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"FILING APPEALS IN THE COURT OF APPEALS OF GEORGIA"

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Thank you for the opportunity to speak to you this morning regarding the filing of appeals in the Court of Appeals of Georgia. I wish to discuss with you this morning the three basic ways in which you may appeal a case to the Court of Appeals of Georgia: Direct Appeals, Interlocutory Applications and Discretionary Applications.

DIRECT APPEALS

Direct appeals are initiated by filing a Notice of Appeal with the clerk of the trial court. OCGA § 5-6-37. Generally, the Notice of Appeal must be filed within 30 days of the date of the entry of the order or the judgment you are appealing. OCGA § 5-6-38. The Notice of Appeal should set out the title and lower court case number of the case; the name of the appellant and the name and address of the appellant's attorney; a concise statement of the judgment, ruling or order entitling the appellant to take an appeal; the court appealed to; a designation of those portions of the record to be omitted from the record on appeal, if any; and a concise statement as to why the Court of Appeals has jurisdiction of the appeal rather than the other appellate court; and whether a transcript of evidence and proceedings is to be transmitted as part of the record on appeal.

See OCGA § 5-6-51 for suggested forms for Notices of Appeal. It is imperative that the Notice of Appeal have the complete address of the attorney or party filing the

Notice of Appeal and the complete address of the attorney or party being served with the Notice of Appeal and the Certificate of Service. Without the complete address, the clerk's office is unable to docket the appeal because we cannot send out Docketing Notices.

Direct Appeals are docketed in the Court of Appeals after the 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 in requested for inclusion that should be transmitted by the clerk along with the record. Do not urge the clerk to send the record until all transcripts have been filed.

When the record, as certified by the trial court clerk, and the transcript, as certified by the court reporter and the trial court clerk, 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 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 a 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.

After the docketing clerk is satisfied that the record is complete, and the Notice of Appeal and the Certificate of Service contains sufficient addresses, 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.

The Court of Appeals is comprised of 12 judges sitting in panels or divisions of three judges each. One judge on each panel is assigned the case for purposes of authoring the opinion for the approval of the other two judges. If any judge on the panel dissents, or does not agree with the opinion as authored by another judge, then the case is decided by seven judges, the three judges of the original division, three judges of the next division in succession and a seventh judge from the third division.

If a majority of judges on the division, or a majority of judges on the seven judge court, determine that the case is of such importance that all 12 judges should consider the matter, that majority may request consideration by all 12 judges. If seven of the 12 judges on the Court vote for all 12 judges to review the matter, the matter will be passed on by all 12 judges.

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 in the Court or the following business day. However, as noted above, 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 stamped filed order or judgment to be appealed. A stamped filed copy is necessary so the Court can determine if the statutory time for filing has been met. If the Clerk's office can physically docket an appeal, we shall do so. However, after docketing, if you discover a portion of the record which was to be included in the record on appeal has been omitted by the clerk of the trial court, you may file a motion to supplement the record in the trial court (OCGA § 5-6-41 (f)) or you may file a motion to supplement the record in the appellate court. Ordinarily, if the portion of the record for which supplementation is requested is not made a part of the record in the trial court, or is not tendered or offered to be a part of the record, it may not be permitted to be a part of the record on appeal. The Court of

Appeals cannot receive evidence or testimony, but is bound by the record of the trial court. Therefore, it is imperative that the record be properly made out in the trial court as opposed to trying to add to or rehabilitate the record on appeal.

When the case is docketed, the Clerk's office sends out docketing notices to the parties listed on the Notice of Appeal and the Certificate of Service for the Notice of Appeal. The docketing notice contains important information. It gives you the docketing or case number in the Court of Appeals; it lists the judges on the division that will consider the case; it lists the tentative oral argument dates, should be oral argument be requested and granted; it contains the briefing schedule; explains the costs that are due; the process for requesting oral argument and other important information.

After the case is docketed with the Court of Appeals, the next step in the process is for the appellant to file Appellant's brief. Appellant's brief is due 20 days <u>from the date of docketing</u>, (Rule 26), not 20 days from the date counsel or pro se parties receive the docketing notice. The brief should be in three parts -- Part I is the Statement of the Case; Part II is the Enumeration of Errors and Part III is Argument and Citation of Authority. 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 Appellant's Brief and it must contain a jurisdictional statement. That is, a statement as to why the Court of Appeals, not the Supreme Court, has jurisdiction. The jurisdiction of the appellate courts is set out in the State Constitution at Article VI, Section VI, Paragraphs II and III.

This enumerates the jurisdiction of the Supreme Court of Georgia. All other appellate jurisdiction is to the Court of Appeals. Notwithstanding the Constitutional delineation of jurisdiction, often the Supreme Court will transfer cases to the Court of Appeals in which it appears the Supreme Court has jurisdiction. Appealing your case to the wrong appellate court will not hurt you. It may delay the matter but you will not be dismissed for appealing to the wrong appellate court, so long as your Notice of Appeal is timely filed.

All filings with the Court of Appeals must be an original and two copies with service to opposing counsel. Documents that are not signed, or do not contain a Certificate of Service, cannot be received by the clerk. Likewise, pursuant to OCGA § 5-6-4, the clerk is prohibited from receiving the Appellant's brief or the application without the $80.00 filing fee or a sufficient pauper's affidavit. After the appellant has filed the initial brief, the Appellee has 20 days from the date of filing of the appellant's brief or 40 days after the date of docketing, whichever is later, to file appellee's brief. (Rule 26[b]). Appellant has the right to reply to the appellee's response. Reply briefs must be filed within 20 days from the filing date of appellee's response brief, and may not exceed 15 pages. 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.

