



The APPELLATE REVIEW

First Edition

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A Quarterly Newsletter of the Appellate Practice Section of the State Bar of Georgia

MESSAGE FROM THE CHAIR

By Laurie Webb Daniel, Section Chair
Holland & Knight LLP, Atlanta

Welcome to the Appellate Practice Section of the State Bar of Georgia. This new section was approved by the Board of Governors at the annual meeting of the State Bar in June 2000. State Bar President George Mundy appointed the initial Chair, Vice Chair and Secretary in October 2000, and now the Section is fully organized and actively pursuing the aims of its charter.

The purpose of the section, as stated in its bylaws, is "to foster professionalism and excellence in appellate advocacy and to encourage improvements in the appellate process." The work of the section will involve publishing newsletters, sponsoring programs and seminars, encouraging appellate pro bono representation, providing a forum for dialogue between the appellate bench and bar of this state, and advocating improvements in appellate procedure through legislation, when appropriate.

The need for the new section arose from the developing recognition of appellate advocacy as a distinct

practice area that involves a unique set of practice skills. Appellate practice is governed by an independent set of procedural rules that have only minimal overlap with those that apply to trial practice. Further, the approach to written and oral advocacy in the appellate context differs from most of the skills generally employed in trial practice.

Today, there are many members of the State Bar of Georgia who have practices that are limited to or focus primarily on appellate practice. The Appellate Practice Section will offer these members programs and activities that focus on their particular practice area. In addition, the new section will provide all members of the bench and bar in Georgia with an added resource, a source of valuable information regarding appellate practice in the state and federal court systems.

I have been thrilled with the enthusiastic response to the creation of the Appellate Practice Section from all sectors of Georgia's bench and bar. The Section's tremendous diversity reflects the interests of sole practitioners, big firm lawyers, government lawyers, defense lawyers, public service lawyers, and many others - not to mention the appellate judges, staff attorneys and clerks of the courts in this State who have participated in the organization of the Section.

We have several exciting events already in the works. The Section's luncheon during the State Bar's mid-year meeting will feature Judge Pope's address, *Lawyers Never Die, They Just Lose Their Appeal*. In the spring, we will present a full day seminar, *Victory From the Jaws of Defeat*. We also are planning a couple of brown bag lunch programs, Technology and Appeals and How to Build an Appellate Practice, and are discussing possible activities in conjunction with the Eleventh Circuit Judicial Conference in May and the

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annual meeting of the State Bar in June. Stay tuned for details.

This newsletter provides information about the Section's structure and membership. Please join if you have not done so already. Also, if you have any questions about our activities or suggestions for the Appellate Practice Section, please do not hesitate to contact me by phone (404-817-8533), e-mail

(ldaniel@hklaw.com), fax (404-541-4463), or the old-fashioned method (1201 W. Peachtree, Suite 2000, Atlanta, Georgia, 30309-3400). Likewise, feel free to share with us any thoughts that you may have on how to improve the rules governing appeals in this state. The clerks of the Georgia Supreme Court, the Georgia Court of Appeals, and the Eleventh Circuit are interested in our feedback on practice and procedure❖

EMERGENCY MOTIONS AND EXPEDITED APPEALS

By Edward Wasmuth, Smith Gambrell and Russell, LLP, Atlanta

In 2000, the Elian Gonzales and presidential election cases placed emergency appellate procedure in the spotlight. The rules in the federal and state appellate systems incorporate special procedures for emergency matters. These procedures, however, are not reserved for issues of national concern. Clients large and small are equally susceptible to unexpected developments that require fast-paced appellate remedies. This article summarizes the important rules and other guidance provided by the clerks' offices in the United States Court of Appeals for the Eleventh Circuit and the Georgia Supreme Court with respect to emergency motions and expedited appeals.

ELEVENTH CIRCUIT APPEALS

11th Cir. R. 27-1(b) sets forth the requirements for emergency motions. The motion (1) must be labeled "emergency motion," (2) must state the nature of the emergency and the time by which action must be taken, and (3) must discuss the traditional factors required to grant injunctive relief (likelihood of success on the merits, prospect of irreparable harm, harm to other parties if relief is granted, the public interest).

When we asked the clerk's office for advice on filing emergency motions, we were told that practitioners need to become familiar with the requirements of 11th Cir. R. 27-2, particularly those dealing with the contents of the motion. Counsel seeking a stay or request

for an injunction pending appeal also need to follow the requirements of FRAP 8 and 11th Cir. R. 8-1. Copies of all materials needed to decide the emergency motion should be filed with the motion. Practitioners should not assume that the court has access to a pleading or order in the district court record.

