

Thank you for the opportunity to meet with you. Today I would like to begin by focusing my remarks on the appellate procedures important to domestic relation cases and finish up with some general appellate practice procedures which you may find helpful as you bring your cases to the Court of Appeals of Georgia.

#### 1. DISCRETIONARY APPLICATIONS

OCGA §5-6-35 is the Code Section dealing with discretionary applications. OCGA §5-6-35(a)(2) provides that appeals from judgments of orders in divorce, alimony, child custody and other domestic relation cases are initiated by filing a discretionary application. Discretionary applications are filed directly with the appellate court. Generally, appeals from divorce and alimony matters are appealed to the Supreme Court of Georgia. All other domestic relation cases come to the Court of Appeals. Applications which are timely filed but addressed to the wrong court would be transferred between the courts. However, an application which is defective procedurally, no matter in which court it is filed, is subject to dismissal.

In most cases, discretionary applications must be filed in the proper appellate court within 30 days of the date of the order or the judgment you seek to appeal. OCGA §5-6-35(d). However, under

OCGA §44-7-56, an appeal from a judgment in a dispossessory action must be filed within seven days of the entry of the judgment. This is true if you are filing an application or a direct appeal in a dispossessory matter. Please note that this Code Section is not cross referenced in OCGA §5-6-35 nor OCGA §5-6-38(a), which deals with the time of filing in direct appeals.

If you are unsure if the subject matter you are appealing should be filed as a direct appeal under OCGA §5-6-34(a), 37 and 38, you may file it as a discretionary application. OCGA §5-6-35(j) provides that when an appeal in a case enumerated in subsection a of 5-6-34, but not in section 5-6-35(a), is initiated by filing an otherwise timely application, the appellate courts will have jurisdiction to decide the case and grant the application. In other words, your discretionary application will not be dismissed, but granted under the provisions of subsection(j) and the court will issue an order granting you the right to file a Notice of Appeal within ten days of the court's order. *This is not a two-way street.* If you file a direct appeal in case which should come up by discretionary application, the Court does not have jurisdiction to hear such a matter and the Court will issue an order dismissing the application.

What should be contained in the discretionary application? The application must contain a stamped filed copy of the order or judgment you are appealing. The time frames set out in the application statutes are jurisdictional. Unless there is a stamped filed copy of the appealed order

contained in the application, the appellate court has no way of knowing if the application was timely filed. If the Court of Appeals receives an application without a stamped filed copy of the order being appealed, the Court of Appeals will issue an order directing the applicant to supplement the application with a stamped filed copy of the order being appealed. The order of the Court of Appeals will direct that the order being appealed must be *physically* filed with the Court within ten days of the date of the order. Failure to rehabilitate the application with a copy of the stamped filed order filed within the time directed by the Court may result in the dismissal of the application.

The application should also contain so much of the record you wish the Court to review in order to make a determination if there is a likelihood that the trial court committed reversible error. Those parts of the record should be tabbed and indexed. Examples of such other parts of the record may be the complaint, the answer, substantive motions and orders and any other exhibits you think the Court should review.

The parts of the record which are attached as exhibits to applications do not need to be certified by the trial court clerk. However, all documents filed with the trial court which you include as exhibits in the application should be stamped filed.

What is the physical form or structure of the application? There is no set form for the application. The body of the application is limited to 30 pages in civil cases and 50 pages in criminal cases. However, there is no page limit on the number of exhibits or parts of the record to be included in the application. The Court of Appeals does not know how much of the record you must present to the Court in order for the Court to come to the conclusion that there is a possibility of reversible error by the trial court.

While there is no set form for the application, a good practice is to follow the format of an appellant's brief, that is, beginning with a statement of the case, a brief and succinct description of how the case came about followed, by a section enumerating the errors you contend were committed by the trial court and finally the argument and citation of authority where you give your written legal arguments and the authority upon which you base those arguments. *Oral argument is never permitted in applications.*

Neither the Code nor our rules permit any extension of time to file applications, nor responses thereto. Responses are due within ten days of the date of the filing of the application. Since applications may be filed by certified mail under Court of Appeals Rule 4, sometimes the clerk's office does not receive the application until four, five or six days after the application has been mailed. This

means the response time may be severely limited. Please realize that the Court will consider a response, even if it comes in after ten days. However, the Court will not necessarily wait on a response. This is particularly true if the Court dismissing an application.

