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Cindy Jo Percival

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upholding H.B. 1221 as a valid exercise of the state's police power, the Oklahoma Supreme Court has appropriately recognized that it is a legitimate end for the state to seek to protect correlative rights by preventing discrimination in favor of one owner as against another even in the absence of waste.

*Gregory F. Pilcher*

## Procedure: Effect of Attorney Fees on Finality of Judgment—Amendment to Rule 1.11(c)

Despite an unprecedented triple revision of its rules by the Oklahoma Supreme Court, there continues to be a serious question on the most fundamental level of appellate procedure. When must a petition in error be filed with the Oklahoma Supreme Court for it to be timely where the trial court has decided all substantive issues raised in an action other than the issue of attorney fees? An attorney may have to choose between the date of the decision on the substantive issues and the date of ruling on attorney fees. Practitioners need a clear-cut rule so that there remains no doubt as to which date is the jurisdictional terminal point for perfecting an appeal. Because the timely filing of a petition in error is a jurisdictional prerequisite to appellate review in Oklahoma, it is imperative that the petition be filed within thirty days of a final judgment.<sup>1</sup>

This note will explore the history of rule 1.11(c) through its various revisions promulgated by the Oklahoma Supreme Court. The progression of case law on final judgments and rulings on attorney fees will be examined. The

1. The Rules for Appellate Procedures in Civil Cases, 12 OKLA. STAT. § 990 (1981), provides the Oklahoma Supreme Court with the power to promulgate rules for appellate procedure having the force of statute. Additionally, section 990 states that "except for the filing of a petition in error . . . all steps in perfecting an appeal are not jurisdictional." By negative inference, the filing of the petition in error is jurisdictional. *See State v. County Beverage License No. ABL-78-145*, 652 P.2d 292 (Okla. 1982); *L'Aquarius v. Maynard*, 634 P.2d 1310 (Okla. 1981); *Esker v. Kip's Big Boy, Inc.*, 632 P.2d 414 (Okla. 1981); *Western Okla. Ch. of Nat'l Elec. Contrs. Ass'n v. State ex rel. Corp. Comm'n*, 616 P.2d 1143 (Okla. 1981).

Oklahoma Supreme Court Justice Hargrave gave the practicing bar valuable guidance on the importance of filing a timely appeal. Justice Hargrave writes:

The filing of this petition is jurisdictional and may not be extended by the trial court or the Supreme Court. Thus, once the 30 day limitation period has passed, the once appealable and assumedly erroneous decision will become the law of the case unless it is subject to vacation under 12 O.S. § 1031, or is void on the face of the judgment roll and subject to collateral attack. . . . If any doubt exists about the finality of an order, the necessity to appeal, or when the 30 day period expires, the practitioner should consider filing early enough to clear all doubts on the subject.

*See Hargrave, Brief Observations on Appealable Orders*, 53 OKLA. B.J. 1015 (Apr. 24, 1982).

present rule and its potential ramifications will be considered. Additionally, recommendations will be made for a fourth revision of rule 1.11(c) in order to avoid the necessity of judicial interpretation of a rule that remains a mystery.

*History: Appeals—Prayers for Attorney Fees*

Attorneys are justifiably confused over when an appeal must be filed where all issues raised in the action have been resolved except the award of attorney fees when a party is or may be entitled to such an award. The Oklahoma Supreme Court has promulgated three versions of its rules on the subject in less than three years. The first of this trilogy became effective July 12, 1984, and was captioned: “(c) *Premature Commencement of Appeal Before Prayer for Attorney’s Fee Award Has Been Determined by the Trial Court.*”<sup>2</sup> This first revision of the rule made no provision for a final judgment from which to prosecute an appeal where the trial court had not determined the issue of attorney fees.<sup>3</sup> The rule specifically identified an appeal filed before the award of attorney fees as a “prematurely-filed appeal.”<sup>4</sup> Thus, it appeared that any appeal prior to award of attorney fees under the 1984 version of the rule was ipso facto premature.

