



The Appellate Review

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EQUAL DIVISION IN THE COURT OF APPEALS: NUANCES AND DIFFICULTIES

by Eric J. Marlett

The Georgia Constitution requires that any case in which the judges of the full Court of Appeals are evenly divided must be transferred to the Supreme Court for decision. As one can imagine, this situation does not arise frequently, however, when it does, the question of whether the Equal Division clause of the Constitution applies can sometimes create confusion in these cases, which, by their very nature, are already more complicated than average.

The Equal Division clause is set forth in Article VI, Section V, Paragraph V of the Georgia Constitution and provides as follows:

In the event of an equal division of the Judges when sitting as a body, the case shall be immediately transmitted to the Supreme Court.

While, on its face, this rule may appear straightforward and easily applied, in practice there are a number of nuances which have resulted, over the years, in the Equal Division clause sometimes either being misapplied, or not being invoked when necessary, a fact which also likely derives in part from the relative rarity of equally divided opinions.

This constitutional provision was first enacted as part of the Georgia Constitution of 1945.¹ Two years later, in *W.T. Rawleigh Co. v. Forbes*², which appears to be the first decision implicating the new Equal Division clause, the rule was applied without complication in a case involving an equal division on the question of whether the Court of Appeals had jurisdiction.³ Very simply, the Supreme Court determined that jurisdiction did exist in the Court of Appeals, and transferred the case back to that Court for a ruling on the merits.⁴

By 1954, however, we see one of the first misapplications of the Equal Division clause. In *Atlantic Coast Line R. Co. v. Godard*⁵, the Court of Appeals transferred the case to the Supreme Court by way of an order and memorandum which stated that the Court was evenly divided on the question of whether the evidence authorized the verdict, and which also stated that the Court of Appeals did not address any other grounds of the appeal, reasoning

that if the Court found grounds to reverse, without a definitive determination of the question on which it was evenly divided, the issue would likely recur on retrial and return to the Court of Appeals with the same issue still undecided.⁶ The Supreme Court, however, held this application of the Equal Division clause to be improper, stating that the rule

contemplates the transfer by the Court of Appeals to this court of cases where the Judges of the Court of Appeals are equally divided on all questions in the case which would require an affirmance or reversal of the judgment of the trial court, and does not provide for a transfer by that court to this court of any case where there is an equal division between the judges of the Court of Appeals on an isolated question in the case, and there remain for consideration and decision assignments of error whereby, if error be found that required a judgment of reversal, a consideration of the isolated question would become immaterial.⁷

Since the Court of Appeals in that case had not ruled on every issue, there was, therefore, not yet an equal division requiring a transfer to the Supreme Court, and the case was accordingly returned to the Court of Appeals.⁸

Thus, early on, the Supreme Court established the principle that for a transfer to be proper, the Court of Appeals must rule on all issues and be equally divided on everything that would require affirmance or reversal. In fact, the Supreme Court subsequently even went so far as to hold that when the Court of Appeals has ruled on only one issue and concluded that it is evenly divided, the Supreme Court is “without jurisdiction of the case” and “it must and will be returned to the Court of Appeals for determination.”⁹

Notwithstanding that conclusion, however, the Supreme Court has not always followed this procedure. In *Garland v. State*¹⁰, the Court of Appeals issued an opinion in which the judges were evenly divided on one issue,

See Equal Division on page 8

Word from the Chair

by Bryan Tyson



It is my privilege to welcome you to another new year in the Appellate Practice Section. Our Section's purpose is "to foster professionalism and excellence in appellate advocacy and to encourage improvements in the appellate process." To achieve that goal, we undertake a number of specific projects.

First, we hold lunch events to interact with experts and hone our practice. Last year, we had a series of lunches with entertaining speakers, including the clerks of the various appellate courts. This year, Jason Naunas will be heading up that effort, so watch your emails for invitations.

The second thing we do to foster professionalism and excellence is publish a newsletter about various topics of interest for appellate practitioners. Historically, we've covered everything from fonts to strategy to brief-writing, along with rule changes from the appellate courts. This year Section Secretary, Margaret Flynt, will be heading up the newsletter and managing our Section listserv.

Third, to encourage improvements in the appellate process, we also review proposed state legislation relating to appellate practice. Our Section recently had a direct impact on the scope of appeals of child support orders through legislative efforts undertaken at the request of an appellate judge. Lee Kynes will be heading up the state legislative committee this year.

The federal committee reviews and comments on proposed changes in the federal rules. A great example of its work occurred about two years ago when the Eleventh Circuit asked for comments from the bar regarding its electronic records on appeal program. The Section sent comments and the Eleventh Circuit ultimately changed its procedures. This year Andy Tuck will be heading up the federal practice committee.

Finally, one of the biggest projects of the section to foster professionalism is our sponsorship of the Appellate Practice Institute, an annual all-day CLE that focuses on appellate practice specifically. Darren Summerville has chaired that effort for years and has thankfully agreed to continue doing so this year. It always draws a great crowd and usually we have to stop registration because we max out the space available.

If you're interested in furthering our mission, please let me or one of the committee chairs know. I look forward to continuing to foster professionalism and excellence in our profession with you.

Bryan Tyson is the 2014-15 Section chair for the Appellate Practice Section. He is a civil litigator with Strickland Brockington Lewis LLP and focuses on elections and political law.

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September APS Meeting: Volokh on SCOTUS

by Margaret Flynt

At the September Appellate Practice Section meeting, Professor Alexander “Sasha” Volokh of Emory Law School gave an overview of important U.S. Supreme Court cases that were recently decided, as well as a preview of the upcoming term.

Prof. Volokh focused on three significant cases from last term:

1. *Schuette v. Coalition to Defend Affirmative Action*: In a 6-2 decision (Kagan, J. recused), the Court held that it was not a violation of the Equal Protection Clause for Michigan voters to amend the state constitution to prohibit state universities from considering race as part of the admissions process.
2. *Burwell v. Hobby Lobby Stores, Inc.*: In this 5-4 decision, the Court held that although the Affordable Care Act mandates employers to provide contraception coverage, the Religious Freedom Restoration Act of 1993 allows a closely-held, for-profit corporation to deny contraception coverage on religious grounds.
3. *Harris v. Quinn*: In this 5-4 Illinois case, the Court held that public unions may not exact agency fees from non-union workers who are not full-fledged public employees. This fairly narrow opinion applies only to home healthcare workers in Illinois, although it may signal the possible overruling of the 1977 decision in *Abood v. Detroit Board of Education*, which allowed compulsory dues to public-employee unions for non-political purposes.

