The Appellate Review

The Newsletter of the Appellate Practice Section
State Bar of Georgia
Summer 2013

Strategic Considerations for Appellees in the Federal Courts of Appeals[1]

by Andrew Tuck

It is common for attorneys on appeal to treat the role of appellee as purely defensive – wait for the appellant to strike with its opening brief and respond with counter arguments in a response brief. This strategy overlooks both a trap for the unwary appellee and a potentially powerful weapon for the appellee.

First, the trap for the unwary follows from two well-accepted rules – (1) the appellee can raise alternative arguments in defense of the judgment below that the trial court either rejected or ignored (the so-called "right for any reason" rule), and (2) the *appellant* waives any argument in favor of reversal not raised in its opening brief. The logical combination of these two rules is that an *appellee* waives any arguments not raised under the right-for-any-reason rule in its opening brief. This combination has the potential to be particularly devastating where a party wins in the trial court despite losing on a potentially meritorious argument, then simply defends the appeal without affirmatively raising the issues on which he lost. In that situation, in the event the appellate court reverses, the appellee may have foregone the opportunity to have appellate review of the issue on which he lost.

> The logical combination of these two rules – appellant waiver-by-omission and "right for any reason" – presents a trap for the unwary appellee.

Second, in certain circumstances, the appellee can file a cross-appeal. A cross-appeal is a powerful weapon for the appellee because it gives the appellee an extra brief – the sur-reply – and the ever-important last word before oral argument or decision.

This article briefly summarizes these two strategic considerations, describes when each applies, and collects relevant rules and cases in various federal courts of appeals.

1. Appellate Waiver By the Appellee

Appellee waiver flows from two well-accepted rules. First, an *appellant* waives any argument in favor of reversal by not raising that argument in its opening brief.[2] Second, the appellee need not simply respond to the arguments raised in an appellant's brief; instead "an appellee may rely upon any matter appearing in the record in support of the judgment below."[3] Therefore, in its response brief the appellee can affirmatively raise arguments from the court below that the trial court either rejected or ignored. This practice provides the appellee with two powerful advantages: it allows the appellee to present the court additional avenues to affirm the beneficial judgment, and it forces the appellant to spend valuable pages in its reply brief responding to new issues rather than supporting its initial brief's arguments in favor of reversal.

The logical combination of these two rules – appellant waiver-by-omission and "right for any reason" – presents a trap for the unwary appellee. As the 11th Circuit recently held, if the appellee fails to raise an issue in its response brief, it is deemed to have abandoned that issue.[4] In *Hamilton v. Southland Christian School*, as succinctly stated by Judge Ed Carnes, "[a] woman of childbearing age was hired as a teacher at a small Christian school. Then she got pregnant, married, and fired. In that order. Then she filed a lawsuit. She lost on summary judgment."[5] Though the small Christian school – the appellee – won summary judgment in the trial court, the trial court had rejected the school's argument that the employment law "ministerial exception" barred the former teacher's suit.[6] The school defended the lower court's judgment on appeal, but did not use the right-for-any-reason rule to raise the ministerial exception as an alternative ground for affirming the judgment.[7] After briefing was complete in *Hamilton*, the United States Supreme Court issued an opinion supporting the ministerial exception in *Hosanna–Tabor Evangelical Lutheran Church & School v. EEOC*.[8] The school in *Hamilton* filed a notice of supplemental authority directing the 11th Circuit to the Supreme Court's decision in *Hosanna-Tabor*.[9] The parties also addressed the ministerial exception at oral argument.[10] The court, nonetheless, refused to consider the issue:

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Message from the Chair

by Paul J. Kaplan
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The goal of the Appellate Practice Section, as stated in our bylaws, is "to foster professionalism and excellence in appellate advocacy and to encourage improvements in the appellate process." We've been hard at work on both fronts over the last few months.

This spring, we hosted two of our signature events: In late February, under the able stewardship of Amy Weil, we co-hosted the fourth biannual Eleventh Circuit Appellate Practice Institute in Miami. And in March, under the leadership of Darren Summerville and Kamal Ghali, we hosted our annual Georgia Appellate Practice Seminar at the State Bar.

