



GEORGIA APPELLATE PRACTICE HANDBOOK

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FOREWORD

Alston & Bird LLP is pleased to provide this Seventh Edition of the *Georgia Appellate Practice Handbook* to the Institute of Continuing Legal Education in Georgia.

The *Handbook* was first published in 1985 under the leadership of Alston & Bird partner Terry Walsh, with the invaluable assistance of Supreme Court Justices Harold Clarke and George Carley (then a Court of Appeals Judge). The lawyers and judges who have contributed to updated editions of the *Handbook* during the intervening decades are too numerous to name, but we remain thankful for their contributions, leadership, and guidance in connection with this work.

For this Seventh Edition, we are particularly grateful to Justice David E. Nahmias of the Supreme Court and Judge Christopher J. McFadden of the Court of Appeals, each of whom authored chapters for this edition of the *Handbook*. Their comments and insights will undoubtedly be of great interest to all appellate practitioners in Georgia. We are also deeply appreciative of the time and effort spent by Therese “Tee” Barnes, Clerk of the Supreme Court, and Holly K.O. Sparrow, Clerk of the Court of Appeals, in reviewing and commenting on relevant portions of this edition.

The names of the Alston & Bird lawyers who contributed to this edition are found on the preceding page. We thank each of them for their outstanding effort to make the Seventh Edition of the *Handbook* both user-friendly and accurate.

We hope that the *Handbook* will continue to be a valuable resource for all who practice in the Georgia appellate courts.

Daniel F. Diffley
Jeffrey J. Swart
Chief Editors

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1

APPEAL TIMETABLE SUMMARY

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*Kacy McCaffrey***

§ 1.1 Introduction

This chapter discusses generally the timetables for appeals in the Court of Appeals and the Supreme Court. As this chapter provides only a summary of the timetables applicable to appeals, it is in no way intended as a substitute for a careful review of the appropriate rules and statutes. Thus, all attorneys are cautioned to consult the pertinent chapters of this Handbook, as well as the relevant statutes and rules, for more detailed information.

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§ 1.1.1 General Information

Except for the notice of appeal and where otherwise indicated, all filings should be made with the clerk of the appellate court to which the appeal is being taken.¹ With respect to the Court of Appeals, a document is deemed filed when it is physically delivered to the clerk’s office,² with sufficient costs, if applicable, and clocked in by the clerk’s office staff.³ A document sent via the United States Postal Service or commercial delivery service is deemed filed in the clerk’s office on the date listed on the official postmark appearing on the document’s transmittal envelope or container, with the exception of a motion for reconsideration in the Court of Appeals, which is deemed filed only on the date it is physically received in the clerk’s office.⁴

Alternatively, select motions, briefs, notices and responses are eligible for electronic filing in the Court of Appeals—with the list of approved documents being periodically updated by the court.⁵ Any document submitted to the court’s electronic filing system will be deemed filed on the date and time received if the document meets all other requirements for filing under the relevant rules of the court. Counsel will be sent an email that a document has been submitted. After the court’s review, a second email will be sent confirming the acceptance of the document or rejecting the document. An acceptance confirmation email will be proof of the date and time a document is filed with the court. If after review the court rejects a document submitted to the e-filing system, the counsel submitting the document will be sent an email with the rejected document attached that explains the reason for rejection. Counsel may then correct and resubmit the filing.⁶

The filing requirements in the Supreme Court are similar to those of the Court of Appeals. Properly addressed mail sent by priority, express or first-class mail is deemed filed as of the date such mail is postmarked by the U.S. Postal Service.⁷ A document sent via a commercial delivery service, and marked for delivery within three days, is deemed filed in the clerk’s office on the date listed on the official postmark appearing on the document’s transmittal envelope or container.⁸

¹ The offices of the clerk of both the Supreme Court and the Court of Appeals are open Monday through Friday from 8:30 a.m. to 4:30 p.m. GA. S. CT. R. 1; GA. CT. APP. R. 2(a).

² The Court of Appeals’ clerk’s office has provided a drop box for filing documents after hours. GA. CT. APP. R. 4(a). Any items placed in the drop box after 4:30 p.m., Monday through Friday, will be docketed to the date the documents were placed in the drop box. *Id.* The Judicial Building is open from 7:00 a.m. until 5:00 p.m. *Id.*

³ GA. CT. APP. R. 4(c).

⁴ GA. S. CT. R. 13; GA. CT. APP. R. 4(b)-(c).

