

Pitfalls In Oklahoma Appellate Practice

By J. Michael Medina

Oklahoma appellate law, because of its unique structural posture, presents many potential traps lurking to snare inexperienced (or even experienced) lawyers. Oklahoma is one of two states (Texas is the other) that have two courts of last resort;¹ furthermore, Oklahoma is one of only three states (Idaho and Iowa are the others) in which all appeals are initiated in the Supreme Court. The Supreme Court then proceeds to select the cases it will hear, and assigns the remainder to the various divisions of the Court of Appeals.²

Fortunately, Oklahoma does have extensive rules governing the civil appellate process. An Oklahoma lawyer risks committing malpractice³ if he plans to be involved in an appeal and does not become familiar with:

a. Rules for District Courts of Oklahoma (12 O.S. 1981, Ch. 2, Appendix, following 12 O.S. 1981, §85);

b. Rules of the Supreme Court of Oklahoma (12 O.S. 1981, Ch. 15, Appendix 1);

c. Rules of Appellate Procedure in Civil Cases (12 O.S. 1981, Ch. 15, Appendix 2);

d. Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court (12 O.S. 1981, Ch. 15, Appendix 3); and

e. Rules for the Management of Workload in the Supreme Court and the Court of Appeals, issued November 25, 1985, 56 O.B.J. 2879 (Dec. 14, 1985).

The discussion that follows and the pitfalls enumerated can all be best avoided by an attorney

gaining a thorough knowledge of the appellate rules. A final word: Business is booming. In fiscal year 1984, 1,965 cases were filed in the Supreme Court.⁴

1. **Failing To Preserve The Error Below:** The appellate court will ordinarily only review issues raised and preserved in the trial court. *Kepler v. Strain*, 579 P.2d 191 (Okla. 1978); *McGill v. City of Stroud*, 492 P.2d 1094 (Okla. 1971). A trial lawyer must constantly be aware of the requisites for preserving his objection, including any special requirements. See, e.g., *Messler v. Simmons Gun Specialties*, 687 P.2d 121 (Okla. 1984) (concerning motions in limine); *Zehner v. Post Oak Oil Co.*, 640 P.2d 91 (Okla. App. 1981) (same).⁵

2. **Filing A Useless Motion For New Trial:** In the past, the filing of a motion for new trial was required in many instances before one could perfect an appeal from district court. *Stinhcomb v. Myers*, 28 Okla. 597, 115 P.602 (1911); *Poafpybitty v. Skelly Oil Co.*, 394 P.2d 515 (Okla. 1964). The requirement no longer prevails. 12 O.S. 1981, §991; Rule 1.12(a), Rules of Appellate Procedure in Civil Cases. However, if a motion for new trial is filed, one is limited on appeal to the issues raised in the motion for new trial. 12 O.S. 1981, §991(b); Rule 1.17(a), Rules of Appellate Procedure in Civil

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AUTHOR'S NOTE: This article is dedicated to the memory of the late E. Dwight Morgan, Professor of Law at the University of Oklahoma. Professor Morgan offered a presentation entitled "The ABC's of a Civil Appeal and Avoiding Pitfalls," for a 1982 seminar on Oklahoma appellate practice which served as the inspiration for this article.

Cases; *National Educators Life Ins. Co. v. Apache Lanes, Inc.*, 555 P.2d 600 (Okla. 1976); *Reeves v. Melton*, 518 P.2d 57 (Okla. App. 1973); See also, Rule 17, Rules for the District Courts of Oklahoma, amended November 1, 1984, 55 O.B.J. 2242.⁶ Furthermore, recitation in the motion of vague statutory language (12 O.S. 1981, §651) as the basis for the motion for new trial (*i.e.*, "error of law occurring at the trial," "verdict not sustained by the evidence") will not preserve error for appeal. Rule 17, Rules for the District Courts; *Federal Corp. v. Indep. School Dist.*, 606 P.2d 1141 (Okla. App. 1978) (approved for publication, Okla. Sup. Ct. 1980); *Neil v. Board of County Commissioners*, 617 P.2d 201 (Okla. 1980).⁷

