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ATLANTA, GEORGIA

JANUARY 13, 2006

**LITIGATING  
IN THE  
COURT OF APPEALS**

by

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**LITIGATING**  
**IN THE**  
**COURT OF APPEALS OF GEORGIA**

Thank you for the opportunity to speak to the Litigation Section of the Atlanta Bar Association about Litigating in the Court of Appeals of Georgia. There are four ways in which you can bring a case to the Court of Appeals of Georgia: direct appeal, discretionary application, interlocutory application and Rule 40(b) Motion.

## DIRECT APPEALS

Direct appeals are initiated by filing a Notice of Appeal with the trial court. Generally, the Notice of Appeal must be filed within 30 days of the date of the entry of the order or judgment which you are appealing. (OCGA §5-6-38(a)). Please be advised that if you are appealing a dispossessory action, the time for filing the Notice of Appeal is seven days from the date of the entry of the order or judgment you are appealing. (OCGA §44-7-56).

You begin your litigation in the Court of Appeals of Georgia insofar as direct appeals are concerned by filing a Notice of Appeal in the trial court. The Notice of Appeal should contain the title and docket number of the case being appealed, the name of the appellant and the name and address of appellant's attorney, a concise statement of the judgment ruling or order entitling the appellant the right to appeal, the court to which the case is appealed, a designation of those portions of the record which shall be omitted on appeal and whether a transcript shall be filed for inclusion

with the record on appeal. (OCGA §5-6-37). Please make sure that when you do file the Notice of Appeal that you put your complete name and mailing address on the Notice of Appeal and also the complete name and mailing address of the opposing party on the Certificate of Service of the Notice of Appeal. Without the complete name and address of the parties, we are unable to docket the appeal because we do not know to whom and to where to send the Docketing Notices.

After the appeal has been docketed in the Court of Appeals, the clerk's office will send out Docketing Notices to the parties signing the Notice of Appeal and those served with a copy of the Notice of Appeal. The Docketing Notice will give you the Briefing Schedule and other important information. Also in the Docketing Notice you will receive special instructions on requesting oral argument, and it will give you the names of the judges assigned to the Division and the potential oral argument dates.

The Briefing Schedule in the Court of Appeals is twenty (20) days from the docketing date, not the date you receive the Docketing Notice. Rule 23(a). The appellee has twenty (20) days from the date the appellant files the Appellant's Brief, or forty (40) days from docketing, whichever is later to file a responsive brief. Rule 23(b). The appellant may file a reply brief, although it is not required. Appellant has twenty (20) days after the date of the filing of the responsive brief to file the reply brief, which is limited to 15 pages. Rule 23(c)(f).

Appellant's initial brief must be accompanied by the \$80.00 filing fee or sufficient pauper's affidavit. (OCGA §5-6-4).

Briefs in civil cases are limited to 30 pages and briefs in criminal cases are limited to 50 pages. Rule 23(f). These limits are inclusive and include title page, table of authorities, table of contents, exhibits, appendices and Certificate of Service.

Oral argument is not granted as a matter of right. In 1995 the Court changed its rule to require parties to file a Request for Oral Argument stating how oral argument would aid the Court in reaching the proper decision in an appeal. The Court will then issue an order granting or denying the Request for Oral Argument. **A request for an extension of time to file the Brief of Appellant does not extend the time to request oral argument. Oral argument must be requested within twenty (20) days of docketing to be timely.** Rule 28 (a)(1).

One of the questions I am asked frequently is what is required to get oral argument granted. What peaks the interest of a judge or judges on the Court regarding a request for oral argument is probably the most subjective thing on the Court. I would suggest that your request for oral argument state a definite reason or reasons oral argument is being requested. I would also suggest the request be longer rather than shorter.

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Logistically the Court of Appeals is housed in two buildings and several different floors so a judge is not necessarily going to have the Briefs nor the record available when the judge acts on the Request for Oral Argument. A judge is not going wandering around three floors in one building or into another building looking for the documents to support the request. Please make your Request for Oral Argument self-contained. The vote of one judge is sufficient to grant a timely request for oral argument.

The parties have three briefs as a matter of right, the appellant's initial brief, the responsive brief and the reply of the appellant. Any other brief filed by the parties must be submitted as supplemental briefs, which must be preceded by a Motion for Permission to File the Supplemental Brief. Rule 27(a). The Court is generally liberal in accepting Supplemental Briefs, if they provide the Court with new information. You do not impress the Court nor improve your position by simply regurgitating information and/or authorities cited in prior briefs.

Interestingly, there is no requirement an amicus receive permission to file the Brief of Amicus, only that the amicus identify the party for whom the amicus is filing and the interest of the amicus in the appeal. Rule 26.

