

# An Update On Pitfalls In Oklahoma Appellate Practice

By J. Michael Medina

Oklahoma appellate practice continues to cause practitioners problems. Pitfalls do exist; yet, in almost every case, the pertinent rule or statute, when carefully read, will point the way. This article seeks to accomplish two goals: (1) to revisit several of the pitfalls discussed in an earlier article;<sup>1</sup> and (2) to discuss additional areas where an unwary attorney might get into trouble. The new pitfalls discussed are not affected by the current status of the Oklahoma Judgments and Appeals Act. That act is comprehensively covered in other published material.<sup>2</sup>

## Prior Pitfalls

The earlier article commenced its discussion with citations to the applicable rules. These citations have not changed; the text, however, in many cases has.

**Failing to Preserve the error below:** Judging from the cases, both reported and unpublished,<sup>3</sup> the most common failing is the appellant's omission of the proper documentation for an adequate record on appeal. It is primarily the appellant's responsibility to have the appropriate record prepared for the appeal,<sup>4</sup> and recent cases suggest that appellants often fail to discharge that responsibility.<sup>5</sup> In particular, proper preservation of instructional error continues to elude attorneys.<sup>6</sup> The instruction in point must be set out in full either in the brief or in a separate appendix.<sup>7</sup>

**Filing an inadvisable motion for new trial:** As discussed in the earlier article, filing a motion for new trial (or a motion for reconsideration

from rulings on dispositive motions) carries with it significant appellate implications, one of which is that any subsequent appeal is limited to the issues clearly raised in the motion for new trial.<sup>8</sup> Recent appellants have seen parts of their appeal discarded for failure to comply with Oklahoma's exacting new trial practice.<sup>9</sup>

**Untimely filing of petition in error:** Appeals are still being dismissed for untimely filing.<sup>10</sup> The Judgments and Appeals Act's requirement of a written judgment or final order<sup>11</sup> should decrease the potential for error. No longer will attorneys have to agonize over whether a trial court's oral pronouncement constituted an appealable order.<sup>12</sup>

**Failing to file a petition for rehearing in the Court of Appeals prior to seeking certiorari in the Supreme Court:** Until recently, a precondition to certiorari review of a Court of Appeals decision was that petitioner first file for rehearing in the Court of Appeals.<sup>13</sup> Such a requirement made little sense,<sup>14</sup> and the Supreme Court has wisely amended the rules to delete the requirement: "[a] party may petition for certiorari without having first sought rehearing in the Court of Appeals."<sup>15</sup> No time period is set out for filing such a petition for certiorari. The assumption, confirmed by informal discussions with both court personnel and a Supreme court justice, is that a petition for certiorari (to be filed without a prior rehearing petition) should be filed no later than twenty days after the filing of the decision of the Court of Appeals.

**Failing to Obtain a Written Memorialization of the Order Being Appealed:** Old §32.2 of title

12 required as a jurisdictional prerequisite to appellate consideration of an appeal that a recorded order by the trial court be provided in the record.<sup>16</sup> While the current law reduces the significance of now §32.3 by requiring as a requisite for appeal a properly recorded order or judgment, §990A(A) by its own terms is limited to final orders and judgments.<sup>17</sup> Thus, the very large category of interlocutory orders appealable as a matter of right<sup>18</sup> do not (as of now) require as a prerequisite for appeal a recorded order. Therefore, the law's previous requirement of a recorded order prior to appellate consideration of the appeal remains.<sup>19</sup> Appellants would be wise to not ignore a show cause order requiring inclusion of the needed document.<sup>20</sup>

### Additional Pitfalls

**1. Failing to Designate the Appropriate Party as the Appellant in the Petition in Error:** Most defects in the appellate process are curable by amendment or other action.<sup>21</sup> In the recent decision of *Bane v. Anderson, Bryant & Co.*,<sup>22</sup> however, the Supreme Court made clear that a petition in error may not be amended after expiration of the appeal period to include additional appellants. In *Bane*, exceptional facts not likely to be commonly duplicated persuaded a majority of the Court to permit one party to successfully be added.<sup>23</sup> The appellate courts have strictly enforced the amendment prohibition; thus, in several cases, where the appeal was carried in the name of the party, the court found that the party's attorney was actually the real party in interest. The appeals were thus dismissed.<sup>24</sup> The lesson is clear: be very careful to include all potential parties to an appeal, both in the caption and in the text of the petition in error. It is much easier to later delete a party than to convince an appellate court to permit addition of an appellant.