In view of the foregoing, filing a motion for new trial after conclusion of an unsuccessful trial should never be a matter of routine. Careful weighing of the possible benefits of the motion (*i.e.*, suspension of the appeal time, possibility of changing the trial court's opinion or decision) must be balanced against the dangers, heightened by the inflexible and short 10 day filing period,⁸ of omitting an appealable issue through the lack of a transcript or time for deliberation. Heightening further the danger of a motion for new trial is the Oklahoma rule which prevents a party from adding, after the 10 day period has expired, new grounds to his timely filed motion for new trial. *Arkansas Louisiana Gas Co. v. Travis*, 682 P.2d 225 (Okla. 1984); *Creamer v. Bucy*, 700 P.2d 668 (Okla. App. 1985).

3. Being In The Wrong Court: If you intend to request the appellate court to overrule existing Oklahoma precedent or to decide an issue of first impression, you want the case to be assigned to the Oklahoma Supreme Court.⁹ Your briefs, petition in error, etc. should be geared towards convincing the Supreme Court to retain the case. Filing a Motion to Retain Case is essential. The Supreme Court's announced intention to retain for initial appellate review a relatively small number of cases places a premium on the appellate lawyer's ability to frame the dispositive issues in such a manner to reflect significant public interest concerns.¹⁰ Conversely, if you are defending the appeal, and basing your position on a prior precedent that appears questionable, you want to be in the Court of Appeals. Draft your briefs to minimize the importance and novelty of the issues on appeal.

With the promulgation of the new work management rules, the case will likely be assigned to the Court of Appeals.

4. Filing Petition In Error Late: THIS IS THE ONE UNFORGIVABLE APPEAL ERROR. The statutes (12 O.S. 1981, §§990, 992), the rules (Rules 1.14, 1.51, Rules of Appellate Procedure in Civil Cases), and the cases are clear. There appears to be no legally sufficient excuse for failing to file within the proper jurisdictional period—usually thirty days.¹¹ See *e.g.*, *Warehouse Market, Inc. v. Berry*, 459 P.2d 853 (Okla. 1969) (filing petition within 30 days of filing of order, but more than 30 days of oral rendition); *Ogle v. Ogle*, 517 P.2d 797 (Okla. 1973) (filing timely petition in error, but attempting to amend such petition after 30 day filing period expired to include additional appellant); *Transok Pipeline Co. v. Darks*, 515 P.2d 218 (Okla. 1973) (reliance on a court rule, found by appellate court to have been superseded by statute); *Turrel v. Continental Oil Co.*, 466 P.2d 643 (Okla. 1970) (mailed before expiration of period, but delivered to Supreme Court clerk after expiration); *Burk v. Burk*, 516 P.2d 268 (Okla. 1973) (mail failure); *Fernow v. Gubser*, 196 Okla. 58, 162 P.2d 529 (1945) (discharge of attorney). The most common error is to assume that a final order must be a written order. In Oklahoma, the rendition of the judgment is crucial; often, the rendition takes place orally. *Warehouse Market, Inc. v. Berry*, 459 P.2d 853 (Okla. 1969); *Werfelman v. Miller*, 180 Okla. 267, 68 P.2d 819 (1937).¹²

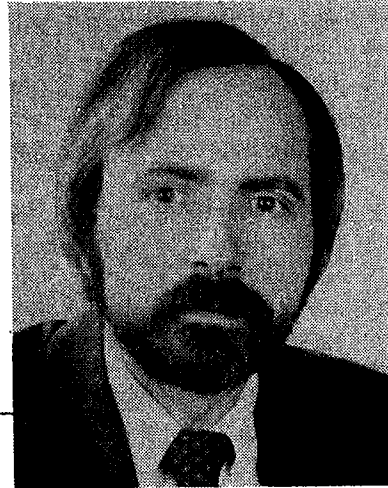
The Guiding Principle is, therefore, file when in doubt. But note, a premature petition in error is generally of no effect, *Sneed v. State*, 683 P.2d 525 (Okla. 1984), so you must file a petition within 30 days of every conceivable "final order." See *Delhi Gas Pipeline Corp. v. Mahall*, 546 P.2d 1019 (Okla. App. 1975) (Although plaintiff had filed petition in error after judgment was entered, the plaintiff failed to file a petition in error after denial of the defendant's motion for new trial. The appeal was dismissed, apparently *sua sponte*); but see, Rule 1.11(c), Rules of Appellate Procedure In Civil Cases, concerning premature commencement of appeal prior to a determination of a pending attorney fee request.¹³

