

**RESOLUTION NO. ONE
CIVIL PROCEDURE**

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its Legislative Program, as published in the *Oklahoma Bar Journal* and posted on the OBA Web site at www.okbar.org, proposed legislation amending 12 O.S. Sections 2011.1, 2005, 2005.2, 2006 and a new statute to be codified as 12 O.S. Section 2004.3 relating to sanctions for frivolous arguments made in a Motion to Dismiss, video recording of depositions, electronic service, and service by courier. (Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5) (Submitted by the Civil Procedures Committee. Adoption recommended by the OBA Board of Governors.)

Proposed New Statute

12 O.S. § 2004.3 Service by Courier or Delivery Service

A. In lieu of mailing a copy of process or other papers by certified mail, return receipt requested and delivery restricted to the addressee as required or allowed by Title 12 of the Oklahoma Statutes, a party or attorney may send same by commercial courier service, overnight delivery service, or other reliable personal delivery service to the party addressed, in each instance evidenced by a written or electronic receipt signed by the addressee showing to whom delivered, date of delivery, address where delivered, and person or entity effecting delivery.

B. In lieu of mailing a copy of papers by ordinary mail as required or allowed by Title 12 of the Oklahoma Statutes, a party or attorney may send same by commercial courier service, overnight delivery service, or other reliable personal delivery service to the party addressed.

C. When one of the methods described in this section is utilized, all deadlines based upon service shall be calculated in the same manner as if the service had been by mail.

D. This section shall not apply to the filing of any document with a court clerk. The filing of documents with a court clerk remains governed by other statutes and court rules.

Comment

Given ever-increasing problems with the speed and reliability of the U.S. Postal Service, allowing parties and attorneys to use reliable commercial couriers would further the goal of the "just, speedy and inexpensive determination of every action" set forth in 12 Okla. Stat. § 2001. This proposed statute is patterned after the 2000 amendment to Kansas Statute 60-303. Kansas attorneys have found the statute very useful, as is evidenced by one Kansas law firm's newsletter:

In 2000, the Kansas legislature overhauled K.S.A. 60-303 and provided an innovative way to serve an elusive defendant with process. Pursuant to K.S.A. 60 303(c), service upon a defendant may be made by return receipt delivery. Service by return receipt delivery includes" service effected by certified mail, priority mail, commercial courier service, overnight delivery service, or other reliable personal delivery service to the party addressed." Id. To be valid, the service need only be evidenced by a written or electronic receipt showing to whom it was delivered, the date of delivery, the address where it was delivered and the person or entity effecting delivery. Id.

* * * Pat Neustrom related success obtaining service by Federal Express which will deliver the package directly to the defendant and require signature. The signature can be taken off the internet for proof of service. Service was obtained by Pat on a defendant who was avoiding sheriff's service, but who was eager to receive a package from Federal Express. Summer, 2003, Quarterly Newsletter of Shamberg, Johnson & Bergman.

Proposed amendment to Okla. Stat. tit. 12, § 2005

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

A. SERVICE: WHEN REQUIRED. Except as otherwise provided in this title, every order required by its terms to be served, every pleading subsequent to the original petition unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party or any other person unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Section [12-2004] of this title.

B. SERVICE: HOW MADE. Whenever pursuant to this act service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service directly upon the party himself is ordered by the court or final judgment has been rendered and the time for appeal has expired. Service upon the attorney or upon a party shall be made by delivering a copy to him the attorney or the party or by mailing it or sending by third party commercial carrier for delivery within 3 calendar days to him the attorney or the party at the attorney's or the party's last-known address; or by electronic means if the attorney or party consents in writing to receiving service in a particular case by electronic means and the attorney or party provides instructions for making the electronic service consented to by the attorney or party. The required written consent and electronic service instructions may be made in the Entry of Appearance filed by the attorney or the party pursuant to subsection A of Section 2005.2 of this title, or the required written consent and electronic service instructions may be made in another pleading filed by the attorney or the party in the

case. The term electronic means includes communications by facsimile or electronic mail through the internet, commonly known as email. If no mailing address, physical address, or electronic means address for the attorney or the party is known, service is effected by leaving it with the clerk of the court. Delivery of a copy within this section means:

1. Handing it to the attorney or to the party; or
2. Leaving it at his the office of the attorney or the party with his the attorney's or party's clerk or other person in charge thereof; or
3. If there is no one in charge, leaving it in a conspicuous place therein; or
4. If the office is closed or the person to be served has no office, leaving it at his or her dwelling house or usual place of abode with some person residing therein who is fifteen (15) years of age or older. Except for service of the summons and the original petition, service by mail is complete upon mailing, service by commercial carrier is complete upon delivery to the commercial carrier, and service by electronic means is complete on transmission, unless the party making service is notified that the copy or paper served was not received by the party served.