⁵ The electronic filing system for the Court of Appeals can be accessed at: <http://efast.gaappeals.us>.

⁶ *See* Court of Appeals of Georgia, EFAST Registration and E-Filing Instructions (Nov. 7, 2011), <http://www.gaappeals.us/eFile2/instructions.pdf>.

⁷ GA. S. CT. R. 13.

⁸ *Id.*

However, if there is no clear postmark date, the filing date is the date on which the document is received.⁹ Alternatively, a document will be deemed filed as of the date upon which it is delivered to the U.S. Postal Service or commercial delivery company for overnight delivery as evidenced by the receipt provided by the same.¹⁰ The exception is for a motion for reconsideration, which is deemed filed as of the date such mail is physically received in the clerk's office.¹¹ Unless the court determines otherwise in a particular case, counsel are permitted to file electronically with the Supreme Court and shall follow all governing policies and procedures.¹² Electronic filings received before midnight will be deemed filed that same day.

A letter requesting an extension of time must reach the Supreme Court before the last day for filing.¹³ In the Supreme Court, a document may be filed by facsimile with prior permission of the court.¹⁴ A filing received by facsimile will be deemed filed as of the date the facsimile is received, so long as the original has been received by mail.¹⁵ In both the Supreme Court and the Court of Appeals, when an expiration date falls on a Saturday, Sunday, or official state or national holiday, the time for filing is extended to the next business day.¹⁶

⁹ *Id.*

¹⁰ *Id.*

¹¹ GA. S. CT. R. 27.

¹² GA. S. CT. R. 13.

¹³ GA. S. CT. R. 12. A request for extension of time for filing a brief should be by letter directed to the clerk of the Supreme Court and should be sent sufficiently in advance of the request so that if the request is denied the briefs can still be filed within the time fixed by applicable rules. *Id.*

¹⁴ GA. S. CT. R. 2.

¹⁵ *Id.*

¹⁶ GA. S. CT. R. 11; GA. CT. APP. R. 3.

§ 1.2 Direct Appeals

§ 1.2.1 Notice of Appeal and Cross-Appeal

§ 1.2.1.1 Time for Filing

To initiate an appeal, a notice of appeal must be filed with the trial court within 30 days after entry of an appealable decision or judgment.¹⁷ When a motion for new trial, in arrest of judgment, or for judgment notwithstanding the verdict has been filed, the notice of appeal must be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion.¹⁸ In civil cases, the appellee may institute a cross-appeal by filing a notice of cross-appeal within 15 days after service of the appellant's notice of appeal.¹⁹

§ 1.2.1.2 Extensions of Time for Filing Notice

The granting of an extension of time for filing a notice of appeal or notice of cross-appeal rests in the discretion of the trial judge.²⁰ The trial court may grant only one extension of time, and the extension cannot exceed the time otherwise allowed for the initial filing of the notice. Thus, an extension of time for filing a notice of appeal may not exceed 30 days, and an extension of time for filing a notice of cross-appeal may not exceed 15 days.²¹

¹⁷ O.C.G.A. § 5-6-38(a). Generally, a trial court judgment is automatically stayed for 10 days after its entry and, during this 10-day period, execution or commencement of proceedings to enforce the judgment is prohibited. O.C.G.A. § 9-11-62(a). A trial court judgment will not be automatically stayed: (i) when the parties have made such an agreement in a writing filed with the court; (ii) in the case of a default judgment; or (iii) when the judgment is interlocutory or final in an action for an injunction or receivership. *Id.* When an appeal is taken from a judgment granting, dissolving, or denying an injunction, the trial court, in its discretion, may suspend, modify, restore, or grant an injunction upon such terms as to bond or otherwise as it considers proper to secure the rights of the appellee. O.C.G.A. § 9-11-62(c). The appellate court, too, has the power to stay proceedings and to suspend, modify, restore, or grant an injunction during the pendency of an appeal and to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered. O.C.G.A. § 9-11-62(e).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ O.C.G.A. § 5-6-39(a).

²¹ O.C.G.A. § 5-6-39(c).