Volokh also previewed seven upcoming cases:

1. *Halbig v. Sebelius*. Although not before the SCOTUS, two U.S. Courts of Appeals came to opposite conclusions over the interpretation of the same provision of the Affordable Care Act (ACA). In July, a three-member panel of the D.C. Circuit held that the ACA only allows tax credits for coverage obtained through state-run exchanges. On the same day, a Fourth Circuit panel held that coverage obtained through federal exchanges are also eligible for tax credits. The D.C. Circuit granted rehearing on the case en banc. Oral argument was set for Dec. 17, 2014
2. *Holt v. Hobbs*: The Arkansas Department of Corrections prohibits inmates from growing beards in the absence of a medical condition. Inmate Holt is a Muslim who believes that his faith requires him to grow a full beard. The Court will decide whether the grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000.
3. *Zivotofsky v. Kerry*: The Petitioner, a U.S. citizen born in Jerusalem, wants his passport to show that he was born in the nation of Israel. Although Congress passed a law ordering the State Department to allow such citizens to list their places of birth as Israel, relying on its Article I authority to “regulate commerce with foreign nations” and to enact a “uniform rule of naturalization,” the White House argues that this infringes on presidential authority, specifically, the president’s Article II authority to “receive ambassadors and other public ministers” and to “make treaties.”
4. *Yates v. United States*: The captain of a commercial fishing vessel was caught with fish that violated regulations. An inspector told him to return to port with the catch, but Yates threw the fish overboard. He was charged with destroying evidence under a law passed during the Enron era that made it a crime to destroy or alter “any record, document or tangible object” with the intent to impede or obstruct a federal investigation. The Court will decide whether the law applies only to documentary evidence, or whether fish are the types of “tangible objects” contemplated by the statute.
5. *Alabama Legislative Black Caucus v. Alabama*: After Alabama re-drew political boundaries to reflect changes in the 2010 census, it was accused of gerrymandering and intending to reduce minority influence in the surrounding districts. The issue is whether Alabama’s legislative redistricting plans unconstitutionally classify black voters by race by intentionally packing them in districts designed to maintain supermajority percentages produced when 2010 census data are applied to the 2001 majority-black districts.
6. *North Carolina Board of Dental Examiners v. Federal Trade Commission*: The state licensing board ordered non-dentists to stop providing services such as teeth whitening. The FTC found that this “conspiracy, in restraint of trade” violated the Sherman Antitrust Act, reasoning that the Board is a “private” actor because a majority of the board members are dentists who stand to financially gain from limiting competition. The Board argues that it is a state agency, so the Sherman Act does not apply. The Court will decide whether a state agency is properly considered to be a “private” actor simply because a majority of its board consists of market participants.

7. *Department of Transportation v. Association of American Railroads*: Since around 1970, Congress has subjected Amtrak to government oversight and regulations, although it has specifically declared that Amtrak is not a government agent. Congress later passed The Passenger Rail Investment and Improvement Act of 2008, which requires the Federal Railroad Administration and Amtrak to “jointly . . . develop” the metrics and standards for Amtrak’s performance. The question now before the Court is whether this was an unconstitutional delegation of legislative power to a private entity.



Margaret Flynt is the section secretary and a staff attorney with the Appellate Division of the Georgia Public Defender Standards Council. She handles only direct appeals in criminal cases across the state.

Section Officers

During the June 19, 2014, Planning Meeting of the section, the following officers were elected for the 2014-15 Bar year:

- Bryan Tyson, chair
- Darren Summerville, vice-chair
- Scott Key, immediate past chair
- Margaret Flynt, secretary
- Leland Kynes, treasurer

The following committees and chairs were designated for the 2014-15 Bar year:

- State Practice and Legislation Committee: Leland Kynes
- Federal Practice Committee: Andy Tuck
- Programming and Events Committee: Jason Naunas
- Communications Committee (Newsletter): Margaret Flynt

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Book Briefs: *The Sense of Style: The Thinking Person's Guide to Writing in the 21st Century*

by Brandon Bullard

Good writing begins strong. Not with a cliché.¹ So says cognitive scientist Steven Pinker in his new writing book *The Sense of Style*. Although it's unclear how anyone writes a style guide without reference to Bryan Garner, there is much that recommends Pinker's book to the appellate brief-writer. And some that doesn't.

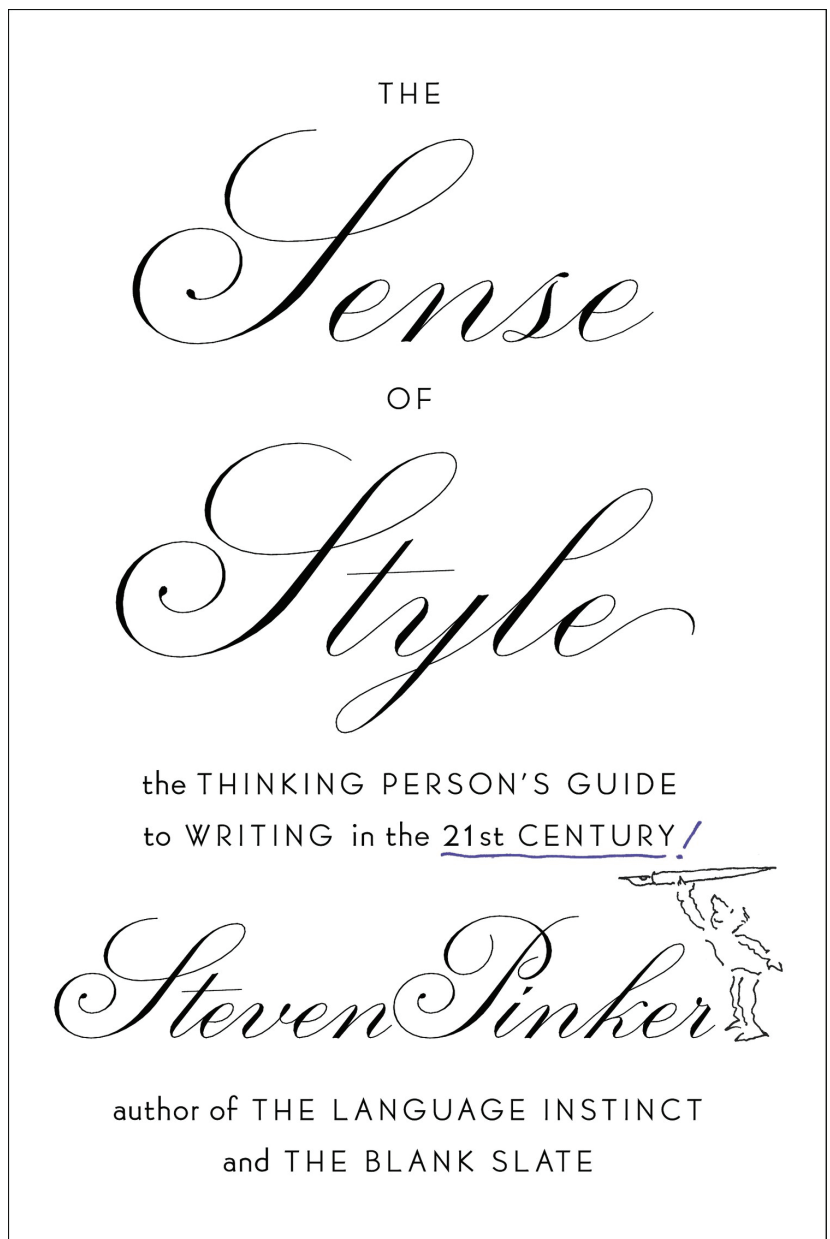
Taking first the good, *The Sense of Style* fills a gap in the literature. In it, Pinker approaches writing from his home disciplines: psycholinguistics and cognitive science. So, rather than appealing to the writer's ear and long-echoed maxims, Pinker focuses on how written words affect readers. He explains that readers are not telepathic, that readers grab onto finite bits of information, and that readers need cues on how to chunk information and maps to navigate text. At each stage, Pinker shows where writing goes awry and how to fix it—not with rules, but with sound, intuitive principles.