5. Failing To Enclose Your Cost Deposit With Your Petition In Error: Rule 1.14(a) of the Rules of Appellate Procedure in Civil Cases provides that an appeal from a district court is deemed

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commenced by (1) timely filing of the Petition in Error and (2) remitting to the clerk of the Supreme Court the requisite cost deposit or *in forma pauperis* affidavit. Under earlier provisions, the remittance was subject to the filing period, and providing the check late led to dismissal of the appeal. *Brown v. Butler*, 194 Okla. 46, 146 P.2d 1010 (1944). There are no published cases on this point since the appellate structure was overhauled in the sixties.¹⁴

6. Failing To File A Cross-Appeal¹⁵ Where You Intend To Ask Affirmative Relief From The Appellate Court: Allegations of independent error which would result in the appellate court doing something more than simply affirming the trial court must be preserved by a separate petition in error. *Cole v. Anderson*, 304 P.2d 295 (Okla. 1957). Rule 1.18(a) provides that once a petition in error has been filed, any other party may file his petition in error within 40 days after rendition of the judgment.¹⁶ However, when a party will only be defending the judgment below on grounds other than those upon which the trial court granted relief, a separate petition need not be filed. *Short v. Guy Nall Trucking Co.*, 442 P.2d 497 (Okla. 1968); *Woolfolk v. Semrod*, 351 P.2d 742 (Okla. 1960). See, as to the federal practice, Stern, "When to Cross-Appeal or Cross-Petition—Certainty or Confusion?," 87 Harv. L. Rev. 763 (1974).

7. Failing To Obtain A Written Memorialization Of The Decision Being Appealed: Under 12 O.S. 1981, §32.2, a recorded order signed by the court is a jurisdictional prerequisite to appellate review. Section 32.2 does not require that a recorded order be in existence before the appeal is initiated. *Johnson v. Johnson*, 674 P.2d 539 (Okla. 1983). However, the appellate court will not review the

decision below without one. If the court determines that the required written memorial is not in the file at the time the court is ready to review the decision below, the court will often issue a minute order directing that such an order be filed within a given period of time. *Huff v. Huff*, 687 P.2d 130 (Okla. 1984); *Willitt v. ASG Industries*, 572 P.2d 1296 (Okla. 1978). Failure to file the order pursuant to the court's instruction could lead to dismissal of the appeal. See, e.g., *Taylor v. Groce*, No. 61,354 (Okla. App. 1985), 56 O.B.J. 2392 (unpublished); *Poindexter v. Red Ball Motor Freight, Inc.*, 548 P.2d 1056 (Okla. App. 1976) (dicta).

8. Failing To File A Petition For Rehearing In The Court Of Appeals Before Seeking Certiorari In The Oklahoma Supreme Court: One trap into which federal appellate practitioners may fall during their initial foray into state appellate practice is the requirement found in Rule 3.13B, Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court, that a would-be petitioner to the Supreme Court first file a petition for rehearing in the Court of Appeals.¹⁷ This requirement does not exist in federal practice. Knibb, "Federal Court of Appeals Manual," §25.3.¹⁸ Therefore, the object of the Petition for Rehearing is different in state court. In federal appellate practice, a petition for rehearing should only be filed where there is a genuine belief that the appellate court has overlooked a dispositive fact or precedent amounting to obvious error, or that new precedent indicates that the Court's decision is in error. Thus, the number of justified petitions for rehearing in federal court is small. Knibb, "Federal Court of Appeals Manual," §25.3; Levy, "How to Handle An Appeal," §10.2.3.1. To the contrary, in Oklahoma, if there is any chance that you will want

to file for certiorari, file your petition for rehearing within 20 days of the court's opinion.¹⁹ (Rule 3.9, Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court; Rule 28, Rules of the Supreme Court.)