We've also been active before the legislature and the courts. At the suggestion of the Court of Appeals of Georgia, and in partnership with Bar lobbyists and the Family Law Section, Jeff Swart and our State Practice and Legislation Committee proposed and secured passage of SB 204, which amends O.C.G.A. § 5-6-34(a) to limit direct appeals in child custody cases. The bill passed the General Assembly unanimously and was signed by the governor on May 6.

In March, we alerted you to our concerns with the 11th Circuit's expanded record excerpts program, and, in coordination with the appellate sections of the Florida and Alabama bars, we encouraged our members to share with the Court their experiences with the excerpt rules. Our thanks to Larry Sommerfeld and Lynn Fant Merritt, co-chairs of our Federal Practice Committee, for coordinating our efforts, and to all of you who wrote to the Court. A copy of the Section's letter on the issue is reprinted on page 9.

Later this month we'll he hosting two events at the annual meeting of the State Bar. On June 20, we'll host a CLE recapping significant developments at the Court of Appeals of Georgia, Supreme Court of Georia and the 11th Circuit Court of Appeals. On June 21,we'll host a lunch discussion by Michael Manely, recounting his first appearance – and unanimous win – at the U.S. Supreme Court.

Also at the annual meeting, I'll hand over the reins to a new chair and board. It's been an busy and rewarding year for the Section, and I'm incredibly proud of what we've accomplished. My thanks to all of our officers and committee chairs, and to every one of you who has attended, participated in, and contributed to our events. The state of our Section is strong, and I look forward to even greater strides in the years ahead as we continue to foster excellence and community among the appellate bench and bar.

Inside This Issue

Appellate Practice Section Listserv

You can join members of the Appellate Practice Section on our listserv, an electronic mailing list, to share information among those who specialize in appellate practice. Once you join, you can customize how many emails you receive and easily sort messages from the list. Everything from answers about the rules to formatting to general practice tips are available because the entire Section membership can see your question. When sending emails to the list, be sure to remember that recipients may include judges or opposing counsel, and review the tips posted on the group page.

To join, send an email to bryan.tyson@sbllaw.com.

Section Officers

During the Sept. 27, 2012, Planning Meeting of the section, the following officers were elected for the 2012 -13 bar year:

- **Paul Kaplan, chair**
- **Scott Key, vice-chair**
- **Ronan Doherty, immediate past chair**
- **Bryan Tyson, secretary**
- **Darren Summerville, treasurer**

The following committees and chairs were designated for the 2012-13 Bar year:

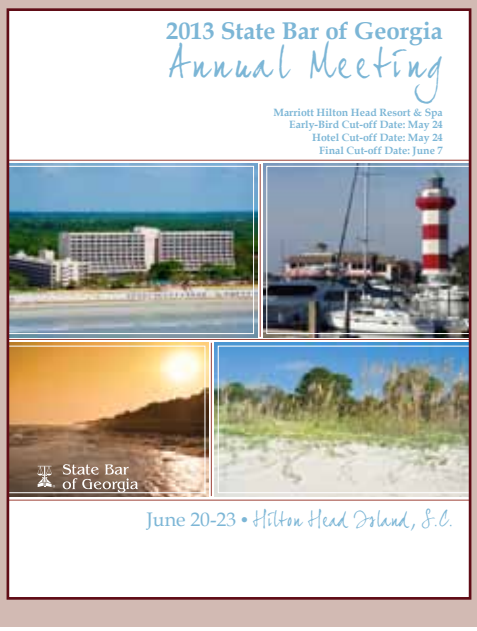
- **State Practice and Legislation Committee – Jeff Swart, chair**
- **Federal Practice Committee – Lynn Fant Merritt and Larry Sommerfiled, co-chairs**
- **Programming and Events Committee – Scott Key, chair**
- **Communications Committee – Bryan Tyson, chair**

Appellate Practice Section at the State Bar Annual Meeting

The State Bar's Annual Meeting will be held in Hilton Head Island, S.C. on June 20-23. You don't want to miss the CLE sponsored by the Section, updating practitioners on a variety of recent decisions from the Court of Appeals of Georgia, the Supreme Court of Georgia and the 11th Circuit. The session takes place on Thursday, June 20 from 9 a.m. - noon, and you will receive three CLE hours with three trial practice credits.

On Friday, June 21, the Section will host a luncheon where we'll elect new officers and hear from Marietta attorney Michael Manely on his recent 9-0 victory before the U.S. Supreme Court.

You can register online at www.gabar.org.