After the Court has received all briefs, the Court will dispose of the case, either by order or opinion. Generally the Court will issue an opinion in the case, unless procedurally the case should not be before the Court, and then the Court may dismiss or transfer by order.

Once the Court issues a dispositive order or opinion, the parties have ten (10) days from the date of the order or opinion to file a Motion for Reconsideration. Under the Court's Rule 4, all pleadings except a Motion for Reconsideration, may be filed by certified mail and receive the filing date of the official United States Postal Service cancellation postmark date on the envelope or container. This is not the case with Motions for Reconsideration. Motions for Reconsideration must

be physically filed with the Court within ten (10) days of the date of the order or opinion upon which reconsideration is sought. Rule 37, generally.

Should the Court deny the Motion for Reconsideration, the parties have ten (10) days from the date of that order to file a Notice of Intent to Apply for Certiorari with the Supreme Court of Georgia. Rule 38(a)(1). When the Application for Certiorari is filed with the Supreme Court, the parties are required to file a Notice of Filing Certiorari with the Court of Appeals. Rule 38(a)(2).

This alerts the Court of Appeals to hold the remittitur and that the Application for Certiorari has not been abandoned.

Most of the opinions which issue from the Court of Appeals are three judge cases. However, if there is a dissent on the Division, the case will be decided by seven judges, the Division to which it was assigned, the next Division in succession and a seventh judge. (OCGA §15-3-1(c)(1)(2)). In rare cases, twelve judges may vote on the case. In such a situation should there be a six - six tie, the

case is immediately transferred to the Supreme Court for resolution of the issues. *Ga. Const. 1983*, Art. VI, Sec. VI, Para. III(7).

When the Court issues its opinion, it is designated to be published or not published. When you receive your opinion, if it has a stamp at the top that says "Not to be Officially Reported", then that means the Court is not going to publish the case, and therefore the case will have no precedential value. Rule 34. If you think the case should be published you may file a motion with the Court stating that fact and the reason you think the case should be published. Any such motion should, of course, show service to all counsel.

## **DISCRETIONARY APPLICATIONS**

Discretionary applications must be filed with the Court within thirty (30) days of the date of the order or judgment which you are appealing. (OCGA §5-6-35(d)). In the case of dispossessories,

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the time limit is seven (7) days. Discretionary applications are filed directly with the Court of Appeals or Supreme Court of Georgia, not the trial court. The application must be filed as an original and two copies since the Court operates in panels of three judges. Rule 6. The application must contain a stamped filed copy of the order or judgment being appealed and so much of the record as you deem appropriate for the Court to consider to reach the conclusion that reversible error has been committed. Rule 30, generally and OCGA §5-6-35, generally.

Interlocutory applications, like discretionary applications, must be tabbed and indexed. That is, you should prepare an index of the exhibits that you are presenting in your application and tab these exhibits so the Court may turn quickly to them. The exhibits will be portions of the record which you think are pertinent to the Court's consideration of the application.

A response is not required but may be filed. The statute says it must be filed within ten (10) days, but the Court will consider a response even if it comes in after ten (10) days unless the Court has already issued an order.

When in doubt as to whether to file a discretionary application or a direct appeal, please refer to OCGA §5-6-35(j). This code section says if you file an application when you should have filed a direct appeal, the Court will automatically grant the application and the matter will not be dismissed. This does not work the other way. If you file a direct appeal when you should have filed an application, you deprive the Court of jurisdiction to hear the direct appeal and the matter will be dismissed.

The Court of Appeals must issue an order granting, denying or dismissing the application within 30 days of the date the application was docketed with the Court. With the Certified Mail

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Rule, this can cut the Court's time to as little as 22 or 23 days. The vote of one judge on a panel of three will cause the application to be granted.

Should the Court grant the application, you have ten (10) days from that date to file the Notice of Appeal in the trial court and then the appeal proceeds as would any direct appeal. Failure to file the Notice of Appeal within ten (10) days pursuant to the order granting the application will may result in the dismissal of the appeal.

Please be advised the time frames regarding discretionary applications are jurisdictional. Also, if the application is not accompanied by the \$80.00 filing fee or sufficient pauper's affidavit, the clerk is prohibited from receiving the application. (OCGA §5-6-4). This may result in an application being late so always remember to include your filing fee when you mail your application.

## INTERLOCUTORY APPLICATIONS

The interlocutory application must be filed with the Court within ten (10) days of the date of the entry of the Certificate of Immediate Review. See Rule 31, generally and OCGA §5-6-34(b).

The Certificate of Immediate Review must be entered within ten (10) days of the date of the entry of the order or judgment you are appealing. Like discretionary applications, interlocutory applications must contain a stamped filed copy of the order you are appealing, and a stamped filed copy of the Certificate of Immediate Review. Without these stamped filed copies, the Court does not know if you filed timely.

