the years, courts have held people accountable for passing diseases on to another. After HIV/AIDS hit the scene, The California Supreme Court in John B. v. Superior Court, 210 Cal. App. 3d 1074 (1989), rejected the notion that the transmission of sexual diseases, such as the HIV/AIDS virus, can proceed based on constructive knowledge. Indeed, because of the nature of the virus, some states including Oklahoma, criminalized the intentional or reckless transmission of HIV/AIDS.

Just last month, the Supreme Court of Texas, in John Doe v. Superior Court, 210 Cal. App. 3d 1074 (1989), rejected the notion that the transmission of sexual diseases, such as the HIV/AIDS virus, can proceed based on constructive knowledge. Indeed, because of the nature of the virus, some states including Oklahoma, criminalized the intentional or reckless transmission of HIV/AIDS.

One knows he has syphilis. His partner has no reason to know of his condition. Can she state a claim for battery given that the sexual contact was consensual but the heightened risk of infection was not. Common law jurisdictions split on this for over a century. In many ways, the “new corona virus” liability cases will likely be a matter of fitting old wine into new skins.

Dear Rosecoe: The members of a neighborhood association take turns driving evening patrols. The patrol witnesses a crime, and the suspect flees in a vehicle. The patrol volunteer calls 9-1-1 and stays on the line as he follows them through the neighborhood where he loses them. The suspects are later arrested: the entire call to 9-1-1 is a present sense impression or is it just the reporting of the crime itself? W.L., OK.

Dear W.L.: First of all, I’d say the neighborhood patrol guy had more balls than brains. Hopefully, it wasn’t you. Next, I’d say that the 9-1-1 may be admissible in its entirety. In United States v. Lovato, decided in February, the Tenth Circuit dealt with a similar issue. Holding the entire 9-1-1 call admissible, the court gave the following rationale:

[N]o substantial change in circumstances occurred during the call. When a significant, intervening event or substantial change in circumstances occurs between statements, Rule 803(1) may require a court to treat a declarant’s statements differently. See Jackson, 124 F.3d at 618 (observing that a witness’s statement made after police intervened and gained control of the scene may not qualify as a present sense impression even though earlier statements did qualify). Here, the caller witnessed a shooting, called 911, and followed the Honda during the call with no interruption or police intervention. The caller maintained focus on the Honda and its occupants for the entirety of the discussion. Although the discussion shifted between related topics, the call continually focused on an ongoing stream of observations, which supports the admissibility of the call as a whole.

The Circuit decision did note that they would not have faulted the trial judge for parsing the tape to make a more deliberate analysis and, speaking for myself, I can think of a good many instances in which this “could” should be replaced with “should.”

It took time, effort, and the assistance of about dozen deputies to restore order after Peter Kearney’s bombshells. As quiet settled upon the courtroom, Judge Ohara first addressed Peter Kearney. He remained in the witness chair.

“Well Mr. Kearney, it looks like you’ll be consulting with your attorney today after all,” she said. “This Court shall reconvene at 9:00 a.m. tomorrow. Now, if the bailiff will escort the jury out, it appears counsel for Joseph Kearney wishes to be heard.”

We filed out with the rest of the spectators. Later, Carl Coleman, the prosecutor told me what happened after that.

Counsel for both parties made motions for mistrial which the Court overruled. At that point Joe Kearney’s attorney made an argument for the record. Essentially, he combined his motion for mistrial with motion to bar any testimony by his brother First, he asserted that Peter had participated in defense strategy before entering the cooperation agreement and could therefore share those strategies with the government in violation of the Sixth Amendment right to counsel. Second, he objected because Peter had been present at trial for the testimony of other government witnesses. Third, he claimed that Peter’s testimony would likely refute assertions made by the defense during opening and arguments that were critical to the defense.

Following argument, Judge Ohara held a co-defendant who turns government witness during trial may be permitted to testify at that trial, provided that the district court takes steps to avoid unfair prejudice. She then rejected the argument as to violation of The Rule. The Court determined that does not bar testimony just because a witness was present as a defendant during a prior witness’s testimony unless it was the product of “government connivance” or some “willful violation”. Finally, she ruled that the Sixth Amendment barred only government infiltration of the defense team. Proceedings ended around 8:00 p.m.