The clerk's office recommends that the party filing the emergency motion draw attention to it when filing it. Don't place the emergency motion at the bottom of a stack of other pleadings filed at the same time. Highlight the motion in the cover letter you send to the clerk.

The clerk's office also noted the importance of getting the district court clerk to expedite the transmission of the notice of appeal and other record items to the court of appeals. The notice of appeal, which starts the process, is filed in the district court. Until the notice and related papers arrive from the district court, the court of appeals has no "appeal" in which to entertain the emergency motion.

Counsel must make every possible effort to serve personally opposing counsel. If that is not possible, counsel must notify opposing counsel by phone. 11th Cir. R. 27-2(1). The other party will be allowed time to respond to the emergency motion. Giving immediate notice to the other side will allow the court to set a short response time.

Counsel must alert the clerk's office to the filing of the emergency motion. The clerk's office suggests that you give it as much advance notice as possible. Don't wait until you have finished the emergency motion to tell the clerk you are about to file it. Tell the clerk's office as soon as possible when the motion will be filed and by when relief is necessary.

In non-capital cases, counsel can file an emergency motion outside of normal business hours only if (1) the motion will be moot if a ruling is not obtained prior to noon of the next business day, and (2) if the motion seeks review of a district court's action, the emergency motion is filed within two business days of the filing of the district court order or action. If an attorney calls the clerk's office after hours, he or she will be given a beeper number to call for immediate help on filing emergency papers.

To expedite handling, the clerk's office can authorize the filing of papers by facsimile. The filing party thereafter must also submit an original and the required number of copies by conventional means. 11th Cir. R. 25-2. The clerk's office also may autho-

rize a party to file emergency pleadings by electronic means through the Eleventh Circuit website at www.ca11.uscourts.gov. 11th Cir. R. 25-3.

APPEALS TO THE GEORGIA SUPREME COURT

The Georgia Supreme Court does not have a special rule dealing with emergency motions. However, Rule 11 deals with requests for supersedeas and encompasses other requests for emergency relief.

When presenting a motion for supersedeas or other emergency relief, the applicant must include a copy of the notice of appeal and the order being appealed. The applicant must also pay the Court's \$80 filing fee. The Court requires actual service of the motion on opposing counsel. The clerk's office will confirm whether opposing counsel has been served and ask if a response will be made.

Although the motion need not be labeled "emergency," counsel making such a motion should bring to the attention of the clerk's office the time by which relief is needed❖

APPELLATE TIPS: RULE CHANGES

By Amelia Greeson Pray, Austell (changes to state appellate rules) and Laurie Webb Daniel, Holland & Knight LLP, Atlanta (changes to federal appellate rules)

Because appellate rules are highly technical and sometimes jurisdictional, a slight procedural error sometimes will result in the dismissal of an appeal without any consideration of the merits. To make matters worse, the rules change from time to time. Even the most recently published written materials can be out-of-date. Fortunately, the courts now are providing information about their most recent rule changes on their websites. Moreover, some of the new rules are designed to be more "user-friendly." We recommend, therefore, that you check the website of the relevant court for the most recent appellate rules as soon as you know that you have an appellate issue. Here are some of the recent appellate rule changes that you might not otherwise know about.

CHANGES TO THE RULES OF THE GEORGIA COURT OF APPEALS

The Court of Appeals of Georgia has issued new rules, effective December 14, 2000. The Court, no longer requiring the Appellant to file a separate enumeration of errors, has made housekeeping changes to its rules in this regard in Rules 16(b), 22, and 26. Rule 26(b) contains another rule change the Appellant will appreciate. The Court now gives the Appellant 20 days, instead of 10, to file the reply brief. In Rules 18(b) and 27, the Court has made some changes concerning records filed under seal and the sealing of briefs or motions. Rule 16(a) provides that the filing fee or suf-

ficient pauper's affidavit must accompany a motion for extension of time to file a Notice of Appeal made in the Court of Appeals. Rule 28 adds a new paragraph (g) providing that oral argument is always open to the public, but that counsel may move to exclude the public. Finally, in Rules 30(c) and 31(c), the Court limits applications for discretionary and interlocutory appeal to 30 pages in civil cases and 50 pages in criminal cases, exclusive of attached exhibits and parts of the record.

Following is the text of the changed rules, with the changes marked.

IV. EXTENSION OF TIME FOR NOTICE OF APPEAL, ETC.

Rule 16. Extension of Time for Filing.

