



# OADC OUTLOOK

A Publication of the Oklahoma Association of Defense Counsel

November 2006

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Winter Meeting

**2007  
Renewal Fees  
due December 31!**

Deadline for submissions to the next OADC Newsletter is January 31, 2007. Submissions should be sent to Alison Cave at:

cavealison@sbcglobal.net

Alison A. Cave  
PO Box 30424  
Edmond, OK 73003-008

## President's Letter

By Brad Jackson

Let me just say, this is a great organization. Of course, the organization is nothing without its members. As I look through the membership roles, I realize what a select and distinguished group of lawyers are involved in the OADC. I have no reservation about saying that we have the finest, brightest and most ethical attorneys in the state of Oklahoma. We are blessed with premier trial attorneys, and "the brains of the outfit," the researchers and writers.

Going one step further, I want to acknowledge and thank all of the 2006 officers, directors and committee members for their dedication and work to lead this organization. As you know, we cannot send out newsletters, present CLE seminars and file amicus briefs without a number of volunteers. We have had an excellent year thanks to the efforts of many OADC leaders.

2007 is upon us. Grady Parker will take over as president in 2007 and will continue to promote the OADC and its programs. However, he cannot do this alone. The OADC continues to need volunteers. If you are interested in getting involved in a premier organization of outstanding defense lawyers, I would encourage you to throw your hat in the ring as a volunteer and leader of OADC. There are a number of committees and other leadership positions available, and I would encourage each of you to carefully consider any areas in which you might become involved.

Finally, on another note, be sure to register for the products liability seminar which will take place on December 8, 2006. This promises to be a fantastic seminar with some of the very best products liability defense attorneys our state has to offer. In addition, this will give you another opportunity to secure CLE credit before the end of the year.

Registration information regarding the "Winter Meeting" will be coming out soon, so please reserve space on your busy calendar for January 19th and make plans to attend the meeting in Oklahoma City.

We look forward to seeing you in 2007!

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# 10<sup>th</sup> Circuit Appellate Procedure Basics

by David M. vonHartzsch and Jennifer H. Kirkpatrick

In the April OADC newsletter, the Appellate/Administrative Law Committee provided an article on the basics of filing an appeal in Oklahoma State Courts. This article will address the basics of filing an appeal to the United States Court of Appeals for the Tenth Circuit (“10<sup>th</sup> Circuit”). Although there are a few parallels, federal appellate procedure is substantially different than appellate procedure in Oklahoma State Courts.

As with all appeals, the analysis begins with jurisdiction. Because the 10<sup>th</sup> Circuit Court of Appeals is an inferior Article III court, its jurisdiction is limited to that conferred by federal statute. *See United States v. Padilla*, 589 F.2d 481 (10<sup>th</sup> Cir. 1978). Generally, the 10<sup>th</sup> Circuits jurisdiction is limited to appeals from: (1) final decisions (28 U.S.C. sec. 1291); (2) interlocutory orders related to injunctive relief, receiverships and cases arising from admiralty (28 U.S.C. 1292(a)); (3) interlocutory orders arising from patent cases (28 U.S.C. sec. 1292 (c)); (3) certified interlocutory orders (28 U.S.C. sec. 1292(b)); (4) class action certification orders (Fed.R.Civ.P. 23(f)); and (5) extraordinary writs (28 U.S.C. sec. 1651).

Once the determination is made that jurisdiction exists, it is critical to determine the time permitted for filing the appeal. If the government is not a party, the appeal must be initiated within thirty (30) days after the judgment or order appealed is entered. Fed.R.App.P. 4(a)(1)(A). If the government is a party, then the time period is extended to sixty (60) days. Fed.R.App.P. 4(a)(1)(B). Under Fed.R.App.P. 4, a judgment or order is “entered” at the time the District Court Clerk enters the judgment or order on the docket. Fed.R.App.P. 4(a)(7). An announcement of a judgment or order is not “entered” for the purposes of this rule. Practitioner’s Guide to the Tenth Circuit Court of Appeals, Fifth Revision, December 1998 at 15 (“Practitioner’s Guide”). An appeal initiated before a judgment or order is “entered” is premature and will be deemed filed on the date that the judgment or order is “entered” by the District Court Clerk. Fed.R.App.P. 4(a)(2).

An appeal is initiated by filing a Notice of Appeal (“NOA”) with the District Court from which the appeal is to be taken. Fed.R.App.P. 3. Form 1 of the Federal Rules of Appellate Procedure should be used, but in any event, the NOA must specify the party taking the appeal, the judgment being appealed, and the court to which the appeal will be taken. Fed.R.App.P. 3(c). Notice of the filing of the NOA will be

served upon all counsel of record by the District Court Clerk. Fed.R.App.P. 3(d)(1). The District Court Clerk will also transmit the preliminary record, consisting of the NOA and the docket entries, to the 10<sup>th</sup> Circuit. Fed.R.App.P. 3(d)(1).

Within ten (10) days of the filing of the NOA, the appealing party must file a docketing statement with the 10<sup>th</sup> Circuit. 10<sup>th</sup> Cir. R. 3.4(A). The purpose of the docketing statement is to categorize appeals and to identify potential jurisdictional defects. Practitioner’s Guide at 23. The docketing statement is not a brief and does not limit arguments or issues to be argued on appeal. *Id.* The docketing statement should not include argument and motions to strike or amend the docketing statement, or arguments over its contents, are strongly disfavored. *Id.* The docketing statement should be in the form of Form 1 of the 10<sup>th</sup> Circuit Rules. *Id.* Along with the docketing statement, the appellant should file an entry of appearance (Form 2 of the 10<sup>th</sup> Circuit Rules). In addition, the appellant must file either a transcript order form or a statement stating that no additional transcript will be ordered. Fed.R.App.P. 10(b)(1).