After leading with his general approach, Pinker heads off into a specific discussion of classic style. Classic style, Pinker explains, shows readers something in the world and engages them in conversation. Thus, it evades the tedium of thoughtless signposting—giving a detailed preview of everything to follow. Since readers cannot hold the whole map in their memories, Pinker suggests that it's better to make each turn “obvious when the reader gets to it.” That way, the writing takes advantage of readers' expectations. For similar reasons, classic style eschews jargon and clichés (which do not engage readers' imaginations) and prefers concrete words and fresh constructions (which do).

Pinker moves from classic style to dispel the “curse of knowledge”—the trouble imagining that the reader doesn't understand something that is perfectly plain to the writer. That curse is the cause of much opacity in writing. To lift it, Pinker says, the writer “must first appreciate what a devilish curse it is. Like a drunk who is too impaired to realize that he is too impaired to drive, we do not notice the curse because the curse prevents us from noticing it.” Pinker notes that the usual, talismanic advice to consider the reader is ineffective. Instead, he suggests that writers should be aware of the “pitfalls in their path[s].” They should explain technical terms,

avoid specialized abbreviations, group information into coherent chunks, and describe concrete forms rather than abstract functions.

Curse lifted, the next step is using cognitive science to build better, clearer sentences. The problem here is that the string-like structure of our language doesn't reflect the vast web of our thoughts. Pinker's solution is to consciously arrange words according to type and function. Yes, this



is syntax. But Pinker’s approach helps to make sense of it. More even than in previous chapters, Pinker shows writers how to put words together cogently, how to tell the wheat from the chaff, and to not mislead readers. Pinker demystifies syntax by exposing the deep structure of language and then illustrating how that structure controls readers’ understanding.

Then in the fifth chapter of six, Pinker elevates all of these concepts to address coherence. Again relying on how readers experience writing, Pinker outlines principles necessary to make whole bodies of text clear. Since readers’ understanding requires context, writers should state their topic at the outset. To help readers keep track of their topics, writers should keep their structures and labels stable. And, so readers will understand the point, writers should limit variables and keep the relationships between their sentences clear.

Sure, little of Pinker’s advice is novel. Novelty, however, isn’t the point. The point is that Pinker’s approach to writing is reasoned and not dogmatic. Applying his reasoning will help anyone write a clearer, more-engaging, easier-to-read brief. And had Pinker stopped with his chapter on coherence, the book would have been more than worth the cover price. But he didn’t.

Instead, Pinker closes *The Sense of Style* with a 118-page slog through his opinions on usage. Without naming them, he decries as a group language “purists—also known as sticklers, pedants, peeves, snobs, snoots, nitpickers, traditionalists, language police, usage nannies, grammar Nazis, and the Gotcha! Gang.” Pinker erects what he claims are that group’s superstitions. He then tilts at them either with the consensus of the American Heritage Dictionary’s usage panel (of which Pinker is a member) or with his own opinions.

The trouble with Pinker’s last chapter is that it abandons the cognitive justifications that made the rest of the book so useful. It’s not even that Pinker’s advice is bad. It’s just unclear whether many his linguistic straw men exist. For example, who uses *decimate* only to mean “destroy one-tenth of,” *Frankenstein* only to refer to a scientist, or *livid* only to describe colors? More to the point, although descriptive of how English-speakers speak, Pinker’s advice muddies the language in at least a few places. I, for one, would fight to preserve the distinction between *compose* and *comprise*, as well as that between *nauseous* and *nauseated*.

At bottom, there is much for a brief-writer to profit from in *The Sense of Style*. Would that we all wrote with a firmer eye toward clarity, coherence, and grace. My advice is this: Read Pinker’s first five chapters. Then, when you get to chapter six, put the book down and buy a reputable usage dictionary.

Brandon Bullard is the Executive Staff Attorney for the Georgia Public Defender Standards Council.