New Chief Justice and Presiding Justice of the Supreme Court

by Bryan Tyson

The Supreme Court of Georgia announced that Presiding Justice Hugh P. Thompson will become the next chief justice of the Supreme Court on Aug. 15, 2013. Justice Harris Hines will also begin serving as the presiding justice of the Court on that date.

Thompson began practicing law in 1969 and was appointed to the superior court by Gov. George Busbee in 1979. After serving as the chief judge of the Ocmulgee Circuit from 1987-94, he was elevated to the Supreme Court by Gov. Zell Miller in 1994. Thompson is the recipient of the Outstanding Alumnus Award from Mercer University Law School Alumni, the Distinguished Achievement Award from Georgia College and State University, the Outstanding Public Service Award from the Milledgeville Kiwanis Club and the Distinguished Service Award from the Milledgeville Jaycees. Thompson and his wife, Jane, have two sons.

Hines began his practice in 1968 , working for a senior judge of the Civil Court of Fulton County. He then was in private practice in Cobb County until he was appointed to the State Court of Cobb County by Gov. Jimmy Carter and later won election to the superior court. In 1995, Gov. Zell Miller appointed him to the Supreme Court. Hines is a former trustee of the Kennesaw State University Foundation, a member and Past Distinguished President of the Kiwanis Club of Marietta and a past distinguished lt. governor of the Georgia District of Kiwanis International. He is a past president of the Cobb County Y.M.C.A. He has participated in the Leadership Georgia and Leadership Atlanta programs and was selected as Cobb County's Most Admired Community Leader for 1993. He is an elder in the First Presbyterian Church of Marietta and served as clerk of session. Hines and his wife, Helen, have two children and three grandchildren.

New Chief Judge of the Court of Appeals

by Bryan Tyson

The Court of Appeals announced that Presiding Judge Herbert Phipps will be sworn in as the new Chief Judge on June 25.

He will begin his duties on July 1, 2013.

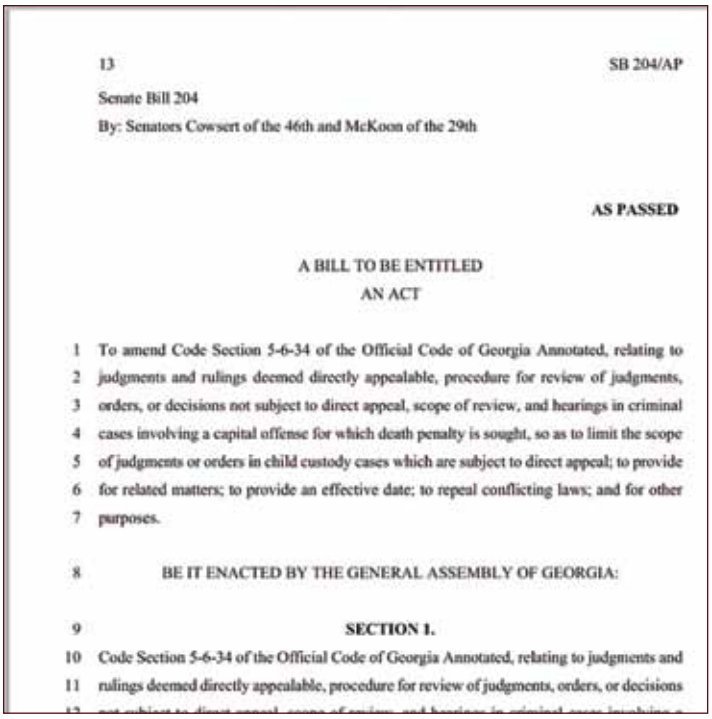
Phipps began his practice in Albany in 1971 while also serving as a part-time magistrate (1980-88) and associate judge of the state court and on the juvenile court (1988-95). In 1995, he was chosen by Gov. Zell Miller to the Superior Court of Dougherty County. Gov. Roy Barnes elevated him to the Court of Appeals in 1999 and he became a Presiding Judge on the court in 2010.

Phipps has been awarded the Justice Robert Benham Award for Community Service and is a member of the Society of Benchers of Case Western Reserve School of Law. He is a past chairman of the Board of Directors of SB&T Bank of Albany and Americus and serves on the Board of Directors of the Georgia Appleseed Center for Law and Justice. He is a member of the Judicial Council of Georgia and serves as chair of the Council's Committee on Court Reporting Matters. He is a past president of the Lawyers Club of Atlanta and a member of Bethel A.M.E. Church in Albany, Sigma Pi Phi Fraternity, Delta Delta Boule', and the Old War Horse Lawyers Club. Phipps and his wife, Connie, have two children and a granddaughter.

