

Institute for Continuing Legal Education in Georgia
Civil Litigation for Younger Lawyers

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Common Mistakes When Appealing

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Thank you for the opportunity to meet with you this morning. Today, I would like to discuss with you some of the common and reoccurring mistakes I see lawyers make when practicing in the Court of Appeals of Georgia.

I. NOT FILING TIMELY

Please be sure you file timely. Not only is late filing a sloppy way to engage in appellate practice, in some cases it can be fatal.

Generally, the notice of appeal is filed with the clerk of the trial court within 30 days of the date of the order or judgment you are appealing. OCGA §5-6-38(a). However, under OCGA §44-7-56 an appeal from a judgment in a dispossessory action must be filed within 10 days of the entry of the judgment. See Lewis v. Country Wide Funding Corporation, 225 Ga. App. 440 (448 SE2d 66) (1997). In that case the Court held that under OCGA §44-7-56, any judgment in a landlord/tenant case shall be appealable, provided that any such appeal "shall be filed within ten days of the date of the judgment of the date such judgment was entered.....".

Please note also that §44-7-56 is not cross-referenced under §5-6-38(a) in the Appellate Practice Act. Also, you must determine if the proper avenue of appeal is a direct appeal or a discretionary application is as provided for in §5-6-35.

Interlocutory applications are filed within 10 days of the entry of the certificate of immediate review, which must be filed within 10 days of the entry of the order or judgment being appealed. OCGA §5-6-34(b). A grant of certificate of immediate review is purely discretionary with the trial court. Most discretionary applications are filed within 30 days of the order or judgment being appealed.

Failure to file timely under §§5-6-34 and 5-6-35 is jurisdictional and will most likely result in the dismissal of the direct appeal or the application. In Jordan v. Caldwell, 229 Ga. 334 (191 SE2d 530) (1972) the Supreme Court held the "proper filing of a Notice of Appeal is an absolute requirement to confer jurisdiction upon the appellate court."

Failure to file briefs timely under the Court's rules may result in the dismissal of the appellant's appeal and subject the offender to contempt, but it is not jurisdictional. Failure of the appellee to file timely may result in non consideration of the appellee's brief and/or a finding of contempt. Rules 26(a) and (b). There is no requirement to file a response to an application. If you cannot file your brief timely, you may request, by motion, an extension of time to file your brief and/or enumeration of errors. The motion should be filed before the date the brief is due. Appellants must file a single, separate enumeration of errors.

Do not pressure the trial court clerk to send up a record until it is complete. All orders on motions for new trial, JNOV and the like should be entered in the record. All transcripts should be filed. Once the case is docketed in the Court of Appeals, the two-term requirement of the Constitution begins to run. Ga. Const. 1983, Art. VI, Sec. IX, Par. II. Without a complete record and the appellant's brief and enumeration of errors, the Court cannot begin to work on the case.

Before Livingston v. The State, 221 Ga. App. 563 (472 SE2d 317) (1996), the act of filing the notice of appeal prematurely was generally fatal. However, under Livingston, the Court said that a notice of appeal which was filed prematurely could ripen into a notice of appeal which can confer jurisdiction on the appellate court. The better practice is to file timely under the statutes.

II. NOT READING YOUR DOCKETING NOTICE

When your case is docketed, read your docketing notice. It contains important and helpful information. It tells you the:

- a) docketing date
- b) briefing schedule
- c) filing fee and the fact that the clerk cannot receive the brief without the filing fee or sufficient pauper's affidavit.

and it:

- d) explains the certified mailing rule
- e) gives the tentative oral argument dates
- f) tells the Division to which the case is assigned and the judges on that Division
- g) explains what to do if you do not receive an oral argument calendar.

Along with the docketing notice, the Court sends out its special instructions regarding requesting oral argument. A sample of the docketing notice and the special instructions are attached as Appendix 1.

III. REQUESTING ORAL ARGUMENT

A request for oral argument must be filed within 20 days of docketing and must state with specificity why the Court would benefit from oral argument. Rule 28(a). A motion for the extension of time to file the brief does not extend the time to file a request for oral argument. Do not assume the Court will have the brief or briefs before the Court when ruling on the request. The request should be self contained. In other words, it should be able to stand alone, without the brief, in communicating to the Court why oral argument would be beneficial and/or important.