§ 1.2.2 Filing of Transcript

Where there is a transcript of evidence or proceedings to be included in the record on appeal, it is the appellant's duty to cause the transcript to be prepared and filed.²² However, when the appellant has not designated that the transcript be made a part of the record on appeal and it is included by designation of the appellee, then the appellee must cause the transcript to be prepared and filed at the appellee's expense.²³ Unless extended as provided for by O.C.G.A. § 5-6-39, the party responsible for filing the transcript must cause it to be filed within 30 days after the filing of: (i) the notice of appeal; or (ii) designation by appellee.²⁴ If the party responsible for filing fails timely to file the transcript and the trial court determines that the delay was inexcusable, unreasonable, and caused by that party, the trial court may, in its discretion, order that the appeal be dismissed.²⁵ An appellant's appeal is not to be dismissed for failure to pay costs if the costs for preparing the record are paid within 20 days (excluding Saturdays, Sundays, and legal holidays) of the appellant's receipt of the notice of the amount of costs.²⁶

§ 1.2.3 Record

If the appellant designates any matter to be omitted from the record on appeal, the appellee may, within 15 days after the appellant has served his notice of appeal, file a designation of record, designating that all or part of the omitted matters be included in the record on appeal.²⁷ The clerk of the trial court is required to prepare a complete copy of the entire record of the case within five days after the transcript is filed, omitting only those things designated for omission by the appellant that were not designated for inclusion by the appellee.²⁸ Where no transcript of evidence and proceedings is to be sent to the appellate court or where the transcript is already on file, the clerk is required to prepare and transmit the record within 20 days after the date the notice of appeal is filed.²⁹

Any objection regarding a party's failure to comply with the provisions of the Appellate Practice Act relating to the filing of a transcript of the evidence and proceedings or transmittal of

²² O.C.G.A. § 5-6-42.

²³ *Id.*

²⁴ *Id.*

²⁵ O.C.G.A. § 5-6-48(c).

²⁶ *Id.*

²⁷ O.C.G.A. § 5-6-42.

²⁸ O.C.G.A. § 5-6-43(a).

²⁹ O.C.G.A. § 5-6-43(a), (d). For a discussion of the effect of and remedies for a delay in filing the record or transcript, see Chapter 4 of this Handbook.

the record to the appellate court is waived unless the objection is made and ruled upon in the trial court prior to the transmittal of the record, and such order is properly appealed.³⁰

§ 1.2.4 Docketing

Upon the docketing of every appeal and application for appeal to the Court of Appeals, the clerk mails notice of the docketing date and schedule for briefing to all counsel.³¹ Failure of counsel to receive a docketing notice does not relieve counsel of the responsibility to file briefs timely.³²

No appeal to the Court of Appeals is docketed until the notice of appeal and a record, and transcript if requested, are filed in the clerk's office.³³ Appeals or applications transferred to the Court of Appeals from the Supreme Court will be docketed as of the date they are received in the Court of Appeals.³⁴ Any Court of Appeals case docketed before the entire record is received by the Court of Appeals may, at the parties' request, be remanded to the trial court until such time as the record is so prepared and delivered to the Court of Appeals.³⁵

In the Supreme Court, if a record is supplemented pursuant to O.C.G.A. § 5-6-41(f) or § 5-6-48(d), a party wanting to present an issue in the Supreme Court relating to the trial court proceeding in which the record was supplemented must first raise the issue before the trial court and then file additional enumerations of error and a brief.³⁶ The additional enumerations of error and brief must be filed within 10 days after: (i) docketing of the supplemental record in Supreme Court; or (ii) the trial court rules on the issue raised, whichever date is later.³⁷ Opposing parties may file a supplemental brief within 20 days after docketing or after the trial court rules on the issue raised, whichever date is later.³⁸

³⁰ GA. S. CT. R. 74; GA. CT. APP. R. 20.

³¹ GA. CT. APP. R. 13.

³² *Id.*; see also GA. S. CT. R. 4 (failure of counsel to receive notice of court action shall not be grounds to reinstate or reconsider any matter adverse to counsel or parties if counsel failed to properly notify the court of any change of address or telephone number).

³³ GA. CT. APP. R. 11(a).

³⁴ GA. CT. APP. R. 11(c).

³⁵ GA. CT. APP. R. 11(d).

³⁶ GA. S. CT. R. 25.