(Endnote)

1 Stephen Pinker, *The Sense of Style: The Thinking Person’s Guide to Writing in the 21st Century!* (Viking 2014).

Judicial Opinions: Recommendations from the Bench

by Margaret Flynt

Judge Stephen Louis A. Dillard of the Court of Appeals of Georgia was asked what legal blogs and websites he would recommend to our section members. Here is a list of what he reads:

- **The Volokh Conspiracy** (washingtonpost.com/news/volokh-conspiracy/): This group blog was cofounded by Eugene Volokh and Alexander “Sasha” Volokh, and almost all writers are law professors, teaching at various law schools throughout the country. They write mostly about law and public policy, though they feel free to blog about whatever else strikes their fancy.
- **SCOTUS Blog** (scotusblog.com): SCOTUSblog is devoted to comprehensively covering the U.S. Supreme Court without bias and according to the highest journalistic and legal ethical standards. The blog is provided as a public service and is sponsored by Bloomberg Law.
- **SCOG Blog** (scogblog.com): The blog covers civil cases at the Supreme Court of Georgia, but not including civil cases involving land title, probate issues, and some injunctive relief. It focuses primarily on cases that civil litigators would find useful in their practice.
- **Wall Street Journal Law Blog** (blogs.wsj.com/law/): The Law Blog covers the legal arena’s hot cases, emerging trends and big personalities.
- **Above the Law** (abovethelaw.com): Above the Law takes a behind-the-scenes look at the world of law. The site provides news and insights about the profession’s most colorful personalities and powerful institutions, as well as original commentary on breaking legal developments.
- **Brief Right** (briefright.com): This is a blog about creating winning legal briefs. Any aspect of brief writing and brief editing may be covered.

You can follow Judge Dillard on his verified Twitter profile: @JudgeDillard. (Just look for the blue check!)

Supreme Court and Court of Appeals Adopt New Admissions Rules, Lower Credit Card Fees

by John Hadden

The Supreme Court of Georgia and Court of Appeals recently amended their rules governing attorney admissions in several significant respects, both of which should serve to simplify certain admissions. First, late last year, the Court of Appeals amended Rule 9(a) governing admission to the court of Georgia attorneys to allow for remote admissions. Previously, all Georgia Bar members wishing to practice before the Court of Appeals were required to appear in person at the Court of Appeals to be sworn in. Under the new rule, attorneys may submit their admission paperwork electronically and be administered the oath over the phone, after which they will be provisionally admitted pending receipt of their admission fee. The fee, payable to the Clerk of the Court of Appeals, is \$200, in addition to the standard admission fee of \$30. Court of Appeals Clerk Stephen Castlen noted that the remote admission rule significantly increased the convenience of admission for attorneys outside the metropolitan Atlanta area.

The second rule change concerns pro hac vice admission of non-Georgia attorneys. The Supreme Court and Court of Appeals have both amended their rules (Supreme Court Rule 4(h) and Court of Appeals Rule 9(c)) to provide more specific instructions to

prospective applicants. The revised rules, which are substantially identical, require applicants to include (1) a certificate of good standing from the highest court of the applicant's own jurisdiction; (2) the applicant's business address, email address, and phone number, and (3) the name of the party or parties the attorney seeks to represent. As under the prior rule, the application may be filed by either the foreign attorney or a local attorney seeking the foreign attorney's admission. The admission fee has been raised to \$200, payable to the Georgia Bar Foundation, and the rules contain provisions for fee waivers in cases involving indigent client representation, as well as electronic filing access for out-of-state attorneys.

Both appellate courts have also lowered the convenience fee charged for credit card payments from \$15 to \$10, effective July 15, 2014. The changes affect only the electronic payment surcharge, and all existing rules governing payment of costs remain unaffected.

John Hadden is a trial attorney with the office of Turkheimer & Hadden in Atlanta. He is author of Green's Georgia Law of Evidence and co-author of Georgia Law of Torts - Trial Preparation and Practice.

Join the APS Listserv

You can join other members of the Appellate Practice Section on our listserv, an electronic mailing list for sharing 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. Answers about everything from 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. This list is designed for appellate practice questions, so questions for other subject areas should be sent to other lists.

To join the list, send an email to mflynt@gpdsc.org and request an invitation.

and on motion for reconsideration, that Court vacated its opinion and transferred the case to the Supreme Court.¹¹ Rather than immediately returning the case to the Court of Appeals, however, the Supreme Court proceeded to rule on the merits of the evenly divided question, and only then noted that “[t]he defendant in this case raised several other issues which were not addressed by the Court of Appeals. Because the record does not show that the Court of Appeals is equally divided on all issues which would require either affirmation or reversal of the judgment, the case is hereby returned to it for determination of these issues.”¹²

Although there has been some inconsistency in the way in which the Equal Division clause is applied in individual cases¹³, the practice and procedure for handling these cases certainly aims to ensure that each matter is properly decided. Stephen Castlen, Clerk of the Georgia Court of Appeals, points out that an equal division on the Court is pretty unusual, typically occurring about once a year, out of thousands of opinions issued annually. Nevertheless, the process of transferring the case is relatively straightforward. What is interesting is the way the Court determines that there is, in fact, an equal division among the judges. Castlen states that due to the heavy caseload of the Court, and the pace at which it issues decisions, when a case is assigned to the full Court, the judges do not, as a matter of practice, convene to review and discuss the case at an early stage to get a preliminary idea of where everyone stands on the issues. In fact, in that regard, a full bench review is no different than any other case decided by the Court of Appeals. According to Castlen, the normal process in a 12-judge case is to draft an opinion and send courtesy copies to all the judges. The case then circulates through each judge’s office, where it is given extensive analysis before being voted on by that judge and then moving to the next judge in the decision chain. Courtesy copies of dissents and concurrences, if any, that arise during this process are also distributed to all judges, and it is often not until this process is complete, or nearly complete, that it becomes apparent that an equal division exists.

What happens then, in a conventional equal division case¹⁴, is that after all of the judges have voted, and they are equally divided, the case is transferred to the Supreme Court by order, along with the opinions that were drafted and voted on, including all dissents and concurrences, if any. This enables the Supreme Court to know the respective position and reasoning of each judge, or group of judges, on each dispositive issue. The Supreme Court then renders a decision on the divided issue or issues, and then, if there are any matters remaining on which the Court of Appeals was not evenly divided, returns the case to that Court for further proceedings. In fact, while the drafting and forwarding of the opinions of the divided Court of Appeals unavoidably leads to both Courts expending judicial resources on the crafting, and subsequent consideration, of opinions that have no binding effect and do not resolve the dispute, this step is nevertheless essential to proper appellate review, and is a requirement in cases transferred under the Equal

Division clause. This point was made clear in a case that was recently decided by the Supreme Court, *Crane Composites, Inc. v. Wayne Farms, LLC*,¹⁵ in which the Court of Appeals transferred the case by way of an order entered on July 16, 2014, and stated that the Court was equally divided, but did not include the written opinions that the Court had voted on. The Supreme Court issued an order on August 12, 2014, directing the Court of Appeals to transmit its opinions as part of the record because “in the absence of the Judges’ opinions, it is impossible to ascertain, as we are required to do . . . , whether the full bench of the Court of Appeals considered every claim of error that might cause the judgment of the trial court to be set aside.”¹⁶