**2. Failing to List all Potential Issues in the Petition in Error:** The rules require that the issues sought to be raised on appeal be identified in the petition in error.<sup>25</sup> A surprising number of appeal issues, however, are lost by failure to comply with this requirement.<sup>26</sup> Loss of an appeal on this basis is even more problematic because the rules clearly permit amendment, as a matter of right, to include additional issues up to

the filing of the brief in chief.<sup>27</sup> Even after the brief in chief is filed, amendment is possible with leave of the court.<sup>28</sup> Therefore, no appeal issue arising from the decision which forms the basis for the petition in error<sup>29</sup> should be lost on the ground that such an issue was not specified in the petition in error.<sup>30</sup>

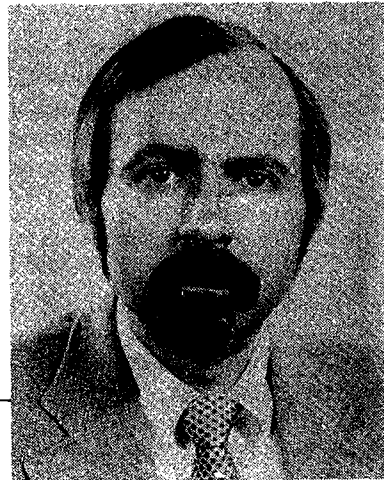
**3. Failing to Comprehensively Canvass All Possible Provisions to Determine Appealability:** Oklahoma has numerous statutes defining appealability under a variety of circumstances.<sup>31</sup> The fact that one statute or rule would seem to preclude a particular order from being immediately appealed is not conclusive. Two recent cases illustrate this point. It is well established that Rule 1.50 of the Rules of Appellate Procedure in Civil Cases bars appeals from orders denying motions for summary judgment.<sup>32</sup> In the recent decision of *Graff v. Kelly*,<sup>33</sup> the Court nevertheless permitted an appeal from an order denying a motion for summary judgment. The motion for summary judgment was on a petition to vacate a default judgment. The court found the appeal authorized under Rule 1.11(b)(3), permitting appeals from orders modifying or refusing to vacate default judgments. Similarly, §1006 of title 12 precludes piecemeal appeals in cases where multiple parties or claims are involved, unless the trial court specifically authorizes the appeal.<sup>34</sup> In *Central Plastics Co. v. Barton*,<sup>35</sup> appeal was sought from denial of a motion filed by only one of several defendants to vacate a default judgment. The Court found the appeal not controlled by §1006, but rather by §952(b)(2), authorizing appeals from orders refusing to vacate a final judgment.

**4. Failing to Properly Apply the Provisions on Multiple Appeals:** Where one party has already timely perfected an appeal, any other party seeking to appeal from "the same decision" may file his petition within forty days of the filing of the applicable order or judgment.<sup>36</sup> The crucial limiter is that the cross-appeal or counter-appeal<sup>37</sup> must be from the same decision being appealed by the initial appellant. The recent case of *Conley v. First Bank of Catoosa*,<sup>38</sup> develops this point. In *Conley*, the Conleys were awarded judgment against the Bank and Badenti. The Bank obtained a foreclosure judgment against