The Oklahoma Supreme Court, on June 5, 1986, withdrew rule 1.11(c) and replaced it with rule 1.11(c)-(e).<sup>5</sup> Unlike the 1984 version, the rule promulgated in June of 1986 did not prevent appeal prior to award of attorney fees. Subsec-

2. Rule 1.11(c) of the Rules of Appellate Procedure in Civil Cases, 12 OKLA. STAT. ch. 15, app. 2 (Supp. 1984), provides in its entirety:

*(c) Premature Commencement of Appeal Before Prayer for Attorney’s Fee Award Has Been Determined by the Trial Court*

Whenever an appeal is deemed to have been commenced before final order or judgment was rendered in the case and the court finds that disposition of a party’s or parties’ prayer for an attorney’s fee is the only remaining issue to be determined by the trial court, the prematurely-filed appeal need not be dismissed but may be stayed until the unresolved issue shall have been determined. Any party who may desire corrective relief after a final order or judgment is rendered by the trial court must timely file a petition-in-error or an amended petition-in-error. Failure by any party to bring an appeal within the maximum time prescribed by law after final order or judgment shall have been rendered will preclude that party from securing corrective relief and will result in the dismissal of the prematurely-filed appeal.

3. *Id.*

4. *Id.*

5. Rule 1.11(c)-(e) of the Rules of Appellate Procedure in Civil Cases, 12 OKLA. STAT. ch. 15, app. 2 (Supp. 1986), provides in its entirety:

*(c) Appeal Prior to Allowance of Attorney Fees to a Party Shall Not Constitute a Premature Appeal*

Failure of the trial court to award attorney fee [sic] in any action shall not prevent a party aggrieved by the trial court’s decision of all other questions from seeking a review of such judgment in this court by the timely filing of a petition in error. The trial court may determine the issue as to attorney fees after the appeal has been lodged or may reserve such issue and determine the same after remand of the matter from this court. At which time the amount of appellate related legal services may also be determined by the trial court provided the appellate court has first approved the allowance of such fees before the issuance of its mandate.

tion (c) of the rule provided: "Failure of the trial court to award attorney fee [sic] in any action shall not prevent a party aggrieved by the trial court's decision of all other questions from seeking a review of such judgment in this court by the timely filing of a petition in error."<sup>6</sup> The rule did not require a district court to relinquish its jurisdiction entirely, however, and provided: "The trial court may determine the issue as to attorney fees after the appeal has been lodged."<sup>7</sup> The rule also provided a procedure to review the award of attorney fees during pendency of the appeal of the substantive issues.<sup>8</sup> The last subsection, 1.11(e), stated that the rule was immediately applicable to all appeals.<sup>9</sup>

What was never clear under the second rule was whether the language providing that review could be sought on substantive issues of a case before award of attorney fees was directory or mandatory.<sup>10</sup> If the language was merely directory, the attorney could safely wait to appeal all issues until after the award of attorney fees. On the other hand, if the language was mandatory, and the attorney waited to file a petition in error after the award of attorney fees, catastrophic consequences would result if the jurisdictional thirty days had passed since the trial court's ruling on the substantive issues. Oklahoma Supreme Court Justice Rudolph Hargrave has suggested that if there is a question as to when a judgment is final, "the practitioner should consider filing early enough to clear all doubts on the subject."<sup>11</sup>

The court's third revision of the rule was promulgated on September 22, 1986.<sup>12</sup> This version substituted a new paragraph for subsection (c) and added a new paragraph to subsection (d).<sup>13</sup> Since this revision does not contain an

(d) *Appeal After Allowance of Attorney Fees*

Where the trial court resolves the attorney fee issue during the pendency of the appeal a party aggrieved may, by filing a timely petition in error, or an amended petition in error, have a review of such ruling.

(e) Subsections (c) and (d) above shall be effective immediately and shall be applicable to all appeals including those presently pending.

6. *Id.*, 1.11(c).

7. *Id.*

8. *Id.*

9. *Id.*, 1.11(e).