One of the more uncommon applications of the Equal Division clause occurred this past year in the matter of *Rodriguez v. State*.¹⁷ That case involved the trial court’s denial of a motion to suppress evidence obtained during a traffic stop, and, pursuant to an interlocutory appeal, a panel of the Court of Appeals initially affirmed.¹⁸ Appellant filed a motion for reconsideration, which was granted, and thereafter the initial decision was vacated, and the case was referred to the full court.¹⁹ The Court of Appeals then published its decision affirming the trial court via a per curiam opinion, in which two judges concurred, two judges concurred in part and in the judgment, two judges concurred in the judgment only, four judges dissented and stated that they would reverse the trial court, one judge dissented stating that he would vacate and remand for further proceedings, and one judge dissented without opinion.²⁰ No determination, however, was made that the Court of Appeals was evenly divided, and thus the case was not transferred to the Supreme Court.

As such, not only do we have a rare *published* opinion coming out of what would ultimately be declared an equal division in the Court of Appeals, what is also unusual about the *Rodriguez* case, according to Therese (Tee) Barnes, Clerk of the Georgia Supreme Court, is the way in which it reached the Supreme Court. While the Court of Appeals will ordinarily transmit an equally divided case by way of an order along with its opinion, *Rodriguez* came up on a writ of certiorari. As Barnes points out, in its order granting certiorari, the Supreme Court raised the question as to whether the Court of Appeals was equally divided in the case, and therefore should have transferred it. Barnes, who has worked for the Supreme Court since 1992, first as a staff attorney, and for the last eight years as the Clerk, states that this is the first time she can recall where the Supreme Court posed that question, and took jurisdiction of what was ultimately deemed to be an equally divided case, by way of certiorari, rather than transfer.

In its opinion in *Rodriguez*, the Supreme Court “conclude[d] that the Court of Appeals never should have rendered any decision in this case and instead should have transferred the appeal to this Court.”²¹ The Supreme Court focused, not on the specific position and reasoning of each judge, or group of judges, but on the practical result. Since six judges rendered an opinion and decision that would have resulted in the trial court judgment being affirmed, and six judges held that the judgment should be set aside

in some form or fashion, and for one reason or another, the ultimate outcome was evenly split, and there was therefore an equal division requiring transfer.²² In fact, one of the main problems with the Court of Appeals' decision is that it *purported* to affirm the trial court, but there was no majority directing the trial court how to proceed. "If their split decision were the last word, the trial judge could not possibly be expected to know whether the motion to suppress still stood denied, and in such circumstances, the trial judge could not reasonably be expected to 'carr[y] into full effect in good faith' the decision on appeal. The Equal Division clause keeps a trial judge from being put into such an untenable position."²³

Thus, the key points to bear in mind when faced with a divided opinion of the full Court of Appeals, are (1) that the Court must rule on all dispositive issues, (2) that regardless of how many different positions and lines of reasoning emerge, the Court must be equally split on whether the trial court ruling should stand, or should be set aside on some ground, and (3) that the opinion of the Court of Appeals must be submitted with the order transferring the case so that the Supreme Court can make its own determination as to whether there is an equal division.

One other thing to note, and this may occur even more rarely than an equal division, but it could prove important, is that if the Court of Appeals is evenly split on a particular issue, and that split does not create a constitutional equal division requiring transfer to the Supreme Court, then in the absence of any further ruling by the Supreme Court *on that issue*, the split in the Court of Appeals will result in the affirmance of the trial court ruling *on that issue*. This is what happened in *Ford v. Uniroyal Goodrich Tire Co.*,²⁴ a case in which the Supreme Court noted that "the majority opinion of the Court of Appeals in [*Ford I*] at (2) purported to find reversible error in the addition of party defendants on the eve of trial ..., [but] the eight participating members of the court were evenly divided as to that question. Because the Court of Appeals was not equally divided on *all* questions presented, it was not required that the case be transmitted to this Court for resolution of the joinder issue ... [a]nd since the joinder issue was not addressed by this Court on certiorari in [*Ford II*], the ruling of the trial court stands."²⁵

In the end, even now, nearly 70 years after it was first enacted, the Equal Division clause of the Georgia Constitution can still give rise to difficulties in its application, as *Rodriguez* demonstrates. However, if you do find yourself on appeal in a case where the full Court of Appeals renders a divided opinion, even if the Court does not raise the issue, careful analysis may reveal that there is, indeed, an equal division, and if that is the case, bring it to the Court's attention. The Equal Division clause provides an opportunity for litigants to obtain a definitive ruling on the merits where an inconclusive decision might otherwise result in affirmance by default. In fact, this further review by the Supreme Court in a proper, equally divided case is not only available to parties on appeal, it is required.

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with offices in Gwinnett County. Mr. Marlett is a graduate of Georgia Tech, New York Law School, and Goizueta Business School at Emory University, and focuses his practice primarily on civil litigation and appeals. He would like to thank Therese (Tee) Barnes, Clerk of the Georgia Supreme Court, and Stephen Castlen, Clerk of the Georgia Court of Appeals, for their valuable and much appreciated insights and contributions to this article.

(Endnotes)

