

THE APPELLATE REVIEW

Appellate Practice Section / State Bar of Georgia

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THE CHAIR'S MESSAGE

Thank you to all of you for your participation in the activities of the Appellate Practice Section. At more than 300 members, our small section is growing impressively and we hope to grow even more dramatically over the coming year. Please join us for a great calendar of activities over the coming year. We will begin the year on October 19, 2005, at 12 noon, at the offices of Sutherland Asbill & Brennan, 999 Peachtree Street, with a review of the many exciting cases pending in this term before the United States Supreme Court and the en banc Eleventh Circuit. Our special guests will be Neil Kinkopf, Professor of Constitutional Law at Georgia State University Law School and Susan Boelyn of the Georgia Attorney General's office. Our next event will be the "Hail to the Chiefs" Reception honoring Chief Justice Leah W. Sears of the Georgia Supreme Court and Chief Judge John Ruffin of the Georgia Court of Appeals, which will be held on November 3, 2005, at 6 p.m. at the Georgia Bar Center. Please see the flyer included with this newsletter giving details about these events and our schedule of meetings and events for the coming year. The schedule of meetings for the Executive Committee of the Section is also reflected on the flyer. All members of the Section are welcome to attend the meetings of the Executive Committee and to help us in planning for the Section. We invite your help with any of the events being planned by the Section and your ideas and suggestions about other events or activities you think the Section should sponsor or support. We look forward to seeing you on the 19th!

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FEDERAL PRACTICE SECTION DRAFTS CONSTITUTIONAL AMENDMENT VOTED INTO LAW DURING LAST ELECTION

In August of 2001, the Federal Practice Section was asked to explore the possibility of drafting proposed legislation to permit federal district courts to certify questions of Georgia law to the Georgia Supreme Court. At the time, Georgia law permitted only state and federal courts of appeals to certify such questions, requiring litigants in federal court to wait until after a case was on appeal to resolve unsettled questions of state law.

In drafting the proposed legislation, the Federal Practice Section discovered that this change in the law would require not only a change in the Georgia statute governing certifying questions of law, but also a change in the Georgia Constitution. Undeterred, the Committee submitted to the State Bar's Board of Governors proposals to amend both the state statute and the state constitution. The Board of Governors issued its approval, and the bill was submitted to the General Assembly, passing both the House

and Senate Judiciary Committees, only to die in the Rules Committee.

Again, undeterred, the Federal Practice Section resubmitted the proposals to the Board of Governors the following year, with a few minor changes, and it again was approved and sent to the Legislature. The second time around was the charm. The 2003 General Assembly passed the legislation, labeled House Bill 164, and the proposal to amend the Georgia Constitution to permit federal district courts to certify questions of Georgia law to the Georgia Supreme Court was placed on the ballot during the general election as Constitutional Amendment 2.

On November 2, 2004, Georgia voters passed Constitutional Amendment 2, and the ratified amendment became effective on January 1, 2005.

SUMMARY OF ELECTRONIC FILING IN THE ELEVENTH CIRCUIT COURT OF APPEALS AND IN THE APPELLATE COURTS OF GEORGIA, FLORIDA AND ALABAMA

Jill Pryor
Bondurant, Mixson & Elmore, LLP
Atlanta, Georgia / July 6, 2005

I. U.S. Court of Appeals for the Eleventh Circuit

The Eleventh Circuit requires electronic filing of briefs in addition to paper briefs. 11th Cir. R. 31-5 provides that “[i]n addition to and contemporaneous with the filing of any paper brief, counsel for any party or amicus curiae shall provide the Court with the same brief in electronic format.” The briefs must be uploaded to the Court’s Web site at www.ca11.uscourts.gov in Adobe Acrobat® PDF format. Each attorney admitted to practice in the Eleventh Circuit receives a login or user identification number for use on the Court’s Web site. The first time an attorney uses electronic filing, he must register on the Court’s Web site and create a password as directed by the Web site. The attorney’s login number and password remain the same for all appeals in which she appears as counsel in the Court. Only an attorney who has submitted an appearance of counsel form for a given appeal may upload a brief in that appeal.

Electronic filing does not affect the time for serving and filing a paper brief, “which is the official record copy of the brief, and is not affected in any way by providing electronic briefs.” 11th Cir. R. 31-5. The certificate of service in the electronic brief shall indicate the date of service of the paper brief. If corrections are required to be made to the paper brief, a corrected copy of the electronic brief must also be provided.