C. SERVICE: NUMEROUS DEFENDANTS. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

D. FILING. All papers after the petition required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding. All papers filed with the court shall include a statement setting forth the names of the persons served and the date, place, and method of service.

E. FILING WITH THE COURT DEFINED.

1. The filing of papers with the court as required by this act shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

2. A duplicate of any paper shall be acceptable for filing with the court and shall have the same force and effect as an original. For purposes of this section a duplicate is a copy produced on unglazed white or eggshell paper by mechanical, chemical or electronic means, or by other equivalent technique, which accurately reproduces the

original. A duplicate that is acceptable for filing shall not be refused because any signatures thereon are duplicates. A carbon copy shall not be considered a duplicate for purposes of this section.

3. Papers may be filed by facsimile or other electronic transmission directly to the court or the court clerk as permitted by a rule of court. The Administrative Office of the Courts shall promulgate rules for the district court for the filing of papers transmitted by facsimile or other electronic transmission device. Rules for facsimile or other electronic transmission filing must have the approval of the Supreme Court.

4. The clerk shall not refuse to accept for filing any paper solely because it is not presented in proper form as required by these rules or any local rules or practices.

Proposed Committee Comments:

The proposed changes by the 2006 OBA Civil Procedure Committee are made to allow the service of pleadings and orders subsequent to the original petition by commercial carrier and electronic means as an alternative to service by mail. The term electronic means includes communications by both facsimile and electronic mail through the internet, commonly known as email. The proposed changes are derived generally from the current version of Rule 5(b), Federal Rules of Civil Procedure and are partly from the current version of Rule 25(c), Federal Rules of Appellate Procedure. Minor changes to make the statute gender neutral are proposed.

The provisions requiring the consent in writing of an attorney or party to receive service by electronic means and for permitting the attorney or party to provide instructions on how the electronic service consented to is made on the attorney or party are drafted in order that the attorney or party can specify that such service be directed to a specific or central location within an attorney's or a party's office for processing in a manner similar to the processing of incoming mail. In the case of service by email through the federal court system, many attorneys and/or law firms have designated alternative or dual service, both direct to the attorney or attorneys and to administrative support personnel. The required consent in writing and electronic service instructions can be made either within the Entry of Appearance required in subsection A of Section 2005.2 of this title or in another pleading in which the written consent and the electronic service instructions are provided. A companion proposal to amend Section 2005.2(A) is being made. Another companion proposal to amend subsection D of Section 2006 of this title to address the time in which to respond to the proposed new forms of service is also being made by the 2006 OBA Civil Procedure Committee.

Proposed amendment to Okla. Stat. tit. 12, § 2005.2

ENTRY OF APPEARANCE; OUT-OF-STATE COUNSEL;
WITHDRAWAL; ADDRESS OF RECORD

A. ENTRY OF APPEARANCE. Every party to any civil proceeding in the district courts shall file an entry of appearance by counsel or personally as an unrepresented party when no other pleading or other paper in the case by that counsel or party has been

filed, but no later than the first filing of any pleading or other paper in the case by that counsel or party. In the event a party changes, adds, or substitutes counsel, new counsel must immediately file an entry of appearance as set forth in this section. The entry of appearance shall include the name and signature of counsel or the unrepresented party, the name of the party represented by counsel, the mailing address, telephone and fax numbers, Oklahoma Bar Association number, and name of the law firm, if any. In the event that counsel or a party consents to receive service by electronic means in the particular case or civil proceeding pursuant to subsection B of Section 2005 of Title 12 of the Oklahoma Statutes, counsel or a party may give notice of the required written consent within counsel's or the party's entry of appearance. Counsel or the party giving the required written consent shall provide the electronic means address or addresses to which service by electronic means will be accepted by the consenting counsel or party. Copies shall be served on all other parties of record. Filing an entry of appearance as required by this section does not waive any defenses enumerated in subsection B of Section of Title 12 of the Oklahoma Statutes.

B. COUNSEL NOT LICENSED IN OKLAHOMA. All motions of counsel not licensed to practice in Oklahoma shall comply with the requirements of Section 5 of Article 2 of the Rules Creating and Controlling the Oklahoma Bar Association in Appendix 1 of Title 5 of the Oklahoma Statutes. The statement required by Section 5 of Article 2 of the Rules Creating and Controlling the Oklahoma Bar Association shall be in the form of an affidavit attached to the motion. The motion shall show that the requirements of Section 5 of Article 2 of the Rules Creating and Controlling the Oklahoma Bar Association are fulfilled. The required entry of appearance of the associate attorney shall be filed with the motion and affidavit.

