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UNDERSTANDING THE COURT OF APPEALS

WHAT TO DO AND WHAT NOT TO DO WHEN PRACTICING IN THE COURT OF APPEALS

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Thank you for allowing me to be a part of your seminar. This morning I want to speak to you about some of the things you should do and should not do when practicing in the Court of Appeals of Georgia. Also, I have some parting gifts for you, copies of our Court rules, our Court History and some suggested standards of review.

I. DOCKETING NOTICE

As soon as the clerk's office receives the record from the trial court, and transcript if it is to come up with the appeal, the case will be docketed, if it is physically able to be docketed. As soon as the case is docketed, a docketing notice will go out to the parties. Please read the docketing notice. It contains the briefing schedule and other important information. File the docketing notice with your case file, but before you do that make a copy of the docketing notice to give to your attorney.

Tickle your attorney's calendar with the date that the brief and enumeration of errors are due. Do a memorandum to the attorney telling him/her the tentative oral argument dates and also the judges on the panel. All of this information is contained in the docketing notice.

II. FILING BRIEFS

The appellant's brief is due 20 days after the appeal has been docketed. Rule 26(a). Failure to file the brief within that time, unless an extension has been granted, may cause the appeal to be dismissed and may subject the offender to contempt, or both.

Briefs are to be filed as an original and two copies. Make sure that the briefs have been signed and contain a signed Certificate of Service. All documents filed in the Court of Appeals must contain a Certificate of Service. Rule 1(a). Documents which do not contain a Certificate of Service cannot be received by the clerk.

The physical preparation of the brief should be as follows:

1. Letter sized (8½ inch x 11 inch) white paper;
2. Bound at the top or sides with staples or round head fasteners;
3. Double spaced, including footnotes and in text quotes;
4. Font or type size shall be no smaller than courier 10 cpi, 12 point (or equivalent);
5. All documents filed with the Court, except letters, must be backed with a white manuscript cover of recyclable paper, heavier than regular stationary type paper. Rule 1(b)

A single separate original copy of the enumeration of errors must be filed within 20 days of docketing. Rule 22. The physical preparation of the enumeration of errors shall follow generally the rules of the physical preparation of the brief. The enumeration of errors must contain a statement of jurisdiction explaining why the Court of Appeals, and not the Supreme Court has jurisdiction of the appeal. The enumeration of errors shall be deemed to include and present for review all judgments necessary for a determination of the error specified.

The jurisdiction of cases which are appealed to the Court of Appeals are all of those cases which are not otherwise appealable to the Supreme Court. The jurisdiction of the Supreme Court is set out in the Constitution of the State of Georgia. The exclusive appellate jurisdiction of the Supreme Court is all cases involving the construction of a treaty or of the Constitution of the State of Georgia, or of the United States and all cases in which the constitutionality of a law, ordinance or constitutional provision has been drawn in question. Ga. Const. 1983, Art. VI, Sec. VI, Para. II.

The general appellate jurisdiction of the Supreme Court of Georgia, which may be provided by law, that is, changed from time to time by the legislature, is as follows:

- (1) Cases involving title to land;
- (2) All equity cases;
- (3) All cases involving a will;
- (4) All habeas corpus cases;
- (5) All cases involving extraordinary remedies;
- (6) All divorce and alimony cases;
- (7) All cases certified to it by the Court of Appeals;
- (8) All cases in which a sentence of death was imposed or could be imposed. Ga. Const. 1983, Art. VI, Sec. VI, Para. III.

If the case does not fall into one of these categories, then it is properly appealed to the Court of Appeals of Georgia. On occasion, the Supreme Court may transfer a case to the Court of Appeals of Georgia, even though it is one in which the general appellate jurisdiction would be to the Supreme Court of Georgia. The Supreme Court does this when that Court feels the law in a particular area is well settled.

A direct appeal may be filed in either court; it will be transferred to the proper court, without penalty to the appellant, as long as the appeal is timely filed. When in doubt, file in the Supreme Court of Georgia, that way the case gets transferred only once.

III. REQUESTS TO ARGUE

A request for oral argument must be filed within 20 days of docketing by filing a separate document, an original and two copies. An extension of time to file a brief and enumeration of errors does not extend the time to file a request for oral argument.

A timely request for oral argument is decided by three judges. When a case is docketed with the Court of Appeals of Georgia, it is assigned to a judge and a division. One judge on the division is primarily responsible for authoring the opinion. The request for oral argument goes first to that judge. If that judge grants the request for oral argument, the case goes on the oral argument calendar. If that judge denies a request for oral argument, it circulates to the other two judges on the panel, and the vote of any one judge on the panel puts the case on for oral argument. An untimely request is passed on only by the judge to whom the case is assigned for the purpose of drafting the opinion.