If either party requests oral argument, a separate document entitled Request for Oral Argument must be filed with the Court within 20 days of docketing. An extension of time to file the brief does not extend the time to request oral argument. The request should state a specific reason that the Court would benefit from hearing oral argument. The request for oral argument should be self-contained, that is, it should be able to stand alone and not rely upon the brief or the record to support the request. If the request for oral argument is timely, that is filed within 20 days of docketing, it will circulate to all three judges on the panel. The vote by any one judge to hear oral argument will be sufficient to put it on the oral argument calendar. If the request is out of time, that is filed more than 20 days after docketing date, the request is required to be passed upon only by the judge to whom the case is assigned. An out-of-time request for oral argument may be granted, however, it does not have to circulate to all three judges.

Briefs are limited to 30 pages in civil cases and 50 pages in criminal cases. 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 may be returned. The 30- and 50-page limitation of briefs is inclusive. Any attachments, exhibits, appendices, table of contents and table of case are counted against the 30- or 50-page limit. Briefs must be double spaced, including quotations within the text and footnotes.

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 docketed for hearing. 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 if an appeal not decided within two terms, the decision of the trial court is affirmed by operation of law. As far as anyone knows, the Court of Appeals has never failed to dispose of a matter within the constitutionally mandated two terms.

The Court of Appeals and the Supreme Court have three terms a year. The January Term begins the first Monday in January; the April Term begins the third Monday in April; and the September Term begins first Monday in September.

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 order or opinion. The Court's certified mail rule does not apply to Motions for Reconsideration. (Rules 4 and 37[b]). If the Court denies 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

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, or in ten days of the order or opinion for which Certiorari is sought. A Motion for Reconsideration is not a prerequisite to filing a Notice of Intent. 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. When the Application for Certiorari is filed with the Supreme Court of Georgia, parties should file contemporaneously in the Court of Appeals a Notice of Filing of Application. 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 Application for Certiorari with the Supreme Court transfers jurisdictions from the Court of Appeals to the Supreme Court. The Court of Appeals will take not further action until directed by the Supreme Court.

Parties may, with leave of Court, file a second Motion for Reconsideration if the Court of Appeals dismisses or denies a Motion for Reconsideration. However, 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. After the Court of Appeals has complied with the direction of the Supreme Court, if any, the Court of Appeals will issue the remittitur to the trial court. The remittitur returns jurisdiction 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. If the Supreme Court denies the application for certiorari or affirms the Court of Appeals of certiorari, the Court of Appeals will issue it's remittitur within one or two days after receipt of the remittitur from the Supreme Court. Essentially, after the Supreme Court has ruled on the matter there is nothing left for the Court of Appeals to but to comply with the Supreme Court's ruling.

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 Court. 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 for Immediate Review if the case is of such importance that the trial judge wants direction from the appellate court on a particularly unique issue of law or there exists a legal question of first impression. The Court of Appeals may grant the application if it appears from the documents submitted that the issue to be decided is dispositive of the case; or the order appears erroneous and will probably cause substantial error at trial or adversely affect the rights of the appealing party until entry of a final judgment or the establishment of the precedent is desirable.

The Certificate for Immediate Review must be entered within ten days of the date of the order or judgment being appealed. The application for interlocutory appeal must be filed with the appellate court within ten days of the entry of the Certificate for 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 likelihood that reversible error was committed in the trial court.

The application is limited to 30 pages in civil cases and 50 pages in criminal cases, exclusive of exhibits or portions of the record which are attached as exhibits. An original and two copies of the application should be filed in the Court of Appeals. Court of Appeals Rule 30(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. Applications must contain a stamped filed copy of the order being appealed as well as a stamped filed copy of the Certificate for Immediate Review. The time frames in the statute on interlocutory applications (OCGA § 5-6-34 (b)) 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. Again, it is imperative that the complete address of the applicant and respondent be contained in the application and the Certificate of Service, otherwise it may prevent the application from being docketed.

The Court has 45 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 reasons the application was dismissed. If the application is denied which means the application was reviewed on the merits but the merits were found lacking.

If the application is granted, an order is entered and mailed to the parties indicating that the appeal will be 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. A Notice of Appeal filed outside of that ten day period deprives the Court of Appeals of jurisdiction to hear the appeal on the granted application.

Assuming the Notice of Appeal is timely filed pursuant to the order granting the application, the appeal will then be treated like any other direct appeal. No remittitur goes out after the Court has completed its work on 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 §5-6-35, there is not a right of direct appeal 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 30 days of the date of the order or judgment complained of, (seven days for dispossessories) 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 31(b) of the Court of Appeals requires that applications for discretionary appeal and their accompanying exhibits must be tabbed and indexed, similar to interlocutory applications. Tabbing and indexing of applications is simply a method to aid the Court and save time for the Court in the consideration of applications. Consider the Court may receive from 800 to 1000 applications each year.

Discretionary applications must be accompanied by an $80.00 filing fee or sufficient pauper's affidavit or the clerk is prohibited from receiving same, again as in the case of interlocutory applications. (OCGA §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 § 5-6-35[h]). Again, no response is required to be filed to a discretionary application. The Court of Appeals has 30 days to grant, deny or dismiss the discretionary application.

As with interlocutory applications, any party may file a Motion for Reconsideration or a Notice of Intent to apply for a writ of certiorari to the Supreme Court of Georgia 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, again, would then proceed as any other direct appeal.

RULE 40(b) MOTIONS

In addition to direct appeals, applications for interlocutory appeal and 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 a Rule 40(b) motion is received, it is 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 cases. 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.