

APPELLATE PRACTICE IN THE COURT OF APPEALS OF GEORGIA

INTRODUCTION

For the purposes of this seminar, the appellate procedures of the Court of Appeals of Georgia are best understood by tracking a case through the process and seeing what actions are taken by the Court and its staff at each stage. This paper describes the internal process and attempts to answer questions most frequently asked by lawyers as their cases work their way through the Court of Appeals from docketing to reconsideration.

TRACKING CASES IN THE COURT OF APPEALS FROM DATE OF DOCKETING TO FINAL DISPOSITION

There are three ways to appeal cases to the Court of Appeals of Georgia. Direct Appeals (OCGA Section 5-6-34[a]), Interlocutory Applications (OCGA Section 5-6-34 [b]), and Discretionary Applications (OCGA Section 5-6-35).

DIRECT APPEALS

DOCKETING

Direct appeals are docketed in the Court of Appeals after a Notice of Appeal is filed in the trial court and the clerk of the trial court has prepared and transmitted a copy of whatever portion of the trial court record was designated by the appellant in the Notice of Appeal. If a transcript of trial court proceedings is requested for inclusion, it would be transmitted by the trial court clerk along with the

record. Also included with these documents is the trial court clerk's certification. (OCGA Section 5-6-43). See OCGA §5-6-51 for suggested forms for Notices of Appeal.

When the certified records and transcript reach the Court of Appeals, the case is docketed. Counsel and pro se parties are notified of this event by mail. The docketing clerk checks the record to make sure that it contains a copy of the order or judgment being appealed. If the Notice of Appeal states that a transcript will be filed with the record, the docketing clerk also checks to see if the transcript was in fact included.

If the Notice of Appeal states that a transcript will be filed and it has not accompanied the record, the docketing clerk will contact the clerk of the trial court to determine if a transcript will be forthcoming. If the trial court clerk indicates that the transcript will be forthcoming, the docketing clerk will hold the case for the transcript to arrive before docketing. If the transcript does not arrive within one week, the case will not be docketed but will be returned to the trial court for transmittal to the Court of Appeals once the record is complete.

The docketing clerk also determines the names of the parties' attorneys. Appellant's attorneys are taken from those listed on the Notice of Appeal. Appellee's attorneys are taken from those listed in the certificate of service on the Notice of Appeal. If other attorneys are in the case or come into the case after docketing, they should file a Notice of Appearance with the Clerk of the Court of Appeals showing service or courtesy copy to other attorneys in the case.

After the docketing clerk is satisfied that the record is complete, the case is entered on the Court's computerized docketing system. Pertinent information about the case, including the name of the trial court, the trial judge, the type of case, and the names of the attorneys of record are entered. When all the required data fields have been filled with the pertinent case information, the Court's

computerized docketing system is given the command to assign the case to a division of the Court of Appeals, and to a judge within that division. The cases are randomly assigned by the computer on one of four wheels. Each judge on the Court of Appeals receives an equal number of civil and criminal direct appeals and an equal number of interlocutory and discretionary applications.

As soon as the direct appeals are docketed, the entire record is transmitted to the Court's central staff attorneys. A central staff attorney reviews the record, the Notice of Appeal and the order or judgement being appealed to identify jurisdictional issues. If a central staff attorney determines that a case may be improperly before the Court, he or she will do a memorandum of law to the Court outlining his or her concerns. For example, if the case is one involving murder, for which the Supreme Court has exclusive jurisdiction, central staff will do a memorandum recommending the case be transferred to the Supreme Court. If the Notice of Appeal is filed more than thirty days beyond the date of the entry of the order or judgment being appealed, the central staff attorney's memorandum to the Court will point out the jurisdictional problem with the result that the case will be dismissed by the Court for failure to comply with the time requirements for filing a Notice of Appeal. (OCGA Section 5-6-38). Judges on the division to which the case is assigned may or may not agree with the recommendations of central staff on jurisdictional issues. After reviewing the case record along with the central staff memo, the Court will issue an appropriate order. The judges on the division must unanimously agree that the Court lacks jurisdiction for an appeal to be dismissed at this stage. If one or more judges on the panel dissent on the jurisdictional issue, the case will be circulated whole court for decision on dismissal.

Docketing notices are mailed out on the same day the case is actually docketed in the Court of Appeals. Ordinarily, cases are docketed the day they are received or the following business day. As noted above, however, cases may be held if the Notice of Appeal designates a transcript will be included in the record and one is not included or if the record does not contain the order or judgment to be appealed.