When the Court of Appeals dismisses an application, or a direct appeal, this means that there is some procedural defect and the Court has never reached the merits. If the Court issues an order denying the application, this means the Court has considered the merits, but has not been persuaded by your argument.

OCGA §5-6-4 provides that the clerk shall not receive the brief of the appellant nor the application without the \$80.00 filing fee or a sufficient pauper's affidavit. If you file an appellant's brief without the \$80.00 filing fee or evidence of indigency in the record or pauper's affidavit, it simply means that the brief may be filed late. While this could conceivably result in the dismissal of the direct appeal, this is seldom the case. *However, the failure to include the \$80.00 filing fee or a sufficient pauper's affidavit with the application may result in the application not being filed timely which will result in the dismissal of the application.*

The Certified Mail Rule, Rule 4 of this Court, means that if you file by certified or registered mail with the official United States Postal Service cancellation postmark on the envelope or the container

(your office meter does not count), you will receive the filing date of the postmark date, if you have included costs or a pauper's affidavit. When you mail your certified filing, always have the United States Postal Service hand cancel your certified mail receipt. If the postal service fails to hand cancel the envelope, you may submit the hand canceled receipt, which must be dated and filled out in its entirety, as evidence of your mailing date.

The Certified Mail Rule applies to all filings in the Court of Appeals except Motions for Reconsideration and any filings which the Court orders to be physically filed.

Within 30 days of filing the application, the Court will issue an order granting, dismissing or denying the application. If the application is dismissed or denied, you have ten days in which to file a Motion for Reconsideration with the Court of Appeals, or a Notice of Intent to Apply for Certiorari in the Supreme Court of Georgia. If the application is granted, you have ten days from the date of the Court's order granting the application to file the Notice of Appeal in the trial court. The appeal will then proceed as any other direct appeal. Failure to file the Notice of Appeal in the trial court within ten days of the date of the order granting the application deprives the appellate court of jurisdiction to hear the direct appeal from the granted application.

What are the Court's internal procedures in reviewing applications? When applications are received by the Court they are docketed and sent to the applications clerk. If the application can be physically docketed, it will be. If there is no check or pauper's affidavit, the clerk's office will attempt to notify you of that fact. If you are able to pay the filing costs within the time required for filing the application, it will be accepted. *However, an application, even if mailed timely under the Certified Mail Rule, will not be accepted by the clerk's office without the filing fee or pauper's affidavit.*

Please make sure that you include your filing fee with the application. This becomes critical when you mail or file your application on the 30<sup>th</sup> day. There is no time to rehabilitate procedural mistakes at that point.

After the application has been docketed it goes to our Central Staff of attorneys who screen the applications for jurisdiction and do a memorandum to the Court setting out the issues raised in the application and recommending a grant or the denial of the application and the reasons therefore.

The application then goes to the judge to whom the application has been assigned who reviews the work of Central Staff. The judge may agree with Central Staff, disagree with Central Staff or discuss the matter with Central Staff and that judge's staff attorneys.

After the judge to whom the case has been assigned makes the decision to grant, deny or dismiss the application, an order to that effect along with that judge's memoranda and copy of the application and response, are circulated to the other two judges on the panel. The vote of any one judge on the panel grants the application.

When the application is granted and the order granting the application goes out, and the direct appeal is subsequently filed with the Court of Appeals pursuant to the order granting the application, the direct appeal comes back to the Court and will be randomly assigned to one of the 12 judges on the Court. This means that the judge who initially granted the application has a one in 12 chance of receiving the application back and a 1 in 4 chance of being on the panel with the application. On average, the Court of Appeals grants approximately 25% of the discretionary applications it receives.

