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 malpractice[3] 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

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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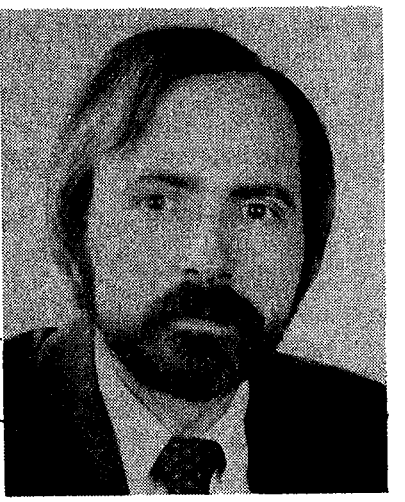

commenced by (1) timely filing of the Petition in Error and (2) remitting to the clerk of the Supreme Court the requisite cost deposit or *in forma pauperis* affidavit. Under earlier provisions, the remittance was subject to the filing period, and providing the check late led to dismissal of the appeal. *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-Appeal[15] 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.

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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); *Timmons 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

in Error or attached to it. The grounds suggesting the need for retention are enumerated. The work management rules now require that a one page letter-size motion be filed within 30 days of the commencement of the appeal, setting forth adequate grounds for the Supreme Court's retention of the appeal. The grounds are narrower than the grounds set forth in Rule 1.16(c). Even should the Court initially assign the case to the Court of Appeals, all is still not lost. Two avenues of relief are still available: (a) file a motion to reassign in the Supreme Court or (b) file a motion with the Court of Appeals requesting the Chief Judge of the division to which the case is assigned to issue a certificate evidencing the case as proper for Supreme Court consideration. The certificate must be filed by the Chief Judge with the Supreme Court no later than 30 days after initial assignment to the Court of Appeals. Information from the Chief Justice's office indicates that few motions to retain are being granted.

11. One very limited exception was enumerated by the Court in *McCullough v. Safeway Stores, Inc.*, 626 P.2d 1332 (Okla. 1981) where a summary judgment motion was taken under advisement, ruled upon, but no notice sent to the parties. The parties learned of the ruling two months later. The Supreme Court specifically disclaimed any duty of counsel to monitor the trial court's docket and ruled that the 30 day appeal period commences to run only when notice of such ruling has been mailed to (but note: not received by) the parties. Rule 27 of the District Court rules, as amended, June 17, 1985, codifies *McCullough's* holding. It is the writer's practice to transmit the petition in error to the Clerk in such a manner (Courier, Overnight delivery, or Post Office Express Mail) to insure at least a one-day safety margin. There is usually no reason to delay to the last day, since the petition in error can be freely amended, without leave of court, until the brief in chief is filed. After the brief in chief is filed, leave of court must be obtained. Rule 1.17(a), Rules of Appellate Procedure in Civil Cases.

12. One common practice among trial courts (and attorneys seeking to delay the appeal time) is to pronounce "judgment for the plaintiff (or defendant) per journal entry." The question arises whether a final judgment comes into being upon rendition of the pronouncement or upon entry of the journal entry. It would appear that the common belief that such a reservation by the trial court deprives its pronouncement of finality is correct. The crucial date for appellate timing then becomes the date the journal entry of judgment is filed. See *Miller v. Miller*, 664 P.2d 1032 (Okla. 1983); *Bobo v. Bigbee*, 548 P.2d 224 (Okla. 1976); *News Dispatch Printing & Audit Co. v. Bd. of Commissioners*, 132 Okla. 216, 270 P. 2 (1928); *Smaller v. Smaller*, 635 P.2d 1341 (Okla. App. 1981).

13. One additional complication in determining finality occurs when there are multiple parties or multiple claims involved in the case. Oklahoma briefly had, in former District Court Rule 25 (effective only January 1, 1982 to November 18, 1982), an analogue to F.R.C.P. Rule 54(b), making orders disposing only partially of the parties or claims expressly not appealable unless the district court certified the order as final. Without such a rule, Oklahoma law regards an order disposing of one party, see *Ritter v. Perma-Stone Co.*, 325 P.2d 442 (Okla. 1958); *Construction Resources Corp. v. Courts, Ltd.*, 591 P.2d 335 (Okla. App. 1979), or of one claim among the multiple asserted, see *Oklahomans for Life, Inc. v. State Fair of Oklahoma*, 634 P.2d 704 (Okla. 1981), as immediately appealable final orders. The Oklahoma Supreme Court has expressly recognized that there may be several successive final and appealable orders in a case, although the law contemplates only one judgment. *Stubblefield v. General Motors Acceptance Corp.*, 619 P.2d 620 (Okla. 1983).