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Conley. The Bank and Badenti then filed a motion to set-off judgments, which was denied. The court had also denied the Conleys' motion for new trial and attorneys fees during the same hearing. The Bank and Badenti timely perfected their appeal from the trial court's oral denial<sup>39</sup> of the motion to set-off judgments. The Conleys then, within forty days of the trial court's oral actions, filed their appeal from the order denying a new trial and fees, relying on Rule 1.18's multiple appeal provisions. The appellate court rejected their argument and found their counter-appeal fatally time-barred. The decision forming the basis for the counter-appeal was not the same decision from which the initial petition in error was filed. Counsel should also be aware that Rule 1.18 does not apply to all appeals. For example, workers compensation court appeals<sup>40</sup> and tax commission appeals<sup>41</sup> are not covered. In these instances, all petitions in error from the decision must be filed within the time period permitted for the initial appeal.

**5. Failing to Utilize Alternative Methods of Record Preparation Where no Transcript is Available:** Parties sometimes fail to have recorded below a hearing or portions of a trial.<sup>42</sup> Later, on appeal, the omission becomes crucial, and because no transcript is available, an appeal issue will be lost.<sup>43</sup> There are, however, alternatives to a transcript available to appellate counsel. In the very opinions dismissing appeals for lack of an adequate record, the court will frequently refer to Rule 1.22's narrative statement procedure<sup>44</sup> and to Rule 1.23's statement in lieu

of record provision.<sup>45</sup>

Under Rule 1.22, where a transcript is unavailable,<sup>46</sup> one party may prepare a statement of the evidence in narrative form, file it with the court clerk and serve it on opposing counsel. Opposing counsel is to then serve any objections or amendments he may have.<sup>47</sup> The statement and any objections are then considered by the trial court for settlement and approval. Upon approval, the statement is to be included by the court clerk in the record on appeal.<sup>48</sup> Strict compliance with Rule 1.22's requirements are necessary; otherwise, the proposed statement will have no status on appeal.<sup>49</sup> Moreover, attempted compliance with Rule 1.22 is a condition to obtaining relief based on impossibility of preparing a record for appeal.<sup>50</sup> In particular, be sure that the proposed narrative statement (1) is sworn; (2) advises the other parties of the deadline for amendment or objection; (3) cautions the other parties of the possible consequences for failure to respond; and ultimately (4) is approved by the trial court.

Rule 1.23 provides an alternative in the relatively rare case where a pure issue of law is involved and no serious dispute over facts exists. Under Rule 1.23, the parties may prepare and sign a statement evidencing (1) how the legal issue arose; (2) how the issue was decided; and (3) the essential facts. The statement (with the trial court decision attached thereto), when approved by the trial court, becomes the record on appeal.

Finally, the rules permit liberal amendment of the record to permit inclusion of a necessary pleading or other document inadvertently omitted from the initial designation of the record.<sup>51</sup>

**6. Failing to Respond to the Petition in Error:** Under both Rule 1.16(d) governing appeals from judgments and final orders and under Rule 1.63(b) governing appeals from interlocutory orders appealable as a matter of right, the appellee must file a response in the prescribed form.<sup>52</sup> The response contains important information to the appellate process. Thus, the failure to file a required response is not appreciated by the appellate court, which may sanction the appellee by refusing to consider his brief while determining the appeal.<sup>53</sup> In effect, such a sanction is tantamount to the appellee never having failed a brief, a result with unpleasant aftereffects:<sup>54</sup> under established precedent, the record will not be examined in an effort to sustain the trial court; the appellate court will review the appellant's brief and if such brief and the record reasonably supports reversal, the court will so reverse.<sup>55</sup> If the record or appellant's brief does not support reversal, then the trial court will be affirmed.<sup>56</sup>

**7. Failing to Timely File in the Supreme Court Clerk's Office Pleadings other than the Petition in Error:** Under §990A of title 12, a petition in error may be timely filed by certified mailing on or before the final day.<sup>57</sup> All other pleadings, motions and other documents must be physically filed in the court clerk's office by the appointed day.<sup>58</sup>