If the Court of Appeals is going to grant an application under subsection (j), or dismiss an application for a procedural defect, it may not necessarily wait ten days for a response. A reply to a response is permitted, however, you must keep in mind that the statute directs the Court to issue an order granting, denying or dismissing within 30 days, so any reply should be filed promptly. If, for any reason, and it has occasionally happened, the Court does not issue an order within 30 days, it does not

mean that the application is granted by operation of law, nor that the Court has lost jurisdiction and the application is denied by operation of law. It simply means that the Court has failed to comply with an advisory statute.

## 2. INTERLOCUTORY APPLICATIONS

OCGA §5-6-34(b) is the Code Section dealing with interlocutory applications. Interlocutory applications may be filed whenever the trial court in rendering an order, decision, or judgment, otherwise subject to direct appeal, certifies within ten days of the entry of such order, decision or judgment, that is of such importance to the case that immediate review should be had by the Supreme Court or the Court of Appeals. The decision to grant or deny the Certificate of Immediate Review is purely discretionary with the trial court judge. After the trial court judge grants the Certificate of Immediate Review, the decision to grant the interlocutory application is purely discretionary with the appellate court.

Again, as with discretionary applications, the time frames in the interlocutory application statutes are jurisdictional. If you wish to file an interlocutory application, you must file with the trial court, within ten days of the date of the entry of the order or judgment you are appealing, a Certificate of Immediate Review. Failure to file the Certificate of Immediate Review within ten days of the date of

the entry of the order or judgment you are appealing deprives the appellate court of jurisdiction to consider the interlocutory application. Similarly, if the interlocutory application is not filed with the appellate court within ten days of the entry of the Certificate of Immediate Review, the appellate court does not have jurisdiction to consider the interlocutory application. As with discretionary applications, the Court must receive an original and two copies of the application and it must be accompanied by the \$80.00 filing fee or sufficient pauper's affidavit. Failure to pay costs or include the pauper's affidavit means the clerk cannot receive the application. This is particularly critical because the ten day window for filing interlocutory applications does not give much time to rehabilitate an application which fails to have the costs included.

The same rules as to content and length, responses and replies which apply to discretionary applications apply to interlocutory applications. However, the appellate courts have 45 days in which to decide an interlocutory application as opposed to 30 days in discretionary applications. Last year, the legislature amended OCGA §5-6-34(b) to change the time in which the Supreme Court or Court of Appeals have to issue an order granting, denying or dismissing an application from 30 days to 45 days. This amendment to the statute was requested by neither the Court of Appeals nor the Supreme Court.

In fact, the Court of Appeals still tries to maintain a 30 day schedule on granting or denying interlocutory applications.

Generally, interlocutory applications will be granted when it appears from the documents submitted that the issue to be decided appears to be dispositive of the case; or the order appears erroneous and will probably cause substantial error at trial or will adversely effect the rights of the appealing party until the entry of the final judgment in which the case or appeal will be expedited or the establishment of a precedence is desirable. If the appellate court denies or dismisses the interlocutory application, you may still preserve the error at trial and enumerate it as error in a direct appeal.

Please note that there is no parallel in the interlocutory application statute to OCGA §5-6-35(j).

As with discretionary applications, the appellate court must have stamped filed copies of the order being appealed and the Certificate of Immediate Review. As these time frames are jurisdictional, without stamped filed copies of the order or the Certificate of Immediate Review, the appellate courts have no way of knowing if the applicant has complied with the statutes. Also, as with discretionary applications, there are no extensions of time for filing or responding to interlocutory applications.

If the clerk's office receives an interlocutory application which does not contain a stamped filed copy of the order being appealed or a stamped filed copy of the Certificate of Immediate Review, or

both, the Court of Appeals will issue an order directing that the application be supplemented with stamped filed copies physically filed within ten days of the date of the Court's order. Again, the time frames for interlocutory and discretionary applications is very short so the Court must act expeditiously.

If your interlocutory application is granted, again you have ten days from the date of the order of the Court of Appeals granting application to file the Notice of Appeal in the trial court.

### 3. DIRECT APPEALS

As mentioned earlier, the statutes dealing with direct appeals are OCGA §5-6-34(a), 37 and 38. OCGA §5-6-37 deals with the contents of the Notice of Appeal and OCGA §5-6-38 deals with the time frame for filing Notices of Appeal. A Notice of Appeal which is filed outside of the time permitted by the statutes deprives the appellate courts of jurisdiction to hear the appeals.

