The Appellate Review

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How Can Appellate Courts Review Non-Verbal Contempt?

by Kenneth A. Hindman

It is clear that a trial judge has the authority to hold an attorney in criminal contempt for actions which occur in the Court's presence. Sometimes such contempt findings are based on the attorney's statements to the Court. In other cases, the contempt finding may be based on a non-verbal action which shows disagreement or disrespect toward the judge, and not on the content of the attorney's statements. Such conduct may include a facial expression or a statement made in a sarcastic tone of voice.

It is reasonable to question whether the appellate courts should attempt to define the circumstances which must exist before a trial judge may punish non-verbal acts committed in the judge's presence as contempt. It is equally reasonable to wonder how any appellate court, even with the aid of a verbatim transcript, could possibly determine objectively whether a contempt based on non-verbal conduct was an abuse of the trial judge's discretion, or whether evidence of the conduct held contemptuous met the "beyond a reasonable doubt" standard for criminal cases.

Any lawyer who practices in court knows that a non-verbal action such as making a snide remark to the judge, speaking to the judge in a sarcastic tone of voice, or rolling one's eyes in response to a ruling, is a much surer route to a contempt citation than even the most aggressive statement of the lawyer's legal position.

Trial judges have historically had the unquestioned authority to punish this sort of conduct without the need to make a statement on the record defining exactly the conduct warranting the contempt citation, or to make any statement at all justifying the contempt finding. Most judges and lawyers would agree that a judge "knows the type of behavior which constitutes contempt when he sees it," and that lawyers are equally well aware of what conduct "crosses the line."

Appellate courts have accordingly given great deference to the trial judge's determination of whether particular conduct did or did not constitute contempt. This approach is based at least in part on the fact that it is obviously very difficult to determine from reading the words spoken in court whether an event constituting contempt had occurred. It is equally difficult for a trial judge's description of the occurrence upon which a contempt finding was based to give a reviewing court an accurate sense of what actually occurred in the courtroom. The transcript simply does not convey the tone in which words were uttered, or whether the attorney was sneering at the judge when he said them.[1]

Trial judges in Georgia may, however, no longer have that broad discretionary authority to punish non-verbal acts of contempt, under the Supreme Court of Georgia's 2008 decision in *In re Jefferson*, 283 Ga. 216 and the Court of Appeals's application of that decision last summer in *In re Hughes*, 299 Ga. App. 66 (decided July 14, 2009).

In the Hughes case, Ella Hughes had been appointed by the Juvenile Court of Henry County to represent Robyn Harris against charges that Harris had disobeyed an earlier order requiring Harris to cooperate with DFCS by providing the addresses of her children's fathers. Harris defended her refusal to give DFCS this information on the grounds that doing so would endanger the children. The Court found that Harris had been aware of the order, and that she did not have a valid reason for failing to obey the order. The judge then held Harris in contempt and sentenced her to 20 days in jail.[2]

Immediately after the judge held Hughes's client in contempt, he told Hughes that Harris's children would be placed in foster care while Harris served her 20-day contempt sentence. The following colloquy between Hughes and the trial judge then ensued:

Hughes: Well, actually, Your Honor, the children were with their fathers. Why they can't go back to their fathers?

See "Non-Verbal" on page 11

Message from the Chair

by Amy Weil
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Not even a "snow day" could freeze out the Appellate Practice Section's January 8 luncheon at the State Bar's mid-year meeting at the W Hotel in midtown. Those who braved -- and beat -- the elements were rewarded with a memorable presentation by Former Supreme Court of Georgia **Chief Justice Leah Ward Sears**, who dispensed tips for the appellate practitioner and discussed her recent transition into private practice. On Feb. 26**,** the Section hosted its annual Georgia Appellate Practice Seminar. Among other highlights at this well-attended event were panel discussions on "*The Winning Brief: How to Capture an Appellate Judge's Attention (And How to Lose It),"* with panelists **Supreme Court of Georgia Justice David E. Nahmias, Court of Appeals of Georgia Judge J.D. Smith**, and attorneys **DeKalb Co. Assistant D.A. Leonora "Lee" Grant, Simon Weinstein** and **Frank M. Lowrey, IV**; "*Effective Oral Argument in the Appellate Courts,"* with panelists **Georgia Supreme Court Chief Justice Carol W. Hunstein** and **Justice P. Harris Hines**, and **Georgia Court of Appeals Judges Debra H. Bernes** and **Sara L. Doyle**; and "*Professionalism in the Appellate Process*," with panelists **Georgia Court of Appeals Judge Anne Elizabeth Barnes**, and **Georgia Supreme Court Former Chief Justices Norman S. Fletcher and Leah Ward Sears**. This seminar would not be nearly as successful without the strong support of our state appellate court judges. We also have some "appealing" upcoming events. On April 7, **Eleventh Circuit Judge Gerald Bard Tjoflat** will be our speaker at a Section luncheon; on June 18 the Section will host a luncheon at the State Bar's annual meeting in Amelia Island, Fla., with a panel presentation by **candidates for the two open seats on the Georgia Court of Appeals**; in September, **Emory Law Professor Robert Schapiro** will speak at a luncheon highlighting the Supreme Court's 2009-10 term and forecasting the upcoming term; and on October 14 & 15, the Section will co-host (along with the Appellate Practice Sections of the Alabama and Florida Bars) the third **Eleventh Circuit Appellate Practice Institute (ECAPI III),** the popular bi-annual seminar that focuses exclusively on federal appellate practice in the Eleventh Circuit. Our Website Committee is busy working on updating our website. Soon, you will be able to view the details of these events, and more, on our website's calendar. We have many exciting events ahead. We hope to see you there!

Amy Weil
Chair, Appellate Practice Section

Inside This Issue

To contribute to this Newsletter, please contact Christina Smith, editor, at cooleyc@appeals.courts.state.ga.us.

E-Filing Update from the Court of Appeals

by Scott Key

A few weeks ago, I filed a brief in the Georgia Court of Appeals. While such an event is not newsworthy, the interesting thing is that I filed the brief from my laptop computer over a wifi connection at the Starbucks on St. Simons Island. No trees were killed in the completion of the brief. No staples jammed in an attempt to penetrate an original, three copies, and a Blumberg backing. Neither FedEx nor the Postal Service were involved in the event, and approximately an hour later, I received notification on my BlackBerry that the brief was properly filed with the Court as I was re-joining my family for our long weekend. A few months ago, I would not have been able to make the trip because a brief was due, and I needed to be at my office to complete the project.