(a) Pursuant to the provisions of OCGA §5-6-39, requests for extensions of time, which must be in writing, may be made only upon showing a bona fide effort has been made to obtain the extension from the trial court and the reason it could not be obtained. Any motion for extension of time to file a Notice of Appeal made in this Court shall be accompanied by an \$80.00 filing fee or sufficient pauper's affidavit.

(b) Extensions of time to file brief ~~and enumeration of errors~~ must be requested by motion and shall be subject to the Court's discretion. All extensions shall be by written order and no oral extension shall be recognized.

Failure to request an extension of time to file a brief and enumeration of errors prior to the date the brief ~~and enumeration of errors are~~ is due may result in the non-consideration of the motion and/or the dismissal of the appeal.

V. RECORDS AND TRANSCRIPTS

Rule 18. Preparation and Arrangement of Records and Transcripts.

(a) Records and transcripts, to include depositions, shall be printed on one side of white paper not less than letter size of good quality with ample spacing (at least double spaced) and margins so that they may be easily

read. The margin at the top shall be of sufficient space so that the transcript may be read when folded over at the top. Type size shall not be smaller than Courier 10 cpi, 12 point (or equivalent).

(b) Any records or transcripts delivered to this Court from the trial court, and sealed by the trial court, with an order of the trial court attached to the record, shall remain sealed until a motion is made to unseal the record and/or the record is unsealed by this Court. Counsel for any party may move this Court for an order to unseal or seal any record in the Court.

VI. ENUMERATION OF ERRORS

Rule 22. Filing

~~(a) Time of Filing.~~

~~The enumeration of errors shall be filed with the Clerk of the Court within 20 days after the case is docketed.~~

(a) Time of Filing.

Pursuant to OCGA § 5-6-40, the enumeration of errors, which shall be Part 2 of the appellant's brief, shall be filed within 20 days after the case is docketed. A separate enumeration of errors is not required.

~~(b) Physical Preparation.~~

~~Pursuant to OCGA § 5-6-40 the enumeration of errors shall be Part 2 of the brief and a separately filed enumeration of errors is not required.~~

(b) Jurisdictional Statement.

The enumeration of errors shall contain a statement of jurisdiction as to why this Court, and not the Supreme Court, has jurisdiction.

Rule 26. Time of Filing; Contempt; Dismissal; Service.

(a) Appellant's brief, ~~and~~ which shall contain as Part 2 an enumeration of errors, shall be filed within 20 days after the appeal is docketed. Failure to file within that time, unless extended upon motion for good cause shown, may subject the appeal to dismissal, and may subject the offender to contempt. See Rule 7 and Rule 13.

(b) Appellant may file a reply brief within ten 20 days from the date of filing of appellee's brief.

Rule 27. Structure and Content

(c) General Provisions.

(3) References to Record or Transcript.

(iv) No briefs or motions shall be filed under seal unless counsel has moved the Court for permission to file under seal and the Court has granted such motion.

VIII. ARGUMENT

Rule 28.

(g) Oral Argument Open to the Public.

Unless ordered by the Court, oral argument is open to the public. Counsel may move the Court to exclude the public, for a good cause shown. Such motion shall be filed not later than five (5) days prior to oral argument. News media are permitted to photograph, audio-tape or videotape oral argument pursuant to the Court's standing order regarding media in the Courtroom.

IX. APPLICATION FOR INTERLOCUTORY APPEALS

Rule 30. Applications

(c) Applications for interlocutory appeal pursuant to OCGA § 5-6-34(b) should have copies of all materials from the record tabbed and indexed. If not tabbed and indexed, the petition is subject to dismissal. The materials must be sufficient to apprise the Court of the appellate issues, in context, and support the arguments advanced. ~~There is no page limit for interlocutory applications.~~ Applications are limited to 30 pages in civil cases and 50 pages in criminal cases, exclusive of attached exhibits and parts of the record.

X. APPLICATION FOR DISCRETIONARY APPEAL

Rule 31. Leave to Appeal.

(b) Applications for discretionary appeal pursuant to OCGA § 5-6-35 should have copies of all materials from the record tabbed and indexed. If it is not tabbed and indexed, the petition is subject to dismissal. The material must be sufficient to apprise the Court of the

appellate issues, in context, and support the arguments advanced. ~~There is no page limit for discretionary applications.~~ Applications are limited to 30 pages in civil cases and 50 pages in criminal cases, exclusive of attached exhibits and parts of the record.

