

MANEUVERING IN THE COURT OF APPEALS OF GEORGIA

PRO BONO APPELLATE TRAINING

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12:30 p.m.

Sutherland
999 Peachtree Street, N.E.
Atlanta, Georgia

by
William L. Martin, III
Clerk/Court Administrator, Court of Appeals of Georgia

I want to thank Trish McCann and the good people of the Georgia Public Defender Standards Council for inviting me to speak to you today. It is always a pleasure to talk to lawyers and be of any assistance I can to those who are or will be practicing in the Court of Appeals of Georgia.

The title of my talk today is, "Maneuvering in the Court of Appeals". How many people have not yet had an appeal, an application or a Rule 40(b) Motion in the Court of Appeals? Well, for some of you, this may be redundant but hopefully it will be a good review for some of us and new information to the rest.

There are four ways to get a case before the Court of Appeals of Georgia.

- a. Direct Appeals
- b. Discretionary Applications
- c. Interlocutory Applications
- d. Rule 40(b) Emergency Motions

a. **Direct Appeals**

Direct appeals are initiated by filing the Notice of Appeal with the clerk of the trial court. Please see OCGA §5-6-37 for the contents of the Notice of Appeal and OCGA § 5-6-38 for the time for filing the Notice of Appeal. Also, the types of cases that are directly appealable are set out in OCGA §5-6-34(a).

A suggested form for the Notice of Appeal can be found at OCGA §5-6-51. Specifically, the Notice of Appeal should identify the order or judgment which is being appealed and should also direct the clerk of the trial court how to prepare the record. The Notice of Appeal should state whether any portions of the record should be omitted on appeal and whether a transcript of evidence will be filed for inclusion in the record on appeal. The Notice should state the Court of Appeals has jurisdiction and not the Supreme Court.

The Notice of Appeal must be filed in the trial court within 30 days of the date of the entry of the order or judgment you are appealing. If the appeal is to the sentence then it would be 30 days from the date the sentence is filed with the clerk of the trial court. If a Motion for New Trial has been filed, then the Notice of Appeal must be filed within 30 days of the date of the entry of the order denying the Motion for New Trial.

If the Notice of Appeal is not timely filed, it deprives the appellate court of jurisdiction. If you find yourself outside of the 30 day time period for filing the Notice of Appeal, you may file a Motion for an Out-of-Time Appeal in the trial court, in a criminal case only. If the trial court grants your Motion for an Out-of-Time Appeal, you have 30 days from the date of entry of the order granting the out-of-time appeal in which to file the Notice of Appeal. Should the trial court deny the Motion for Out-of-Time Appeal, you have 30 days from the date of the entry of the order denying the Motion for Out-of-Time Appeal to file a Notice of Appeal as to that order.

b. **Discretionary Applications**

OCGA §5-6-35 sets out twelve of the 13 types of cases which must be initiated by filing a Discretionary Application. In other words, the Legislature has determined there are certain types of cases in which the parties do not have a right of a direct appeal. The 13th type of case, which is not listed in OCGA §5-6-35, nor cross-referenced, is the Prisoner Litigation Reform Act of 1996 (OCGA §42-12-1, et seq.). The types of cases which must be initiated by filing a Discretionary Application are:

1. Appeals from superior courts reviewing decisions of State Board Workers' Compensation or state or local administrative agencies;
2. Appeals from judgments or orders in divorce, alimony or other domestic relations cases (custody cases have the right of a direct appeal if the order was entered on or after January 1, 2009);
3. Appeals from cases involving dispossessory warrants in which the only issue to be resolved is the amount of rent due and such amount is \$2,500 or less. Please be advised that pursuant to OCGA § 44-7-56, the time for filing an application or a Notice of Appeal in a dispossessory case is seven days, not 30 days.

4. Appeals from cases involving garnishment or attachment except as provided in paragraph 5 of subsection (a) of OCGA §5-6-34;
5. Appeals from orders revoking probation;
6. Appeals in all actions or damages in which the judgment is \$10,000 or less (but not a defendant's verdict);
7. Appeals, when separate from the original appeal, from the denial of an Extraordinary Motion for New Trial;
8. Appeals from orders under subsection (d) of OCGA §9-11-60 denying the Motion to Set Aside or under subsection (e) of OCGA §9-11-60 denying the relief upon a complaint in equity to set aside a judgment;
9. Appeals from orders granting or denying temporary restraining orders;
10. Appeals from awards, attorneys fees or expenses for litigation under OCGA § 9-15-14;
11. Appeals from decisions of state courts reviewing the decisions of magistrate courts by the *de novo* proceedings so long as the subject matter is not otherwise subject to right of direct appeal;

12. Appeals from orders terminating parental rights; and
13. Appeals under the Prisoner Litigation Reform Act when an inmate in this State seeks to appeal a civil matter when the inmate initiated the case in the trial court.