**8. Failing to Properly Use the Certified Mailing Provisions to File a Petition in Error:** Inclusion of a certified mailing provision is a significant advance in Oklahoma appellate practice and one wisely retained by the legislature when it substantially repealed the Judgments and Appeals Act. Such a provision should lessen considerably the need for last day emergency trips to Oklahoma City. The provision, however, is limited and failure to strictly comply with its terms can lead to disaster. Three important facts must be remembered: (1) mailing must be by certified mail, not regular mail;

(2) proof of date of mailing must be provided by the post office, not by private postmark and (3) private carriers and couriers are not covered.<sup>59</sup>

### Other Recent Developments

The Oklahoma courts have recently made clear that (1) counsel error stemming from the legislative confusion surrounding the Judgments and Appeals Act will be leniently handled,<sup>60</sup> (2) parties who fail to receive notice of an otherwise appealable order or judgment will not be precluded from exercising their appeal rights<sup>61</sup> (3) appeal time begins to run when a jury verdict is entered by the court clerk, not when the journal entry is ultimately filed,<sup>62</sup> and filing time for motions for new trial begins when the judgment or final order is pronounced, not when it is filed.<sup>63</sup>

### Conclusion

In major part, the Oklahoma courts have applied the procedural appellate provisions with consideration and equity. While an attorney should not rely on the appellate court's forgiving attitude in disregarding a rule, the courts have been open to leniency where good cause and reasonableness appear.

1. Medina, "Pitfalls in Oklahoma Appellate Practice," 57 Okla. B.J. 741 (1986).

2. See, Ellis, "The 1991 Repeal of the 1990 Judgments and Appeals Act," 62 Okla. B.J. 2793 (1991); Adams & Medina, "Recent Developments in Oklahoma Civil Appellate Procedure," 25 Tulsa L. J. 489 (1991). As Ellis notes, the current status of the revised Act, when combined with court rules promulgated to effect implementation of the original Act, creates its own set of particular pitfalls. Fortunately, the Oklahoma Supreme Court has been understanding of the problems confronting the appellate practitioner and has fashioned relief. See *e.g.*, *P & H Oil Field Services, Inc. v. Spectra Energy Corp.*, 823 P.2d 365, 63 Okla. B.J. 12 (Okla. 1992) (appeal in which initial petition in error was premature and amended petition in error was untimely under Act will not be dismissed; court's decision will be given prospective effect only); *Jaco Prod. Co. v. Luca*, 823 P.2d 364, 62 Okla. B.J. 3544 (Okla. 1991) (rule on computation of appeal time from jury verdict applied only prospectively); *In re Heimbach*, \_\_\_ P.2d \_\_\_, 63 Okla. B.J. 604 (Okla. 1992) (rule that ten-day period for filing new trial motions begins upon pronouncement, not filing of judgment or final order, applied prospectively only).

3. A word of caution: This article cites as illustrations many unpublished orders and decisions of the Oklahoma Supreme Court and Courts of Appeal. Of course, these un-

published orders are "without value as precedent," except in cases of *res judicata*, collateral estoppel or law of the case. Rule 1.200B(E) of the Rules of Appellate Procedure in Civil Cases. Indeed, Oklahoma Court of Appeals decisions, even if published, are only entitled to persuasive value, unless specifically approved for publication by the Oklahoma Supreme Court. Rule 1.200C(B). See, e.g., *Willow Creek Condominiums Second, Inc. v. Andreyev*, 798 P.2d 648 (Okla. App. 1990). This precedential policy is apparently unique to Oklahoma. Matthis & Yalowitz, "Stare Decisis Among [sic] the Appellate Court of Illinois, 28 DePaul L. Rev. 571, 596-97 (1979).