Common E-Filing Mistakes

1. *Not reading the instructions online*
2. *Not signing your document electronically (/s/)*
3. *Scanning instead of converting to a pdf*
4. *Filing something that does not fit in category*
5. *Failing to serve opposing counsel*

If the numbers are any indication, I am far from alone in the experience of efficiency and liberation from the office. There were 72 briefs e-filed with the Court of Appeals in February, and there are now 415 registered e-filers with the Georgia Court of Appeals. The Court of Appeals e-Fast System website adress is http://efast.gaappeals.us.

If you have not begun e-filing yet, then you should. Even if you do not feel comfortable e-filing yet, simply register online anyway so you will be able to take advantage of new services the Court will offer soon. The Court will eventually begin submitting orders and opinions to registered e-filers electronically, so you can get instant updates on your case whenever anything is filed.

If you plan on e-filing briefs with the Court, there are a few common mistakes to avoid that will ensure that your brief is filed and your opponent is properly served. The biggest mistake is not reading the instructions for e-filing, which may be found at **http://www.gaappeals.us/Efile2/questions_and_answers.pdf**. Otherwise, here are a few things to avoid as you file your first briefs with the Court electronically.

First, make sure that your signature conforms to the Court's requirements. A brief is properly signed if the filer's names is typed and preceded by **/s/**, with your name typed again below the signature line. You should not print your brief, sign your name with a pen and scan your brief into a pdf, which brings me to the next common mistake.

You should not print the brief and scan it to a pdf. Instead, convert your word processor document to a pdf electronically. Consult your software program if you are unsure how to do this -- most programs have that function. If yours does not, you can download a program for free from dopdf.com. While the Court will not reject a scanned pdf file, it is not always possible or easy to search the text of scanned documents, and searching can make it easier for the Court to go back to any particular portion of your brief.

Currently, the e-fast system is set up to handle direct appeals only and common types of filings associated with direct appeals. Discretionary and interlocutory applications still must be filed by paper, as well as motions. When you e-file your document, you will be prompted to select the type of filing. If your filing does not exactly match a type found in the menu, then you should not attempt to e-file by selecting the type of filing you think most closely fits. In addition, it is important to identify your role in the case. If you are the appellee, appellant, or amicus counsel, then make sure you identify yourself as such when prompted to select the filing type.

Finally, though e-fast will e-mail a copy of your filing to any opposing attorney who is registered with the system who represents a party in your case, e-fast is not responsible for serving opposing counsel. You must serve counsel properly the way you have always done, and you must certify that you have properly served opposing parties in your case the way you always have.

If in doubt, call the clerk's office after you submit your filing, and they will tell you whether you have filed properly. They are as excited as the bench is about the new filing system and welcome our feedback as you begin filing your brief electronically. Give e-filing a try soon, particularly if you are drinking some coffee hundreds of miles from your office.

Scott Key is an attorney in Macon with a focus on general appellate law and criminal trial practice. His e-mail address is scottkey@bellsouth.net.

Remembering Hon. John H. Ruffin Jr.

Dec. 23, 1934 - Jan. 29, 2010

The Appellate Practice Section has lost a good friend and an esteemed jurist with the passing of Georgia Court of Appeals Judge John H. Ruffin, Jr. Known as "Jack" to his legions of friends, Judge Ruffin served as a mentor to his colleagues, both while on the bench and while engaged in the practice of law. He was a truly exceptional judge before whom all were equal, and despite the slurs he endured during his early career battling for civil rights, he never once treated unfairly those who had treated him so.

Ruffin graduated in 1953 from Waynesboro High and Industrial School, and received his undergraduate degree from Morehouse College, and his law degree from Howard University School of Law. He was admitted to the Georgia Bar on July 5, 1961, and during the 1960s and 1970s was one of the first African American lawyers in the Augusta Judicial Circuit, where he focused his practice on civil rights litigation. In 1986, Ruffin was appointed by Georgia Governor Joe Frank Harris to serve as a Superior Court Judge of the Augusta Judicial Circuit. Ruffin was the first African-American member of the Augusta Bar Association, and the first African-American Superior Court Judge for the Augusta Judicial Circuit. He was elected without opposition in 1988, and continued to serve as Superior Court Judge until his appointment to the Georgia Court of Appeals by Georgia Governor Zell Miller on Aug. 24, 1994. In 2005, Ruffin became the first African-American to serve as Chief Judge of the Court of Appeals of Georgia. During his tenure as chief judge, he spearheaded the court's Centennial Year Celebration in 2006. The Court of Appeals honored Chief Judge Ruffin on Sept. 11, 2008, with a ceremony for the unveiling of his portrait, which now hangs in the Court of Appeals courtroom. His portrait also hangs in the Augusta Judicial Circuit Courthouse in Waynesboro, Ga., his hometown. Ruffin served as a presiding judge of the Court of Appeals of Georgia until his retirement on Dec. 31, 2008.

Ruffin did not talk much about his civil rights experiences, but searching the caselaw databases reveals how instrumental he was in many ways. One of his more famous cases involved the lengthy, hard-fought battle to desegregate public schools in Richmond County, Augusta. A brief review of the appellate history of this one case reveals the judge's perseverance, determination, and ability, and provides a unique look into history. *Acree v. County Board of Education of Richmond County, Georgia*, 294 F. Supp. 1034; (S.D. Ga. 1968), 301 F. Supp. 1285 (S.D. Ga. 1969); 443 F.2d 1360 (5th Cir. 1971), 336 F. Supp. 1275 (S.D. Ga. 1972), 458 F.2d 486 (5th Cir. 1972), cert. denied, *County Board of Education v. Acree*, 409 U.S. 1006 (93 SC 431, 34 LE2d 299) (1972), application for stay denied *Drummond v. Acree*, 409 U.S. 1228 (93 SC 18, 34 LE2d 33) (1972) (Mr. Justice Powell, Circuit Justice). In the last opinion uncovered related to this ligitation, in which Ruffin still represented the plaintiffs, the Fifth Circuit said, "Despite an unpromising earlier history, the dismantling of the dual school system in Richmond County, Ga., proceeds, and the public schools there appear at present to function in a generally constitutional manner under the continuing surveillance of the district court." *Acree v. County Board of Education*, 533 F.2d 131 (5th Cir. 1976).