Again, as with discretionary applications, the interlocutory application must contain so much of the record as you deem appropriate for the Court of Appeals to review in order to determine the trial court has committed reversible error.

Interlocutory applications like discretionary applications, must be tabbed and indexed. That is, you should prepare an index of the exhibits that you are presenting in your application and tab these exhibits so the Court may turn quickly to them. The exhibits will be portions of the record which you think are pertinent to the Court's consideration of the application.

Again, the application must be accompanied by the \$80.00 filing fee or sufficient pauper's affidavit.

The Code gives the Court 45 days in which to decide on an interlocutory application. Although the Court has 45 days, it will determine the interlocutory application within 30 days, the same as with the discretionary applications. Should the interlocutory application be granted, you will then have ten (10) days from the date of the order granting the application to file the Notice of Appeal and proceed as you would any direct appeal. Failure to file within ten (10) days may result

in the dismissal of the appeal. The vote of one judge on a panel of three will cause the application to be granted.

There is no statutory correlation of OCGA §5-6-35(j) to interlocutory applications.

However, there is case law which permits the Court to grant an interlocutory application when the party has the right of a direct appeal. Spivey, et al. v. Hembree, et al., 268 Ga. App. 485, (602 SE2d 246) 2004.

## RULE 40(b) MOTIONS

Another way to appeal a case in the Court of Appeals of Georgia is via a Rule 40(b) Motion for Emergency Supersedeas. This may be utilized when the contested issue may become moot if the Court does not act expeditiously. The Court does not grant many Rule 40(b) Motions because most of them are not truly emergencies under the Court's rules.

Generally, you must file a Notice of Appeal before filing the Rule 40(b) Motion. You must serve opposing counsel **prior to** filing it with the Court. The reason for this is the Court acts very quickly on Rule 40(b) Motions.

The Rule 40(b) Motion must be accompanied by the \$80.00 filing fee or a sufficient pauper's affidavit unless a case has already been docketed in this Court. The Rule 40(b) Motion must contain

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portions of the record such that would satisfy the Court that it needs to intervene *ex parte* and substitute its judgment for that of the trial court.

**TEN THINGS  
YOU SHOULD KNOW  
ABOUT  
PRACTICING  
IN THE COURT OF APPEALS OF GEORGIA**

1. E-Filing: it's your future.
2. The Court generates all of its own orders.
3. The Court decides cases within two terms.
4. The Court has a drop box for after hours filings.
5. The Court's orders and opinions are committed to the United States Postal Service mailed the day of the date of the order or the opinion.
6. The Court of Appeals receives a copy of the record from the trial court. The original is on file in the trial court.
7. You can file a Notice of Intent for Certiorari without filing a Motion for Reconsideration.
8. The Court recycles its copy of the record one year after the remittitur date unless you notify us to hold the record.
9. If you file your Notice of Appeal or application on a timely basis, but designate the wrong state appellate court, the case will be transferred to the court which has jurisdiction, not dismissed.
10. The Court has a website containing our web docket and other information. Please use it.

**TEN THINGS  
YOU SHOULD DO  
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1. Sign all pleadings.
2. Attach a Certificate of Service to all pleadings.
3. State a detailed and specific reason when filing a request for oral argument.
4. Include the filing fee or sufficient pauper's affidavit when submitting all briefs and applications.
5. Make sure you cite to the record and/or transcript when preparing your brief.
6. Call the clerk's office before you come to view a record to make sure it is available.
7. Please cite to the Official Georgia Reports, and not the West or other collateral reporters.
8. File a Notice of Intent with the Court of Appeals when you intend to apply for certiorari and a Notice of Filing the Certiorari Application when you have actually filed that with the Supreme Court.
9. Notify the clerk's office in writing if you want the clerk's office to hold or maintain a record after the remittitur issues.
10. File motions, not letters, whenever you wish the Court to take any action.

**TEN THINGS  
YOU SHOULD NOT DO  
WHEN  
PRACTICING  
IN THE COURT OF APPEALS OF GEORGIA**

1. You should not file compound, joint or alternative motions.
2. You should not exceed the page limit for briefs or applications.
3. You should not use a font smaller than permitted by the rules.
4. You should not file a Motion to Dismiss when a brief is one or two days late.
5. Do not attach exhibits to briefs which are not part of the record.
6. Do not attach parts of the record to the briefs. The Court has the record anyway.
7. Do not include two or more Notices of Appeal in one record.
8. Do not urge the trial court clerk to send the record to the Court of Appeals before all transcripts and other portions of the record have been filed with the clerk at the trial court.
9. Do not file a Motion to Supplement the Record for information that was not made a part of the record in the trial court.
10. Do not call the clerk's office about your case without a Court of Appeals Docketing Number.