10. Fraser, *Appeal and Error: Procedure for Appealing a Case*, 21 OKLA. L. REV. 307 (1968). For authority that procedural requirements may be directory, see *Miller v. State*, 94 Okla. Crim. 198, 232 P.2d 651 (1951); *City of Enid v. Champlin Ref. Co.*, 112 Okla. 168, 240 P. 604 (1925). See also *Young v. Postal Mut. Indem. Co.*, 189 Okla. 187, 115 P.2d 139 (1941); *Davis v. Fariss*, 180 Okla. 125, 68 P.2d 417 (1937).

11. Hargrave, *supra* note 1.

12. 12 OKLA. STAT. ch. 15, app. 2, Rule 1.11(c)-(d) (Supp. 1986).

13. The most recent version of rule 1.11(c)-(d) provides:

(c) *Appeal Prior to Allowance of Attorney Fees to a Party Shall Not Constitute a Premature Appeal*

Failure of the trial court to award attorney fee [sic] in any action shall not prevent a party aggrieved by the trial court's decision of all other questions from seeking a review of such judgment in this court by the timely filing of a petition in error. The trial court may determine the issue as to attorney fees after the appeal has been lodged or may reserve such issue and determine the same, together with

effective date, it is effective immediately and applies to all appeals including those presently pending.<sup>14</sup>

A comparison of the June and September versions of rule 1.11(c) reveals no substantive change in subsection (c). The current rule still provides that: "Failure of the trial court to award attorney fee [sic] in any action shall not prevent a party aggrieved by the trial court's decision of all other questions from seeking a review of such judgment in this court by the timely filing of a petition in error."<sup>15</sup> The second sentence of subsection (c) in the most recent rule is a consolidation of the last two sentences in subsection (c) of the June rule that gave the trial court the option of determining the issue of attorney fees after an appeal had been lodged or reserving the ruling until after a decision on appeal had been rendered, at which time the trial court could also hear any application for costs of appellate-related legal services. The original version stated that the appellate court must authorize the award of appellate attorney fees. However, the current version does not require this.<sup>16</sup>

The material differences between the June and September versions of rule 1.11 are found in subsection (d). The caption and first sentence of this section are identical, except that the sentence prescribing the procedure for review of attorney fees where the trial court resolves the issue during pendency of the appeal of the substantive issues is renumbered as part (1).<sup>17</sup> In addition, a new sentence states: "(2) Where the trial court reserves ruling on the attorneys fee issue a party aggrieved by the trial court's decision on other questions may obtain review of such other questions by filing timely petition in error after the trial court's ruling on the attorneys fee issue."<sup>18</sup>

Subsection (d)(2) provides that when the trial court reserves ruling on the attorneys fee issue, after deciding the other questions in the action, the aggrieved party may appeal any of the issues after the trial court has decided the attorneys fee issue. The rule does not specifically require the appellant to wait until all issues have been decided before perfecting a timely appeal, but that is its implication. The last sentence of subsection (c) allows the trial court to determine the issue of attorney fees after the appeal of all other issues has been taken or to reserve the issue and "determine the same, together with

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an application for appellate related legal services, after remand of the matter from this court.

(d) *Appeal After Allowance of Attorney Fees*

(1) Where the trial court resolves the attorney fee issue during the pendency of the appeal a party aggrieved may, by filing a timely petition in error, or an amended petition in error, have a review of such ruling.

(2) where the trial court reserves ruling on the attorney fee issue a party aggrieved by the court's decision on other questions may obtain review of such other questions by filing timely petition in error after the trial court's ruling on the attorney fee issue.

14. See *supra* note 5.

15. See *supra* note 13.

16. See *supra* notes 13 and 5.

17. *Id.*

18. See *supra* note 13.

application for appellate related legal services, after remand of the matter from this court."<sup>19</sup>

Subsections (c) and (d) may be inconsistent since subsection (c) allows the trial court to reserve judgment on attorney fees until after the supreme court has ruled on a prior appeal of attorney fees and subsection (d)(2) may not allow for appeal of the substantive issues where the trial court reserves ruling on attorney fees until such issue be decided. Although the Oklahoma Supreme Court has been struggling mightily over the past three years to draft a definitive rule for taking an appeal where attorney fees are at issue, the most recent of three versions of rule 1.11(c) is still ambiguous.