A prudent appellate attorney will check the record in the trial court and the Court of Appeals to make sure that they are identical. OCGA Section 5-6-43 provides that the clerk of the trial court shall make a copy of the original record and transmit the copy to the Court of Appeals. The clerk shall transmit the original transcript to the Court of Appeals and maintain a copy in the trial court clerk's office. If a part of the record which has been designated to be sent to the Court of Appeals has been omitted by the trial court clerk, the attorney may request that the clerk of the trial court send the omitted portion of the record to the Court of Appeals as a supplemental record. Supplemental records must also include the clerk's certification. Should the clerk of the trial court refuse to transmit the omitted portion, a motion to supplement the record may be filed in the Court of Appeals.

If the portion of the record to be supplemented was not a part of the record before the trial court or if it was created after the Notice of Appeal was filed or after the case was docketed, a motion to supplement the record should be filed in the Court of Appeals stating specifically what is to be included as a supplement, the reasons the supplementation is necessary, and a statement whether opposing counsel objects to the proposed supplementation of the record.

The docketing notice mailed to counsel and pro se parties provides the Court of Appeals' docket number. It also informs them of the date of docketing, the briefing schedule, the costs that are due, the

process for requesting oral argument and the tentative dates for oral argument should oral argument be granted.

BRIEFS

Appellant's brief is due twenty days from the date of docketing, (Rule 26), not twenty days from the date counsel or pro se parties receive the docketing notice. A single copy of the Enumeration of Errors, a separate pleading, is no longer required, however, the Enumeration of Errors must still be Part II of the Appellant's Brief also due within twenty days of the date of docketing. (OCGA §5-6-40) Rules 6 and 22). All filings in the Court of Appeals should contain an original and two copies, and should be backed with white manuscript cover, should contain a Certificate of Service and service must be made on opposing counsel. (Rules 1(c) and Rule 6).

Appellant's brief must be accompanied by an \$80.00 filing fee or a sufficient pauper's affidavit. The Clerk is prohibited by statute from receiving the appellant's brief unless the costs have been fully paid. (OCGA Section 5-6-4). Appellee has twenty days from the date of filing of the appellant's brief or forty days after date of docketing, whichever is later, to file appellee's brief. (Rule 26[b]).

When the original and two copies of the appellant's brief are docketed with the Court, they are distributed to the judges on the division to which the case is assigned, and work commences on the case. Similarly, when the original and two copies of appellee's brief are filed, they are likewise distributed to the judges on the division.

If oral argument has been requested and granted, a calendar of the oral argument dates is mailed to counsel and pro se parties approximately twenty days before oral argument. Counsel who have received an order from the Court granting oral argument, or who have requested oral argument but have

received no order granting or denying same, should contact the Clerk's office if counsel has not received a calendar at least ten days before the first tentative oral argument date listed in the docketing notice.

After appellee files the response brief, the appellant has the right to file a reply brief. Reply briefs must be filed within ten days from the filing date of appellee's response brief, and may not exceed fifteen pages. (Rule 23(e), as amended). Any other briefs filed must be filed as supplemental briefs, which must be accompanied by a motion for permission to file such briefs. Leave of Court is required for those briefs to be considered. (Rule 24). The Court will no longer accept letter cites or letter briefs. Any briefs filed other than appellant's initial brief, appellee's responsive brief and appellant's reply brief must come to the Court as a supplemental brief, with a motion requesting permission to file the supplemental brief.

Briefs are limited to thirty pages in civil cases and fifty pages in criminal cases. (Rule 23 [e]). A motion for permission to enlarge the brief must be filed prior to the briefs being offered for filing. Briefs exceeding the page limits without leave of Court will be returned. The thirty and fifty page limitation of briefs are inclusive. Any attachments, exhibits or appendices are counted against the thirty or fifty page limit. Briefs must be double spaced, including quotations within the text and footnotes. The required type size is Courier 10 cpi, 12 point (or equivalent). Rule 1[c].

With approximately three thousand direct appeals per year coming through the Court, and approximately 1,000 applications, the rules on type size and length of briefs are an effort by the Court to ask counsel to be succinct and direct in their arguments and have a type size large enough to be read easily.

ORAL ARGUMENT

A request for oral argument must be filed within twenty days of the date a case is docketed. A motion for an extension of time to file brief and enumeration of errors does not extend the time to request oral argument. A request for oral argument which is timely filed is reviewed by the division to which the case is assigned. Oral argument is granted if any one judge on the division wants to hear argument.

TWO TERM RULE

After the case has been fully briefed, and argued, if applicable, the Court will render a disposition within two terms of the date the case is actually docketed. The "two-term" rule is a constitutionally mandated time frame for appellate decision making. Article VI, Section IX, Paragraph II of the Constitution of the State of Georgia requires that "The Supreme Court and the Court of Appeals shall dispose of every case at the term for which it is entered on the Court's docket for hearing at the next term." This "two term rule" provides that in any appeal not decided within two terms the decision of the trial court is affirmed by operation of law. The triggering date for the first term is not the date the case is docketed with the Court, but the date the case would come on for hearing if oral argument is requested and granted. For instance, a case filed on April 30th is filed during the April Term. However, that case would be docketed to the September oral argument calendar or the April Call. Since the September Call is in the September Term, the case docketed April 30th would be docketed to the September Term and the Court would have the September Term and the January Term to dispose of the case.