No one really expected smooth sailing going forward, but we couldn’t anticipate how rough it would get.

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Quote of the MONTH

No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend’s or of thine own were: any man’s death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bells tolls; it tolls for thee.

— John Donne - Lawyer and Essayist (1572-1631)
OBITUARY

Justice Lavender Dies

By Rex Travis

Long-time Oklahoma Supreme Court Justice Robert Lavender passed away March 23, 2020. He was 93 years old. Justice Lavender served on the Supreme Court for 42 years, becoming the longest serving Justice on the Court. When he was appointed to the Supreme Court, in 1965, he was the youngest Justice to serve on the Court.

Justice Lavender was a member of the “Greatest Generation.” He grew up on a farm near Catoosa, where he was brought up by his Grandparents after his Mother died when he was 12.

Immediately upon graduating high school, in 1944, he enlisted in the Navy, to serve in World War II. He was assigned to a navy gun crew, which the Navy put on merchant ships which were being sunk in large numbers crossing the Atlantic, to protect the merchant ships from submarines. The navy gun crews were important because, if there were no escort ships nearby, the submarines would surface and sink the merchant ships in the convoy with the sub’s guns. Having the gun crew on the merchant ships forced the sub’s to use their torpedoes, which forced the subs to return to Germany for more torpedoes, which reduced dramatically the number of submarines in the Battle of the Atlantic.

When the war in Europe was over and there was no German submarine threat, Justice Lavender was transferred to a battleship, the U.S.S. New Jersey.

After Japan was defeated, he returned to civilian life and went to college and law school on the GI bill. He worked his way through night law school at Tulsa University Law School as a deputy court clerk and graduated in 1953. He first worked as an assistant city attorney for the City of Tulsa and then went into private practice with a firm in Claremore. He practiced there until his appointment to the Supreme Court.

Justice Lavender proved to be a great justice, who was willing to change the law when it proved to be unfair. For example, under Brigance v. Velvet Dove Restaurant, 1988 OK 68, 756 P.2d 1232 (Brigance II), release and satisfaction of a judgment barred an action against joint or concurrent tortfeasors, whether that was the parties’ intent or not. In a landmark opinion, by Justice Lavender, Kirkpatrick v. Chrysler Corp., 1996 OK 136, 920 P.2d 122, the Supreme Court reversed that ruling, holding a release and satisfaction releases other tortfeasors only if the judgment was actually litigated or on its face reflects that it is intended to be a full satisfaction of all claims, including those against tortfeasors not joined. The problem was, of course, with friendly suits. We reduced claims to judgments and released and satisfied them to obtain court approval, because a minor could not contract to release a claim. Those friendly suits proved unfriendly. Now they are much less so.

Similarly, Releases also used to be dangerous. Brown v. Brown, 1966 OK 2, 410 P.2d 52, held signing a release which releases the named tortfeasor “and all other persons” had the effect of releasing all tortfeasors. This became a very common source of malpractice problems, as lawyers failed to adequately read “boilerplate” releases and released claims they never meant to release. Once more, Justice Lavender came to our rescue and, in Moss v. City of Oklahoma City, 1966 OK 2, 410 P.2d 52, reversed Brown and held that only named tortfeasors will be released by such a release. A lot of us have avoided malpractice cases because of that.

Another problem was the rule that release of the original tortfeasor released a successive tortfeasor. This applied most commonly when a doctor or hospital treated an accident victim and was alleged to have committed malpractice. If the victim settled with the tortfeasor who caused the original accident and injury, this release also released the doctor or hospital. Farrar v. Wolfe, 1960 OK 123, 357 P.2d 1005. Justice Lavender reversed that decision in Hoyt v. Paul R. Miller, Inc., 1996 OK 80, 921 P.2d 30 holding an agreed judgment and release and satisfaction of the claim against the original tortfeasor would not release the claim against the doctor.

We have certainly missed the service of this courageous Justice with his retirement in 2007. In addition to being a great Justice, he was a very good man, who will be missed for that reason.