³⁷ *Id.*

³⁸ *Id.*

§ 1.2.4.1 Closing of the Docket

The docket for the January, April, and September terms of the Court of Appeals closes at noon on the 15th day of December, April, and August respectively.³⁹ By order, a closed docket may be opened when expedient for the docketing of a case, so that judgment may be rendered by the Court of Appeals at the earliest practicable date.⁴⁰

§ 1.2.5 Supersedeas

The appellant's filing of a notice of appeal and payment of all costs in the trial court serves as automatic supersedeas in all civil cases, except for injunction cases.⁴¹ An appellant is not required to give a supersedeas bond unless the trial court, upon motion by an appellee, moves for such bond to be given.⁴² When an appeal is taken by the state or by any county, city, or town or an officer or agency thereof, no bond or other security is required.⁴³

§ 1.2.6 Payment of Costs⁴⁴

Costs in the appellate courts are incurred upon docketing and must be paid upon the filing of an application for interlocutory or discretionary appeal,⁴⁵ or, on direct appeals, with the filing of appellant's brief.⁴⁶

³⁹ GA. CT. APP. R. 12.

⁴⁰ *Id.*

⁴¹ O.C.G.A. § 5-6-46(a).

⁴² *Id.*

⁴³ O.C.G.A. § 9-11-62(d).

⁴⁴ As a general matter, costs in all Supreme Court cases and criminal cases in the Court of Appeals are \$80, and costs in civil cases in the Court of Appeals are \$300, unless a pauper's affidavit is filed. GA. S. CT. R. 5; GA. CT. APP. R. 5. In the Supreme Court, costs are waived if pauper status has been granted by the trial court and the record so reflects. GA. S. CT. R. 5. In the Court of Appeals, costs will be waived if a pauper's affidavit is filed with that court or if such an affidavit is contained in the record on appeal. GA. CT. APP. R. 5. The clerk shall not file any matter unless the costs have been paid or a sufficient pauper's affidavit has been filed. *Id.* Costs in the Supreme Court are not required for certified questions or in disciplinary cases. *Id.*

⁴⁵ GA. S. CT. R. 5; GA. CT. APP. R. 5.

⁴⁶ GA. S. CT. R. 5; GA. CT. APP. R. 5.

§ 1.2.7 Oral Argument

In the Court of Appeals, unless expressly ordered by the court, oral argument is never mandatory.⁴⁷ The Court of Appeals will place a case on the calendar for oral argument only upon the granting of a request for oral argument made by one of the parties.⁴⁸ The clerk of the Court of Appeals mails the calendar to counsel in each appeal to be orally argued at the addresses shown on the notice of appeal, unless the court is otherwise advised under Rule 9(e), at least 14 days prior to the date set for oral argument.⁴⁹ Counsel not receiving a calendar at least 10 days prior to the tentative oral argument dates should contact the clerk’s office to inquire about oral argument dates.⁵⁰

In the Supreme Court, no request is necessary when there is a direct appeal from a judgment imposing the death penalty; in such cases, oral argument is mandatory.⁵¹ Cases in which certiorari has been granted are also placed on the Supreme Court’s oral argument calendar automatically, unless disposed of summarily by the court.⁵² A written request for oral argument must be made in all other appeals to the Supreme Court.⁵³ Except in death penalty cases, oral argument is not mandatory.⁵⁴

In both the Court of Appeals and the Supreme Court, when a case is not scheduled for oral argument automatically, a request for oral argument must be filed within 20 days from the date the case is docketed.⁵⁵ As a general matter, argument will not be permitted to parties whose briefs have not been timely filed.⁵⁶

Court of Appeals arguments are limited to 30 minutes per case or 15 minutes per side.⁵⁷ Unless otherwise provided by the court, Supreme Court arguments are limited to 30 minutes per side in direct appeals of death penalty judgments and 20 minutes per side in all other cases.⁵⁸ In the

⁴⁷ GA. CT. APP. R. 28(a)(1).

⁴⁸ *Id.*

⁴⁹ GA. CT. APP. R. 14(a).

⁵⁰ GA. CT. APP. R. 14(b).

⁵¹ GA. S. CT. R. 50(1).

⁵² GA. S. CT. R. 50(2).

⁵³ GA. S. CT. R. 51.

⁵⁴ GA. S. CT. R. 50(1), (3).

⁵⁵ GA. S. CT. R. 50(3); GA. CT. APP. R. 28(a)(2).

⁵⁶ GA. S. CT. R. 50(3).

⁵⁷ GA. CT. APP. R. 28(d).

⁵⁸ GA. S. CT. R. 54.