The request for oral argument should state with specificity why the Court would benefit from oral argument. A request for oral argument which states that oral argument is necessary because the court might have questions will generally be deemed insufficient. The same is true of a request which says the case is one of first impression. If the case is one of first impression, you should state what the first impression is.

IV. MOTIONS

Anytime you wish the Court to take action in a particular matter, you must file a motion. Responses to motions are due as soon as you deem it appropriate. There is no 10 day rule in which to respond to motions nor is there a three day grace period for mailing pleadings. Motions should be filed as an original and two copies and follow the same physical form as briefs. Motions for

reconsideration must be physically in the Court within 10 days. A certified mail rule does not apply to motions for reconsideration.

V. **ORDERS AND OPINIONS**

Orders and opinions are mailed the same day they are issued, that is the same day they are dated. The proper way to contest an order or opinion is by filing a motion for reconsideration.

Motions for reconsideration must be filed with 10 days of the date of the order or opinion. Motions for reconsideration are deemed filed only when received in the clerk's office and clocked in by clerk's office personnel. Rule 4. A motion for reconsideration which is left outside the clerk's door, or pushed under the clerk's door, is not sufficient nor is it deemed filed.

VI. **NOTICE OF INTENT**

The purpose of the notice of intent is to alert the clerk's office to hold the remittitur. The remittitur is a document which goes out after the Court has completed its work on a particular case. The remittitur goes to the clerk of the trial court, and returns the jurisdiction to the trial court. Once the trial court receives the remittitur, jurisdiction is transferred back to the trial court, and the trial court may carry out any sentence or execute judgment.

The notice of intent must be filed within 10 days of the date of the order denying the motion for reconsideration, or within 10 days of the date of the opinion or the order disposing of the case. A motion for reconsideration is no longer a condition precedent to apply for certiorari with the Supreme Court of Georgia.

The notice of intent, unlike the motion for reconsideration, may be filed by following the certified mail rule. After the application for certiorari has been filed with the Supreme Court, a notice of filing application should be filed with the Court of Appeals. Rule 38(a)(2). Both the notice

of intent and the notice of filing application for certiorari should be filed as an original and two copies, with service to opposing counsel.

VII. CERTIFIED MAIL RULE

Probably nothing causes more headaches and heartaches than the certified mail rule. It needs to be subtitled the "its my secretary's fault rule" because rightly or wrongly you get blamed when there is noncompliance with the rule.

Rule 4 is the certified mail rule. Basically, that rules says that any document, except a motion for reconsideration, which is mailed by certified or registered mail, and which has the official United States Postal Service cancellation postmark date on the envelope or the container, shall be deemed filed on the date it is mailed.

Here is how to comply with the certified mail rule:

- (1) Mail the document by certified or registered mail;
- (2) Obtain the official United States Postal Service cancellation postmark date on the envelope or the container;
- (3) Your office meter date or Pitney Bowes meter is not sufficient;
- (4) Always get the receipt stamped or hand canceled;
- (5) Purchase a dated mailing meter strip from the United States Postal Service.

If a document is mailed by certified or registered mail but does not contain the official United States Postal Service cancellation postmark date, it does not comply with the rules. The Court needs the round or barrel stamp on the envelope or your receipt in order to know the date the document was mailed.

VIII. APPLICATIONS

Discretionary and Interlocutory applications must be filed as an original and two copies with a certificate of service. Again, make sure the applications and the certificate of service are signed by counsel.

The applications should be tabbed and indexed. By tabbing and indexing, I mean, that the documents or exhibits which are referred to should be tabbed as "A, B, C etc." or "1, 2, 3 etc." and should be listed in an index. Remember, the time frames with applications are jurisdictional. An application which is not filed timely will be dismissed by the Court for lack of jurisdiction. Responses to applications are due within 10 days, but are not required.

Applications must contain a stamped file copy of the order you are appealing or in case of an interlocutory application, a stamped file copy of the order and a stamped file copy of the certificate of immediate review. Without a stamped file copy of the order you are appealing or the certificate of immediate review, the Court cannot ascertain if you complied with the time frames.

The Court of Appeals does not have equity jurisdiction. We are bound strictly by the law. The law says a discretionary application must be filed within 30 days of the date of the entry of the order or judgment of which you are complaining or within 10 days of the entry of the certificate of immediate review if you are filing an interlocutory application.

Applications must be accompanied by the \$80.00 filing fee or sufficient pauper's affidavit, or the clerk is prohibited from receiving same. OCGA §5-6-4. Again, no extensions are granted in applications. Rule 16(b).