MOTION FOR RECONSIDERATION

When the Court disposes of a case, either by order or opinion, the parties have ten days from the date of the order or opinion to file a Motion for Reconsideration with the Court. To be considered timely, Motions for Reconsideration must be physically received and filed with the Court within ten days of the date of the opinion. The Court's certified mail rule does not apply to Motions for Reconsideration. (Rule 4 and 37[b]). If a party files a Motion for Reconsideration, a Notice of Intention to Apply for Certiorari with the Supreme Court of Georgia may be filed after the Court enters an order on the Motion for Reconsideration.

NOTICE OF INTENT

If a party files a motion for reconsideration, a notice of intention to apply for certiorari with the Supreme Court of Georgia may be filed after the Court enters an order on the motion for reconsideration. The notice of intent is filed in the Court of Appeals. It must be filed within ten days of the date of the entry of the order denying the motion for reconsideration. The purpose of the notice of intent is to alert the Court of Appeals to hold the remittitur pending action by the Supreme Court on the application for certiorari. The application for certiorari must be filed with the Supreme Court within twenty days of the date of the order or judgment appealed. The application for certiorari is filed directly with the Supreme Court. However, contemporaneously with the filing of the application for certiorari with the Supreme Court, a notice of filing of application should be filed with the Court of Appeals. (Rule 38, as amended). This alerts the Court of Appeals to continue to hold the remittitur until the Court of Appeals receives directions from the Supreme Court. The filing of the notice of intent

alerts the Court of Appeals to the possibility of the filing of an application for certiorari. The actual filing of the application for certiorari with the Supreme Court transfers jurisdiction from the Court of Appeals to the Supreme Court. The filing of a motion for reconsideration of a Court of Appeals decision is no longer a prerequisite to filing a writ of certiorari in the Supreme Court, though it is still necessary to file the notice of intent with the Court of Appeals. Whether following an order on a motion for reconsideration or by-passing the motion for reconsideration, the notice of intent may be filed by certified mail; it is not necessary that the notice of intent be physically filed in the Court before the expiration of ten days.

Parties may, with leave of Court, file a second motion for reconsideration if the Court of Appeals dismisses or denies a motion for reconsideration. Be alert because filing a second motion for reconsideration does not toll the running of the ten day period for filing the notice of intent to apply for certiorari. That period may run before the Court acts on the request for a second motion for reconsideration. If the request for a second motion for reconsideration is denied and the ten day period has run, the subsequent application for certiorari is subject to dismissal by the Supreme Court.

After the Supreme Court has acted upon an application for certiorari and completed its review of a case, the record is returned to the Court of Appeals along with the Supreme Court's remittitur. The Court of Appeals then sends out its remittitur to the trial court. In cases which are not appealed to the Supreme Court, the Court of Appeals will send out the remittitur approximately 15 to 20 days after the date of the order or opinion disposing of the case. The remittitur returns jurisdiction to the

trial court. At that time, any stay which is in effect because of the filing of the Notice of Appeal is lifted.

When the remittitur is returned to the trial court, the Court of Appeals loses jurisdiction over the matter. The remittitur cannot be recalled unless it was issued through fraud, inadvertence, mistake or negligence, or if the judgment does not change. Slappy v. Georgia Power Company, 109 Ga. App 850 (1964).

INTERLOCUTORY APPLICATIONS

Interlocutory applications are filed directly with the Appellate Courts. To file an interlocutory application, the applicant must first get a certificate of immediate review from the trial judge. This is entirely discretionary with the trial judge. Generally, it is expected that a trial judge will only grant a certificate of immediate review if the case is of such importance that the trial judge wants direction from the appellate court on a particularly unique question of law. A certificate may also be appropriate if the case involves a legal question of first impression. Trial judges sometimes grant certificates for other reasons the trial court may find appropriate.

The certificate of immediate review must be entered within ten days of the date of the order or judgment sought to be appealed. The application for interlocutory appeal must be filed with the appellate court within ten days of the entry of the certificate of immediate review. The application should contain a sufficient portion of the record to convey to the appellate court such information as

will lead the appellate court to believe there is a substantial likelihood that reversible error was committed in the trial court.