14. The most obvious reason for including the cost deposit is that the Court Clerk will most likely refuse to file your petition in error without it. The Oklahoma Supreme Court, in its unpublished April 1, 1985 order in *Dempsey v. Hill*, No. 63,936, permitted an appellant to overcome this pitfall. Appellant had mailed his petition in error with an insufficient cost deposit ($50 instead of $100) to the Court Clerk. The petition in error was received by the Court Clerk on the thirtieth day, but not filed since the cost deposit was insufficient. Upon notification, appellant's attorney then presented the correct amount to the Court Clerk who then proceeded to file the petition in error. The Supreme Court, on March 6, 1985, *sua sponte* raised the jurisdictional issue, since the petition in error on its face showed an untimely filing. In its April 1, 1985 Order, the Court found that its inquiry was satisfied and ruled that the appeal would be deemed to have been timely filed as of the date the petition in error was first received by the Court Clerk.

15. As explained by Justice Opala in his dissenting opinion in *Spears v. Pebble*, 661 P.2d 1337, 1344 (Okla. 1983), a true cross-appeal is one brought by an appellee in the original appeal who seeks relief only against another appellee. A counter-appeal, on the other hand, is one brought by an appellee for relief against the original appellant. For purposes of this article, the term "cross-appeal" will subsume the counter-appeal as well.

16. The 40 day period is jurisdictional and may not be waived. *Gilbreath v. Gilbreath*, 56 O.B.J. 929 (Okla. 1985) (petition for rehearing pending); *Moore v. McAlester*, 428 P.2d 266 (Okla. 1967).

17. See *e.g.*, *Johnson v. Wade*, 642 P.2d 255 (Okla. 1982). Alabama and Indiana also require applications for rehearing in the intermediate court before certiorari can be requested of the Supreme Court. See, Ala.R.App.P. 39(a); Ind.R.App.P. 11 (B).

18. Justice Frankfurter succinctly expressed the federal view concerning rehearings in his concurring opinion in the *Western Pacific Rd. Case*, 345 U.S. 247, 268, 270 (1952):

> "Rehearings are not a healthy step in the judicial process; surely they ought not to be deemed a normal procedure. Yet one who has paged the Federal Reporter for nearly fifty years is struck with what appears to be a growth in the tendency to file petitions for rehearing in the courts of appeals. I have not made a quantitative study of the facts, but one gains the impression that in some circuits these petitions are filed almost as a matter of course. This is an abuse of judicial energy. It results in needless delay. It arouses false hopes in defeated litigants and wastes their money. If petitions for rehearing were justified, except in rare instances, it would bespeak

serious defects in the work of the courts of appeals, an assumption which must be rejected."

See also, Stern, "Appellate Practice in the United States," §9.1.

19. Even as a successful party, you may want to file for certiorari. The Court of Appeals may have affirmed or reversed the trial court below but on grounds unsatisfactory to you. In this instance, file for rehearing, since your request for affirmative relief by the Supreme Court will require a petition for writ of certiorari. *Johnson v. Wade*, 642 P.2d 255 (Okla. 1982). See *e.g., Elder et al. v. El Paso Natural Gas Co. et al.*, No. 62,940 (Okla. App. 1985), 56 O.B.J. 1064 (unpublished), cert. denied 56 O.B.J. 2755 (5-4) (Trial Court denied class certification on multiple grounds; Court of Appeals reversed on all but one ground. Parties opposing certification filed petitions for rehearing, then for certiorari, as they wanted review of Court of Appeals' reversals of grounds relied upon by the Trial Court.)

20. One common failing shared by both petitioners and respondents is the practice of either cross-referencing in the petition or answer the briefs filed in the case or of citing the record. Under the current internal practice of the Supreme Court, the Justices receive, on Tuesday, to be considered in conference the succeeding Monday, only the following materials: a referee's analysis of the case, the petition for certiorari, the answer, the reply (if any), and the opinion of the Court of Appeals. They do not receive the briefs nor portions of the record. Similarly, the referee normally cannot examine the briefs or record in preparing the analysis for the Court.