The complete rules of the Court of Appeals of Georgia can be found at the Court's web site at: <http://www.appeals.courts.state.ga.us>.

The Appellate Section of the Bar extends its thanks to William L. Martin, III, Administrator/Clerk of the Court of Appeals of Georgia, for providing the information about these rule changes.

**CHANGES TO THE RULES OF THE
GEORGIA SUPREME COURT**

The Supreme Court of Georgia has made only one change to its rules since July 1, 1998. The following rule took effect on June 23, 2000 concerning filing by mail.

Rule 15. FILING BY MAIL. The contents of properly addressed, registered or certified mail shall be deemed filed on the official United States Postal Service postmark date. Alternatively, a document will be deemed filed as of the date on which is delivered to a commercial delivery company for overnight delivery as evidenced by the receipt provided by the commercial delivery company. If there is no clear official or cancellation date stamped, the filing date shall be the date the filing is received.

Letters requesting an extension by certified or registered mail, or by overnight delivery, that do not reach the Clerk's office before the last day for filing, as required by Rule 14, will not be considered timely, but these may be filed by facsimile, as set out in Rule 2.

Sherie Welch, Clerk of the Supreme Court of Georgia, asked that we assure you that you can use the post office overnight delivery as well.

Unlike the Court of Appeals of Georgia, the Supreme Court of Georgia continues to require the Appellant to

file a separate and additional copy of the enumeration of errors at the time of filing of the briefs. See Rule 20. The easiest way to access the Court's website is to go to www.georgiacourts.org and click on "Supreme Court".

The Appellate Section of the Bar extends its thanks to Sherie Welch, Clerk of the Supreme Court of Georgia, for providing information about the rules.

CHANGES TO THE RULES OF THE ELEVENTH CIRCUIT

In 1999, the Eleventh Circuit implemented significant changes to the rules governing federal appeals in this circuit. Consistent with the amendment to Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the court adopted a word count limitation for principal briefs exceeding thirty pages and reply briefs exceeding fifteen pages.

The Court also made two series of changes to its local rules. First, the court adopted rules effective April 1999 that severely compressed the briefing schedule. If the appeal will require no additional transcripts beyond those already in the district court's record (such as in an appeal from a summary judgment ruling), then pursuant to 11th Cir. R. 31-1(a), the brief of appellant now is due to be filed 40 days from the date the record is "deemed completed" under 11th Cir. R. 12-1, i.e., the date the appeal is docketed in the Eleventh Circuit and assigned a number. Or, if the appellant has ordered a transcript, the record is "deemed completed" on the date the court reporter files the transcript in the district court clerk's office.

The Eleventh Circuit clerk typically includes with its notice of docketing an attachment that provides instructions for making proper record references in the briefs. It requires reference to the docket entries by docket entry number and volume of the record as prepared by the district court clerk. That attachment now contains a new section that takes into consideration the fact that the record may not have been filed by the time the appellant's brief is due to be filed. It states: "If volume numbers have not yet been assigned to transcripts by the court, record references to transcripts should be to the document number and page number. For example, Doc 83 - Pg 65 indicates Document Number 83 (a transcript), Page 65."

In October 1999, the Eleventh Circuit adopted a second set of rule changes, effective January 1, 2000, that pertain primarily to motions for extensions of time and penalties for failing to comply with the court's briefing schedule and other requirements in civil appeals. Under 11th Cir. R. 31-2(b), the clerk may grant a party's first request for an extension of time not exceeding seven calendar days if good cause is shown and the briefing schedule has not been established by court order. A party can obtain this short first time request over the telephone. If the request is for more than seven days, it will be acted upon only by the court. Under 11th Cir. R. 31-2(c), "the motion must be filed at least seven calendar days in advance of the due date." The rule goes on to provide that "[s]econd requests for an extension of time to file a brief or record excerpts, or to correct a deficiency in a brief or record excerpts, are extremely disfavored and are granted rarely."

With the adoption of 11th Cir. R. 42-2 and 42-3, the court added teeth to the time schedules by providing for the automatic dismissal of civil appeals on the first business day following the due date for an appellant's failure to comply with the briefing schedule without first filing a motion to extend time, or for failing to correct deficiencies in a brief within the time set by the court. Moreover, 11th Cir. R. 42-2(e) provides that such a dismissal can be reversed only under the strictest circumstances:

An appeal dismissed pursuant to this rule may be reinstated only upon the timely filing of a motion to set aside the dismissal and remedy the default showing extraordinary circumstances, accompanied by the required brief and record excerpts. Such a motion ... must be filed within 14 days of the date the clerk enters the order dismissing the appeal. The timely filing of such a motion, accompanied by the required brief and record excerpts, and a showing of extraordinary circumstances, is the exclusive method of seeking to set aside a dismissal entered pursuant to this rule...