Do not say: Oral argument is necessary in case the Court needs to ask some questions.

Do not say: This is a case of first impression. If it is a case of first impression, go further and state what the first impression is and how oral argument will assist the Court in reaching the proper decision. The fact that you believe the matter is a case of first impression may or may not be the case.

Do not say: The case has a complicated factual situation, but rather say what that factual situation is, what facts are in dispute, and how the factual situation relates to the Court's decision of the case and how oral argument will aid the Court in deciding the case.

IV. FAILURE TO FOLLOW THE RULES IN FILING DOCUMENTS

Please remember when filing documents with the Court of Appeals, except for enumeration of errors, Court rules require an original and two copies. Rule 6. All filings should be backed with a white manuscript cover and contain a Certificate of Service. Rule 1. The Court is prohibited from receiving any filings without a Certificate of Service. Service means copies have been furnished to opposing counsel before being offered for filing with the Court. Rule 1(a).

Briefs are limited to 30 pages in civil cases and 50 pages in criminal cases. Rule 23(e). The type or font size should be Courier 10 cpi, 12 point or equivalent. Rule 1(b). By equivalent, the rules mean 10 characters per inch. The Court does not sit around measuring font size and margins, however, if opposing counsel raises the issue, the Court will address it.

Do not forget to sign your pleadings, especially the original. Please remember to include costs. The \$80.00 filing fee or a pauper's affidavit must accompany the application or the clerk is

prohibited from receiving same. OCGA §5-6-4. Please make sure the check goes into the envelope before you mail the application.

Please make sure your Bar number, address and telephone number are included on all pleadings. It would be nice if you would put opposing counsel's telephone number on the Certificate of Service, but that is not required. You must notify the Court if you have a change of address or telephone number during the pendency of your appeal. Rule 9(f).

V. FILING APPLICATIONS

If applications are not filed timely, the result may be dismissal of the application. Time frames are jurisdictional with applications. There are no extensions of time permitted in filing applications or responses. OCGA §§5-6-34 and 35 and Rule 16(b). The Court must dispose of applications within 30 days of filing of the application. Service in applications should be made before filing with the Court according to the statutes. OCGA §§5-6-34(b) and 35(d).

Please include a stamped "filed" copy of the order you are appealing and the Certificate of Immediate Review in interlocutory applications. Since the time frames are jurisdictional, the Court must know when the orders were entered in relation to when the application or Certificate of Immediate Review was filed.

Applications should be tabbed, indexed and signed with an original and two copies. There is no page limit to applications since the Court does not know how much of the record needs to come before the Court in order for the Court to decide if there is a likelihood that reversible error was committed at the trial court. Responses to applications are not mandatory, but are due within 10 days of docketing. The Court may not wait 10 days to deny or dismiss an application. The Court will receive a late response, but the Court will not necessarily wait on a response filed after 10 days.

Replies by the appellant to responses are permitted, but again the Court has a short window in which to grant or deny an application.

VI. **CERTIFIED MAIL RULE**

Probably the most misunderstood rule of the Court and one which causes most heartaches and headaches is the certified mail rule. Rule 4.

Here is how to comply with Rule 4. Mail the filing by certified or registered mail. Affix sufficient postage. Have the official United States Postal Service cancellation postmark date stamped on the envelope or the container. **WE WILL NOT ACCEPT YOUR OFFICE METER DATE.**

You must get the round or barrel stamp on the envelope, or buy the meter strip at the Post Office. **ALWAYS GET YOUR RECEIPT STAMPED.** The United States Postal Service will always stamp your receipt, however, they may not always stamp the envelope or your postage. If the certified mail comes in without the official United States Postal Service cancellation postmarked date or stamp on the envelope or the container, you can provide the Court with your receipt or a copy of your receipt to prove your timely mailing.

THE CERTIFIED MAIL RULE DOES NOT APPLY TO MOTIONS FOR RECONSIDERATION. Motions for Reconsideration are no longer a condition precedent to filing and intent to apply for certiorari.

Some examples of correct and incorrect certified mailings are attached as Appendix 2.

VII. **MOTIONS TO EXPEDITE**

Please do not file Motions to Expedite. The two-term rule requires expedition of every case. However, there are statutory and policy requirements that compel the Court to expedite certain cases.