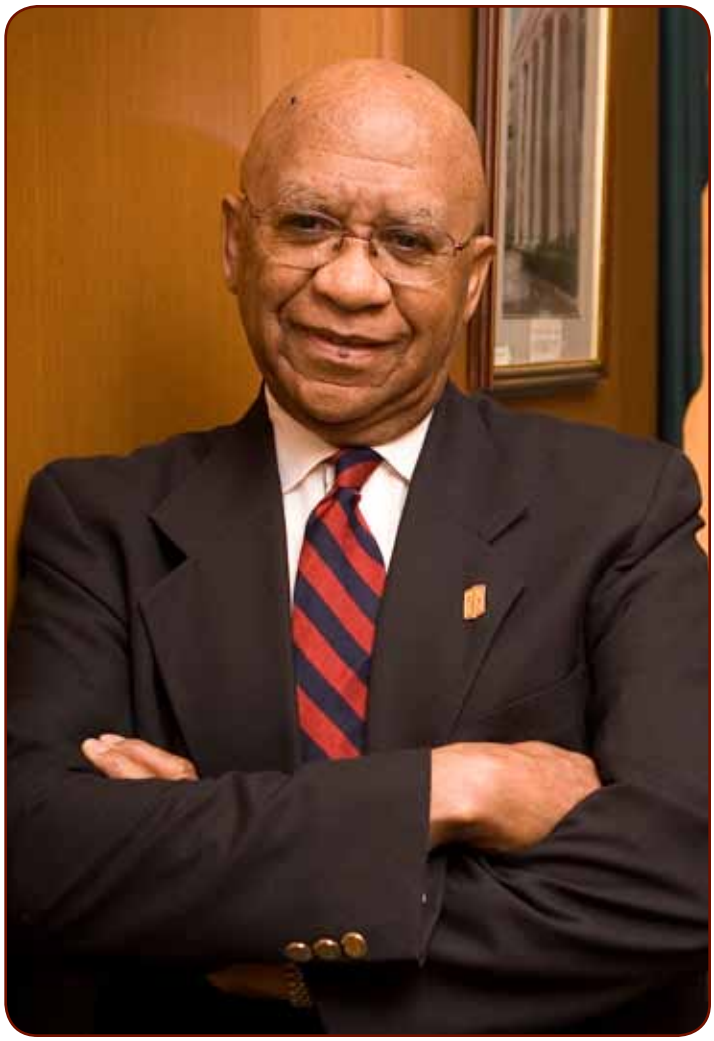

Photo by Zachary D. Porter/Daily Report

Ruffin always pushed boundaries, and perhaps his ability to push against social norms was part of what made him so effective in his civil rights work. The

Richmond County school desegregation case was only one of many. For example, in *Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (90 SC 608, 24 LE2d 477) (1970), the Supreme Court reversed the Fifth Circuit's deferral of student desegregation in a number of cases, including one from Burke County in which the judge represented the appellants. In *East Central Health District v. Brown*, 752 F.2d 615 (11th Cir. 1985), the Eleventh Circuit affirmed the district court's order holding that the Eleventh Amendment to the U. S. Constitution did not provide immunity from suit in an employment discrimination case.

In addition to his ground-breaking big-picture litigation, though, Ruffin also represented regular people dealing with regular problems, and sometimes also represented the interest of not-so-regular animals. One of those special creatures was "Blackie the Talking Cat," whose owners objected to buying a business license. *Miles v. City Council of Augusta, Ga.*, 710 F.2d 1542 (11th Cir. 1983), affirming *Miles v. City of Augusta*, 551 F. Supp. 349 (S.D.Ga.1982). Blackie was unique, and his owners made a pretty good living for a while sharing Blackie's talents with the public. As the district court observed, "For hundreds, perhaps thousands of years, people have carried on conversations with cats. Most often, these are one-sided and range from cloying, mawkish nonsense to topics of science and the liberal arts. Apparently Blackie's pride does not prevent him from making an occasional response to this great gush of human verbiage, much to the satisfaction and benefit of his 'owners.' Apparently, some cats do talk. Others just grin."

Ruffin had a vast reserve of eloquence and a catalog of literary references. In his last dissent at the Court of Appeals of Georgia, Ruffin objected to the majority's decision affirming summary judgment to employees of the Glynn County Detention Center, in an action brought under 42 USC § 1983 for violations of the plaintiff's Fourth and Fourteenth Amendment rights. He wrote,

> The majority, by its heavy-handed actions today, has invaded the circle of the unconcerned and has entered what Thomas Carlyle refers to as the "Centre of Indifference." Thomas Carlyle, Sartor Resartus, 112-121 (Charles F. Harrold ed.). The summary disposition by the majority makes it a sad time for Georgians who are in the custody of police officers -- placing life, limb, and liberty of an arrestee in the very hands of those whose sworn duty is to protect all citizens.

Whitten v. Wooten, 295 Ga. App. 281, 289 (671 SE2d 317) (2008) (Ruffin, J., dissenting).

The bench and bar will miss Judge Ruffin's unique style.

Committee Updates

The **Website Committee,** consisting of **Bryan Tyson**, **Jason Blanchard**, and **Nicole Kaplan**, is working on preparing a brand-new Appellate Section website. The updated Section website will include many features requested by members of the Section, including easy-to-find historical archives of appellate section newsletters and a member "search by practice" area. Even within appellate practice, there are a variety of specialties, from criminal to civil to personal injury. The new website will allow the Section to indicate which members specialize in which types of appeals.

We should be rolling out the new design in the next month or so, and will update Section members when the new site goes live. If you have any suggestions for items to include on the newly-designed site, please pass them along to Bryan Tyson, bpt@sbllaw.net

The **Appellate Luncheon Committee** started the year by sponsoring a luncheon at the State Bar Meeting in January. The snow the night before made for a significantly smaller crowd than expected and prevented our scheduled speaker from attending, but former Georgia Supreme Court Justice Sears was in the audience and graciously agreed to speak. She was a big hit.

On April 7, 2010, Hon. **Gerald Bard Tjoflat** will be a speaker at a section lunch. In June, the Appellate Section will be hosting a lunch at the State Bar Meeting. In September, Professor **Robert Schapiro** (Emory Law School) will speak regarding significant themes of the OT 2009 Supreme Court and give an overview of the upcoming term.

Chief Judge M. Yvette Miller spoke at the section's annual seminar, chaired by Ronan Doherty

Our joint luncheon with the Federal Bar Association honoring Judge **Joel F. Dubina** has been postponed indefinitely because of Judge Dubina's overwhelming schedule. We will keep the membership posted when a date materializes.