4. *Davidson v. Gregory*, 780 P.2d 679, 682 (Okla. 1989); *Snyder v. Smith Welding & Fabrication*, 746 P.2d 168, 171 (Okla. 1986). See, for a complete discussion of the appellate record, Means & Walker, "Reducing Errors and Omissions in Records on Appeal," 60 Okla. B.J. 1884 (1989). A fortunate attorney, however, may be able to solve his evidentiary problem through admissions contained in his opponent's appellate brief. *Bearden v. Tulsa*, 821 P.2d 394, 395 (Okla. App. 1991).

5. See, e.g., among the literally dozens of cases lost for lack of an adequate appellate record, *Cosper v. Cosper*, No. 76, 113, 63 Okla. B.J. 317 (Okla. App. 1992) (no transcript on attorney fee hearing); *Ryan v. Townsend*, No. 66, 759, 61 Okla. B.J. 903 (Okla. App. 1990); *In re Wells*, No. 72,011, 61 Okla. B.J. 2249 (Okla. App. 1991).

6. See, e.g., refusing to consider allegations of instructional error because of non-compliance with Supreme Court Rule 15, *Eversole v. Oklahoma Hospital Founders Ass'n*, 816 P.2d 456 (Okla. 1991); *Grand Federal Savings Bank v. Klingenberg*, 821 P.2d 1069 (Okla. App. 1991); *Security National Bank v. Hufford*, 754 P.2d 561 (Okla. App. 1987); *Thompson v. St Anthony Hospital*, No. 73, 008, 62 Okla. B.J. 964 (Okla. App. 1991). cf., *O'Neal v. Joy Dependent School Dist.*, 820 P.2d 1334, 1339 (Okla. 1991) (record did not contain instructions actually given to jury).

7. Rule 15 of the Rules of the Supreme Court of Oklahoma (as amended); *James v. State Farm Mut. Auto. Ins. Co.*, 810 P.2d 365 (Okla. 1991). Failure to comply was not invariably fatal, however. The opposing party had to raise the defect or it was waived. *Bentley v. Hardin*, 577 P.2d 471, 473 fn. 1 (Okla. App. 1978), overruled on other grounds, *James v. State Farm Mut. Auto. Ins. Co.*, 810 P.2d 365 (Okla. 1991).

8. See, 12 O.S. 1991 Supp., §991 (b); Rule 1.17 (a) of the Rules of Appellate Procedure in Civil Cases; Rule 17 of the Rules for District Courts of Oklahoma.

9. See, e.g., *Smith v. Liersch*, No. 76, 067, 63 Okla. B.J. 316 (Okla. App. 1992) (mere allegation of statutory language in new trial motion does not preserve any errors for appellate review); *City National Bank & Trust Co v. Jackson National Life Ins. Co.*, 804 P.2d 463 (Okla. App. 1990); *Zumwalt v. Flewelling*, No. 74, 375, 62 Okla. B.J. 3510 (Okla. App. 1991).

10. See, e.g., *Hill v. Hill*, 819 P.2d 728 (Okla. App. 1991); *Fluker v. Fidelity Financial Services, Inc.*, No. 74, 430, 62 Okla. B.J. 2923 (Okla. App. 1991); *White v. Myers*, No. 72, 786, 62 Okla. B.J. 1967 (Okla. App. 1991).

11. 12 O.S. 1991 Supp., §990A. As to interlocutory orders appealable as a matter of right, however, the old rule remains. Thus, the appeal trigger is the rendition of the order (if done in open court), not the memorialization thereof. See, Ellis, *supra* fn. 2, 62 Okla. B.J. at 2794. But see fn. 17 *infra* concerning pending legislation. Rule 1.40(b) of the Rules of Appellate Procedure in Civil Cases makes this clear. Although Rule 1.40(b) was designed to implement §1004 (now repealed), that section merely codified the old rule and its repeal should not effect the continuing validity of Rule 1.40(b).

