COMMON MISTAKES

MADE BY

ATTORNEYS

PRACTICING IN THE

COURT OF APPEALS OF GEORGIA

by

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This is a list of practice mistakes and errors that occur frequently in the Court of Appeals of Georgia. These mistakes occur, not only by pro se parties, but unfortunately from experienced attorneys who practice in the Court of Appeals of Georgia.

Some of the mistakes listed here are merely embarrassing. However, other mistakes may be jurisdictionally fatal to an appeal or an application.

If you ever have a question about a rule interpretation or a statute in the Appellate Practice Act, do not hesitate to contact the clerk's office. The clerk's office personnel will be happy to assist you in any way they can.

Other than the clerk, the other clerk's office personnel are not attorneys, however they are familiar with the rules and how cases are processed in the Court. Please remember that no one in the clerk's office, not even the clerk who is an attorney, is permitted to give you legal advice, but all will be happy to help you with any questions that you have. It is much better to call if you have a question. A problem may be avoided with early intervention of the clerk's office.

The following are a list of several common and reoccurring mistakes seen in the clerk's office:

1. Attorneys failing to sign pleadings or to sign and attach a Certificate of Service. Unsigned pleadings is an oxymoron. Unless pleadings are signed by the attorney, or the pro se party, they are not proper pleadings before the Court. Court of Appeals Rule 1(a) says that "service

shall be shown by written acknowledgment, certificate of counsel or affidavit of server, to include the mailing address of all opposing counsel. Service shall be made before filing. Any document without a Certificate of Service will not be accepted for filing."

2. Attorneys fail to enclose filing fees. OCGA §5-6-4 states the clerk is prohibited from receiving the application for appeal or the brief of the appellant unless costs have been paid or sufficient affidavit of indigence is filed or contained in the record. Additionally, Rule 5 of the Court of Appeals of Georgia, in restatement of the code, says costs in all cases are $80.00 unless a sufficient pauper's affidavit is filed with the Court or contained in the record." Rule 4, the Certified Mail Rule, states a document is deemed filed when it is physically delivered to the clerk's office with sufficient cost, if applicable, and clocked in by the clerk's office staff, and a document is also deemed filed in the clerk's office when it is deposited in the United States Postal Service registered or certified mail, with sufficient costs, if applicable, provided the United State Postal Service cancellation postmark date is on the envelope or the certified mail receipt.

The filing of a brief late may, in extreme cases, cause the appeal to be dismissed, and may subject the party filing late to contempt, but is not jurisdictionally fatal. This is not true with the filing of applications. If an application is filed late, that is jurisdictional and the Court cannot hear the application. Therefore, it is imperative applications be accompanied by the $80.00 filing fee or sufficient pauper's affidavit, if applicable.

3. Attorneys should not file a Notice of Appeal in the trial court if they do not intend to represent the party on appeal. Once an attorney has filed a Notice of Appeal and that appeal has been docketed in the Court of Appeals, the attorney will have to file a Motion for Permission to Withdraw, which may not be granted, especially in a criminal case. The old adage of get your fee first if you are going to represent a client applies to appellate practice as well as trial work.

4. Attorneys fail to send motions when seeking Court action. Lawyers often send letters, instead of motions as required by Rule 41(a), when they want the Court to take some action. Letters are not always treated with the same dignity as motions. Letters get clocked in and are placed in a file folder. All motions should be filed as an original and two copies, with the Certificate of Service and the appropriate backing. When letters are sent seeking Court action, they will be returned to the sending party with a letter of appropriate instructions to file motions.

5. Attorneys fail to call or check with the clerk's office before coming to view an appellate record. Sometimes the record in an appeal may be in a judge's office or with Central Staff or another staff attorney. If a record is with the Court, it may not be readily available for viewing by the public. It is always best to call the Court of Appeals to check on the availability of a record before you come to inspect the record.

If a record is in a judge's office, the clerk's office will make every effort to retrieve the record. However, if the judge's office is working on a particular record at the time you wish to view it, it may not be available to you. The Court is not going to sanitize a record of its paper clips, post-its and other marks to allow you to have it for ten minutes to get your record cite.