#### *Interpretation of Rule 1.11(c)-(e) in Light of Prior Case Law*

The dilemma of when to file a petition in error is not a new one for the practicing bar in Oklahoma. As early as 1921, the supreme court recognized there was "an apparent irreconcilable conflict of authorities on what constitutes a final judgment."<sup>20</sup> In *Wells v. Shriver* it was recognized that although several causes of action might be joined in one action, there could be but one judgment and one appeal in the action. The court held that there could be but one final judgment from which an appeal would lie and defined a final judgment as "the final determination of the rights of the parties in an action."<sup>21</sup> By 1951, the court was willing to recognize that where several related matters were litigated in one case, there could be several successive final and appealable orders, although there is but one judgment disposing of the main action.<sup>22</sup> Considering this recognition, appeals should be prosecuted under rule 1.11(c) as soon as all issues other than attorney fees are ruled upon by the trial court, *unless* the trial court has specifically reserved attorney fees as an issue under subsection (d)(2). In this latter case, under subsection (d)(2) any appeal prior to award of attorney fees would appear to be premature. However, under the most recent version of 1.11(c), the practitioner ought to treat the trial court's order disposing of the main action as the final judgment and a later award of attorney fees as simply a collateral appealable order.

In November of 1979, the supreme court decided two cases concerning the issue of final judgments where attorney fees had not been awarded.<sup>23</sup> In the first of these, *Hubbard v. Hubbard*,<sup>24</sup> the court held a decree adjudicating all issues except attorney fees to be a final order.<sup>25</sup> In dicta, the court explained why the order was final without a ruling on the attorney fee issue:

19. *Id.*

20. *Wells v. Shriver*, 81 Okla. 108, 197 P. 460, 462 (1921).

21. *Id.*, 197 P. at 479. (quoting Code of Civil Procedure, Revised Laws 1910, § 5123).

22. *Stubblefield v. General Motors Accep. Corp.*, 619 P.2d 620, 624 (1980); *State ex rel. Bd. of Pub. Affairs v. Neff*, 205 Okla. 205, 236 P.2d 681, 683 (1951).

23. *King v. Finnell*, 603 P.2d 754 (Okla. 1979); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979).

24. 603 P.2d 747 (Okla. 1979).

25. *Id.*

Clearly, the decree as entered was a final order, as it resulted in a final adjudication of all issues involved, save attorney fees, which we consider to be an item of cost. We do not find that the trial court's action constituted error, but we do believe that it would be better procedure for the trial court to rule on the question of trial attorney fees at the time the trial of the case is completed.<sup>26</sup>

Thus, although the supreme court would have preferred that the trial court rule on the attorney fee issue at the time all other issues were decided, its failure to do so was not error and the appeal was not premature.<sup>27</sup>

The second case, decided the same month, *King v. Finnell*,<sup>28</sup> at first appears to be contrary to *Hubbard*. The court found the order of the trial court had resolved only the issue of liability and that there had been no pronouncement made in regard to damages or attorney fees.<sup>29</sup> Since damages were not decided, the order did not constitute a final order within the meaning of rule 1.11(b).<sup>30</sup> However, the court did not indicate whether the trial court's order

26. *Id.* at 753.

27. Justice Opala dissented from the adoption of both the June and the September 1986 versions of rule 1.11(c). See *supra* note 2, at 1547-50. Relying on *Hubbard*, he dissented because he thought the better procedure to be for the trial court to rule on the issue of attorney fees at the time the trial was completed. *Id.* But see *State ex rel. Bd. of Affairs v. Neff*, 205 Okla. 205, 236 P.2d 681 (1951) (recognizing that where several related matters are joined in one case, there could be several successive final and appealable orders). Justice Opala also objected on the ground that subsection (c) provided for retroactivity of the rule to appeals brought before the effective date of adoption. *Id.* However, the retroactivity question is beyond the scope of this note.

28. 603 P.2d 754 (Okla. 1979).

29. *Id.* at 756.