IX. IMPORTANT TIME FRAMES

Some time frames are jurisdictional under the Appellate Practice Act. That is, if certain documents are not filed within a certain time frame or period, then the appellate court does not have jurisdiction to entertain the matter. Other time frames are required by the rules. Failure to follow time frames required by the rules may result in the dismissal of the appeal, if you are the appellant, and/or may result in contempt of court. Rule 26 (a). Failure of the appellee to file timely by the rules may result in non-consideration of the appellee's brief and/or contempt. Rule 26(b). The following is a list of documents which are filed pertaining to appeals and the applicable time frames:

(a) Notice of Appeal

The notice of appeal is filed with the clerk of the trial court within 30 days of the date of the entry of the order or judgment you are appealing. OCGA §5-6-38. However, under OCGA §44-7-56, an appeal from a judgment and a dispossessory action must be filed within 10 days of the entry of the judgment. See Lewis v. County-wide Funding Corporation, 225 Ga. App. 440 (484 SE2nd 66) (1997). These time frames are jurisdictional, and failure to timely file may result in the dismissal of the appeal.

(b) Interlocutory Applications

Interlocutory applications must be filed within 10 days of the date of the entry of the certificate of immediate review. OCGA §5-6-34(b). The application is filed directly with the Court of Appeals or the Supreme Court, whichever has jurisdiction. Failure to timely file the application deprives the Court of jurisdiction to hear the application.

The certificate of immediate review must be filed within 10 days of the date of the order or judgment you are appealing. Failure to file the certificate of immediate review

within that time frame is jurisdictional, depriving the Court of jurisdiction to hear the application. The certificate of immediate review is purely discretionary with the trial court, and there is no appeal from the denial of the trial court in granting a certificate of immediate review. These time frames are jurisdictional.

(c) Discretionary Applications

Discretionary applications are filed within 30 days of the date of entry of the order or judgment you are appealing. There are 12 categories of cases which should be appealed by discretionary application. Eleven of these are set out in OCGA §5-6-35. The twelfth type of case is found in OCGA §42-12-1, The Prisoner Litigation Reform Act of 1996.

Discretionary applications are filed directly with the Court of Appeals. Failure to timely file discretionary applications deprives the Court of jurisdiction to hear the application, the application will most likely be dismissed.

Pay special attention to OCGA §5-6-35(a)(3) which deals with cases involving dispossessory warrants. You must reconcile that with OCGA §44-7-56 which has a 10 day time period for appealing.

(d) Appellant's Brief and Enumeration of Errors

The appellant's brief and enumeration of errors are due within 20 days of the date of the docketing of the appeal. Failure to timely file the appellant's brief and enumeration of errors may result in the dismissal of the appeal. The late filing of a brief is not jurisdictional, however, it may result in the dismissal of the appeal or in contempt to the appellant's counsel. If you have a legitimate reason for needing an extension, you may file a motion for an extension of time to file your brief, setting forth the reason that the extension is needed.

(e) Appellee's Brief

The appellee's brief is due within 40 days of docketing or 20 days after the appellant's brief is filed, whichever is later. Failure of the appellee to file appellee's brief may result in non-consideration of appellee's brief or contempt or both.

(f) Appellant's Reply Brief

The appellant has the right to file a reply brief to appellee's responsive brief. The reply brief must be filed within 10 days of the date of the filing of the responsive brief. Failure to file within that time would require a motion for permission to file a supplemental brief. A reply brief is not required.

(g) Motion for Reconsideration

A motion for reconsideration must be filed within 10 days of the date of the order or opinion you wish the Court to reconsider. Failure to file within 10 days does not deprive the Court of considering the motion for reconsideration. The Court may consider it, even though it is late, but the Court is not required to do so. Anytime the Court uses the term "dismissed", it means the Court did not reach the merits. Anytime the Court uses the term "denied", it means the Court reached the merits but found the merits lacking.

(h) Notice of Intent

The notice of intent to apply for certiorari is filed within 10 days of the date of the order, opinion or the order on MFR which is dispositive of the case. As stated earlier, the notice of intent may be filed by following the certified mail rule.

(i) The Two-Term Rule

Ga.. Const. 1983 Art. VI, Sec. IX, Para. II requires that the appellate courts dispose of every case at the term for which it is entered on the court's docket for hearing or the next term. This is the so-called two term rule. Failure of the Court to dispose of the case within two terms means it is affirmed by operation of law. This is one of the reasons that the time frames in the Court of Appeals are relatively short. As far as anyone knows, the Court of Appeals has never allowed a case to be affirmed by operation of law.