- 1 Georgia Constitution of 1945, Article VI, Section II, Paragraph VIII (§2-3708). At that time, the Court of Appeals consisted of six judges, sitting in two divisions. From its beginning in 1907, until an amendment and legislation enacted in 1916, the Court of Appeals consisted of a single panel of three judges. The Court would later be expanded to seven judges in 1960, nine judges, sitting in three divisions, in 1961, ten judges in 1996, and finally to its current size of twelve judges, sitting in four divisions, in 1999. <http://www.gaappeals.us/history/index.php>.
- 2 *W.T. Rawleigh Co. v. Forbes*, 202 Ga. 425, 43 S.E.2d 642 (1947).
- 3 *Id.*, at 430.
- 4 *Id.*
- 5 *Atlantic Coast Line R. Co. v. Godard*, 211 Ga. 41, 83 S.E.2d 591 (1954).
- 6 *Id.*, at 41-42.
- 7 *Id.*, at 42.
- 8 After the *Godard* case was transferred back to the Court of Appeals, that Court ruled on all of the remaining issues, affirming the trial court on each, but ultimately remained evenly divided on the same issue as in its first ruling, resulting in another transfer back to the Supreme Court for a decision on the merits. See *Atlantic Coast Line R. Co. v. Godard*, 211 Ga. 373, 375-76, 86 S.E.2d 311 (1955).
- 9 *Atlantic Coast Line R. Co. v. Clinard*, 211 Ga. 340, 343, 86 S.E.2d 1 (1955).
- 10 *Garland v. State*, 263 Ga. 495, 435 S.E.2d 431 (1993).
- 11 *Id.*, at 495.
- 12 *Id.*, at 497.
- 13 See, e.g., *Smith v. Ellis*, 291 Ga. 566, 731 S.E.2d 731 (2012), where the Supreme Court rendered a decision on the merits in a case transferred from the Court of Appeals under the Equal Division clause, even though a key issue was not "squarely addressed" by the Court of Appeals. *Id.*, at 573.
- 14 See, e.g., *Munroe v. Universal Health Services, Inc.*, 277 Ga. 861, 596 S.E.2d 604 (2004), on remand at *Munroe v. Universal Health Services, Inc.*, 270 Ga.App. 320, 605 S.E.2d 928 (2004).
- 15 *Crane Composites, Inc. v. Wayne Farms, LLC* (Supreme Court of Georgia, S14A1680, November 17, 2014, and Georgia Court of Appeals, A14A0697, July 16, 2014).
- 16 In accordance with the Supreme Court's order, the Court of Appeals transferred its unpublished opinions, one of which was supported by six judges and would have affirmed the trial court's denial of a motion for attorney's fees under O.C.G.A. § 9-11-68. The dissent, which was also supported by six judges, would have

overruled a prior decision of the Court of Appeals and reversed the decision of the trial court. The Supreme Court ultimately sided with the dissent.
17 *Rodriguez v. State*, 295 Ga. 362, 761 S.E.2d 19 (2014).
18 *Id.*, at 363.
19 *Id.*
20 *Rodriguez v. State*, 321 Ga.App. 619, 623-27, 746 S.E.2d

366 (2013).
21 *Rodriguez*, 295 Ga. at 363.
22 *Id.*, at 364-65.
23 *Id.*, at 365 n. 5 (quoting O.C.G.A. § 5-6-10).
24 *Ford v. Uniroyal Goodrich Tire Co.*, 270 Ga. 730, 514 S.E.2d 201 (1999).
25 *Id.*, at 731, n. 4 (emphasis in original).

ABA's Council of Appellate Staff Attorneys

by Christina Cooley Smith

Appellate staff attorneys and law clerks are an eclectic bunch. We come from all kinds of legal backgrounds, straight out of law school, from solo practice, from law firm partnerships, and from public interest jobs. In addition to the 65-plus attorneys who work on the Court of Appeals and Supreme Court of Georgia, I've been fortunate to meet lawyers from all over the country who work for state and federal appellate courts through my membership in the ABA's Council of Appellate Staff Attorneys (CASA).

I worked as a law clerk on the Georgia Court of Appeals for years before I heard about CASA. CASA is a national network of state and federal appellate court attorneys, and along with the Council of Appellate Lawyers it is part of the ABA's Appellate Judges Conference. The conference is one of five within the Judicial Division. (When I joined the Judicial Division, the ABA included a flow chart in my information packet, but I had to learn the acronyms on my own.)

I met several CASA members when I attended my first four-day national Appellate Judges Education Institute (AJEI) summit, which was in DC that year. The summit is hosted by the ABA Judicial Division and SMU Dedman School of Law. If you are an appellate judge, attorney, law clerk, or staff attorney, you owe it to yourself to attend at least once.

Much of an appellate lawyer's work is solitary, and I often focus on the most prosaic of details. For example, before I even discuss the legal issues on appeal with my judge, I want to know how many of this term's cases have box-sized records, how many briefs enumerate double-digit errors, and most importantly, how many appeals have been withdrawn? Working at the court is like surfing giant waves of paper from an endless ocean of litigation. Staying on top of the curl is satisfying, but you know there are strange creatures lurking in those murky pools of paper ready to leap up and smack into you. Sometimes I really want to look at the big picture instead of worrying about the details.

That first summit was eye-opening: instead of earning my CLE hours listening to a lecture about the latest twist in DUI defense or expert witness requirements, I heard Ken Starr debate the reach of legislative and judicial power. Instead of listening to an update on workers comp law, I heard former New York Times reporter Linda Greenhouse discuss the altered course of U.S. Supreme Court jurisprudence. This year U.S. Supreme Court Antonin Scalia and Professor Bryan A. Garner of SMU

Dedman School of Law talked about their book "Reading, Interpreting, and Writing about the Law," and Professor Susan Herman of Brooklyn Law School. discussed "Three Decades After '1984': Why Does Privacy Matter?" The summit is an opportunity to look up from the specifics in front of us and consider broader issues.

I have been fortunate in working for my brilliant law school classmate and friend Anne Elizabeth Barnes since 1999, when she won election to an open seat, because unlike many of the appellate judges before her, Presiding Judge Barnes has always encouraged her staff to participate in the broader legal community. This view has allowed me to become active in the Appellate Practice Section, the State Bar's High School Mock Trial Program, the Lawyers Club of Atlanta, and CASA, and to attend the AJEI summit, which is not held in the same place each year and which inconveniently falls in mid-November, shortly before the end of one of our court terms.

When I met the CASA members at my first summit, they welcomed me like I was, well, one of them. They worked for federal and state appellate courts all over the country, some as "elbow clerks" for a single judge, some as staff attorneys for the whole court, and some as supervisors of other staff attorneys. I stayed in touch with some of the 11th Circuit members, and two years ago a retiring CASA executive board member asked me to join the board as a first-year member at large. Much as when Adam Hames asked me to serve on the board of the Appellate Practice Section, I did not really think about the fact that accepting meant that I would move up in the ranks and eventually serve as the board's chair, so I accepted.

I am now serving as the 2014-15 chair-elect of CASA's executive board. This January, CASA Education Committee members will begin working with appellate practitioners and judges in the Appellate Judges' Conference on next year's summit program. I am particularly looking forward to working with the founder of the Appellate Practice Section, the Hon. Christopher J. McFadden, who is chairing the Program Committee of the Appellate Judges Conference. We hope to see you at the next AJEI Summit, which will return to DC in November 2015.

Christina Cooley Smith is the senior staff attorney for Presiding Judge Anne Elizabeth Barnes of the Court of Appeals of Georgia.