30. Definitions of final orders or judgments are found at various places within the Oklahoma Statutes. See Rule 1.11(b) of the Rules of Appellate Procedure in Civil Cases, which provides: "(b) *Computation of Judgment Date and Definition of Order.* In cases tried to a jury, judgment is deemed rendered when the verdict is returned and accepted by the court without reservation." 12 OKLA. STAT. § 696 (1961). "If judgment on jury verdict is reserved or if the case is tried to the court, judgment is deemed rendered when its terms are completely pronounced by the judge and clearly resolve all issues in controversy." Rules of Appellate Procedure in Civil Cases, 12 OKLA. STAT. ch. 15, app. 2. In the same title, the definition of a final order or judgment is set out in rule 1.10(a): "Within the meaning of Part I the term 'final judgment or final order' is synonymous with the term 'decision.'" *Id.* Section 953 of title 12 defines a final order as:

An order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding or upon a summary application in an action after judgment, is a final order, which may be vacated, modified or reversed, as provided in this article.

*Id.* § 953. Section 681 of the same statute defines a judgment: "A judgment is the final determination of the rights of the parties in an action." *Id.* § 681.

Statutory definitions have not, however, settled the issue of when there is a final judgment from which to prosecute an appeal. See, e.g., *Presbyterian Hosp., Inc. v. Board of Tax-Roll Corrections*, 693 P.2d 611 (Okla. 1984); *McCullough v. Safeway Stores, Inc.*, 626 P.2d 1332 (Okla. 1981); *Shaw v. Sturgeon*, 304 P.2d 341 (Okla. 1956); *Centcorp Corp. v. Gulf Prod. Corp.*, 183 Okla. 436, 83 P.2d 181 (1938); *Wells v. Shriver*, 81 Okla. 108, 197 P. 460 (1921).

would have been a final judgment if the damages had been decided in absence of an attorney fee award.

*Hubbard* and *King* can be reconciled. Considering the holding in *Hubbard*, had the award of attorney fees been the only outstanding issue unresolved at the time of the appeal in *King*, the court would not have held the petition in error prematurely filed. In *Gilbreath v. Gilbreath*,<sup>31</sup> the court commented on *King*:

*King* involved an action on a promissory note in which the trial court granted summary judgment on the issue of liability only. We held that since no pronouncement had been made with respect to the issues of damages and attorney fees, the issue of liability was not appealable as a final judgment as required by Rule 1.11(b). In that case, *the issue of attorney fees was inseparably intertwined with the issue of damages*.<sup>32</sup>

The very next year the Supreme Court again considered a case, *In re Estate of Buckner v. Buckner*,<sup>33</sup> where attorney fees were an item of cost. The trial court initially assessed costs, excluding attorney fees, on September 25; the award of attorney fees was entered October 12, and the petition in error was filed October 27. The *Buckner* court held that there was no final judgment until attorney fees had been awarded, basing its decision on the trial court's apparent "intent" to award fees as part of the response to the Motion to Assess Costs.<sup>34</sup>

Perhaps this is the type of situation that, under subsection (d)(4) of the most recent rule, would result in an appeal being premature where the trial court intends to decide the issue of attorney fees before there is an appeal of any of the issues. However, the supreme court should amend subsection (d)(2) to make it clear that a party cannot appeal where the trial court reserves the issue.<sup>35</sup>

Most recently, the court addressed the effect of the failure to award attorney fees on final judgments in *Gilbreath v. Gilbreath*.<sup>36</sup> The decree in *Gilbreath* was granted July 23. The wife's timely motion for new trial was overruled and eight days later the husband filed his petition in error. The issue of attorney fees was decided on September 23 and the wife filed a cross-appeal on October 8, appealing both the September 23 ruling as to attorney

31. 56 OKLA. B.J. 929 (Apr. 20, 1985).

32. *Id.* at 930 (emphasis added).

33. 609 P.2d 1285 (Okla. 1980).

34. *In re Estate of Buckner v. Buckner*, 609 P.2d 1285, 1286 (Okla. 1980).