C. WITHDRAWAL OF COUNSEL. A motion to withdraw may be filed at any time. All motions to withdraw shall be accompanied by a proposed order. No counsel may withdraw from a pending case without leave of the court. The counsel filing the motion shall serve a copy of the motion on the client and all attorneys of record. All motions to withdraw shall be signed by the party on whose behalf counsel has previously appeared or contain a certificate by counsel that:

1. The client has knowledge of counsel's intent to withdraw; or
2. Counsel has made a good faith effort to notify the client and the client cannot be located.

In civil actions, the court may grant a motion to withdraw where there is no successor counsel only if the withdrawing attorney clearly states in the body of the motion the name and address of the party. The order allowing withdrawal shall notify the unrepresented party that an entry of appearance must be filed either by the party pro se or by substitute counsel within thirty (30) days from the date of the order permitting the withdrawal and that a failure of the party to prosecute or defend the case may result in dismissal of the case without prejudice or a default judgment against the party. If no entry of appearance is filed within thirty (30) days from the date of the order permitting withdrawal, then the unrepresented party, other than a corporation, is deemed to be representing himself or herself and acting pro se. In all cases, counsel seeking to

withdraw shall advise the court if the case is currently set for motion docket, pretrial conference, or trial.

D. ADDRESS OF RECORD. The address of record for any attorney or party appearing in a case pending in any district court shall be the last address provided to the court. The attorney or unrepresented party must, in all cases pending before the court involving the attorney or party, file with the court and serve upon all counsel and unrepresented parties a notice of a change of address. Any attorney or unrepresented party has the duty of maintaining a current address with the court. Service of notice to the address of record of counsel or an unrepresented party shall be considered valid service for all purposes, including dismissal of cases for failure to appear.

E. NOTICE OF CHANGE OF ADDRESS. All attorneys and unrepresented parties shall give immediate notice to the court of a change of address by filing notice with the court clerk. If the attorney or unrepresented party has provided written consent to receive service by electronic means pursuant to subsection A of this Section, or in another pleading, the attorney or party shall include a change of electronic mailing address as part of the notice required in this subsection. The notice of the change of address shall contain the same information required in the entry of appearance, shall be served on all parties, and a copy shall be provided to the assigned judge. If an attorney or an unrepresented party files an entry of appearance, the court will assume the correctness of the last address of record until a notice of change of address is received. Attorneys of record who change law firms shall notify the court clerk and the assigned judge of the status of representation of their clients, and shall immediately withdraw, when appropriate.

Proposed Committee Comments:

The 2006 OBA Civil Procedure Committee proposes amending this Statute to facilitate or provide a standard or uniform method for an attorney or a party to give written consent to receive service by electronic means, including email, in accordance with the proposed amendment to subsection B of Section 2005 of this title. The proposed method of giving the required written consent to receive service by electronic means includes allowing the attorney or party who agrees to accept service by electronic means to specify the address or addresses to which service by electronic means will be accepted by the consenting counsel or party.

Okla. Stat. tit. 12, § 2006

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D. ADDITIONAL TIME AFTER SERVICE BY MAIL, THIRD-PARTY COMMERCIAL CARRIER, OR BY ELECTONIC MEANS. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, third-party commercial carrier, or by electronic means, three (3) days shall be added to the prescribed period; provided, however, when a summons and petition are served by mail, a defendant shall serve an answer within twenty (20) days or thirty-five

(35) days if pursuant to subsection A of Section 2012 of this title, after the date of receipt or if refused, the date of refusal of the summons and petition by the defendant.

Proposed Committee Comments

This change is made to complement changes to Section 2005 of this title to permit service by electronic means. The term "electronic means" encompasses both facsimile transmissions and electronic mail transmitted over the internet, commonly known as e-mail. The allowance of additional time to respond after service by electronic means is justified because although such communications are usually delivered instantly, such delivery does not assure that the communication comes to the immediate attention of the recipient. As an example, service by electronic means can be utilized after normal business hours and on weekends. The recipient could be out of his or her office during normal business hours. By allowing the standard three days additional time, time and day of the week restrictions do not have to be imposed on when service by electronic means can be made.

Okla. Stat. tit. 12, § 2011.1

Amendatory

In any action not arising out of contract, if requested the court shall, upon granting ruling on a motion to dismiss an action or a motion for summary judgment or subsequent to adjudication on the merits, determine whether a claim or defense asserted in the action by a nonprevailing party was frivolous. As used in this section, "frivolous" means the action claim or defense was knowingly asserted in bad faith, was unsupported by any credible evidence, was not grounded in fact, or was unwarranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. Upon so finding, the court shall enter a judgment ordering an order requiring such nonprevailing party to reimburse the prevailing party for reasonable costs, including attorney fees, incurred with respect to such claim or defense. In addition, the court may impose any sanction authorized by Section 2011 of Title 12 of the Oklahoma Statutes.