The **State Seminar Committee**'s annual seminar on February 26, 2010, at the State Bar, was a resounding success, thanks to the hard-working chair, **Ronan Doherty**, and committee members **Simon Weinstein**, **Paul Kaplan**, and **Stephen Dillard.** Georgia Court of Appeals Chief Judge **M. Yvette Miller** gave a warm tribute to the memory of former Court of Appeals Judge John H. "Jack" Ruffin, Jr. One stellar panel moderated by **Michael B. Terry** of Bondurant, Mixson & Elmore, LLP, discussed how to present an effective oral argument and included from the Georgia Supreme Court **Chief Justice Carol Hunstein**, **Justice P. Harris Hines,** and Court of Appeals **Judges Debra H. Bernes** and **Sara L. Doyle**.

Simon Weinstein, Judge J.D. Smith, Justice David E. Nahmias sit on a panel that was moderated by J. Darren Summerville.

Another rousing panel moderated by **J. Darren Summerville** of the Bird Law Group discussed how to capture an appellate judge's attention with a winning brief, and included Georgia Supreme Court **Justice David E. Nahmias,** Georgia Court of Appeals **Presiding Judge J.D. Smith, DeKalb County Assistant District Attorney Leonora "Lee" Grant**, attorney **Simon Weinstein**, and **Frank M. Lowrey IV,** of Bondurant, Mixson & Elmore, LLP.

Both clerks of our appellate courts generously shared practice tips: **Therese "Tee" Barnes** of the Georgia Supreme Court and **William L. Martin, III,** of the Georgia Court of Appeals. **W. Scott Henwood o**f Hall, Booth, Smith & Slover addressed the good and bad of interlocutory applications; **Sarah M. Shalf** of Bondurant, Mixson & Elmore, LLP, introduced appellate jurisdiction, and **Paul Kaplan**, FSB Legal Counsel, discussed preserving issues for appeal.

Therese "Tee" Barnes and William L. Martin, III, shared practice tips at the seminar.

Finally, our last panel held a lively discussion on professionalism in appellate practice, moderated by **Ronan Doherty** and including Georgia Court of Appeals **Judge Anne Elizabeth Barnes** as well as former Georgia Supreme Court **Justices Norman S. Fletcher** (now with Brinson, Askew, Berry, Seigler, Richardson & Davis) and **Leah Ward Sears** (now with Schiff Hardin LLP).

Judge Sara L. Doyle, Judge Debra H. Bernes and Justice P. Harris Hines discussed how to present an effective oral argument.

Former Chief Justices Leah Ward Sears and Norman S. Fletcher addressed professionalism in appellate practice.

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Recent Changes in the 11th Circuit and Other Federal Appellate Rules

by Roger C. Wilson*

Various changes have been recently been promulgated, and several more proposed, in the rules governing practice before the Eleventh Circuit Court of Appeals. The changes are in the Eleventh Circuit Rules (referred to herein as "Circuit Rules") and Internal Operating Procedures ("IOP"). Some became effective on Dec. 1, 2009. Others were proposed then for public comment and have not yet become effective. Many of the changes, effective and proposed, either reconcile or implement recent amendments of the Federal Rules of Appellate Procedure ("FRAP") that also became effective on Dec. 1. The more significant changes affect both civil and criminal cases.

CURRENTLY EFFECTIVE CHANGES

A number of changes in Circuit Rules and IOP became effective on Dec. 1, 2009. The most significant are rules promulgated in new Circuit Rule 12.1-1 to implement the "indicative rulings" mechanism created by the new FRAP 12.1 Most of the other Eleventh Circuit changes involve new time-computation provisions adopted in the 2009 amendments to the FRAP.

1. "Indicative Rulings": New FRAP 12.1 and Circuit Rule 12.1-1

The new FRAP 12.1, effective on Dec. 1, 2009, treats the situation of so-called "indicative rulings" by district courts. This is the situation in which a timely motion has been made in the district court for relief that the court lacks authority to grant because an appeal has been filed and is pending, and the district court indicates either that it would grant the motion or that the motion raises a substantial issue. New FRAP 12.1(a) requires the movant in the district court to promptly notify the Court of Appeals Clerk in such situations. Then, FRAP 12.1(b) permits the Court of Appeals to remand the case to the district court for further proceedings, although it specifies that the appellate court retains jurisdiction unless it expressly dismisses the appeal. If the Court of Appeals remands but retains jurisdiction, the parties then must promptly notify the Court of Appeals Clerk when the district court has decided the motion on remand.

The 11th Circuit adopted Circuit Rule12.1-1, also effective Dec. 1, 2009, to implement procedures to address indicative rulings in the Circuit. The Rule appears to contemplate, potentially at least, both an appellate stay determination and possibly also a remand determination, although in many situations, a formal remand may not be necessary for the district court to consider the motion pending before it. The Circuit Rule requires that in all indicative-ruling situations the party filing the motion in the district court must also file within 14 days a motion with the Court of Appeals requesting a stay of the appeal until the district court rules on the motion before it.[1] If the Court of Appeals grants the stay, then the movant in the district court must file written status reports at 30-day intervals from the date of the stay order, informing the Court of Appeals of the status of the district court proceedings, unless the Court of Appeals orders otherwise.[2]

The Circuit Rule then specifies different procedures for remand, "indications," and substantive consideration by the district court, depending upon whether or not the motion before the district court seeks substantive relief from the order or judgment under appeal. If the movant does not seek substantive relief (e.g., a motion to correct a clerical error pursuant to Fed.R.Civ.P. 60(a)), then any party to the appeal may move for a limited remand permitting the district court to rule on the motion, without waiting for the district court to signify its intentions.[3] If the motion filed in the district court does request substantive relief from the order or judgment under appeal (e.g., a motion to modify a preliminary injunction or a motion for relief from judgment pursuant to Fed.R.Civ.P. 60(b)), then the district court may "consider" whether to grant or deny the motion without obtaining a remand from the Court of Appeals.[4]

For such substantive-relief motions, the Circuit Rule appears to contemplate that the district court will first make a threshold determination whether or not the motion should be granted or denied without further proceedings. The court may deny the motion without any remand from

Rules Changes Effective Dec. 1,2009

1. *"Indicative ruling" by district court may affect pending appeal*
2. *Weekends and holidays are included in lime calculations*
3. *"Replacement brief' required from appointed counsel if pro sc brief filed*

Pending Proposed Rule Changes

1. *Certificate of appealability in criminal cases will not be required*
2. *Appearance of counsel form required within 14 days of notice of appeal*
3. *Refercnce in IOP to drawing lots for FERC appeal pancls to be deleted*

the Court of Appeals.[5] Otherwise, if the district court determines that the motion should be granted or that further proceedings are necessary, further action is required from the Court of Appeals.