Governor Approves Appellate Practice Section Proposal on Direct Appeals

by Jeff Swart

On May 6, the Governor signed legislation enacting into law the Section's proposal to amend O.C.G.A. § 5-6-34(a)(11) to restrict the types of orders in child custody cases that can be directly and immediately appealed as a matter of right. Under the legislation, which gained the unanimous approval of both chambers of the General Assembly, parties in such cases now have a right to immediately appeal only such orders that actually affect child custody (including related contempt orders). Otherwise, parties seeking appellate review in child custody cases will need to comply with the discretionary appeal procedure provided by O.C.G.A. § 5-6-34(b).



13 SB 204/AP

Senate Bill 204

By: Senators Cowsert of the 46th and McKoon of the 29th

AS PASSED

A BILL TO BE ENTITLED
AN ACT

To amend Code Section 5-6-34 of the Official Code of Georgia Annotated, relating to judgments and rulings deemed directly appealable, procedure for review of judgments, orders, or decisions not subject to direct appeal, scope of review, and hearings in criminal cases involving a capital offense for which death penalty is sought, so as to limit the scope of judgments or orders in child custody cases which are subject to direct appeal; to provide for related matters; to provide an effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Code Section 5-6-34 of the Official Code of Georgia Annotated, relating to judgments and rulings deemed directly appealable, procedure for review of judgments, orders, or decisions

The purpose of the revision successfully proposed by the Section was to reduce the appeals of collateral orders in child custody cases, with the hope of achieving a corresponding reduction in the time and expense required to bring such cases to final judgment. The issue was first called to the Section's attention by Hon. Christopher McFadden of the Court of Appeals of Georgia and was thereafter noted by the Court in *Collins v. Davis*, 318 Ga. App. 265, 269 n.17, 733 S.E.2d 798, 801 n.17 (2012).

The Section worked closely with the Family Law Section on this proposal.

Jeff Swart is a partner at Alston & Bird LLP and serves as the chair of the Appellate Practice Section's State Practice and Legislation Committee.

Considerations continued from page 1

> The requirement that issues be raised in a party's brief on appeal promotes careful and correct decision making. It ensures that the opposing party has an opportunity to reflect upon and respond in writing to the arguments that his adversary is raising. And it gives the appellate court the benefit of written arguments and provides the court and the parties with an opportunity to prepare for oral argument with the opposing positions and arguments in mind.[11]

Two other circuits – the Seventh and Tenth – have reached somewhat similar conclusions regarding appellee waiver, but in passing and without analysis, and Judge Hamilton in the Fourth Circuit has dissented and urged application of an appellee-waiver rule.[12]

In contrast, the Second, Fourth, Fifth, and Sixth Circuits refuse to apply a waiver rule to appellees.[13] These courts have allowed application of the right-for-any-reason rule even where the alternative argument in favor of affirming is first raised at oral argument.[14]

Additionally, in the Third, Eighth, D.C., and Federal Circuits, an appellee's failure to raise alternative grounds for affirmance under the right-for-any-reason rule will have no effect on its ability to assert those grounds in the district court on reversal or in a second appeal.[15] These courts reason that applying a waiver rule to prevent appellees from raising arguments in subsequent appeals that could have been raised under the right-for-any-reason rule in a previous appeal is inappropriate because "[a]ppellees do not select the issues to be appealed" and "are at a procedural disadvantage in appeals because they can neither file reply briefs nor choose when to appeal."[16] Though not explicitly accepting a rule that appellees do not waive arguments in their initial appeal by failing to raise them, these courts' reasoning suggests they would not apply such a rule, and confirms that even were such a rule applied, it would not bar eventual appellate consideration of the waived arguments in a subsequent appeal.

In summary, appellees in all circuits can and should affirmatively raise issues decided adversely to their client (or ignored by the trial court) under the right-for-any-reason rule. The practice is procedurally proper, presents the court additional reasons why a beneficial judgment was correct, and lessens the impact of the appellant's reply brief by forcing the appellant to address new issues in reply rather than supporting its arguments in favor of reversal. In addition, in the 11th Circuit, and possibly in the Seventh and Tenth Circuits, failing to raise right-for-any-reason arguments could result in waiver.