The original record is kept at the trial court and can be viewed there if a record is unavailable at the Court of Appeals. Additionally, if you are under a time constraint to file a brief and cannot get access to the record for your record cites, the Court is very liberal in granting extensions of time to file the brief in those circumstances.

6. Attorneys fail to read the Docketing Notice sent from the Court. The Docketing Notice contains valuable information about the Court and your appeal. The Docketing Notice includes the case number, the briefing schedule, how and when to apply for oral argument, which division and judges have been assigned to the case, the filing fee, tentative oral argument dates and other important information. Often times the Docketing Notice is filed by a secretary and the attorney never sees it, or it is mis-calendared and it does not come up on the tickler and the briefs do not get filed or get filed late.

7. Attorneys fail to read the Notices of Remittitur. After the Court of Appeals has completed its work on an appeal, it issues a remittitur to the trial court. This is simply a single page document which returns jurisdiction to the trial court and advises the parties involved in the

matter the appeal has been finally concluded and states the judgment of the Court of Appeals. The attorneys receive a Notice of Remittitur. This states the remittitur has issued to the trial court. It also states the record in the appeal will be preserved by the Court of Appeals for a period of one year after the remittitur date. After that date the record will be recycled (destroyed), unless the attorneys notify the clerk, in writing, the record should be preserved and why. Once the record has been recycled, if the case is to be appealed again, the appellant will have to pay the trial court to copy the record again.

The record the Court of Appeals receives is a copy of the record. The original is maintained in the trial court for a period of years depending upon the type of record and the record retention schedule of a particular court. The Court of Appeals microfilms the original documents filed with the Court, the briefs, substantive motions and orders, opinions and docketing notices. The microfilm is stored in perpetuity at the State Archives and a reader copy is available there. Additionally, a reader copy is available at the Court of Appeals .

8. Attorneys who fail to have a Court of Appeals case number ready when calling the clerk's office. Attorneys who call the clerk's office seeking information on a particular case and do not have the case number of the appeal simply delay the time it takes the clerk's office to respond to their inquiry. By having the Court of Appeals case number ready, you save time for yourself and clerk's office personnel. If you do not have the Court of Appeals case

number, please try to have the style of the case, or at least one party. Individuals are much easier to reference than corporations.

If you have the lower court case number, you must also have the lower court county. A special note – you must have the same lower court case number as the number to which the case was docketed. For instance, if the Notice of Appeal contains a lower court case number with a judge suffix, then your inquiry must have the judge's suffix. If the lower court case number on the Notice of Appeal does not have the judge's suffix, and you give the clerk's office personnel a lower court case number with the judge's suffix, the clerk's office may not be able to cross reference the case in the Court of Appeals.

9. In a case of applications, attorneys fail to have a stamped filed copy of the order from which the party is appealing. The code section dealing with applications is jurisdictional in terms of time frames. Without a stamped filed copy of the order being appealed, the appellate court cannot determine if the application was filed timely. If you are appealing a workers' comp decision in which the trial court did not enter an order, but let the award of the Board be affirmed by operation of law, please state that fact in your introductory paragraph in the application. This will save you and the Court time.

If the Court receives an application without a stamped filed copy of the order, or a stamped filed copy of the Certificate of Immediate Review, the Court will issue an order requiring you

to provide the Court with a stamped filed copy of the order within ten (10) days. Failure to comply with that order may result in the dismissal of the application.

There are no extensions of time granted in applications; neither the statutes nor the rules of the Court permit extensions. The Court of Appeals must issue an order granting, denying or dismissing the discretionary application within 30 days of docketing and within 45 days for interlocutory applications. If the application is filed by certified mail, the time the Court has to act may be shortened by as much as seven (7) days.

10. Attorneys fail to communicate with the clerk's office regarding an appeal. There should be no communications between lawyers or parties with any judge or member of the judge's staff regarding any pending case. It is inappropriate in the Court of Appeals of Georgia to discuss a pending appeal or a case which may come before the Court of Appeals with a judge of the Court of Appeals, a judge's administrative assistant or a judge's staff attorney. Again, you are free to call the clerk's office for any questions, concerns or comments.