If the district court determines at the outset that the motion should be granted, then the Circuit Rule provides that the district court "should" enter an order stating that it intends to grant the motion if the Court of Appeals returns jurisdiction to it.[6] Any appellant or cross-appellant then may file an objection to remand with the Court of Appeals within 14 days of the district court's order, which the Court of Appeals will treat as a motion to retain jurisdiction.[7] Replies and responses then may be submitted pursuant to the FRAP and Circuit Rules, and the Court of Appeals will determine whether to retain jurisdiction and refrain from remanding the case to the district court to enter the order.[8] If no objection to remand is filed within the 14-day period, the Court of Appeals "may" remand the case in full to the district court for entry of an order granting relief, and "will" direct the Clerk to close the appeal. That Court of Appeals order will constitute an express dismissal of the appeal for purposes of FRAP 12.1.[9]

If the district court determines that it requires more time or further proceedings to decide the motion before it, (as the Circuit Rule puts it, "that the motion raises a substantial issue that warrants further consideration") then it "should enter an order so stating." Thereafter it may, without a remand, conduct such further proceedings as are necessary to determine whether the motion should be granted or denied, during which the appeal will remain stayed unless the Court of Appeals orders otherwise.[10] After further consideration, the same rules apply as before: the district court may dismiss the motion without any remand or other action from the Court of Appeals[11] or it may determine that the motion should be granted and issue an order to that effect., after which the parties may litigate the remand issue before the Court of Appeals as described above.[12]

If after a remand under these rules a district court enters an order that fails to grant the relief it said it would grant, then any appellant or cross-appellant may move the Court of Appeals within 30 days of the district court's order to reopen and reinstate the closed appeal.[13]

2. Time Calculation Changes

A number of amendments were made to the FRAP, also effective in December 2009, changing time computations in appellate practice. The core change is the move to a "days-are-days" time-computation methodology, under which intervening weekends and holidays are now counted in (rather than excluded from) all time calculations, regardless of the length of the time period involved. A number of the other FRAP December amendments relate to this core change, increasing somewhat the times permitted for various filings in light of the core computational change. In turn, several changes were made in the Circuit Rules effective December 1, 2009 to conform them to these FRAP changes.

The core change is in FRAP 26. The former paragraph (a) of that Rule excluded from most time calculations all intervening weekend days and legal holidays when the time period involved was less than 11 days. The new paragraph (a) omits such exclusions. Now, all days (including weekend days and holidays) are counted in all calculations under the FRAP and under any local rule, court order, or any statute that does not specify a different method of computing time.[14] Likely to compensate somewhat for this computational change, the amounts of time allotted for a number of actions are expanded in a number of the other FRAP.[15] Correspondingly, a number of the Circuit Rules also were amended effective December 1, 2009, to conform them to these FRAP changes.[16]

3. "Replacement Briefs"

Among the remaining Circuit Rules amendments effective in December, the main one that is not "housekeeping" in nature is a small one relating to "replacement briefs" in pro se appointment situations.

Circuit Rule 31-6 specifies that when counsel is appointed to replace a pro se party, and that party has already filed a pro se brief , appointed counsel is required to file a replacement brief unless otherwise directed by the Court.[17] Otherwise (e.g., when a brief was filed by previous counsel for a now pro se party) replacement briefs may only be filed on motion and by leave of court.[18] Circuit Rule 31-1(c) was amended by adding that a motion to file a replacement brief under Circuit Rule 31-6(b) will postpone the due date for an opposing party's response brief or reply brief until the Court rules on the motion. When the Court rules on the motion, a new due date will be set for filing the next brief.

PENDING PROPOSED CHANGES

In addition to these changes that became effective in December 2009, other amendments to the Circuit Rules and IOP were proposed by the Eleventh Circuit in December, and have not yet become effective. These proposed changes are fewer in number and lesser in significance than the now-effective amendments. The most important affect criminal appeals.

1. Criminal Appeals

A proposed amendment to Circuit Rule 22-1, governing appeals under 28 U.S.C. §§ 2254 and 2255, would eliminate the prerequisite that appellant's counsel first petition the district judge who rendered the underlying judgment to issue a certificate of appealability, and that the judge either issue a certificate or state why one should not issue (found in paragraphs (a) and (d) of that Rule, and formerly in FRAP 22(b)(1)). Under revised Rule 11 of the Rules Governing Proceedings Under 28 USC § 2254 or § 2255, effective December 1, 2009, the certificate of appealability requirements were eliminated from FRAP 22(b)(1) effective December 1. The currently proposed amendment to Circuit Rule 22-1 would eliminate the requirements from that Rule as well.

Under the proposed amendment, the new Rule states that in all cases brought pursuant to 28 U.S.C. §§ 2241, 2254, or 2255, a timely notice of appeal must be filed. Paragraph (a) under the proposed revision states that a party must file a timely notice of appeal even if the district court issues a certificate of appealability, but also that the district court or the Court of Appeals will construe a party's filing of an application for a certificate of appealability, or other document indicating an intent to appeal, as the filing of a notice of appeal.[19] Revised paragraph (b) states that if the district court denies a certificate of appealability, a party may seek a certificate from the Court of Appeals; and if a party does not file an application for a certificate, the Court of Appeals will construe a party's filing of a timely notice of appeal as an application to the Court of Appeals for a certificate of appealability.

2. Appearance of Counsel Form

In a proposed change to the IOP, all counsel filing a notice of appeal in the Eleventh Circuit in any type of case would be required also to file an Appearance of Counsel Form within 14 days after filing the notice of appeal (or such other time as the Court of Appeals may specify) to satisfy the requirement of a "Representation Statement" established by the revised FRAP 12. The Representation Statement names the parties that the attorney represents on appeal. Under FRAP 12(b), the statement must be filed within 14 days of the notice of appeal. The existing IOP under Circuit Rule 12 provides that an Appearance of Counsel Form is the "preferred" method of making that Representation Statement; under the amendment the IOP would state that an Appearance of counsel form is the "required" method.

