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Message from the Chair

The Court of Appeals Should Be Further Expanded

It is settled law that there is no constitutional right to an appeal. Appeals are allowed by the grace of the legislature. Georgia did not even have appellate courts until 1845, when the General Assembly created the Supreme Court.

Nevertheless, if law is the application of neutral principle rather than the exercise of raw power, appeals are the sine qua non of law. Without an appellate process, "Each judge is supreme in his own [court], construing as he pleases, allowing no controlling influences to any opinion but his own, and often over-ruling them. Such a system is fraught with evils intolerable, that it is a matter of wonder that an enlightened people should submit to it for a single day." So argued Governor Charles McDonald in 1843, advocating the creation of our Supreme Court.

Appellate courts do not merely set legal policy and correct error. They check power. If setting legal policy was the sole reason for appeals, only the handful involving matters of concern, gravity and importance to the public would need to be decided. If correcting error was the sole reason, low reversal rates, high costs, and long delays would argue persuasively for eliminating appeals entirely.

For a several years I have served on a committee of domestic lawyers that advocates restoration of direct appeals in domestic cases. Initially I was more than skeptical. Rulings in domestic cases usually turn on issues of fact and matters of discretion. Prolonging such cases is often a real disservice to the parties and their children. Domestic cases are often appealed for emotional reasons – or just plain bad reasons. But lawyers who remember when domestic appeals became discretionary persuaded me. They recounted that when domestic appeals became discretionary and the appellate check on trial judges' power became more remote, the quality of trial-court judging deteriorated.

A vigorous appellate system is a necessity primarily because Acton's famous observation that power corrupts and absolute power corrupts absolutely is as true of judges as of any other mortals. The United States Attorney and the Judicial Qualifications Commission are equipped to handle the rare instances of gross or criminal corruption. But appeals are the only viable remedy for venial corruption – the sort to which all of us are subject and of which the best of us are the most conscious in ourselves. Appeals provide a remedy for the subtle corruption that tempts judges to give their predispositions too much sway, to confuse their own opinions with the law, to overestimate their own wisdom, or to rely on gut instinct instead of thinking through a difficult issue. (Of course, lawyers often share in the culpability for that last sin.)

As to such temptations, appellate review instills discipline. Appellate judges are similarly disciplined by the need to persuade their colleagues. That discipline is effective only to the extent that appellate review is rigorous and that appellate judges' need to persuade their colleagues is real.

In Georgia, most appeals are handled by the Court of Appeals. The rising caseload in that court cannot but make appellate review more remote and therefore less rigorous.

The Court of Appeals had nine judges from 1961 until 1996. A tenth judgeship was created in 1996, and the number was increased to twelve in 1999. In 1961 there were 55 superior court judges. In 1996 there were 169. Today there are 187. In a 1990 report by the National Center for State Courts, Georgia ranked among the busiest appellate courts in the nation. In a 1999-2000 National Center report, Georgia ranks second among 21 reporting states in the number of mandatory appeals cleared per judge. The ground gained by adding three judges in the late 1990s is rapidly being lost.

Caseload pressures have consequences. The judges of Georgia's Court of Appeals are apparently unique among American appellate judges in not routinely discussing their cases face-to-face except at oral argument. In recent

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years, the Court of Appeals reduced the maximum length of oral argument and made the grant of oral argument discretionary. Caseload pressures push members of the court to increase their reliance on the judge to whom the case is assigned, undermining the discipline imposed by the panel system. Regardless of the judges' diligence and the diligence of their staffs, it is unrealistic to expect that caseload pressures will not affect the quality of decisions and the rigor with which appellate judges review the work of trial judges and of one another.

As the rigor of that review erodes, the discipline imposed upon trial courts and upon the members of the appellate court erodes as well. Unless the membership of the Court of Appeals is allowed to keep pace with its caseload, that rigor and therefore that discipline cannot but erode.

It is often assumed that adding members to the Court of Appeals must mean dividing it along lines of geography or subject-matter. Such divisions would come with a price. Different appellate districts will necessarily mean different law in different parts of the state. Specialty appellate courts are subject to more focused political pressure than generalist appellate courts. This is especially true of courts of criminal appeals, which are the specialty appellate courts created in other states.

But technology has made it possible to expand the Court of Appeals without creating such divisions. Records can now be copied in electronic format and accessed over the internet. Federal appellate judges have long had the option to establish their chambers anywhere in their circuits. Judges of the Georgia Court of Appeals should have a similar option. Such an option would make service on the Court of Appeals more attractive to Georgians who live outside metropolitan Atlanta. The loss of face-to-face contact among the judges would be a disadvantage, but the court operates primarily by memo now.

Regardless how it is done, the Court of Appeals should expand along with its caseload. Under the best of circumstances, there are enough vagaries in the appellate process to make reversal of even the most blatant error uncertain. The greater that uncertainty, the closer our system degenerates toward Governor McDonald's "evils intolerable."