2. Cross Appeals

Cross appeals are a potent weapon for an appellee for the simple reason that they provide the appellee an additional brief, and the additional brief comes last in time.[17] Once the losing party files a notice of appeal, the appellee can choose to file a brief in response, or file a cross-appeal.[18] The appellee must file a cross-appeal to raise an issue that will alter the judgment in the appellee's favor.[19] Without a cross-appeal, "the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary."[20] Said differently, a party granted the entirety of the relief it sought in the trial court is not "aggrieved" for purposes of appellate standing, and therefore cannot file its own appeal.[21]

There are multiple ways a prevailing party can seek to amend the judgment in its favor, necessitating a cross appeal: seeking to enlarge or reduce the measure of damages,[22] seeking enhanced damages or punitive damages,[23] seeking attorney's fees (or an alternative measure of fees),[24] challenging an award of attorney's fees,[25] or seeking an alternative prejudgment interest rate.[26] An appellee can also cross appeal where a challenged portion of the lower court's ruling would have collateral estoppel effect in subsequent litigation.[27]

Cross appeals are a potent weapon for an appellee for the simple reason that they provide the appellee an additional brief, and the additional brief comes last in time.

In addition, some circuits permit an appellee to file a conditional cross-appeal.[28] The conditional cross appeal preserves issues that *could* become adverse to the appellee should the appellate court vacate or modify the district court's judgment on related issues.[29] Other courts, however, have explicitly rejected conditional cross-appeals.[30]

Other than the few circuits allowing a conditional cross-appeal, a cross-appeal that does not seek to expand or modify a judgment in the cross-appellant's favor is generally improper.[31] Moreover, courts disfavor cross appeals, as Judge Easterbrook has explained:

> Cross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary. They disrupt the briefing schedule, increasing from three to four the number of briefs, and they make the case less readily understandable to the judges. The arguments will be distributed over more papers, which also tend to be longer. Unless a party requests the alteration of the judgment in its favor, it should not file a notice of appeal.[32]

In summary, an appellee derives the procedural benefit of an additional brief from a cross appeal, and appellees risk waiving the ability to challenge undesirable portions of a favorable judgment by not cross appealing. Therefore, an appellee should always carefully consider whether there is a good-faith basis to file a cross appeal and balance the possible exercise of that right against the reasons courts have articulated for disfavoring cross appeals.

3. Conclusion

In its response brief, an appellee should raise any strong alternative arguments supporting the judgment in its favor, even those rejected or ignored by the trial court, using the right-for-any-reason rule. Not only is it beneficial to raise the alternative arguments, failure to raise them arguments will, in some circuits, result in waiver. In addition, in analyzing the appeal, an appellee should determine whether it can arguably be considered to be requesting an alteration of the favorable judgment. If it can, there is a good faith basis to file a cross-appeal, and the appellee should balance the procedural benefits to be gained by filing a cross appeal against the disruptive issues that have caused some courts to disfavor cross appeals.

Andrew Tuck is a senior associate in the Litigation & Trial Practice Group at Alston & Bird LLP, a member of the Appellate Practice Section, and a member of the Atlanta Section of the Federal Bar Association. His complex litigation practice focuses on appeals, class actions, and antitrust matters. *He would like to thank Alston & Bird summer associate and Georgetown law student Emily R. Chambers for her invaluable help researching the issues discussed in this article.*

(Endnotes)