The electronic brief must include all contents required by the 11th Cir. Rules, including Rules 28-1 (Briefs-Contents), 28-2(Reply Brief) and 29-2(Amicus Brief), in a single electronic document or file. Appendices may, but do not have to, be included in the electronic brief. Hypertext links or bookmarks to cases, statutes and “other reference materials available on the Internet” are authorized. 11th Cir. R. 31-5(a). If the electronic brief is provided on CD-ROM (see below), documents referenced in hypertext links may also be included on the CD-ROM itself, provided the materials are in Adobe Acrobat® PDF format and there is no infringement of copyrighted works.

Although uploading to the Court’s Web site is strongly favored, with the Clerk of Court’s permission, an electronic brief may be provided in another format, including but not limited to floppy disk or CD-ROM. The Clerk’s Office will accept the electronic brief for filing in an alternative format if it is accompanied by a letter addressed to the Clerk requesting permission to file in the alternative format. Permission is not required to file courtesy electronic copies of the brief on diskette or CD-ROM in addition to the electronic upload to the Court’s Web site.

If the Clerk permits an electronic brief to be provided on either a floppy disk (IBM formatted, 3 1/2”) or CD-ROM (ISO Mode 1 (yellow book)), there are special rules that apply to each format. You must know in which format you are going to request permission to provide the electronic brief before you send the brief for filing, because the floppy disk or CD-ROM must be enclosed in an appropriate holder and fastened securely to the last page of each copy of the brief that is filed. Each disk or CD-ROM must be labeled with the following information: appeal docket number, short style of the appeal, type of brief (e.g., appellant’s appellee’s, appellant’s reply, etc., with or without hyperlinks), the document format (Adobe Acrobat® PDF), and the date of service. A copy of the disk or CD-ROM must also be served on counsel for each party separately represented, and the certificate of service must indicate service of the brief in both paper and electronic form.

II. Appellate Courts of the States of Georgia, Florida and Alabama

A. Georgia

1. The Supreme Court of Georgia

The Supreme Court of Georgia’s rules do not provide for electronic filing.

The Supreme Court permits filing by facsimile only with prior permission of the Court. Rule 2, Ga. S. Ct. A filing received by facsimile will be filed as of the date the facsimile is received only after the Court has received the original by mail. *Id.* Service upon opposing counsel must be shown on the facsimile. *Id.*

An electronic courtesy copy (on diskette or CD-ROM) of any paper brief may be filed with a motion for leave to file it. The motion must include a statement that the electronic copy is the same as the hard copy with the addition of hyperlinks or highlighting if applicable. The motion may be filed contemporaneously with the electronic copy. The Georgia Supreme Court tells us that it has never denied a motion to file an electronic courtesy copy.

original and copies that must be filed. The Court states that “compliance, if feasible, is greatly appreciated.” Notice to Attorneys and Parties (Rev. 02/23/05); Rule 12, 1st DCA (Fla.) (See www.1dca.org.) WordPerfect format is preferable, although the Court’s computer system can convert briefs prepared in “most programs.” Id. The Court requests that the diskette and the envelope containing it be labeled with the case number and name of the brief it contains.

The Court does not accept filings by fax unless specifically authorized or ordered by the Court.

Although it does not fall under the topic of electronic filing, (because it deals with technology) I also note that the First DCA permits video conferencing for oral arguments upon approval of the Court with the consent of opposing counsel when the request for oral argument by video conferencing designates the specific location for the appearance of counsel in the motion or request for oral argument. Videoconferencing for oral arguments is available from Miami, West Palm Beach, Tampa, Daytona Beach, Pensacola and Jacksonville. The party requesting oral argument by videoconferencing is responsible for payment of the fee for the videoconferencing.

b. Second DCA

When an appellate brief (or petition, response or reply in a certiorari proceeding) is filed, the Second DCA requests that an additional copy be filed on a 3 1/2” diskette in a “compatible WordPerfect format[. . . .]” The acceptable formats are listed in the Court’s Notice (effective June 1, 1995) (available on its Web site at www.2dca.org), and include most versions of MS Word. The brief on the diskette must be named the same as the Court’s file (case) number with a letter added at the end of the file number to designate the type of brief (I- initial brief (or petition if certiorari proceeding); A- answer brief (or response if certiorari proceeding); R-reply brief (or reply if certiorari proceeding); C-cross reply brief; S-supplemental brief; and X-amicus brief). A stick-on label must be affixed to the diskette containing the following information: DCA case number; style of case; attorney’s name who prepared the brief; attorney’s telephone number; word processing format used for the diskette; and a self-addressed, stamped envelope attached to the disk if the attorney wants it returned. The filing of the diskette does not affect the filing requirements for the paper original brief and copies.

c. Third DCA

The Third DCA requests that when an appellate brief is filed with the Court, an e-mail attaching a copy of the brief is sent to the Court at 3dca@flcourts.org. The brief should be saved as a single file in MS Word format. The file should be named with the case number followed by the type of brief.doc. For example, the initial brief in case number 03-726 should be named “03-726ini.doc”. Abbreviations for the other briefs are “ans” (answer), “rep” (reply), “cro” (cross-reply), “sup” (supplemental), and “ami” (amicus). The e-mail to which the file is attached should be title with the style of the case, case number, and type of brief. Notice (Nov. 2003).