9. Preparing The Petition For A Writ Of Certiorari As If It Were Just Another Brief In The Appellate Process:

Many attorneys, when drafting their Petitions for Certiorari, simply attempt to condense their appellate briefs into the 10 page maximum permitted by Rule 3.14B of the Rules of Practice and Procedure in the Court of Appeals and on Certiorari to that Court. This is an often-times fatal mistake.²⁰ Not only does such an approach demonstrate the attorney's failure to understand the nature of the certiorari jurisdiction of the Supreme Court, the approach is plainly contrary to Rule 3.14F's admonition that "the petition . . . shall not reach the merits of the appeal but rather pertain to reasons [the] Supreme Court should review the decision of the Court of Appeals."²¹ The Supreme Court's certiorari jurisdiction is not for error-correction; it is for policy resolution.²² The Supreme Court, in Rule 3.13, has itemized some of the considerations involved in its certiorari jurisdiction. Note the warning that certiorari will be granted "only when there are special and important reasons."

The fact that the Court of Appeals erred will, by itself, seldom convince the Supreme Court to grant certiorari. The Supreme Court simply has too many cases of which to dispose to concern itself with error-correction, unless the challenged error (1) violates prior Oklahoma precedent, (2) resolves an issue of first impression, (3) creates a conflict among the Courts of Appeals, or (4) affects a matter of significant public interest. Therefore, the drafting of the Petition should be approached entirely differently than merely repackaging of the prior briefs. The merits should not be argued except as an extension of why this case is important.

See Stern & Gressman, "Supreme Court Practice," (5th Ed. 1978), §4.18; Lynn, "Appellate Litigation," §§1.9, 2.9, 14.9 14.10; Houts & Rogosheske, "Art of Advocacy: Appeals," §7.01, 7.02; Stern, "Appellate Practice in the United States," §5.7; Martineau, "Modern Appellate Practice," §16.3; Leahy, "The Ten Commandments of Certiorari," 71 A.B.A.J. 78 (Oct. 1985).

10. Filing A Motion For New Trial Or Rehearing

In Situations Other Than From A Decision of the District Court: There are specific sections of the Rules of Appellate Procedure in Civil Cases covering appeals from certain interlocutory orders and from orders of certain administrative agencies. It is important to note that the filing of a motion for reconsideration, new trial or rehearing will not toll the prescribed appeal time where the appeal is from either an interlocutory order appealable as a matter of right (i.e., injunctions, class action orders), see Rule 1.61, or from an order of the Corporation Commission. Rule 1.76; *Transok Pipeline Co. v. Darks*, 515 P.2d 218 (Okla. 1973).²³ Do not file a motion for new trial in these instances; rather, initiate the appeal process.²⁴

11. Failing To File A Timely Petition In Error When You Are Requesting Or Planning To Request The Supreme Court To Assume Original Jurisdiction:

Often-times attorneys will use applications to assume original jurisdiction to present issues before the Supreme Court that the attorney does not believe to be immediately appealable. E.g., pretrial discovery orders, see *Carman v. Fishel*, 418 P.2d 963 (Okla. 1966); *Cox v. Theus*, 569 P.2d 447 (Okla. 1977); venue orders, *Oklahoma Ordinance Works Authority v. District Court*, 613 P.2d 746 (Okla. 1980); orders sustaining personal jurisdiction, *Union Bank v. Ferris*, 587 P.2d 454 (Okla. 1978); *Barnes v. Wilson*, 580 P.2d 991 (Okla. 1978). This determination of non-appealability, unless clear precedent exists, is often tricky. And since an extraordinary writ will not lie where the Court determines an adequate appeal remedy exists, *Moses v. Hoebel*, 646 P.2d 601 (Okla. 1982); *Casualty Corp. of America v. Owens*, 619 P.2d 874 (Okla. 1980), reliance only upon an application to assume original jurisdiction seems foolhardy. The danger would then exist that the Court would consider the order you are challenging to be a final appealable order not subject to an extraordinary writ. Since no timely petition in error would have been filed, the Court would dismiss the proceedings. See e.g., *Moses v. Hoebel*, 646 P.2d 601 (Okla. 1982).²⁵