1 A version of this article appeared in the March 2013 edition of *The Federal Lawyer*.
2 Fed. R. App. P. 28(a)(9)(A); e.g. *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999).
3 *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982); *see also United States v. American Ty. Express Co.*, 265 U.S. 425, 435 (1924) ("it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it").
4 *Hamilton v. Southland Christian Sch.*, 680 F.3d 1316, 1318-19 (11th Cir. 2012).
5 *Id*. at 1317.
6 *Id*. at 1318.
7 *Id*.
8 132 S.Ct. 694, 706 (2012).
9 *Id*. at 1319.
10 *Id*.
11 *Id*. at 1319.
12 *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1207 (10th Cir. 2007); *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 924 (7th Cir. 2012); *Hillman v. IRS*, 263 F.3d 338, 344-45 (4th Cir. 2001) (Hamilton, J., dissenting).
13 *Int'l Ore & Fertilizer Corp. v. SGS Control Servs., Inc.*, 38 F.3d 1279, 1286 (2d Cir. 1994) ("The [right-for-any reason] rule applies even when the alternate grounds were not asserted until the court's questioning at oral argument."); accord *Kennedy v. City of Villa Hills, Ky.*, 635 F.3d 210, 214 n.2 (6th Cir. 2011); *Hillman v. IRS*, 263 F.3d 338, 343 n.6 (4th Cir. 2001); *Shell Offshore, Inc. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 122 F.3d 312, 317 (5th Cir. 1997). *But see Burnley v. City of San Antonio*, 470 F.3d 189, 200 n.10 (5th Cir. 2006) (appellee waived argument for appellate attorney's fees by failing to sufficiently brief).
14 *Int'l Ore*, 38 F.3d at 1286. Also, in the Third, Eighth, D.C., and Federal Circuits, an appellee's failure to raise alternative grounds for affirmance under the right for any reason rule will have no effect on its ability to assert those grounds in the district court on reversal or in a second appeal.
15 *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 741 (D.C. Cir. 1995); *accord Eichorn v. AT&T Corp.*, 484 F.3d 644, 657-58 (3d. Cir. 2007); *Kessler v. Nat'l Enters., Inc.*, 203 F.3d 1058, 1059 (8th Cir. 2000); *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 954 (Fed. Cir. 1997).
16 *Laitram*, 115 F.3d at 954.
17 *See generally* Fed. R. App. P. 28.1.
18 Fed. R. App. P. 28(b), 28.1(c)(2).
19 *Morley Constr. Co. v. Md. Cas. Co.*, 300 U.S. 185, 191 (1937); Fed. R. App. P. 28.1(c)(2).
20 *American Ry. Express Co.*, 265 U.S. at 435.
21 *Klamath Strategic Investment Fund v. United States*, 568 F. 3d 537, 546 (5th Cir. 2009); *see also Perez v. Ledesma*, 401 U.S. 82, 87 n.3 (1971).
22 *See Int'l Ore & Fertilizer Corp.*, 38 F.3d at 1286 (refusing to address appellee argument in favor of additional damages because appellee did not cross appeal); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 725-26 (2d Cir. 1978) (Friendly, J.) (refusing to reduce damages because party failed to cross appeal); *Aerospace Servs Int'l v. LPA Group*, 57 F.3d 1002, 1004 n.3 (11th Cir. 1995) (requiring cross appeal to challenge calculation of damage).
23 *Laitram*, 115 F.3d at 955.
24 *Id*.
25 *Chowaniec v. Arlington Park Race Track, Ltd.*, 934 F.2d 128, 130-31 (7th Cir. 1991).
26 *Speaks v. Trikorka Lloyd P.T.*, 838 F.2d 1436, 1439 (5th Cir. 1988).
27 *In re DES Litig.*, 7 F.3d 20, 23 (2d Cir. 1993) (recognizing that prevailing party has standing to challenge lower court's rulings that would have adverse collateral estoppel effect, but refusing to apply that rule to trial court's personal jurisdiction ruling, which would not have such an effect); *cf. Camreta v. Greene*, 131 S. Ct. 2020, 2028-33 (2011) (holding that Supreme Court can review appeals from § 1983 defendants who were held to have violated the constitution but were entitled to qualified immunity).
28 *E.g., Cook v. Rockwell Int'l Corp.*, 618 F.3d 1127, 1153 (10th Cir. 2010), *cert. denied*, No. 10-1377, 2012 WL 2368857 (U.S. June 25, 2012); *Hartman v. Duffey*, 19 F.3d 1459, 1465 (D.C. Cir. 1994).
29 *Cook*, 618 F.3d at 1153.
30 *See, e.g., Nautilus Grp., Inc. v. Icon Health & Fitness, Inc.*, 437 F.3d 1376, 1378 (Fed. Cir. 2006).
31 *Aventis Pharma S.A. v. Hospira, Inc.*, 637 F.3d 1341, 1343 (Fed. Cir. 2011), aff'd 675 F.3d 1324 (Fed. Cir. 2012); *Marcatante v. City of Chicago, Ill.*, 657 F.3d 433, 438 (7th Cir. 2011); *Mitchell Partners, L.P. v. Irex Corp.*, 656 F.3d 201, 208 n.7 (3d Cir. 2011); *Nat'l Union Fire Ins. Co. of Pittsburg, PA v. West Lake Acad.*, 548 F.3d 8, 23 (1st Cir. 2008); *Leprino Foods Co. v. Factory Mut. Ins. Co.*, 453 F.3d 1281 (10th Cir. 2006); *In re Sims*, 994 F.2d 210, 214 (5th Cir. 1993).
32 *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 439 (7th Cir. 1987); accord *Nautilus Grp., Inc.*, 437 F.3d at 1377.