11. Attorneys fail to show up on time for oral argument. Oral argument is not automatic in the Court of Appeals of Georgia. Attorneys must file a request for oral argument, stating why the Court will benefit for oral argument, and the Court must grant the request. After the Court grants the request, motions to reschedule the oral argument are infrequently granted. As stated earlier, the Docketing Notice gives you the tentative dates of oral argument several

months beforehand. The Court is unimpressed when you want to reschedule an oral argument because of a deposition you scheduled after the docketing date.

When you come to Court to argue your case, you should check in with the clerk at 9:30 a.m. before oral argument at 10:00 a.m. When you check in with the clerk in the courtroom, give your case number, state your name and how long you intend to argue, 5, 10 or 15 minutes. If one side chooses a 10 minute argument and the other side chooses a 15 minute argument, both parties will have 15 minutes to argue their case. Parties do not have to argue the entire 15 minutes but each will have an equal amount of time.

Similarly, if oral argument is granted to the appellant, it is automatically granted to the appellee. If you have companion cases and cross appeals, oral argument must be requested in each case. The grant of oral argument in the main appeal does not automatically grant oral argument in the cross appeal. However, basically, if oral argument is granted you have 15 minutes to argue your case and you can use that 15 minutes to argue whatever you wish.

12. Make sure you file your Notice of Appeal in the trial court timely. The Court does not have jurisdiction to hear an appeal which is filed beyond the statutory limit. Generally, a party has 30 days from the date of the entry of the order or judgment the party is appealing to file a Notice of Appeal. Please note in dispossessories, the parties have seven (7) days to file the Notice of Appeal, or discretionary application, whichever is appropriate. A Motion for

Reconsideration filed in the trial court does not toll a time to file the appropriate Notice of Appeal or application.

Any appellate record which is sent to the Court of Appeals from the trial court in which the Notice of Appeal calls for a transcript, and there is no transcript with the record, will be returned to the trial court. Once the Court of Appeals dockets an appeal, it starts the two-term rule running. This is the constitutional requirement that the Court of Appeals dispose of every case at the term for which it is entered on the Court's docket for hearing or at the next term. If the case is docketed and a brief is necessary for preparation of the appeal, and no transcript is necessary, then the brief cannot be filed and the appeal is delayed.

13. If there is a pending Motion for New Trial or Motion to Dismiss the Notice of Appeal in the trial court, the clerk's office will not docket the record. If the trial court grants the motion to dismiss the Notice of Appeal, or if the trial court grants the Motion for New Trial, it may obviate the need for an appeal. If the trial court grants the Motion to Dismiss the Appeal, that order may be appealed. However, that is a procedural matter which the Court will deal with before dealing with the merits of the appeal.

14. Rule 4, the Certified Mail Rule, does not apply to Motions for Reconsideration. Motions for Reconsideration are deemed filed in the Court upon the physical receipt. You may mail the Motion for Reconsideration, however, if it arrives more than ten (10) days from the date of

the order or opinion for which you are seeking reconsideration, the Court may dismiss the Motion for Reconsideration as untimely.

15. Finally, please proof your briefs and other pleadings that you file in the Court of Appeals of Georgia. "Spell check" does not take the place of proofreading. It is frustrating for the Court, and probably does not help your cause, if you cite to the wrong authority because of a typographical error or if you have typos in the body of your brief. You do not impress or dazzle the Court with the amount of your written materials, but the substance and the content of your written materials. Do not confuse quantity with quality.

Resist the urge to be the party which files the last pleading with the Court. The person who files the last brief or supplemental brief is not the person who is going to win. The person who is going to prevail on the appeal is the one who has preserved the errors properly in the trial court and/or who has cited controlling authority clearly and concisely to the Court of Appeals to support one's position.

Thank you for your time and attention. Do not hesitate to call the clerk's office if you have any problems or questions about rules, procedures or if the Court of Appeals can otherwise be of assistance to you. The Court of Appeals of Georgia is the busiest appellate court in the country. We are striving to be the friendliest and the most helpful.