Christopher J. McFadden

ATTORNEY'S RESPONSIBILITIES FOR APPEAL RECORDS DOCKETED IN THE GEORGIA COURT OF APPEALS

By William L. Martin III
Clerk, Georgia Court of Appeals

Not a week goes by that I do not receive calls from attorneys regarding omissions in records transmitted to the Court of Appeals for docketing, and in turn, receive a request for extension to file briefs or motions to supplement the record so that attorneys can file meaningful briefs with the Court.

There are steps attorneys can take to minimize the problems caused by omissions in the appellate record which is received by the Court of Appeals.

The following is a list of practice tips that will make life easier for you once the appeal is docketed with the Court of Appeals.

1. DEPOSITIONS

If depositions are to be sent with the record, the attorney should so state in the Notice of Appeal and make sure the lower court clerk's office has the depositions on hand before the record is sent to the Court of Appeals. It is your responsibility to file depositions with the trial court and to make certain they are part of the record in the trial court. If depositions have not been opened or viewed by the trial court, the attorney should obtain an order from the trial court judge to permit the depositions to be unsealed, copied and transmitted with the record on appeal. If the trial court declines to issue such an order, you may request the clerk at the trial court to send the original depositions, which will be accepted by the Court of Appeals. If the trial court clerk declines to send the original depositions and the trial court judge declines to unseal the depositions, you may file a Motion to Supplement the Record in the Court of Appeals being specific as to which depositions you want the trial court clerk to send the Court of Appeals.

2. AUDIO/VIDEOTAPES

If audio or videotapes are to be transmitted with the record on appeal, the attorney should so specify in the Notice of Appeal and be sure the items are turned over to the trial court clerk for inclusion in the record on appeal. Often times, the court reporter will maintain custody of such tapes. It may not be sufficient to state in the Notice of Appeal that the clerk shall omit nothing from the record on appeal. You should check with the trial court clerk to see what that office's policy is about transmitting audio and videotapes. It is your responsibility to contact the court reporter and make sure such tapes are filed with the clerk. The Court of Appeals prefers copies of the audio/videotapes, however, the Court will accept originals. Any

tapes sent to the Court must come up as certified by the trial court clerk as part of the record.

3. MOTIONS/ORDERS

All **orders on** motions for out-of-time appeal, motions for new trial and the like should be reduced to writing by the lower court judge and entered in the trial court, that is, filed with the clerk of the trial court, before the Notice of Appeal is filed. Attorneys should not file an out-of-time appeal without an order from the trial court approving such. If the trial court denies the motion for out-of-time appeal, that may be appealed. No Notice of Appeal should be filed unless the trial court has entered an order denying the motion for new trial, and that order has been reduced to writing and filed with the trial court clerk. The trial court's oral recitation in the transcript that the motion for new trial is denied is not sufficient to permit the Court of Appeals to docket an appeal.

4. EXHIBITS

If exhibits are to be a part of the record on appeal, the attorney should so state in the Notice of Appeal and make sure the trial court clerk has the items and documents available before the record is sent to the Court of Appeals. Generally photo static copies of documents and photographs will be sufficient for the appellate record. If the Court of Appeals finds that the photo static copy of a particular document is not sufficient, the Court, on its own motion, can direct the trial court to send up the original, as a supplemental record.

5. TRANSCRIPTS

The Notice of Appeal should state exactly which transcripts should be included in the record on appeal. If the Notice of Appeal says a transcript of evidence shall be filed for inclusion with the record on appeal, and the transcript of the trial comes up, the clerk's office will docket the appeal. However, if a transcript on a Motion to Suppress, Motion for Summary Judgment or Motion for New Trial is imperative for the Court's review of the trial court's action, and that transcript is not included with the record on appeal, it may require that the appeal be remanded to the trial court for the completion and filing of such other transcript before the Court of Appeals can address the issues involved in the appeal. This will cause delay, added expense to the parties and extra work for the lawyers and the Court. Once a case is docketed with the Court of Appeals, the constitutional requirement that the Court dispose of a case within two terms kicks in. Any delay in the appropriate record coming to the Court simply reduces the available time for the Court to address the issues raised in the appeal.

6. NAME, ADDRESS AND BAR NUMBER

Attorneys should always type their name, current address and bar number on the Notice of Appeal. If the attorney's name is not typed and the signature is illegible, then the Court must refer to the bar number in order to docket the appeal. Any change of address by the attorney after the Notice of Appeal is filed with the trial court and before the case is docketed with the Court of Appeals should be communicated to the trial court and made a part of the record on appeal. The Court of Appeals uses the address in the Notice of Appeal to send out the Docketing Notices. Any change of address after the case has been docketed in the Court of Appeals must be communicated to the Court of Appeals in order for attorneys to receive the orders and opinions of the Court.

7. CERTIFICATE OF SERVICE

Attorneys filing a Notice of Appeal are responsible for providing in the Certificate of Service on the Notice of Appeal the full name and complete address of opposing counsel. Again, this is necessary in order for the Court of Appeals to be able to send a Docketing Notice to opposing counsel.

8. MOTIONS TO SUPPLEMENT THE RECORD

Any party wishing to supplement the record on appeal may file such motion in the trial court pursuant to OCGA §5-6-41(f) or file such motion in the Court of Appeals, after the appeal has been docketed with the Court of Appeals. Any Motion to Supplement the Record should be specific as to what documents or items are to be included in the supplemental record and the reasons such items should be included.