Georgia Appellate Practice Seminar Held in Atlanta

By Bryan Tyson

On March 1, more than 115 lawyers gathered to participate in the annual Georgia Appellate Practice Seminar. Many more wished to join those in attendance, but the Section had to stop taking registrations due to room size.

Four of the seven Supreme Court Justices and seven of the 12 Court of Appeals Judges offered insights into better appellate practice. Topics covered included interlocutory appeals, effective oral argument, professionalism, practice pointers from appellate judges who are now in private practice, briefs, and preserving issues for appeal.

The Section is grateful for the participation of Justices Hugh P. Thompson, Harold D. Melton, David E. Nahmias and Keith R. Blackwell of the Supreme Court of Georgia. The Section is also grateful for the participation of Presiding Judges Herbert E. Phipps and Sara L. Doyle; and Judges Stephen Louis A. Dillard, Christopher J. McFadden, William M. (Billy) Ray II, Elizabeth L. (Lisa) Branch and Carla Wong McMillian of the Court of Appeals of Georgia and retired judges Alan Blackburn and J.D. Smith.

The Section also thanks appellate practitioners Scott Henwood, Laurie Webb Daniel, Mark Cohen, Scott Key, Sarah Gerwig-Moore, Paula Smith, James Bonner, Kenneth Hodges, Mary Webb, Sarah Shalf, Jennifer Jordan, John Hadden, Jeff Swart, Leighton Moore, Thomas Byrne and Paul Kaplan for sharing their expertise.

This year's Georgia Appellate Practice Seminar was co-chaired by Darren Summerville of Summerville Moore, P.C. and Kamal Ghali of the U.S. Department of Justice, who did a fantastic job assembling the panels and topics. If you missed this year's seminar, be sure to make plans to attend and learn next year!

Bryan Tyson is an associate at Strickland Brockington Lewis LLP and serves as Secretary for the Appellate Practice Section.

Eleventh Circuit Appellate Practice Institute (ECAPI) Held in Miami

By Amy Weil

Described by many as "the best ECAPI ever," the fourth bi-annual 11th Circuit Appellate Practice Institute took place on Feb. 7 - 8 in Miami, Fla. Co-hosted by the Appellate Practice Sections of the State Bars of Florida and Alabama, the program attracted appellate practitioners from each of the three states in the circuit, as well as a number of 11th Circuit Judges. Senior Judge Peter T. Fay presided over a panel on appellate ethics; Hon. Charles R. Wilson and recently-appointed Judge Adalberto Jordan spoke on effective brief writing; Hon. Stanley Marcus and Hon. William H. Pryor Jr. participated in an oral argument panel; and Hon. Rosemary Barkett hosted a cocktail party for attendees at her home. U.S. Supreme Court practitioners Miguel Estrada, Catherine Stetson and U.S. Deputy Solicitor General Michael Dreeben spoke about cases currently pending before the Supreme Court, and also gave tips on how to get from the 11th Circuit to the high court. Clerk of the Court John Ley gave helpful tips on how the clerk's office is managed, and a lively panel discussion was directed at the Court's requirement for filing expanded record excerpts (the "Electronic Records on Appeal Program"). Attendees also watched a live oral argument at the 11th Circuit Courthouse, and participated in civil and criminal breakout sessions.

The next ECAPI is being planned for 2014 in Montgomery, Ala. You don't want to miss it!

Amy Weil is a partner at The Weil Firm, LLC, a past chair of the Appellate Practice Section, and specializes in appellate litigation.