When you file the Notice of Appeal, the notice should state what part of the record should be omitted from the record on appeal, if any, and whether a transcript of evidence or proceedings will be filed for inclusion with the record on appeal. As appellants, it is your responsibility to have before the Court all parts of the record and all transcripts necessary for the Court to review the case. Your failure to insure that the record on appeal contains the portions of the record in the trial court that wish the Court of Appeals to review and/or your failure to make sure the court reporter and/or clerk of the trial

court transmit to the appellate courts the appropriate transcript or transcripts, may result in an adverse appellate decision to your position.

As appellee, it is your responsibility to ascertain that any portion of the record or any transcripts you deem appropriate, not sent by the appellant, are transmitted in the appellate record. See OCGA § 5-6-42.

When the clerk's office receives the record in the direct appeal from the trial court clerk's office, it would be docketed, if physically possible. Docketing Notices will go out to the party filing the appeal and all parties served with a copy of the Notice of Appeal. It is imperative that you put the complete address of parties being served with the Notice of Appeal on the Certificate of Service of the Notice of Appeal. Otherwise, it is impossible for the clerk's office to send out the Docketing Notices and may result in a return of the record to the trial court. Also, the Court of Appeals cannot docket any record which does not contain a final order or disposition of the trial court. If there is a pending motion on a JNOV or Motion for New Trial, the clerk's office will return the record to the trial court for disposition by the trial court before the Court of Appeals can consider the appeal.

Please read the Docketing Notice you receive with the direct appeal. It contains information important to your appeal. It sets out the briefing schedule, tells you the tentative oral argument dates,

gives you directions on how to request oral argument and tells you the Division and the judges to which the case has been assigned.

The Court of Appeals has two terms in which to dispose of an appeal. The Georgia Constitution of 1983, Article VI, Section IX, Para. II. Georgia is the only state with a constitutional requirement to that its appellate courts dispose of a case within two terms. This constitutional requirement, coupled with the high case load of the Court of Appeals, makes it difficult for the Court to grant extensions of time to file briefs and requires that the Court work diligently to dispose of matters before the Court. Failure to comply with the constitutional provision means that the case is affirmed by operation of law and that the Court has lost jurisdiction over the appeal. Should this occur, neither the Court of Appeals nor the Supreme Court can consider the matter. As far as anyone knows, since the inception of the Court in 1907, it has never failed to meet this constitutional burden.

#### 4. GENERAL OBSERVATIONS AND INFORMATION

When filing applications or briefs in the Court of Appeals of Georgia, be succinct and direct. One page of straight forward information with accurate and poignant cites is much more impressive than four pages of flowery eloquence. If you require 30 pages in your civil brief or 50 pages in your criminal brief, by all means file a brief in that regard. However, do not use 30 or 50 pages just because

that is the limit. Remember, your objective is to convince the Court of your position as clearly and convincingly as you can. Your enumerated errors should be confined to real errors, not just personal disagreements with the trial court in matters which are within the discretion of the trial court.

The Court of Appeals has a web site which has, among other things, the Court's oral argument calendar, the Rules of the Court, biographical information about the judges on the Court, information on the Court's History, directions to the Court of Appeals, Suggested Standards of Review, a Citizen's Guide to Filing for Pro Se in English and Spanish, and a feature entitled "Ask the Clerk" in which you can email the clerk questions, suggestions or comments.

The clerk's office is open from 8:30 a.m. until 4:30 p.m. Also, there is a drop box for filings outside the clerk's office, located on the third floor of the Judicial Building at 40 Mitchell Street. Any items placed in the drop box between 4:30 p.m. and 5:30 p.m. will be retrieved by the clerk's office the following business day and given the previous business day's filing date.

Communications with judges and judge's staffs are not permitted in the Court of Appeal, however, you are free to call the clerk's office. The clerk's office will help you with rules, procedures and other questions you may have. You may call the clerk, Bill Martin, at (404) 657-8352.

Again, I want to thank you for the opportunity to speak to you today and urge that you call the clerk's office if you have any questions. Best wishes to you and yours for a safe and happy holiday season.