It would seem the better course is to either file both a petition in error within the 30 day period and the application or prepare the application to assume original jurisdiction in such a manner that it contains all the information necessary for a petition in error and file the application within 30 days. *Amarex, Inc. v. Baker*, 655 P.2d 1040 (Okla. 1982).²⁶

There are, undoubtedly, other traps lurking in Oklahoma's appellate practice.²⁷ These noted are just illustrative. Once again, however, it must be emphasized that an understanding of the court rules will reduce, if not entirely eliminate, the chances that your appeal would be subject to a procedural dismissal. With apologies to Ambrose Bierce, an appeal is not a crapshoot.²⁸ Appeal is one of the procedural guarantees that renders meaningful the rule of law. An appeal should therefore be approached in all seriousness.

1. It is clear that the Supreme Court, in rare instances, can even exercise jurisdiction over the Court of Criminal Appeals. *Carder v. Court of Criminal Appeals*, 595 P.2d 416 (Okla. 1978). The Supreme Court, however, will not exercise this extraordinary jurisdiction to create another level of appellate review. *Wofford v. Bussey*, 556 P.2d 1280 (Okla. 1976).

2. The Supreme Court has recently issued new rules for the management of the appellate workload. See, 56 O.B.J. 2879 (Dec. 14, 1985). The new rules create a 90 day period in which the appellate courts are to devote their energies exclusively to accelerated dispositions. The Court's order further establishes procedures to effect the emphasis on accelerated dispositions. Furthermore, the order reflects the Supreme Court's desire to become more of a policy resolution and law development court than an error-correction court. Effectively, the Supreme Court has provided for the assignment of all cases pending in the Supreme Court to the Court of Appeals, subject to two relatively narrow exceptions: (1) cases presenting significant public interest issues and (2) cases presenting dispositive legal questions which have major public significance. Assuming that the Court carries through with the new order, the Oklahoma appellate system would closely resemble, in effect, the federal two-tier appellate system. For a review of the former fast-track procedure, see Perry, "The Fast Track: Accelerated Disposition of Civil Appeals in the Supreme Court," 6 Okla. City L. Rev. 453 (1981).

3. See Mallen & Levitt, "Legal Malpractice" (2d Ed. 1981), §583; Meiselman, "Attorney Malpractice and Procedure," §15:1 et seq. Pertinent Oklahoma cases include *Collins v. Wanner*, 382 P.2d 105 (Okla. 1963); *Sutton v. Whiteside*, 101 Okla. 79, 222 P.974 (1924); *Tishomingo Elec. Light & Power Co. v. Gullett*, 52 Okla. 180, 152 P. 849 (1915). See, *Demarsh v. Schaapveld*, No. 61,668 (Okla. 1985), 56 O.B.J. 945 (unpublished) (appeal dismissed for failure to follow rules of appellate procedure); *Poindexter v. Red Ball Motor Freight, Inc.*, 548 P.2d 1054 (Okla. App. 1976) (appellee's brief stricken as not complying with Rules 13, 14, 15, 19, and 24 of the Supreme Court).

4. Practitioners have an obligation to only appeal cases where there is a reasonable chance of success. Lynn, "Appellate Litigation," §§3.9, 6.9. Oklahoma can no longer afford the appellate process being viewed simply as another chance to relitigate the case. Furthermore, the bringing of a frivolous appeal may lead to imposition of attorneys fees. 20 O.S. 1984 Supp., §15.1; *Southlands Development, Inc. v. Melinder*, —P.2d—, 56 O.B.J. 2792 (Okla. 1985).