When the record is complete, the District Court Clerk will notify the parties and the 10<sup>th</sup> Circuit. Within forty (40) days of this notification, the appellant must file their opening brief. Fed.R.App.P. 31(a)(1). The appellee will then have thirty (30) days to file a response brief. *Id.* A reply brief may be filed within fourteen (14) days after the service of the response brief. *Id.*

The appellants brief must include: (1) a corporate disclosure statement required under Fed.R.Civ.P. 26.1; (2) a table of contents; (3) a table of authorities; (4) a jurisdictional statement; (5) a statement of the issues presented for review; (6) a statement of the case; (7) a statement of the facts; (8) a summary of the argument; (9) the argument (which must include a statement of the standard of review); (10) a conclusion; (11) a certificate of compliance; (12) a statement on oral argument; and (13) the name of the Court and Judge appealed. Fed.R.App.P. 28; 10<sup>th</sup> Cir. R. 28.2. In addition, the 10<sup>th</sup> Circuit requires the appellants brief to include specific references to the record and copies of all pertinent findings, conclusions, opinions or orders of the district judge and a transcript of any judicial pronouncement thereof (even if these items are also contained in the appendix to be filed). *Id.*; 10<sup>th</sup> Cir. R. 28.1. The appellees brief must also contain 1-13 above, however, some items may be omitted if the appellee is satisfied with the appellants statement of such. *Id.*

The 10<sup>th</sup> Circuit has very particular requirements regarding the form of briefs that can be found in Fed.R.App.P. 32 and 10<sup>th</sup> Cir. Rule 32.1.

Unlike in Oklahoma State Courts, in cases where all parties have retained counsel, the record completed by the District Court Clerk is retained with the District Court Clerk and the record on appeal consists of those documents included in the appendices filed by the parties (although the 10<sup>th</sup> Circuit has access to the entire record). *See* Practitioner's Guide at 26-27. The parties are encouraged to agree on the contents of the Appendix. Fed.R.App.P. 30(b)(1). If the parties cannot agree, Fed.R.App.P. 30(b)(1) provides a process to assist the parties in resolving any disputes. On motion by the parties, the 10<sup>th</sup> Circuit will entertain a motion to defer the filing of an appendix until after the briefing is concluded so that a joint appendix may be filed. Practitioner's Guide at 27; Fed.R.App.P. 30(c).

Once briefing has concluded, the 10<sup>th</sup> Circuit may set the matter for oral argument. Fed.R.App.P. 34; 10<sup>th</sup> Cir. R. 34.1. Otherwise, the court will consider the appeal and may or may not issue an opinion. 10<sup>th</sup> Cir. R. 36.1. If the 10<sup>th</sup> Circuit issues an opinion it will be either published or unpublished, although proposed revisions to the 10<sup>th</sup> Circuit Rules effective January 1, 2007 may render this distinction obsolete. A mandate is issued seven days following the rehearing process or the expiration of time allotted for such. Fed.R.App.P. 41(b). In 2001, the average time from the filing of the NOA to the issuance of an opinion was 11.2 months. Practitioner's Guide at 10.

As is indicated above, this is a very basic outline of the procedures required by the 10<sup>th</sup> Circuit. The Practitioners Guide cited herein, and available at the 10<sup>th</sup> Circuits website, is an excellent resource for a more detailed discussion regarding the appellate process, including a sample brief.

Nominations Wanted:  
**Outstanding Defense  
Lawyer of 2006**

Candidates for the award must have demonstrated outstanding commitment to the work of OADC and during the 2006 year have obtained one or more substantial litigation successes (not necessarily a defense verdict). Nominations must be submitted by December 30th.

Nominations Wanted:  
**Outstanding Young Lawyer of 2006**

Candidates for the award must have demonstrated outstanding commitment to the work of OADC and during the 2006 year have one or more of the following:

1. Published Articles
2. Pro Bono Work
3. Work with Law Students
4. Community Service
5. Successful Briefs /Assistance in a Trial

Send to all Nominations to: Brad Jackson  
[bjackson@rhodesokla.com](mailto:bjackson@rhodesokla.com)

# OADC

## Product Liability December 8, 2006

**Seminar Cost** (Includes Lunch)

\$ 100 OADC Members

\$150 Non-Members

9:00am - 4:30pm

**Location of Seminar:**

The Tower (Valliance Bank Building)

Downstairs Conference Room

1601 NW Expressway

Oklahoma City, OK

**7 CLE &  
1 Ethic Credit**

**Mail this form and payment to:**

OADC

2601 NW Expressway, Suite 703W

Oklahoma City, OK 73112

\_\_\_\_\_  
Name

\_\_\_\_\_  
Firm

\_\_\_\_\_  
Email

For a detailed agenda....  
[www.OADC.org](http://www.OADC.org)

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**The Oklahoma Association of Defense Counsel  
Board of Directors and President Brad Jackson**

Cordially Invite you to attend the

**2007 Winter Dinner and Dance**

Friday, January 19, 2007  
Gaillardia Country Club  
5300 Gaillardia Boulevard  
Oklahoma City, OK 73142

6:30pm Reception  
7:00pm Dinner

Please join us for a great evening of fellowship and fun as we honor our outgoing President Brad Jackson,  
welcome our incoming President Grady Parker and honor members for their outstanding service.



**Oklahoma Association of Defense Counsel**  
2601 NW Expressway, Suite 703W  
Oklahoma City, OK 73112