35. The supreme court reversed the award of attorney fees in *Buckner* finding they did not fall within the purview of either statute or contract. *See* *Hall v. Coe*, 412 U.S. 1 (1973); *Hanska v. Hanska*, 395 P.2d 648 (Okla. 1964). There are exceptions to the general rule that attorney fees are not to be awarded in absence of statute or contract. *See* *City Nat'l Bank & Tr. Co. v. Owens*, 565 P.2d 4, 8 (1977), recognizing an inherent equitable power in the court to award attorney fees regardless of the fact they are not authorized by statute or contract.

36. 56 OKLA. B.J. 929 (Apr. 20, 1985).

fees and the decree of divorce granted July 23. The court held that a decree of divorce is final and appealable when all issues other than the right to attorney fees are determined and not when a decision is made as to attorney fees. The court reasoned: "[I]f the trial court is empowered to retain jurisdiction over the request for attorney fees, then surely we have jurisdiction to hear the appeal from the divorce decree even though the trial court has retained jurisdiction over the request for attorney fees."<sup>37</sup>

Both the court of appeals and the supreme court found the decree of divorce final and appealable when rendered, not when a decision was made with respect to attorney fees.<sup>38</sup> Since the husband's petition in error was not premature, the court reviewed the issue of attorney fees.

In *Gilbreath*, the court never addressed the 1984 version of rule 1.11(c) designating an appeal premature where disposition of attorney fees is the only issue remaining for the trial court. This seems curious since the facts place the case squarely within the purview of the rule. However, *Gilbreath* was appealed in 1981 and any comments about the 1984 rule would only have been dicta. Yet, *Gilbreath* could have been decided under either the June or September versions of rules 1.11(c) and 1.11(d). Assuming that the trial court had not specifically reserved the issue of attorney fees, as provided for under subsection (d)(2) of the September version, the same result would have been reached. Had the trial court specifically reserved the issue, the petition in error would have been considered prematurely filed under the most recent rule.

#### *Recommendations: The Need for Change*

Allowing appeal of substantive issues in a case as soon as possible is supported by elements of fairness and equitable considerations. Parties whose property or other interests are bound up in litigation, often for years before there is a decision in the district court, should be allowed review by the appellate court at the earliest possible time. Even when the earliest date is chosen for filing a petition in error, the date of a ruling on the substantive issues, the parties will often have to wait anywhere from several months to years before the case is disposed of on appeal. There is no need to delay consideration of these substantive issues while waiting for a ruling by the trial court on award of attorney fees. In accordance with these considerations of equity and fairness, rule 1.11(c) provides that: "Failure of the trial court to award attorney fee [sic] in any action *shall not prevent* a party aggrieved by the trial court's decision of all other questions from seeking review of such judgment in this court by the timely filing of a petition in error."<sup>39</sup>

The question of when to appeal where attorney fees are at issue is one area of the law that justifies a bright-line rule. The Oklahoma Supreme Court ap-

37. *Id.* at 930.

38. *Id.*

39. See *supra* note 5 (emphasis added).

pears to have attempted to delineate such a definitive rule in its most recent version of rule 1.11(c), but a number of questions remain unanswered. Primary among these questions is whether an appeal must be taken prior to award of attorney fees in order to be timely, or whether a party may elect to appeal after all issues, including attorney fees, have been decided. In the absence of judicial guidance in the form of a clearly delineated rule, there will remain unanswered questions. Trial counsel might be reluctant to appeal the substantive issues without a ruling on attorney fees for fear appeal might waive the claim to attorney fees.

Another vexing question associated with the present rule is whether once there has been a final judgment as to all substantive issues and the time for appeal is past, may a party then request attorney fees or is he foreclosed from doing so by a final judgment in the case? The court might consider a rule specifying that where there is a final judgment of all issues except an award of attorney fees, the request for attorney fees must be filed within the same time period within which to make a request for a new trial.