This voluntary procedure does not affect the number, timing, or method of delivery of the paper briefs that are required to be filed under the Florida Rules of Appellate Procedure.

d. Fourth DCA

In addition to the usual number of required hard copies, effective July 1, 2005, the Fourth DCA requires filing of certain documents in electronic form. These documents include:

- a. All briefs in appeals under Rules 9.110, 9.130, 9.140, 9.141, 9.145, 9.146 and 9.160;
- b. All petitions and responses under Rule 9.100;
- c. All responses to Orders of the court; and
- d. All motions for rehearing or relief under Rules 9.330 and 9.331.

In addition, any transcript and any appendix must be filed electronically with the initial brief. The electronic filing shall be made on the earlier of the day of filing the paper original or the day of service. The official filing date is the date of filing the paper original.

Electronic filing must be made by transmitting the document as an attachment to an e-mail sent to: efilings@4dca.org. The attached documents must be in Microsoft Word, Corel WordPerfect, or .pdf (Adobe) format (except for transcripts, which may be submitted in the format used by the court reporter who prepared the transcript). The subject or reference line of the e-mail must contain the Fourth District case name and a case number if available.

LEGISLATIVE UPDATE

An attorney filing any paper document in the Fourth District shall include an e-mail address to receive communications from the court. See Admin. Order re: Electronic Filing dated 6/10/05, effective 7/1/05.

e. Fifth DCA

The Fifth DCA does not permit electronic filing.

C. Alabama

On March 1, 2005, the Supreme Court of Alabama adopted an “Appellate Court E-Filing” pilot project in Lee, Madison, Montgomery and Russell Counties for the purpose of evaluating electronic filing in cases appealed to the appellate courts of Alabama. The Court’s order authorizes the establishment of “Uniform Practices and Procedures” to be applied in those appeals filed under the pilot project. *Id.* The pilot project applies to appeals in which the notice of appeal is filed on or after April 1, 2005 and shall last for 12 months from March 1, 2005 unless extended by the Chief Justice for an additional six months. See Order of Supreme Court of Alabama dated 3/1/05.

The procedures for electronic filing under the pilot project can be found at www.judicial.state.al.us/efiling.cfm.

1. Supreme Court of Alabama

Except for the pilot project, the Supreme Court of Alabama has no rule permitting or requiring electronic filing of any kind; however, a copy of the brief on diskette or CD-ROM may be filed in addition to the paper brief. No motion, request or permission is required.

2. Alabama Court of Civil Appeals

Except for the pilot project, Alabama’s Court of Civil Appeals has no rule permitting or requiring electronic filing of any kind; however, a copy of the brief on diskette or CD-ROM may be filed in addition to the paper brief. No motion, request or permission is required.

3. Alabama Court of Criminal Appeals

Except for the pilot project, the Court of Criminal Appeals of Alabama does not permit electronic filing of any kind.

The 2005 legislative session made the following changes in Georgia appellate practice.

Class Actions. Along with specifying procedures for making class certification rulings, SB 19 modified O.C.G.A. § 9-11-23 to change the law regarding the appealability of those rulings. Before this change, the statute authorized an application for a discretionary appeal within ten days of an order granting or denying class certification. Now, the statute makes the certification decision a final decision, and an appeal from the order must be taken within 30 days of the order. All other action in the trial court is stayed pending the outcome of such an appeal.

Domestic Relations. HB 221 added “final judgments of child support” to the list of orders that are directly appealable under O.C.G.A. § 5-6-34(a). This change takes effect July 1, 2006.

Criminal Law. Among many other changes to criminal procedure and evidence, HB 170 modified O.C.G.A. § 5-6-34(b) to make explicit reference to the denial of a defendant’s motion to recuse in criminal cases as a decision “not otherwise subject to direct appeal.” It modified O.C.G.A. § 5-7-1(a) to add the denial of the state’s motion to recuse or disqualify a judge as a decision from which the state may take an appeal.