These are:

1. (1) Civil cases in which the State of Georgia is a plaintiff. OCGA §9-10-1.
- (2) Criminal cases in which the defendant is incarcerated. OCGA §5-6-43(c).
- (3) The Parental Notification Act. Ga. Const. 1983, Art. VI, Sec. 1, Par. IV; OCGA §§15-1-5 and 15-3-13.

By Court policy the Court expedites child custody matters, appeal bonds, appeals from supersedeas in civil cases and Rule 40(b) Emergency Motions. Even if the Court grants a motion to expedite an appeal, or even if a statute requires expedition, once the draft opinion leaves one judge's office, that office loses control over that case. If there is a dissent, then the case must be reviewed by four other judges' offices and possibly seven more. All of this takes time.

VIII. APPLYING FOR CERTIORARI

When applying for certiorari to the Supreme Court of Georgia, you may either file a motion for reconsideration with the Court of Appeals or a notice of intent with the Court of Appeals. The motion for reconsideration must be physically filed in the clerk's office within 10 days of the date of the order or opinion you are appealing. Rule 37(b). You must file the notice of intent with the clerk of the Court of Appeals within 10 days of the date of the order denying the motion for reconsideration or 10 days of the date of the order or opinion you are appealing, if you do not apply for motion for reconsideration. Rule 38(a)(1). The notice of intent may be filed by following the certified mail rule. The purpose of the notice of intent is to alert the clerk of the Court of Appeals

to retain the remittitur until such time as the Supreme Court directs the Court of Appeals to send out the remittitur or until certiorari has been abandoned.

When you actually file your application for certiorari with the Supreme Court of Georgia, please file a notice of filing application for certiorari. Rule 38 (a)(2). This directs the clerk to continue to hold the remittitur. Once the application for certiorari is filed with the Supreme Court, jurisdiction passes from the Court of Appeals to the Supreme Court. The Court of Appeals will take no further action on the matter until it is directed by the Supreme Court.

Under the Court of Appeals record retention schedule, the court holds the record for one year after the remittitur date. At that time, the records which are copies from the trial court, are recycled. If you anticipate a case will come back to the Court of Appeals or if you are going to apply for certiorari in the Supreme Court of United States, you must notify the clerk, in writing, to maintain or hold the record, and why it should be held. Also, if you wish to retrieve the record, you must notify the clerk to hold the record before the expiration of one year after the remittitur date and make arrangements to come and pick up the record. The clerk's office cannot mail the record to you, even on a collect basis.

The Court of Appeals of Georgia does not stay remittiturs on applications for certiorari to the Supreme Court of United States. If you want to request that the Supreme Court of United States direct the Court of Appeals of Georgia to hold the remittitur or to recall the remittitur, you may do so.

IX. GNAT BITES

Here are some things you should avoid when practicing in the Court of Appeals. I call them gnat bites. They are not really big things but they can be aggravating to clerk's office personnel.

(1) Requesting a stamped file copy and not sending an extra copy.
(2) Requesting stamped file copy and not sending return postage.
(3) Requesting stamped file copy and not sending sufficient return postage.

- (4) Not tabbing and indexing applications.
- (5) Not binding or putting together applications.
- (6) Coming late for oral argument.
- (7) Not checking in with the clerk in the courtroom for oral argument.
- (8) Coming to oral argument or to be sworn-in without proper attire.
- (9) Walking in the clerk's office door at 4:30 p.m. with a filing.
- (10) Pounding on the clerk's office door at 4:31 p.m. with something to be filed.
- (11) Being gruff or rude to my staff.
- (12) Purchasing copies without a check or correct change.
- (13) Calling about your case without the case number.

IX. CONCLUSION

Please remember that we are happy to help you with any questions that you have about rules and procedures of the Court of Appeals of Georgia. Do not hesitate to call me or my staff. My direct line is (404) 657-8352.

Please review your pleadings before filing them with the Court. I will give you an example of what was received in an application in the Court of Appeals not long ago. Included in the original of the application was two pages of an attempt at humor listing 100 reasons it is great to be a guy and 10 things that are not great about being a guy.

Thank you for the opportunity to speak to you and if you have any questions I will be happy to answer them now or talk to you later.

Again, thank you.