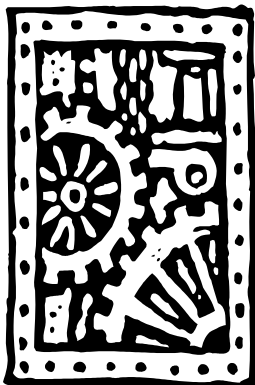
If an appellee fails to comply with the time table without seeking an extension, the penalty is the forfeiture of oral argument. 11th Cir. R. 42-2(f).

It has been a year since the new provisions in 11th Cir. R. 31 and 42 went into effect. The good news is that it is very easy to obtain an unopposed seven day first time request for an extension of time. The bad news is that there is still some confusion as to the due dates for briefs. In addition, the provision in 11th Cir. R. 31-2(c) that a request for an extension of more than seven days "must be filed at least seven calendar days in advance of the due date" has led some people to the mistaken belief that such a motion is timely as long as it is filed more than seven days prior to the due date.

The problem is that the court usually will not have time to rule on the motion before the due date if it is filed only eight, nine or ten days before. If the party does not submit the request well in advance of the due date,

it likely will not receive any extension before the due date, and will have to choose between filing a rough brief at the last minute or delaying the filing based on the assumption that the court will grant the request. If the party takes the second approach and the court denies the request, however, the appeal will be automatically dismissed. Moreover, the party cannot count on requesting the seven day extension authorized by 11th Cir. R. 331-2(b) if it has not received a ruling in time because at that point the seven day request would constitute the party's second request for an extension.

If you need more time for an Eleventh Circuit brief, therefore, the best thing to do is to ask for no more than seven days in the first place, if possible. If you know that you will need more time due to a conflict, be sure to submit your request well in advance of the due date❖



THE WORK OF THE SECTION

The Section can accomplish its objectives only through the active participation of its membership. To focus and channel our energies, we have adopted the committee structure described below. If you would like to join a particular committee, please contact the committee co-chairs or any member of the executive committee. Comments and suggestions on this committee structure also are welcome.

1. *The Executive Committee* is responsible both for overseeing the management of the Section's current activities and for long term planning. The committee is made up of the Section's officers, Laurie Webb Daniel, Section Chair; Chris McFadden, Section Vice Chair; David Webster, Section Secretary; plus three members at large: Teresa Roseborough, Frank Lowrey, and Bob Marcovitch.

2. *The Newsletter Committee* is responsible for publishing quarterly newsletters that will provide information regarding the Section's activities, address any new rules affecting state or federal appellate practice, present feature articles with practice pointers, and discuss recent cases of interest. Co-Chairs: Amelia Pray and Ed Wasmuth.

3. *The Program Committee* coordinates the Section's seminars and events. This Committee will be responsible for putting together the programs, arranging for CLE credit, and taking care of other details to make sure that the Section's activities are successful. Co-Chairs: Jim Grant and Ruth Marks.

4. *The Website Committee* will design and update the Section's website. The website will provide immediate access to information regarding the Section's structure, activities, and the feature articles published in the Section's newsletters. It also will supplement the official court websites with practical information regarding appellate practice in this state. Co-Chairs: Carl Greenberg and Jeff Lacy.

5. *The State Practice Committee* will focus on practice issues relating to the Georgia Supreme Court and Georgia Court of Appeals. Co-Chairs: Jake Arbes and Lisa Krisher.

6. *The Federal Practice Committee* will focus on practice issues pertinent to appeals in the federal court system. Co-Chairs: Amy Weil and Dorothy Kirkley.

7. *The Amicus Curiae Briefs Committee* will analyze the policies and procedure governing requests for amicus curiae briefs from the State Bar of Georgia. This committee also will be on the look-out for issues appropriate for a State Bar amicus curiae brief, and will be available to provide assistance with respect to the preparation or coordination of such briefs. Co-Chairs: Chilton Varner and Andy Head.

8. *The Special Projects Committee* will focus on projects of interest to the appellate bench and bar. This committee will have the responsibility of ascertaining what issues need further attention and of proposing solutions for addressing them. Co-Chairs: Mike Terry and Amy Lee Copeland ■



**Yes, I Would Like To Join
The "NEW" Appellate Practice Section
FOR HALF PRICE**

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