When you file a Discretionary Application with the Court of Appeals of Georgia, it must contain a stamped filed copy of the order you are appealing. Without a stamped filed copy of the order you are appealing the Court does not know what you are appealing nor does the Court know if the application has been timely filed. The application should contain so much of the record as you deem appropriate for the Court to review in order to determine that the trial court has committed reversible error. The application does not need to contain certified copies, but we do need stamped filed copies. The exhibits in the application should be tabbed and indexed. This makes it easier for the Court to review your pleadings.

The application must be accompanied by a filing fee (\$80.00 criminal and \$300.00 civil) or a sufficient pauper's affidavit. For the pauper's affidavit to be sufficient it must be signed before a notary public and signed, dated and sealed by the notary public.

The application should be filed as an original and two copies since the Court operates in panels of three judges. Finally, the application must contain a Certificate of Service showing the complete name and mailing address of opposing counsel. Without this information, the Court does not know to whom to send the Docketing Notice. If we cannot send out the Docketing Notice, we cannot docket the application. Also make sure that you have your name, address, bar number and telephone number on your application.

The Court of Appeals will issue an order granting, denying or dismissing the application within 30 days of docketing. If the application is granted, you have ten (10) days to file the Notice of Appeal with the clerk of the trial court.

c. **Interlocutory Applications**

Interlocutory applications are appeals which are taken during the pendency of a case. See OCGA §5-6-34(b). Often, an Interlocutory Appeal will be filed to address the denial of a Motion for Summary Judgment or a Motion to Suppress Evidence in a criminal case. An application for Interlocutory Appeal may be filed only after the trial court has granted a Certificate of Immediate Review. The granting of the Certificate of Immediate Review is entirely discretionary with the trial court.

The time frames for filing Applications for Interlocutory Appeal are as follows:

1. Within ten (10) days of the date of the entry of the order or judgment you are appealing, you must file a Certificate of Immediate Review with the trial court.
2. Within ten (10) days after the filing of the Certificate of Immediate Review with the trial court, you must file an Application for Interlocutory Appeal with the Court of Appeals or Supreme Court, depending upon which Court has jurisdiction.

The Application for Interlocutory Appeal must contain a stamped filed copy of the order you are appealing; a stamped filed copy of the Certificate of Immediate Review and so much of the record as you deem appropriate for the Court of Appeals of Georgia to review in order to determine the trial court committed reversible error. As with Discretionary Applications, Interlocutory Applications must be filed as an original and two copies and contain a Certificate of Service showing the complete name and mailing address of opposing counsel. The application must be tabbed and indexed and be accompanied by the appropriate filing fee or sufficient pauper's affidavit.

The Court of Appeals will issue an order granting, denying or dismissing the application within 45 days of the date it is filed with the Court of Appeals. If the application is granted, you have 10 days from the date of the order granting the application to file the appropriate Notice of Appeal in the trial court.

d. **Rule 40(b) Motions**

The Court also permits the filing of what we call a Rule 40(b) Motion. Rule 40(b) says, "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 shall be exercised sparingly."

Basically, a Rule 40(b) is sort of an appellate TRO.

1. The Rule 40(b) shall contain an explanation of why an order of this Court is necessary and why the actual request is time sensitive;
2. Contain a stamped filed copy of the order being appealed.
3. Contain a stamped filed copy of the Notice of Appeal, if such has been filed in the trial court;
4. Show that service has been perfected upon the opposing party before filing the motion with the Court; and
5. Be accompanied by the appropriate filing fee or sufficient pauper's affidavit.

The Court generally acts very quickly on Rule 40(b) Motions. For the most part, they are not granted because many of them are not real emergency situations. However, when you file your Rule 40(b) Motion, please include a fax number on your pleadings so the Court can fax you its order if necessary.

Some General Things About The Court of Appeals of Georgia You Should Know

Oral argument is not automatic in the Court of Appeals. You must file a request stating a specific reason or reasons that oral argument would benefit the decisional making process. Please put enough information in the request to apprise the Court of the reason oral argument would be important.

A request for oral argument timely filed circulates to the three judges on the panel. If any one judge on the panel votes to grant oral argument it is on. It is not necessary to have two or all three judges agree to oral argument.

If a timely application is filed with the Court, it takes the vote of only one judge on the panel to grant the application. Like oral argument, it is not necessary to have two or all three judges vote to grant the application.

Records

The Court of Appeals of Georgia receives a copy of the record from the trial court and the original transcript. The trial court maintains an original record and a copy of the

transcript. You can go to the trial court to get your record cites or come to the Court of Appeals. If you come to the Court of Appeals, please call ahead of time to make sure that the record will be available to you. If a record is in a judge's chambers we cannot always retrieve it for you at a moment's notice.

Please be advised that pursuant to the Court's Record Retention Schedule, the Court of Appeals maintains its copy of the record for a one-year period after the remittitur date. If you think your case is coming back to the Court of Appeals, it is your responsibility to notify the Court, in writing, to hold the record. We ask that you tell us why the record should be held and the period of time for which we should hold the record. We are happy to hold the record if the case is coming back, but our space limitations make it impossible for us to hold all records.

Thank you again for the opportunity to speak to you. If you have any questions I will be happy to stay and answer them after my speech or you can call me or email me with any questions or comments.