Open Chambers: The Court of Appeals Caseload, the Two-Term Rule, and “Distress”

by Judge Stephen Louis A. Dillard



(This is a three-part series of excerpts from *Open Chambers: Demystifying the Inner Workings and Culture of the Georgia Court of Appeals* by Judge Stephen Louis A. Dillard. The article was a special contribution to the Summer 2014 Mercer Law Review Journal. Please note that the footnotes correspond with those in the original article, which may be read in its entirety at: 65 Mercer L. Rev. 831. The Appellate Practice Section thanks Judge Dillard for granting permission to share these excerpts with its members.)

It has been said before, but it bears repeating: The Georgia Court of Appeals is one of the (if not the) busiest intermediate appellate courts in the United States,³ and the court’s considerable caseload⁴ is only exacerbated by the two-term rule mandated by the Georgia Constitution, which requires that “[t]he Supreme Court and the Court of Appeals shall dispose of every case at the term for which it is entered on the court’s docket for hearing or at the next term.”⁵ This constitutional rule “imposes strict and (almost) immutable deadlines upon the merits decisions of [Georgia’s appellate courts],”⁶ and the Draconian remedy for the failure to abide by this rule is “the affirmance of the lower court’s judgment by operation of law”⁷ (something that has never occurred in the history of Georgia’s appellate courts). It should come as no surprise, then, that many of the court’s operations are reflected to some degree by the intense pressure placed upon the judges and staff by an extremely large caseload and the two-term rule. For example:

- Unlike many appellate courts, the court of appeals randomly and immediately assigns each case docketed to a judge for purposes of authoring the opinion.
- There is no *formal* conferencing between the judges,⁸ regardless of whether a case is scheduled for oral argument.
- Oral argument is entirely discretionary,⁹ is only granted in about one-third of the cases in which it is actually requested by the parties, will rarely be rescheduled due to personal or professional conflicts,¹⁰ and is not permitted for “whole court” cases¹¹ or “applications or motions.”¹²
- There are strict time limits for oral argument, strict page limits for appellate briefs,¹³ and strict deadlines for filing motions for reconsideration, interlocutory applications and responses, and

responses to discretionary applications.¹⁴

- The court frequently remands a case when there has been a significant delay in transmitting the transcript or some other part of the appellate record.¹⁵
- The court is often unable to hold or delay consideration of a case involving an issue under consideration by the Georgia Supreme Court or the United States Supreme Court.
- The court is often unable to give multiple extensions of time to file an appellate brief.
- The court is often unable to hold a case when there are ongoing mediation or settlement efforts.¹⁶
- Cases that are ultimately considered by a seven-judge or twelve-judge “whole court” (discussed *infra*) are not re-briefed or re-argued, and the parties are not informed that their case has moved beyond the consideration of the initial three-judge panel until the court’s opinion is published.
- During the final month of a term (which, as explained *infra*, the court refers to internally as “Distress”),¹⁷ the judges are extremely focused on circulating their colleagues’ cases and are often unable to spend as much time as they would like reviewing those cases (while still spending as much time as is needed to thoughtfully consider the merits of each case).
- In the rare cases in which the judgment line “flips” after a motion for reconsideration has been filed and granted, the losing party may be effectively deprived of the opportunity to file a motion for reconsideration from this revised decision.¹⁸

The internal pressures placed upon the court of appeals by the two-term rule culminate three times a year with the constitutional deadlines for the January, April, and September terms. Indeed, while the court remains busy year-round, things get especially hectic the month before these deadlines—a time period we refer to as “Distress.” Any opinion that circulates during this period is embossed with the attention-getting “DISTRESS” stamp in bright red ink, and is addressed immediately by the judges charged with considering the merits of that case. As my colleague, Judge John J. Ellington, is fond of saying, “Distress brings with it great clarity”; and this is absolutely true. Our Distress

period seems to fly by, and there is simply no delaying the inevitable. The judges have to make a decision in each Distress case by the deadline, whether we like it or not. And in most cases, the two-term rule works perfectly and (no doubt) as intended. But in a handful of cases each term, I am reminded (sometimes in rather stark terms) that the tremendous efficiency brought about by the two-term rule¹⁹ can come at a steep price in especially complex cases that--notwithstanding every effort to resolve those cases at an earlier time-- are decided during the waning days of Distress. Thus, while I am a strong supporter of the two-term rule, I also firmly believe that litigants are not well served when judges do not have the time they need to thoughtfully reflect upon the merits of an appeal decided during Distress. My hope is that a constitutionally permissible means of addressing this problem will be identified and implemented in the near future.

What lawyers should take away from the foregoing discussion, then, is that the court of appeals continually operates under enormous internal pressures, and that it is absolutely crucial for practitioners appearing before the court to expend a considerable amount of time and effort preparing their appellate briefs and oral-argument presentations with these pressures in mind.

(Endnotes)

- 3 See Christopher J. McFadden et al., *Georgia Appellate Practice with Forms 25-26* (2013-14) (“The record makes clear that both Georgia appellate courts regularly remain in the top four state supreme and intermediate appellate courts in opinion load”); Michael B. Terry, *Georgia Appeals: Practice and Procedure with Forms 11* (2014) (“The Court of Appeals of Georgia has been for years and remains the busiest intermediate appellate court in the country, with more cases per judge than any other.”); J.D. Smith, *How to Win/Lose Your Case in the Georgia Court of Appeals: Knowing How the Court Does its Work Can Make the Difference 4* (11th Annual General Practice & Trial Institute, Mar. 15-17, 2012) (noting that the court of appeals caseload, “by many measures, is the largest of any appellate court in the country, and in terms of published opinions per judge, it is unquestionably the largest”).
- 4 In 2012, each of the court of appeals twelve judges handled 289 filings, the bulk of which were direct appeals. See *Court of Appeals of Georgia*, <http://www.gaappeals.us/stats/index.php> (last visited June 10, 2014).
- 5 Ga. Const. art. VI, § 9, para. 2.
- 6 See Terry, *supra* note 3, at 29.
- 7 *In re Singh*, 276 Ga. 288, 290 n.3, 576 S.E.2d 899, 901 n.3 (2003).
- 8 There is, however, a considerable amount of informal conferencing that goes on between the judges. See Alston & Bird, LLP, *Georgia Appellate Practice Handbook* 147 (7th ed. 2012) (“Unlike the Supreme Court, the Court of Appeals does not hold regular decisional bancs. Informal bancs do occur, however.”).
- 9 See Ct. Appeals R. 28(a)(1) (“Unless expressly ordered by the Court, oral argument is never mandatory and argument may be submitted by briefs only.”).