9. RECORD CERTIFIED BY THE CLERK

It is the responsibility of counsel to have before the Court of Appeals the record, transcripts, exhibits and other matters which parties wish the Court to consider on appeal. All transcripts, exhibits and portions of the record must come to the Court of Appeals as certified by the trial court clerk. The Court of Appeals cannot receive any such documents, transcripts or exhibits from attorneys or parties.

10. FILING THE TRANSCRIPT

If you begin preparation of your brief prior to receiving your Docketing Notice, many times you will realize that certain necessary portions of the record are not on file with the clerk of the trial court. The party having the responsibility of filing the transcript should cause it to be filed within 30 days after filing the Notice of Appeal or designation by appellee, as the case may be, unless the time is extended as provided in OCGA §5-6-39. In all cases, it should be the duty of the trial court judge to grant such extensions of time as may be necessary to enable the court reporter to complete the transcript of evidence and proceedings. OCGA §5-6-42.

Lower Judicatory Appeals Committee to Meet in Cyberspace

The section has formed a committee to propose reform of the procedure for appealing from lower judicatories, including municipal courts, recorders courts and local administrative agencies exercising judicial authority. It is often necessary to study the local legislation creating such bodies in order to determine how to appeal from their decisions. The section's goal is to offer comprehensive legislation for the 2002 session of the General Assembly.

The committee had a successful first meeting at the bar offices a few weeks ago. The next stage will entail research and discussions among committee members over the internet. If you would like to participate, send your email address to section chair Christopher McFadden at cjmcf@mindspring.com.

The Eleventh Circuit has revised their local rules effective January 1, 2002. A few of the significant changes include:

Under new 11th Cir. R. 27-2, a motion for reconsideration must be filed within 21 days. Under new 11th Cir. R. 27-3, only one motion for reconsideration may be filed with respect to an order. Under new 11th Cir. R. 8-2, a motion for reconsideration of an order under FRAP 8 (stays or injunctions pending appeal) must be filed within 21 days. Under an amendment to 11th Cir. R. 11-1, the court reporter must notify the ordering party when a transcript is filed with the clerk's office.

11th Cir. R. 28, I.O.P. 6, has been amended to delete the limitation on supplemental authorities to only "intervening decisions" or "new developments." While a letter to the court advising of supplemental authorities may not contain argument, it may identify the relevant portion of the cited authority and the issue to which it relates.

11th Cir. R. 31-1(c) has been amended to provide that, where a motion is pending that automatically stays the briefing schedule and the appellant already has filed his opening brief, the appellee's brief is due 30 days after the pending motion is resolved or any supplemental record is deemed filed, whichever is later.

Calendar of Events

Monthly meetings *(4th Friday, except as designated)*

Membership Luncheon *5/24 (speakers & location to be announced)*

Annual Membership Meeting *6/28 (with election at* ***New*** *SBG Hqtrs.) for all members of the section /Noon/Lunch Will Be Served*

Advanced Seminar *Fall, 2003*

Section members are encouraged to submit items they believe would be of general interest to Section members. Please submit comments on this issue or contributions to future issues to ewasmuth@sgrlaw.com

Ed Wasmuth, Editor 404-815-3503

Appellate Practice Legislative Update

The section had two pieces of proposed legislation before then General Assembly this year. Both bills were passed in both chambers, but both bills died on the last day. A bill that would have authorized the Supreme Court to answer certified questions from U.S. District Courts died in the Rules Committee because it required a constitutional amendment, and someone balked at another such amendment -- even though there are only a few pending this year.

A bill designed to clarify appellate practice, which we sponsored in conjunction with Chief Judge Blackburn, died because a dispute arose as to an issue presently before the Supreme Court on certiorari, whether denials of constitutional speedy-trial demands are directly appealable.

Complicating things further, and making some news, the Senate added a controversial amendment to make domestic appeals directly appealable.

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*******Important Note*******

You should have just received your Bar dues notice for the new Bar year. On the notice is listed section dues - don't forget to join for the new Bar year. You won't want to miss this section's activities.

Web Note -

Visit the Section's enhanced web page.

http://www.gabar.org/aprac.htm

IMPORTANT Note To Members

We need your email address in order to send you section notices and reminders. Your email will not be released.

You can go to the State Bar's web site www.gabar.org **to the** Membership Department's **"**Address Change Form**" and verify that we have your correct address information and email. Currently 102 of our Appellate members do not list their email addresses.**

While on the State Bar's web site - check your CLE hours and visit this section's web page where this newsletter is posted, along with some pictures, a member roster & notes from the officers of the section. We're also linked to ICLE under "Section Meetings" (see the link to ICLE at the top of the Section Meetings Page**). You can register for an ICLE Seminar online!**

If you know someone that would like to join our section, instructions are on the State Bar's web site; all bar members should have received their dues notice this month & one can join using the notice.

View the *Bar Journal,* Bar Directory and Annual Meeting Brochure - complete with pictures.

We thought you'd like to know.

www.gabar.org