21. Rule 3.14F also applies to the respondent challenging the need for certiorari. However, arguing the merits is not likely to harm respondent nearly as much. He has the numbers on his side. In fiscal year 1983-1984, for example, 388 petitions for certiorari were filed, but only 84 were granted. [21.6%].

22. The new work management rules can only lead to further entrenchment of the Supreme Court as a policy resolution court. As the United States Supreme Court once observed: "This Court's review is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 471 U.S. 600, 616-617 (1974). Of course, the fact that the Court of Appeals has wrongly decided a case of substantial importance will only advance the prospects for Supreme Court review. Lynn, "Appellate Litigation," §13.5.

23. Relying upon a motion for new trial to delay the appeal time in a situation involving an interlocutory order appealable as a matter of right is usually not fatal. Although a party does lose his right to an immediate appeal, he may still raise errors concerning the interlocutory order in an appeal taken from the final judgment or final order rendered in the case. 12 O.S. 1981, §952(b); Rule 1.17(b), Rules of Appellate Procedure in Civil Cases. This grace apparently does not extend to (a) payments pendente lite appealable under 12 O.S. 1985 Supp., §993A(5), (b) class certification rulings appealable under 12 O.S. 1985 Supp., §993A(6) and (c) rulings under the Oklahoma Arbitration Act, appealable under 15 O.S. 1981, §817, since these proceedings are not enumerated within §952 or Rule 1.17(b).

24. There are also different periods of time for completion of the record and briefing in certified interlocutory appeal and appealable interlocutory order cases. One should note the extraordinarily short time period for completion of the record (see Rules 1.54(c) & 1.64(b), Rules of Appellate Procedure in Civil Cases and briefing. (see Rules 1.55 & 1.66, Rules of Appellate Procedure in Civil Cases.)

25. In the past, practitioners and trial courts alike have abused the certified interlocutory order mechanism found in 12 O.S. 1981, §952 (b) (3) by having certified for certiorari review issues inappropriate for certification as not affecting a substantial part of the merits of the controversy in question. Although the Supreme Court has, in the past, accepted review of issues seemingly not on the merits, see *e.g., Daniels v. Daniels*, 634 P.2d 709 (Okla. 1981) (service of notice issue); *Riffe Petroleum Co. v. McMichael Asphalt Sales Co.*, 585 P.2d 1123 (Okla. 1978) (service and venue), the Court is currently scrutinizing certified interlocutory orders with greater zeal and consideration for the statutory limitations on such certifications. See, *White v. Wensauer*, 702 P.2d 883, 889 (Okla. 1985). There remains considerable disagreement on what constitutes an issue "on the merits." Compare the majority and dissenting opinions in *Willoughby v. Oklahoma City*, 706 P.2d 883, 889 (Okla. 1985) (postjudgment issue) and *Tidmore v. Fullman*, 646 P.2d 1278, 1283 (Okla. 1982) (evidentiary issue). Many of the not "on the merits" issues can be pursued through the filing of a petition for extraordinary relief.

26. The denial of a writ of prohibition for reasons other than on the merits (*i.e.*, denying to assume jurisdiction) does not preclude an appellate court at a later time from granting relief. *Jim Marrs Drilling Co. v. Woolard*, 629 P.2d 810 (Okla. App. 1981); Annot., 21 A.L.R.3d 206 (1968); 63A AmJur.2d, "Prohibition," §39.

27. Caution must be used in relying on recent opinions in the Bar Journal. These opinions are subject to rehearing or reconsideration until the mandate has issued. See the saga of the *Tenneco* opinions recounted in Humble, "Corporation Commission Jurisdiction: The Oklahoma Supreme Court's 'About Face' in *Tenneco Oil Co. v. El Paso Natural Gas Co.*," 20 Tulsa L.J. 494 (1985). Under Rule 1.200C(A) of the Rules of Appellate Procedure in Civil Cases, appellate and trial courts are directed not to cite as authority any recently published opinion until the mandate has been issued in the case. One other potential pitfall should be noted. In accelerated disposition cases, whether heard by the Supreme Court or by the Court of Appeals, the parties are normally entitled to oral argument. In the Supreme Court, however, a waiver of oral argument by one party will waive oral argument as to all parties. In the Court of Appeals, on the other hand, all parties must waive oral argument for waiver to be effected.

28. In "The Devil's Dictionary," an appeal is defined as an action "to put the dice in the box for another throw."