Due to the coronavirus pandemic, a memorial service for Justice Lavender will not be held until what would have been his 94th birthday, July 18, 2020 at 10:00 a.m. at Hahn-Cook/Street & Draper Chapel in Oklahoma City. His family suggests in lieu of flowers a contribution to the charity of your choice.

OBITUARY

Robert Naifeh Passes from COVID-19 Complications

By Rex Travis

Robert “Bob” Naifeh died March 29 from complications related to contraction of the Coronavirus. He was 62 years old. Bob was born in and was born in Norman, the son of a long-time, well-known lawyer there. But he practiced his whole 36-year legal career in Oklahoma City. He got his law degree from OCU and first practiced with the Pierce-Couch firm and later in a partnership with Larry Derryberry, in a firm which ultimately became Derryberry and Naifeh before Larry Derryberry died. The has continued under that name until Bob’s death. He was President and Managing Partner of the firm.

Bob primarily represented insurance companies and their insureds but became best known as an insurance coverage specialist. He was a Fellow of the American College of Coverage Counsel, made up of top lawyers who do coverage work for insurance companies. I opposed him on a regular basis in his coverage practice and can certainly testify that he was a worthy opponent. He was also, however, a thoroughly decent person and a good friend.

Bob also did insurance insolvency work and was counsel for the Oklahoma Property and Casualty Insurance Guaranty Association since 1989. That organization is funded by a premium tax paid by property and casualty insurance companies licensed in Oklahoma and pays claims for those companies if they become insolvent.

Bob was one of the few outstanding lawyers I know who succeeded in achieving the work-life balance we all wish we had. He was a great outdoorsman and family man and loved OU football. He and his wife recently bought a home near the OU campus and thoroughly enjoyed being part of the campus life again.

Because of the pandemic, there will be no memorial service until a later time. The family will announce details of the memorial service at a later time when such meetings can be safely held.

The coronavirus pandemic will leave large scars on our society but the bar took a huge hit with the loss of Bob Naifeh. We shall all miss him.
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Choosing Public and Economic Health

By Miles Pringle

It is hard to wrap one’s mind around the fact that one or a few virus cells that made the jump from animals to humans in the middle of China sometime in 2019, has killed thousands and brought our world’s economies to a standstill in just a matter of months. For all of our intellectual and technological sophistication, we are fundamentally exposed to tiny cells living everywhere on this planet we call home. The words that come to my mind are tragic, disorienting, and most of all terrifying.

To all of those who have and will perish from this miserable germ, to those whom it leaves scarred, and to those left behind, no doubt this pandemic has played the toll and impact the current virus will require cooperation and planning by all levels of government and the private sector.

But by serving one another, we are likely to monitor the mental health arena, to stay abreast of changes, to advocate responsible economic tradeoff. Even if there was, we should choose the former. But by helping those in need. To help those who can’t help themselves. And to persevere.

Right now, we have a duty to mitigate the harm caused by this contagion. To comfort those in need. To help those who can’t help themselves. And to persevere.

It must be also said, however, that there is no legitimate tradeoff between the public health and the economy. Morally, the economy will rebuild, stock prices may regain value, and balance sheets will improve. Lives cannot be recovered. Our first duty is to each other, not to our pocketbooks.

But by serving one another, we are likely to monitor the mental health arena, to stay abreast of changes, to advocate responsible economic tradeoff. Even if there was, we should choose the former. But by helping those in need. To help those who can’t help themselves. And to persevere.

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Nevertheless, according to some academics, “Most of the evidence indicates that the economic effects of the 1918 influenza pandemic were short-term.” In fact, a paper recently cited in the Economist found “that cities that intervened earlier and more aggressively do not perform worse and, if anything, grow faster after the pandemic is over.”

This comment does not in any way downplay the toll and impact the current virus does have and will have on our society. “Given our highly mobile and connected society, our current pandemic may be more severe in its reach, and perhaps in its virulence, than the 1918 influenza despite improvements in health care over the past 90 years... Of course, mitigating a pandemic will require cooperation and planning by all levels of government and the private sector.”