An original and two copies of the application should be filed in the Court of Appeals. Court of Appeals Rule 31 (c) requires that the application and its supporting documents be tabbed and indexed. Interlocutory applications must be accompanied by an \$80.00 filing fee or a sufficient pauper's affidavit or the Clerk is prohibited from receiving same. OCGA Section 5-6-4. Applications must contain a stamped filed copy of the order being appealed as well as a stamped filed copy of the certificate of immediate review. The time frames in the statute on interlocutory applications are jurisdictional, and the Court requires a stamped filed copy of the order and the certificate to ascertain that the applicant has met the time deadlines.

The application is docketed the day it is filed with the Court of Appeals. If the application is filed by certified mail and satisfies the requirements of Rule 4 of the Court of Appeals, the application is docketed as of the date of mailing. The respondent has ten days from the date of docketing to file a response to the application, though no response is required. In order to protect a respondent who chooses to file a response, it is imperative that the applicant serve respondent with a copy of the application prior to offering the application for filing with the Court of Appeals.

When the Court receives and enters the application on the docket, a docketing notice is mailed to counsel for the applicant and to counsel for the respondent named in the certificate of service. As noted, the respondent has ten days to file a response to the application. The Court has thirty days from

date of docketing to grant, deny or dismiss the application. An application will be dismissed if the Court lacks jurisdiction or if the application is procedurally defective. An application will be denied if it does not demonstrate that there was a likelihood that reversible error was committed by the trial court or that an opinion by the Court of Appeals will end the case. An application which is dismissed is generally accompanied by an order stating why the application was dismissed.

If the application is granted, an order is entered and mailed to the parties indicating that the appeal has been allowed. The applicant has ten days from the date of the order granting the application to file a Notice of Appeal with the trial court. Thereafter, the appeal is treated like any other direct appeal. No remittitur goes out on dismissed or denied applications. If the Court of Appeals dismisses or denies the application, it means that the Court elected not to take jurisdiction. A motion for reconsideration or notice of intent to apply for a writ of certiorari may be filed after the Court enters an order granting, denying or dismissing the application, and must follow the same rules and time frames as are applicable to direct appeals.

DISCRETIONARY APPLICATIONS

In those categories of cases defined in OCGA Section 5-6-35, there is no direct appeal as a matter of right from a final order or judgment entered in the trial court. The order or judgment may nevertheless be appealed if the Court grants an application for discretionary appeal. An application for discretionary appeal must be filed with the appellate courts within thirty days of the order or judgment complained of, and must contain a stamped filed copy of the order being appealed. On rare occasions,

such as where a superior court has affirmed a decision of the Board of Workers Compensation by operation of law, there will be no order to attach. In such cases, that fact should be stated in the application. Rule 32 (a) of the Court of Appeals requires that applications for discretionary appeal and their accompanying exhibits must be tabbed and indexed.

Discretionary applications must be accompanied by an \$80.00 filing fee or sufficient pauper's affidavit or the Clerk is prohibited from receiving same. OCGA Section 5-6-4. After an application for discretionary appeal is filed, it follows the same procedure as an application for interlocutory appeal. However, unlike an application for interlocutory appeal, the filing of a discretionary application acts as a supersedeas in civil cases in the same way as the filing of a Notice of Appeal. OCGA Section 5-6-35 (h).

As with interlocutory appeals, any party may file a motion for reconsideration or a notice of intent to apply for a writ of certiorari as to any order granting, denying or dismissing an application for discretionary appeal, following the same procedures as set out for direct appeals.

As with interlocutory applications, no remittitur is sent to the trial court after an order denying or dismissing a discretionary application, since the Court elected not to accept jurisdiction in the matter. If the discretionary application is granted, the applicant has ten days from the date of the order granting the application to file the Notice of Appeal with the trial court. The appeal would then proceed as any other direct appeal.

RULE 40 (b) MOTIONS

In addition to direct appeals, applications for interlocutory appeal and applications for discretionary appeal, cases can come to the Court of Appeals by emergency motion filed under Rule 40 (b) of the Court of Appeals. Rule 40 (b) provides:

"In the exercise of its inherent power this Court may issue such orders or give such direction to the trial court as may be necessary to preserve jurisdiction of an appeal or to prevent the contested issue from becoming moot. This power will be exercised sparingly. Generally, no order will be made or direction given in an appeal until it has been docketed in this Court."

If a case has not yet been docketed in the Court of Appeals, a Rule 40 (b) motion must be accompanied with an \$80.00 filing fee or sufficient pauper's affidavit. As soon as Rule 40 (b) motions are received, they are docketed and immediately taken to the Court. Service on opposing counsel prior to offering the Rule 40 (b) motion to the Court is absolutely necessary. The Court often acts very quickly on these motions because of the nature of the case.

No remittitur goes out after the grant, denial or dismissal of a Rule 40 (b) motion, since the Court is dealing only with a motion on an emergency basis. While possibly giving direction to a trial court, the Court is not taking jurisdiction of the case.