- 10 See Ct. Appeals R. 28(c) (“Postponements of oral argument are not favored, and no postponement shall be granted under any circumstances that would allow oral argument to take place during a term of the Court subsequent to the term for which the case was docketed.”).
- 11 See O.C.G.A. § 15-3-1(c)(3) (2012) (noting that oral argument shall not be held in seven-judge or twelve-judge cases).
- 12 Ct. Appeals R. 28(a)(1); see also Ct. Appeals R. 37(h) (disallowing oral argument on motions for reconsideration); Ct. Appeals R. 44(c) (disallowing oral argument on motions to recuse).
- 13 See Ct. Appeals R. 24(f) (“Briefs and responsive briefs shall be limited to 30 pages in civil cases and 50 pages in criminal cases including exhibits and appendices, except upon written motion directed to the Clerk and approved by the Court. Appellant’s reply brief shall be limited to 15 pages.”).
- 14 See Ct. Appeals R. 4(e) (“Any other provision of these rules notwithstanding, a motion for reconsideration shall be deemed filed only on the date on which it is physically received in the office of the Clerk. See Rule 37.”); Ct. Appeals R. 16 (c) (“No extension of time shall be granted to file an interlocutory application or a response thereto. An extension of time may be granted pursuant to [Ct. Appeals R. 31(g)] to file a discretionary application, but no extension of time may be granted for filing a response to such application.”); Ct. Appeals R. 32(a) (“An application for interlocutory appeal shall be filed in this Court within 10 days of the entry of the trial court’s order granting the certificate for immediate review.”); Ct. Appeals R. 32(b) (“An application for discretionary appeal shall be filed in this Court generally within 30 days of the date of the entry of the trial court’s order being appealed.”); Ct. Appeals R. 37(b) (“Motions for reconsideration shall be filed within 10 days from the rendition of the judgment or dismissal No extension of time shall be granted except for providential cause on written motion made before the expiration of 10 days. No response to a motion for reconsideration is required, but any party wishing to respond must do so expeditiously.”); Ct. Appeals R. 37(d) (“No party shall file a second motion for reconsideration unless permitted by order of the Court. The filing of a motion for permission to file a second motion for reconsideration does not toll the 10 days for filing a notice of intent to apply for certiorari with the Supreme Court of Georgia.”).
- 15 See Ct. Appeals R. 11(d) (“Any case docketed prior to the entire record coming to the Court, as requested by the parties, may be remanded to the trial court until such time as the record is so prepared and delivered to the Court.”); *cf.* *Rodriguez v. State*, 321 Ga. App. 619, 627, 746 S.E.2d 366, 372 (2013) (Dillard, J., dissenting) (noting that “our constitutional duty to resolve this appeal today--and thus within two terms of docketing--places time constraints upon the reconsideration of this case that also warrant vacating and remanding to the trial court”).
- 16 See Terry, *supra* note 3, at 32-33 (“Another example of the courts ‘working around’ the Two Term Rule involves settlements reached during the appeal of cases of types requiring trial court approval of any settlement. This would include, for example, cases where one party is a minor, cases involving estates, and class actions. If a settlement requiring

trial court approval is reached while the case is pending in the appellate court, the court generally will not stay the appeal to await trial court approval The appellate court may, however, dismiss the appeal with leave to re-appeal if the trial court fails to approve the settlement.”).

17 See *Alston & Bird, LLP*, supra note 8, at 148 (“In the vernacular of the appellate courts, ‘distress’ cases are those cases that have reached the second term without being decided, and ‘distress day’ is the last day on which opinions can be issued for distress cases.”).

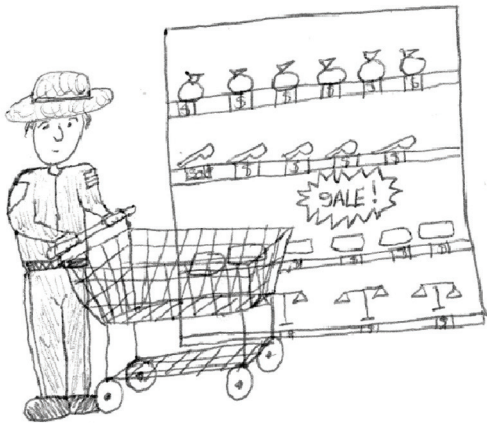
18 See *Rodriguez*, 321 Ga. App. at 627 n.20, 746 S.E.2d at 372 n.20 (Dillard, J., dissenting) (“In referencing the time constraints placed upon the Court in this case, I am not only referring to the limited amount of time that many members of the Court had to consider the complex issues presented by this appeal, but also to the fact that our decision to adopt this new, substituted opinion precludes Rodriguez from filing a motion for reconsideration.”).

19 See *Terry*, supra note 3, at 35 (“On the positive side, the Two Term Rule keeps the courts from falling behind. It imposes discipline and efficiency. It keeps the litigation process moving. It introduces an element of predictability into the timing of judicial decisions that is lacking in other jurisdictions.”).

On the Record

by Margaret Flynt

12 August 15th, 2012, Officer Matthew Kennedy went on this
13 alleged drug buying spree which you - and he recorded
14 some of this. He looks at the attached camera he had



New Year, New Rules: Changes in the Court of Appeals

In addition to the revised admission rules and fee changes (see p.7), the Court of Appeals recently implemented changes to its rules, most of which became effective in October 2014.

For a complete list, go to:

- <http://www.gaappeals.us>
- <http://gaappeals.us/rules2/index.php>
- Recent amendments are collected at http://gaappeals.us/rules2/recent_amendments.php.

Significantly, as of Jan. 1, 2015, Georgia attorneys must use the Court’s EFAST website to file most pleadings.

Other recent changes include:

- Abolition of the double-spacing requirement for footnotes and block quotes (R. 1 (c));
- Clarification that motions for reconsideration must be received by the clerk’s office before 4:30 p.m. on the due date or they will be docketed on the following day (R. 4, 37 (b));
- Fewer copies are required for applications (R. 6);
- For applications, the Court will accept conformed or stamped signatures on orders from courts where the official practice is for the judge to electronically file or stamp orders (R. 30, 31).

To contribute information to the newsletter, please email
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