Circuit Rule 46-5 already required Appearance of Counsel Forms to be filed by most attorneys participating in an appeal, and as a prerequisite to any attorney participating in oral argument, within 14 days of a notice from the Clerk requiring this.[20] Under the proposed amendment, the IOP would make that Appearance Form the required means of making the Representation Statement. Thus, at least the counsel filing the notice of appeal now would be required to file the Appearance of Counsel Form, as his Representation Statement, within 14 days of filing the notice of appeal.

3. FERC Appeals

Finally, a proposed amendment of the IOP under Circuit Rule 15-1 would eliminate the second paragraph of section 3 of that IOP, which relates to internal Court procedures applicable to appeals involving regulation of natural gas companies by the Federal Energy Regulatory Commission. The existing paragraph describes a Court of Appeals practice of yearly drawing by lot panels for FERC cases from among the active judges of the Court to avoid disqualifications problems. The Notice of Proposed Amendment explains that the Court no longer draws these panels by lot annually, and thus proposes to eliminate the paragraph.

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(Endnotes)

1 Circuit Rule 12.1-1-1(a).
2 Id.
3 Circuit Rule 12.1-1-1(b). Reply and response memoranda may be filed pursuant to FRAP 27 and corresponding Circuit Rules.
4 Circuit Rule 12.1-1(c) (emphasis added).
5 Circuit Rule 12.1-1(c)(1).
6 Circuit Rule 12.1-1(c)(2).

7 Circuit Rule 12.1-1(c)(2)(i), (iii).
8 Circuit Rule 12.1-1(c)(2)(iii).
9 Circuit Rule 12.1-1(c)(2)(ii).
10 Circuit Rule 12.1-1(d) & (d)(1).
11 Circuit Rule 12.1-1(d)(2).
12 Circuit Rule 12.1-1(d)(3).
13 Circuit Rule 12.1-1(c)(2)(iv).
14 Another new provision that might conceivably be of interest to at least some attorneys (though certainly not to your author) specifies that "last day for filing" generally means (i) in the context of electronic filing in the Court of Appeals, the date ending at midnight in the zone of the circuit clerk's principal office"; (ii) for filing under FRAP 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C) – and filing by mail under FRAP 13(b) –the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and (iii) for filing by other means, when the clerk's office is scheduled to close on the last such date.
15 Almost all of those changes are extensions of periods from 7 or 10 days, under the previous FRAP, to 14 day under the amendments. See FRAP 4(a)(4)(A)(vi), (5)(C), and (6)(B) [civil cases]; 4(b)(1)(A), (3)(a), and (3)(a)(ii) [criminal cases]; 5(b)(2) and (d)(1) [appeals by permission]; 6(b)(2)(B) [bankruptcy cases]; 10(b) and (c) [transcripts and record matters]; 12(b) [Representation Statements]; 19 [enforcement of agency orders]; 27(a)(3)(A) [responses to motions]; 28.1(f)(4) [reply briefs in cross-appeals]; 30(b)(1) [determination of contents of brief appendices]; 31(a)(1) [filing and serving of briefs]; and 39(d) [bills of costs].
16 See Circuit Rules 10-1 [duties of appellant and appellee in ordering transcripts for appeal]; 26.1-2(a) [Certificates of Interested Persons and Corporate Disclosure Statements]; 33-1(a) [filing of Civil Appeal Statements in appellate mediation procedures];35-6 [motions for leave to file amicus briefs in support of petitions for rehearings en banc]; 39-2(c) [objections to applications for attorneys' fees]; and 40-6 [motions for leave to file amicus briefs in support of petition for panel rehearing].
17 Circuit Rule 31-6(a).
18 Circuit Rule 31-6(b). Such leave generally will not be granted if the appellee has already filed its brief. And when leave is granted, the replacement brief may not incorporate material by reference from the brief being replaced, which earlier brief thereafter will not be considered by the Court, but may explicitly include any such material in the text f the replacement brief. Id.
19 If the notice of appeal or its equivalent is filed in the Court of Appeals (e.g., by a pro se defendant) the clerk of that court will note the date it was received and send it to the district court, pursuant to FRAP 4 (d).
20 The Appearance of Counsel Form requirement does not apply to counsel appointed by the Court for a specific case. For such counsel, the order of appointment will be treated as the appearance form. Circuit Rule 46-5.

"Non-Verbal" continued from page 1

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The Court: Are the fathers here?

Hughes: In court, Your Honor?

The Court: Yes.

Hughes: No, But I'm --

The Court: Then the only ones I can place the children with is with DFCS and then the -- that expression, ma'am, just cost you $100. You are removed from the court approved list. That is absolutely --

Hughes: Your Honor, if I may, I only –

The Court: No, ma'am. Don't interrupt. Your sarcastic looks and your sarcastic attitude is unacceptable to this Court. … If I ever see that action from you again I can assure you that appropriate actions will be taken. Do you understand that, ma'am?

Hughes: Yes, sir.

The Court: You may not like my rulings but you can surely appeal them.

Hughes: If I may, Your Honor, the only thing I did was bow my head to write down what you were saying.

The Court: No, ma'am. You did not. Now you have tested the Court's patience. I find you in willful contempt of this Court. You are fined $1,000 and you are given ten days in jail. Take her into custody. I want the record to reflect that the attorney I just had to hold in contempt was not just bowing her head but she was giving sarcastic, unprofessional looks, body action that showed her disgust for the Court's ruling and disrespect for the Court in its entirety.

***

The The trial court found that the attorney made inappropriate facial and body responses to the Court's ruling, that she expressed unprofessional conduct towards the Court, and that she tried to persuade the Court by giving inappropriate explanations of her conduct.[3]

The Court of Appeals reversed the trial court's decision, based principally on the Supreme Court's *Jefferson* decision.[4] The Court of Appeals held that the trial judge had improperly denied Hughes the opportunity to speak in her own behalf before holding her in contempt. The Court noted that the trial court had actually increased Hughes's fine from $100 to $1,000 as a consequence of her had trying to explain her actions.

The Court of Appeals also determined that the evidence did not show that Hughes's actions had actually interfered with the trial court's "administration of justice," or that they presented an "imminent threat" of causing such interference. 299 Ga. App. at 72. The Court of Appeals therefore ordered the trial court to vacate and dismiss its contempt citation against Hughes.