5. See Lynn, "Appellate Litigation," §§4.1 et seq. Two limited exceptions in Oklahoma concern (1) fundamental errors in the instructions given to the jury, *Short v. Guy Nall Trucking Co.*, 442 P.2d 497 (Okla. 1968); *McGuigan v. Harris*, 440 P.2d 680 (Okla. 1968); *Vogel v. Rushing*, 202 Okla. 277, 212 P.2d 665 (1949) and (2) issues of general public importance, welfare and significance. *Special Indemnity Fund v. Reynolds*, 199 Okla. 570, 188 P.2d 841 (1948); *First National Bank v. Southland Production Co.*, 189 Okla. 9, 112 P.2d 1087 (1941). See also, 12 O.S. 1981, §2104 (D.) (plain error doctrine in evidentiary matters). The exceptions, however, are not expansive and difficult to successfully argue. See, e.g., *Anderson v. O'Donoghue*, 677 P.2d 648 (Okla. 1983); *Wetsel v. Ind. School District*, 670 P.2d 986 (Okla. 1983); *Timmmons v. Royal Globe Ins. Co.*, 653 P.2d 907 (Okla. 1982); *Simons v. Brashears Transfer and Storage*, 344 P.2d 1107 (Okla. 1959). As evidenced by the creation of the fundamental error doctrine, a particular problem area has been the jury instruction. Specific provisions govern the preservation of objections to instructions at the trial level, see 12 O.S. 1981, §578, and on appeal. Rule 15, Rules of the Supreme Court of Oklahoma. Failure to comply with these provisions will lead to dismissal of the objection on appeal, unless the objection involves fundamental error. *Vaughn v. Texaco, Inc.*, 631 P.2d 1334 (Okla. App. 1981) (failure to comply with Rule 15); *Huff v. Duncan*, 530 P.2d 1341 (Okla. App. 1969) (failure to comply with old §578).

6. The Supreme Court may, however, at its discretion, review an issue of broad public policy or interest, even when not preserved in the motion for new trial. *Barks v. Young*, 564 P.2d 228 (Okla. 1977).

7. An insufficient motion, however, may be cured if the trial court is apprised without objection at the hearing on the motion for new trial of the specific issues advanced by movant. *Horizons, Inc. v. KEO Leasing Co.*, 681 P.2d 757 (Okla. 1984); *Huff v. Huff*, 687 P.2d 130 (Okla. 1984); Rule 17, Rules for the District Courts.

8. 12 O.S. 1981, §653 (except for newly discovered evidence or when party is unavoidably prevented from filing motion). The trial court normally cannot extend the time for filing. *Manos v. Leche*, 205 Okla. 213, 236 P.2d 693 (1951); *Roberts v. Seals*, 43 Okla. 467, 143 P. 199 (1914). Therefore, a motion for new trial filed after expiration of the 10 day period is ineffective for purposes of staying the appeal time. *Timeplan Corp. v. O'Connor*, 461 P.2d 935 (Okla. 1969); Rule 17, Rules for the District Courts of Oklahoma and cases cited herein.

9. See, e.g., *Wimberly v. Buford*, 660 P.2d 1050 (Okla. 1983) (Court of Appeals may not overrule precedents of Supreme Court); *Brown v. Oklahoma Transportation Co.*, 588 P.2d 595 (Okla. App. 1978) (Court of Appeals bound by decisions of Supreme Court); *American Food Purveyors, Inc. v. Lindsey Meats, Inc.*, 153 Ga.App. 383, 265 S.E. 2d 325 (1980) (Court of Appeals found full payment check rule questionable, but was bound by decision of Georgia Supreme Court to apply it).

10. The new work management rules seem to supersede the current provisions found in Rule 1.16(c) of the Rules of Appellate Procedure in Civil Cases. Rule 1.16 requires that the Motion to Retain be included within the Petition