12. Medina, *supra* fn. 1, 57 Okla. B.J. at 742. The new Act

will also reduce the potential for error in cases where multiple parties or multiple claims are implicated. Prior Oklahoma decisional law was uncertain and confusing. Holladay, "Appellate Jurisdiction in Cases Involving Multiple Claims," 60 Okla. B.J. 3227 (1989). See, for a recent example of prior Oklahoma law, the case of *State v. Moore*, 818 P.2d 889, 894-95 (Okla. 1991), where plaintiffs' appeals were ruled untimely filed. Under §1006, however, that initial dismissal order would not be appealable absent certification by the trial court as a final order. Section 1006 of title 12 incorporates the dispatcher function of rule 54 (b) of the federal rules to limit and control such situations. Only if the district court certifies the order to be an appealable order does it become one. Adams & Medina, *supra* fn. 2, 25 Tulsa L. J. at 497-499.

13. Medina, "Discretionary Review in the Oklahoma Supreme Court: A Practical Guide to the Court's Certiorari Jurisdiction," 13 Okla. City U. L. Rev. 257, 262-67 (1989).

14. *Id.* at 266

15. Rule 3.13(b), as amended, of the Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court.

16. *Johnson v. Johnson*, 674 P.2d 539 (Okla. 1983).

17. 12 O.S. 1991 Supp., §990(A) specifically is limited to "final order[s] or judgment[s]." Senate Bill 1013 would expand section 990A to cover "a judgment decree or appealable order" so that interlocutory orders would then be subject to the written order requirement. Section 32.3 would be repealed.

18. For a comprehensive list of such orders, see Rule 1.60 of the Rules of Appellate Procedure in Civil Cases. The rules governing these appeals can be found at Rules 1.60 to 1.67. See Parkinson, "Interlocutory Appeals in Oklahoma," 61 Okla. B.J. 1397 (1990) and Hargrave, Brief Observations on Appealable Orders, 53 Okla. B.J. 1015 (1982) for detailed discussion of interlocutory appeals.

19. 12 O.S. 1991 Supp., §32.3

20. See, e.g., *Hill v. Hill*, 819 P.2d 728, 729 (Okla. App. 1991); *Denton v. Reed*, No. 73, 843, 62 Okla. B.J. 1813 (Okla. App. 1991), dismissing appeals for failure to include the required memorialization.

21. See, 12 O.S. Supp. 1991, §990A(D); 12 O.S. 1991 Supp., §952; Rule 1.14(c) of the Rules of Appellate Procedure in Civil Cases. See, e.g., *Oxley v. Tulsa*, 794 P.2d 742 (Okla. 1989) (affidavit of court clerk supplied basis for allowing record to be corrected by amendment); *Huff v. Huff*, 687 P.2d 130 (Okla. 1984) (where record is incomplete for lack of a fundamental instrument, appellant should be afforded opportunity to supply the deficiency by nunc pro tunc correction); *Boxberger v. Martin*, 552 P. 2d 370 (Okla. 1976) (transcript, originally defective, subsequently corrected and appeal reinstated); *Willitt v. ASC Industries, Inc.*, 572 P.2d 1296 (Okla. 1978) (party should be given opportunity to provide missing journal entry of judgment).

22. 786 P.2d 1230 (Okla. 1989). *Bane* was presaged by the earlier decision of *Ogle v. Ogle*, 517 P.2d 797, 799 (Okla. 1973), which barred party-adding amendments from the scope of Rule 1.17(a)'s petition in error provision.

23. *Id.*, 786 P.2d at 1234. Justice Opala would adopt the even stricter federal rule that bars almost all amendments to add additional appellants. *Id.*, 786 P.2d at 1238-42. The federal rule is set forth in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) and discussed in "Moore's Federal Practice," ¶03.17[1].

24. *Davis v. Howard*, 803 P.2d 1172 (Okla. App. 1990) (sanctions imposed against attorney; belated motion to add attorney as appellant denied, appeal dismissed); *Vickers v. Jacques*, No. 71, 410, 61 Okla. B.J. 2329 (Okla. App. 1990) (order requiring attorney to personally pay other par-