The Court of Appeals' second holding is enormously significant because the Court of Appeals unambiguously applied the Supreme Court's *Jefferson* decision to reverse a contempt citation based not on the content of an attorney's statements, but rather on the attorney's conduct in the Court's presence. As discussed below, this ruling expanded the application of the *Jefferson* case beyond what could have been anticipated from prior case law or from the language of the *Jefferson* decision itself.

In the *Jefferson* case, the trial judge charged Sherri Jefferson with eight instances of contempt; one of these was "inappropriate facial expressions," and another was "disrespectful tone of voice." 283 Ga. at 216. The Court of Appeals opinion in the *Jefferson* case shows that the judge brought in to hear the contempt charges against Jefferson found Jefferson not guilty of six of the charges. The judge found, however, that two of Jefferson's statements had "impugned, disparaged, and attacked the impartiality of the court and thereby undermined its authority, respect, and dignity," by accusing the Court of bias against Jefferson's client.[5] It is clear from the *Jefferson* opinions that the trial judge did not find that either accusation based on Jefferson's non-verbal conduct constituted contempt.

The question before the Court of Appeals and the Supreme Court was therefore not whether Jefferson's behavior had constituted contempt, but only whether the content of her statements criticizing the trial judge supported a criminal contempt charge. While the Court of Appeals affirmed the sanctions against Jefferson on the grounds that the content of the statements for which she had been found guilty had called the trial court's impartiality into question, the Court of Appeals was well aware that the *Jefferson* case did not involve the defendant attorney's behavior, but solely the content of her speech.

This was made particularly clear by Judge Bernes's dissent from the Court of Appeals's decision in *Jefferson*. Judge Bernes contended that the Court of Appeals had incorrectly applied *White v. State* of Ga., 218 Ga. 290 (1962) to Jefferson's case. She pointed out that in the *White* case the Supreme Court affirmed the contempt citation against White in part because the trial court had specifically found that White "had made the statements at issue, as well as other remarks throughout the proceedings, in a disrespectful and discourteous manner." Judge Bernes emphasized that the trial court had made the exact opposite finding about Jefferson's statements.

Judge Bernes argued further that the Court of Appeals had already held in *Calhoun v. Findley*, 168 Ga. App. 634 (1983) that an attorney could not be held in contempt merely for "presenting his client's case strenuously and persistently." She also stressed that the *Jefferson* case was controlled by the U.S. Supreme Court's decision in *In re Little*, 404 U.S. 553 (1972), which held that vigorous advocacy could constitute contempt only if the attorney's words were "uttered in a boisterous tone of voice or in any wise actually disrupted the court proceeding." Id. at 555.

The main point of Judge Bernes's dissent was that Jefferson had "not used any derogatory language or epithets" and that "there is no evidence in the record that Jefferson had a disrespectful tone or demeanor," and that therefore what Jefferson had said could not constitute contempt.

Thus, when the *Jefferson* case came to the Supreme Court of Georgia for review, it was clear that the only rulings on review concerned the content of Jefferson's speech. The fact that the appeal did not involve any behavior or other non-verbal conduct was shown by the trial court record, and that distinction was explicitly made in Judge Bernes's dissent.

The Supreme Court stated that its *Jefferson* opinion was intended in broad terms to set forth an "objective" methodology which trial courts could apply, and which would govern contempt citations reviewed on appeal, while preserving attorneys' right to argue their cases vigorously. Notwithstanding the broadness of the Supreme Court's language, there is nothing in the *Jefferson* opinion which indicates that the Supreme Court was actually attempting to state a rule applying to all contempt citations, including those based on attorney behavior or other non-verbal acts. Furthermore, while the Supreme Court was clearly concerned that trial courts were applying differing standards to determine what constituted contempt, none of the cases the Court cited to show that there were "variable outcomes in prior reported cases in this State" involved non-verbal acts of contempt. 283 Ga. at 217.

Why, then, would the Court of Appeals undertake to apply the "rules" set forth in the Supreme Court's *Jefferson* decision to a case which involved a contempt citation based only on an attorney's non-verbal actions?

The result in the *Hughes* case was certainly not required by the *Jefferson* decision.

Nothing in the Court of Appeals opinion indicates that the Court even recognized that it was applying the holding of *Jefferson* to a case involving a qualitatively different type of contempt. Despite the clear indications discussed above that both reviewing courts understood that the *Jefferson* case involved only the content of speech, the Court of Appeals gave no indication of why it might have thought that anything about the *Hughes* case warranted reading *Jefferson* in such an expansive way.

The academic sources on which the Supreme Court based its procedures for reviewing contempt appeals certainly

take the view that trial courts should not generally have the power to punish sarcasm, making faces, and the like as contempt, because those actions should be considered to be a normal part of zealous advocacy, and therefore protected by the First Amendment. The fact that the Supreme Court so enthusiastically embraced arguments of this type in its *Jefferson* decision may have led the Court of Appeals to think that the Supreme Court intended to make a general statement of policy about the circumstances under which contempt could legitimately be found, regardless of the factual context in which the contempt occurred.

It does not seem to this writer that the Supreme Court could possibly have intended for the *Jefferson* decision to establish an "across the board" set of rules to govern all types of contempt cases. The Supreme Court's prominent citation of academic authorities advocating the limiting of judges' authority to punish contempt might suggest that the Supreme Court intended to endorse that point of view in general.

Georgia law, however, has always clearly been to the contrary in allowing trial courts extremely broad authority to punish non-verbal behavior showing disrespect to the Court, without regard to whether any "obstruction" had occurred or to the existence of any other "objective" factors. Georgia courts have always recognized that the problem created by sarcasm, grimacing, and the like is not that they cause delays, but rather that they show disrespect for the Court as an institution.

Furthermore, Georgia law grants such broad authority because in reality the non-verbal acts which judges punish as contempt almost always occur in the middle of court proceedings. The judge is allowed to recognize contemptuous conduct as such, and to deal with it immediately. It is doubtful that this typical course of events could ever be proven to have "obstructed" the course of proceedings, but that is beside the point under Georgia law.

If a trial judge were prohibited from holding a lawyer in contempt unless the lawyer's behavior actually "obstructed" the proceeding in which the act occurred, trial judges' long-established and unquestioned right to identify acts of contempt committed in the courtroom and to punish those acts summarily "on the spot" would be destroyed. It should therefore not be assumed that either the Court of Appeals or the Supreme Court intended that result, since doing so would fundamentally change the ability of trial judges to control behavior in their courtrooms.