Section Letter on Expanded Record Excerpts

In light of questions and concerns from practitioners, the Eleventh Circuit requested public comment this spring on its Electronic Records on Appeal Program, which requires the filing of Expanded Record Excerpts. Section Chair Paul Kaplan sent the following letter to the Clerk on behalf of the Section:

April 19, 2013

Mr. John Ley
Clerk of Court
Eleventh Circuit Court of Appeals
56 Forsyth St NW
Atlanta, GA 30303

Re: Expanded Record Excerpts Program;
Comment Regarding Proposed Amendment to 11th Cir. R. 30-1

Dear Mr. Ley:

I write in my capacity as Chair of the Appellate Practice Section of the State Bar of Georgia, and pursuant to your call for public comment on the proposed change to Eleventh Circuit Rule 30-1, to urge the Court to reconsider its Expanded Record Excerpts Program.

We have encouraged our members to submit comments to you directly to document their specific experiences with the Program. We hope those letters will provide additional detail, but I also wanted to provide this overview of the concerns that our members have expressed.

Members of our Section and colleagues in our sister states have voiced near unanimous concern with the redundancy and expense that the record excerpt program requires. While ostensibly part of an electronic records initiative, the program instead forces litigants to file vast amounts of paper. In one photo circulated at this year's Eleventh Circuit Appellate Practice Institute, one party's excerpts filled three dozen bankers boxes. In just two cases, the U.S. Attorney's Office for the Northern District of Georgia filed nearly 11,000 pages of excerpts, and spent $236 for the postage alone. Because the rules require litigants to submit multiple tabbed copies of every portion of the record relied upon in their briefs, criminal defendants who raise sufficiency of the evidence or argue that an issue is reversible rather than harmless error must file as "excerpts" copies of the entire trial record.

The expense associated with these efforts can be considerable. The U.S. Attorney's Office in Atlanta has had to divert one of its paralegals from Economic Crimes to Appeals, to help prepare the voluminous excerpts that the rules now require. Other litigants do not have that option. CJA panel lawyers often are sole practitioners with little or no administrative support. To compile, copy, index, and tab large portions of the record, they must either hire additional staff (at considerable expense) or spend hours doing the work themselves – clerical work for which, as attorneys, they cannot be reimbursed. We have heard from at least one CJA panel attorney who has decided to no longer take appointed appeals specifically because of these added costs, and we expect that others may follow.

In both civil and criminal matters, retained counsel must explain to their clients, many with very limited means, why they must pay hundreds or thousands of dollars to print from the courts' own PACER service and then index, tab, copy, and send to the Court voluminous paper copies of material that the courts themselves provide online. This process strikes most clients and many lawyers as wasteful and redundant, and in many cases it risks limiting the amount of representation that litigants can afford.

These cost concerns may also affect the quality of briefing that the Court receives. Because the rules now require parties to copy and submit, at their expense, multiple, tabbed iterations of every record item cited in a brief (including, for example, the complete transcript of every witness cited), several attorneys have reported that they now include fewer record cites in their briefs. Because every record citation now comes with a quantifiable cost, counsel are opting to cite the record only for matters believed to be in dispute. In some cases, more focused briefing may be beneficial. But in general, we believe the appellate process functions best when the Court is able to ascertain the basis for all factual assertions, regardless of whether they are disputed or not.

The Expanded Record Excerpts Program largely shifts the burden of preparing the record on appeal from district court clerks to individual litigants. But we believe this shift does little to reduce public expense. The costs of compliance by U.S. Attorneys, Federal Defenders, and CJA appointees ultimately are borne by the taxpayer, and the Court, too, must incur significant expense to store and mail excerpts to individual chambers.

Many judges and most law clerks, we suspect, are comfortable reading documents via PACER online, and with printing only certain documents when required. This kind of more selective and individualized workflow would, we believe, better use the PACER system as it was intended; would reduce unnecessary use of paper, postage, toner, file space, and time; and would better reflect the way files are managed in attorney offices and other courts.

Our members strongly support the expanded use of electronic records. However, as currently drafted, we fear that the Court's pilot program runs counter to that goal. We thank you for seeking input from the appellate bar on this issue, and we hope that these comments and those of our members will be of use as the Court continues to evaluate these rules.

Sincerely,

Paul J. Kaplan
Chair, Appellate Practice Section
State Bar of Georgia

The Court has extended its thanks to all who wrote in. The Court's Electronic Records Committee is reviewing all comments received and will report to the full Court at its next administrative meeting on June 25, 2013.

To contribute information to the newsletter, please email Bryan Tyson, editor, at bryan.tyson@sbllaw.com