We will need a rapid and sizable response(s) by our governments to alleviate the health and economic calamity at hand. Our duty now is to focus on the crises at hand, but we should be confident that the good work we do now will continue to be helpful in the future. There is no moral and economic tradeoff. Even if there was, we should choose the former. But by helping ourselves now, we are likely to help ourselves in the future.
As I write this we are in the thick of the Coronavirus crisis. I am not exactly sure how far, as the distance from where it all began to where it all might end is unsure of itself. One thing is sure to me, that it feels a lot like Winter. Not temperature-wise, not anticipation wise, (as before Christmas), but in the dreary sameness of each day. Politicians on TV giving essentially the same “updates”, the same warnings from health authorities, monotonous. The difference with this winter is no sports. This may be the true test of human sentience.

So, if it is a sort of perennial winter, what are we to do? You already know this is not a book review, as I am in the first person here. One does not write except in third person in a book review, as I am in the first person here. One does not. This is about books, however, and big ones, at that. When I studied for the Bar Exam, so long ago, (Ford was President), I learned about how I study. I learned that I could take a break from the school stuff in the Russian literature. I could make the break as long as I liked, not constrained by station breaks. I learned that I would return to my assigned work refreshed. I mentally put myself in a prison mentality. I read The Gulag Archipelago, first Volume, by Solzhenitsen. I read a book by Stalin’s daughter. I read One day in the Life of Ivan Denisovitch. I read some other more obscure Russian texts. Later, as I worked on the Bar exam itself, the Russian music played inside my head, as though both had been laid on the same tape track. I passed.

From HOMESPUN, PAGE 1

responders, both locally and in rural communities with little access to supplies. With the help of community partners at the Red Cross and FC Energy Soccer Club, mask manufacturing continues while complying governmental mandates. “Due to how quickly COVID changed, we had to change the way we operate, manufacturing from our homes and practicing social distancing while picking up supplies and delivering our masks,” said Hunsucker. “We want to make sure we’re doing what we need to do while making sure our orders are fulfilled.”

Now thousands of orders beyond their 10,000-mask goal; supplies (like essential fabric) are running short. Hunsucker and Branum are now seeking help from the community to continue their work. “We have lived and breathed these masks during the past weeks,” said Hunsucker.

“We would love to see our community come together and support our efforts.”

If you are interested in assisting with the ongoing effort to manufacture face masks, John Branum has invited anyone who would like to help with supplies, donations, or volunteers to contact him at john@branumlawfirm.com.

I Like Big Books

By Bill Gorden

Since then, I have tried to lay out, for each Winter, a large book to read. Something over 500 pages. Bigger than 800 or 900, spread it over two winters, but leave it alone when Spring came, back to it next winter. Some titles: East of Eden, by Steinbeck, The Bible, by you know Who, two Winters. The Complete works of William Shakespeare. Two Winters. (except the Sonnets, I hate sonnets.) The Qur'an. You know who again. The Winds of War, War and Remembrance by Wouk. Shelby Foote’s three volume set on the Civil War. (two Winters, part of a Summer.) Sometimes a set of books would suffice. All of John LeCarre’, all of Raymond Chandler. Sometimes a book that would almost break the chain, such as Parade’s End, by the improbably named Ford Maddox Ford, or Tolstoy’s Anna Karenina, this year. I think I have touched on this theme here before, but I just wanted to make the point that this seemingly meaningless “plague” season, sans sports, sans so much, does not have to be meaningless. It doesn’t have to be painful, either. Read as much or as little as you want, escape for a while, learn something, return as from a short vacation. You may be surprised, as I have been, by how much these works reference each other. We don’t know right now when we will be freer, so the relative “prison” effect is there. One can even take a vacation from one book, in another.

This need not be expensive, even if libraries are closed, as they are as I am writing. Kindle is good, and there are various other sites, such as “Libby” to access these works. Big fat books are often past copyright, and so are accessible. Unless you are just going to impress, you can carry them in your electronic device.

Don’t be intimidated. You are lawyers, and legal professionals. Until recently big old law books were the thing. Pick something, some time or era pleasing to you, something you always said you would try. No one looking over your shoulder, just you and the book, and you can come back any time. That’s why it is an art.
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