The Court of Appeals' *Hughes* decision unquestionably requires that the *Jefferson* rules be applied in any appeal from a contempt citation. If the Supreme Court intended for its broadly-worded statements in *Jefferson* to be applied as the Court of Appeals did in *Hughes*, the Supreme Court made a serious error which it ought to recognize and correct at the first opportunity. This is especially so because the legislature's authority to regulate the contempt power is limited.

If the Court of Appeals in *Hughes* misinterpreted the Supreme Court's *Jefferson* decision by extrapolating its holding to apply to contempts besides those based on the content of statements, both courts ought to acknowledge that the *Hughes* opinion is an incorrect statement of the law which will inevitably lead to unnecessary litigation over the meaning of *Jefferson*. The first Court to which an appropriate case is presented should make it absolutely clear which cases *Jefferson* is to govern.

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(Endnotes)

1 It is possible that having an audio and/or video record of the court proceeding would obviate some of these problems. In the author's experience, however, having such a record is rare, and the problem almost always arises without any record of that type.

2 The Court of Appeals affirmed the trial court's action in In re Harris, 299 Ga. App. 216 (2009).

3 Record, pp. 15-18, 299 Ga. App. at 68-69.

4 The Court of Appeals decision was written by Judge Barnes, with Judges Miller and Andrews concurring.

5 *In re Jefferson*, 284 Ga. App. 877, 878-879 (2007); 283 Ga. at 217.

6 While one reason the trial court gave for holding Hughes in contempt was that she had "tried to persuade the court by giving inappropriate explanations of her conduct," the Court of Appeals held that Hughes had the right to speak not because her speech would constitute "advocacy," whose content had to be protected, but because the Court determined that the right to speak in one's own defense was an essential part of the procedure required for a valid contempt citation.

Upcoming Events

April 7, 2010
Section Lunch
Speaker: Hon. Gerald Bard Tjoflat
11th Circuit Court of Appeals

June 18, 2010
Section Lunch
Speakers: Candidates for the Court of Appeals of Georgia

September 2010
Section Lunch
Speaker: Professor Robert Schapiro
Emory University School of Law

Oct. 14-15, 2010
Seminar
Eleventh Circuit Appellate Practice Institute (ECAPI III)

Georgia Supreme Court Statistics Available on SCOG Blog

by Bryan P. Tyson

Although most attorneys know the U.S. Supreme Court very rarely grants petitions for review of cases on certiorari, few Georgia lawyers know how often the Georgia Supreme Court reviews civil cases on certiorari. (It's a little over nine percent of cases in Georgia.) To help fill this void in commentary and information on the Georgia Supreme Court, the authors of the Supreme Court of Georgia Blog (SCOG Blog, available at http://scogblog.wordpress.com) began compiling statistics for decisions issued by the justices in civil cases, in addition to commentary and updates on recently-released cases and cert grants.

Our goal was to replicate what the SCOTUS Blog has done for tracking U.S. Supreme Court cases and also help practitioners understand how the Court works when it approaches civil cases. Our analysis found some interesting trends, and although the sample size of 41 cases from September 2009 to the present is small, we will continue adding to the analysis as more opinions are released.

From September to March 2010, the Court issued opinions in 16 cases it took by certiorari from the Court of Appeals in civil matters (the rest came by direct appeal, on interlocutory review, or as certified questions). Of those 16, the Court reversed nine and affirmed six, with one affirmed in part and reversed in part. Interestingly enough, 14 of the 16 cases were decided by a unanimous Court of Appeals before going up to the Supreme Court, and the state's highest court reversed one non-unanimous case and affirmed the other (Fortner v. Grange Mutual Casualty Company, decided 5-2 by the Court of Appeals and reversed, Southstar Energy Services v. Ellison, decided 4-3 by the Court of Appeals and affirmed).

Twenty-nine of the 41 opinions issued by the Supreme Court in civil cases during this time period were decided unanimously, and only three civil cases were decided by one vote (a 4-3 decision), although six were decided 5-2 and three were decided 6-1.

Finally, and possibly most interesting, two Justices were always in the majority in civil cases during this period – Hines and Nahmias. Of the non-unanimous cases, Justice Thompson was in the majority for 10 of the 11 he considered, Justices Carley and Melton were in the majority 9 of 12 times, Justice Benham was in the majority for 5 of the 12, and Chief Justice Hunstein was in the majority for 3 of the 12 cases.

Although the number of analyzed opinions is relatively small so far, the initial trends are intriguing. We will continue to track not only the oral arguments and civil cases decided, but also the statistics revealed by the Supreme Court of Georgia opinions at the SCOG Blog.

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Appellate Practice Section Committees

State Practice & Legislation Committee

This committee focuses on issues relating to will focus on practice before the Georgia Supreme Court and Georgia Court of Appeals, including state appellate court proposals and comments on legislation and rules changes, and consider whether to file amicus briefs.

Paul James Kaplan(chair), Christina Cooley Smith, Jeffrey Jerry Swart, Christopher J. McFadden, James C. Bonner Jr., Brian Richard Dempsey, Joshua Barrett Belinfante, Keith R. Blackwell

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This committee focuses on issues relating to appellate practice in the federal court system. Proposes and comments on legislation and rules changes and considers amicus briefs. Comments to the Eleventh Circuit on Rules Amendments/Proposals and oversees the Eleventh Circuit Appellate Practice Institute.

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State Seminar Committee

This committee coordinates the Section's seminars and events concerning issues of state appellate practice (seminar Feb. 26, 2010).

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This committee is responsible for is responsible for administering the Section's luncheon programs and other special events.

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Media Committee

This committee is responsible for publishing the Section's newsletter, *The Appellate Review*, which is published on a quarterly basis, and exploring other possible outlets (blog, list serve, Twitter, etc.). The newsletter provides information about the Section's activities, discusses new rules and aspects of procedure affecting state and federal appellate practice, and features articles about practice pointers and recent cases of interest.

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About the Appellate Practice Section

The purpose of the Appellate Practice Section of the State Bar of Georgia, as stated in its bylaws, is "to foster professionalism and excellence in appellate advocacy and to encourage improvements in the appellate process." Appellate advocacy is a distinct practice area that involves a unique set of skills, governed by independent sets of procedural rules very different than those that apply to trial practice. The Appellate Practice Section offers programs and activities focusing on appellate practice, and also provides all members of the bench and bar in Georgia with a source of valuable information about appellate practice in the state and federal court system.

To get more involved in Section activities, please contact the section chair:
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