The Oklahoma Supreme Court should seriously consider another amendment to the rule. Another revision of rule 1.11(c) would be preferable to explanation or application of the current rule in a prolonged case-by-case development. The following is a proposed draft of rule 1.11(c)-(f):

(c) *Appeal Prior to Allowance of Attorney Fees to a Party Shall Not Constitute a Premature Appeal Where the Trial Court Has Not Specifically Reserved the Attorney Fee Issue.* Where a trial court has decided all questions that were raised in an action but has not awarded an attorney fee, where a party is or may be entitled to an attorney fee, a party aggrieved by the trial court's decision on the issues that were decided may seek an immediate review of the decision by the timely filing of a petition in error, and the filing of a petition in error shall not prevent the trial court from awarding an attorney fee after the appeal has been lodged; *or* the aggrieved party may wait until after the trial court resolves the attorney fee issue to seek a review of all issues decided by the trial court; provided, however, that where the trial court specifically reserves ruling on the attorney fee issue when it decides the other questions in the action, the aggrieved party shall not seek a review of any of the issues decided by the trial court until the trial court has decided the attorney fee issue.

(d) *Appeal After Allowance of Attorney Fees.* Where the trial court resolves the attorney fee issue during the pendency of the appeal, a party aggrieved may, by filing a timely petition in error, or an amended petition in error, have a review of such ruling.

(e) *Attorney Fee Requests Shall Be Filed Within Ten (10) Days.* Where a court fails to award an attorney fee at the time it decides all other questions in an action, a party who is entitled to an attorney fee shall request the award of an attorney fee within ten (10) days after the decision on the other issues, whether or not he has already requested the award of an attorney fee or he waives his right to recover an attorney fee. A request for an attorney fee is not necessary where the court has reserved ruling on the attorney fee issue.

A request for attorney fees shall not extend the time period for filing a timely petition in error.

(f) Subsections (c) through (e) above shall be effective thirty (30) days from the first date of publication.<sup>40</sup>

The proposed rule would allow for the following options. It would (1) give the appellant the option of appealing either where the trial court decides all issues except attorney fees or waiting until all issues, including attorney fees, are decided; or (2) permit the appellant to appeal only after attorney fees have been awarded where the trial court reserves the issue. Subsection (3) would require an application for attorney fees to be filed within a certain period to avoid a waiver of the claim. The proposed rule in subsection (f) would eliminate questions of retrospective application by providing an effective date thirty days after publication.

### *Conclusion*

The practicing bar needs access to a rule so definitive as to leave no question as to when a petition in error must be filed where the trial court has decided all issues except attorney fees. The Oklahoma Supreme Court has gone through a succession of three rules in the last three years attempting to provide the bar with just such a rule. The effort is to be commended. Steps in the right direction have been taken, but one more step is necessary. The court should amend the rule a fourth time, leaving no doubt as to what procedure the trial attorney must comply with where he has applied for an attorney fee award. Such an amendment would avoid the necessity of judicial interpretation of the present rule.

The court has the opportunity to clarify important issues for attorneys who must operate under procedural rules and for jurists who must interpret and apply them. Under rule 1.11(c), a district court judge need not worry if an appeal of the substantive issues removes his jurisdiction over the issue of at-

40. The following is a section-by-section comparison of the present rule as promulgated by the supreme court and the rule proposed by the author.

Subsection (c) of the current rule allows for appeal prior to an award of attorney fees, but neither requires such appeal nor provides for an alternative to appeal after all issues, including attorney fees, have been decided. The proposed rule delineates the options of appealing prior to an award of attorney fees or waiting until all issues have been decided, *except* in a situation where the trial court specifically reserves the issue of attorney fees.

Subsection (d)(1) of the present rule is identical to subsection (d) of the proposed rule. Subsection (d)(2) is eliminated from this portion of the proposed rule and the issue of the trial court's reserved ruling on attorney fees is dealt with in subsection (c).

Subsection (e) of the proposed rule has no counterpart in the present rule. It requires an application for attorney fees to be filed within ten days after a decision in order to avoid waiver of such claim, except where the trial court has reserved its ruling on the issue. Such a request will not extend the thirty-day period for filing a timely petition in error.

Subsection (f) is also not found in the present rule. It provides for an effective date thirty days from the date of first publication to avoid some of the concerns raised by Justice Opala concerning retrospective legislation.