Court of Appeals, a request for additional time for argument may be made; however, the request must be made in writing at least five days before the date set for hearing.⁵⁹

§ 1.2.8 Briefs and Enumerations of Error

§ 1.2.8.1 Briefs, Generally

In both the Supreme Court and Court of Appeals, the appellant's and cross-appellant's briefs and enumerations of error must be filed and served within 20 days after the appeal or cross-appeal is docketed.⁶⁰ The appellee's and cross-appellee's briefs must be filed within 40 days after the case is docketed or 20 days after filing of the appellant's or cross-appellant's brief, whichever is later.⁶¹ In the Court of Appeals, the appellant may file a reply brief within 20 days from the filing of the appellee's brief.⁶² There is no express provision for reply briefs in the Supreme Court rules. However, parties may file supplemental briefs as described below.

§ 1.2.8.2 Supplemental Briefs

In the Supreme Court, supplemental briefs may be filed at any time before decision.⁶³ In the Court of Appeals, however, supplemental briefs may be filed only by leave of the court.⁶⁴ A party may inform the Court of Appeals of recent authorities that come to the attention of a party after the filing of that party's brief or after oral argument, but before a decision, only after seeking permission to file a supplemental brief.⁶⁵ Any response to a supplemental brief must be made promptly and must conform to Rule 24.⁶⁶

§ 1.2.8.3 Amicus Curiae Briefs

In both the Supreme Court and the Court of Appeals, amicus curiae briefs may be filed without leave of court, must include the identity and interest of the person(s) on whose behalf the brief is filed, and must be limited to those issues properly raised by the parties.⁶⁷ The published

⁵⁹ GA. CT. APP. R. 28(d).

⁶⁰ GA. S. CT. R. 10; GA. CT. APP. R. 23(a).

⁶¹ GA. S. CT. R. 10; GA. CT. APP. R. 23(b).

⁶² GA. CT. APP. R. 23(c).

⁶³ GA. S. CT. R. 24.

⁶⁴ GA. CT. APP. R. 27(a).

⁶⁵ GA. CT. APP. R. 27(b).

⁶⁶ *Id.*

⁶⁷ GA. S. CT. R. 23; GA. CT. APP. R. 26.

rules of the appellate courts do not impose any particular time constraints on the filing of amicus curiae briefs.

§ 1.3 Discretionary Appeals of Final Order or Judgment

For a listing of the final orders or judgments that require an application for appeal, see O.C.G.A. § 5-6-35(a).

§ 1.3.1 Application for Leave, Response, and Decision on Application

§ 1.3.1.1 Application

When required, an application for leave to appeal must be filed within 30 days of the entry of the order, decision, or judgment.⁶⁸ When a motion for new trial, in arrest of judgment, or for judgment notwithstanding the verdict has been filed, the application must be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion.⁶⁹

§ 1.3.1.2 Costs

The appellate court's filing fee must be paid at the time the application for leave is filed.⁷⁰

§ 1.3.1.3 Response

The response to an application for leave to appeal must be filed and served within 10 days of the filing of the application.⁷¹ No response is required unless ordered by the court;⁷² however, the Supreme Court encourages that responses be filed.⁷³

⁶⁸ O.C.G.A. § 5-6-35(d).

⁶⁹ *Id.*

⁷⁰ GA. S. CT. R. 5; GA. CT. APP. R. 5.

⁷¹ O.C.G.A. § 5-6-35(e). With respect to discretionary appeal applications, the date of filing and the date of docketing are the same. GA. S. CT. R. 33; GA. CT. APP. R. 31(h).

⁷² GA. S. CT. R. 33; GA. CT. APP. R. 31(h).

⁷³ GA. S. CT. R. 33.

§ 1.3.1.4 Decision by Court on Application

The Supreme Court or Court of Appeals will issue an order granting or denying an application for leave to appeal within 30 days of the date upon which the application was filed.⁷⁴

§ 1.3.2 Notice of Appeal

If the appellate court issues an order granting leave to appeal, the applicant must file a notice of appeal in the trial court within 10 days of the filing of the order.⁷⁵ The procedure thereafter is the same as in other appeals.⁷⁶ The filing of an application for leave to appeal acts as a supersedeas to the extent that a notice of appeal acts as a supersedeas.⁷⁷

If the court issues an order denying leave to appeal, the applicant may make a motion for reconsideration or, if the denial is by the Court of Appeals, file a petition for certiorari.

§ 1.4 Interlocutory Appeals

§ 1.4.1 Automatic Stay

As stated in § 1.2, unless otherwise ordered by the court, an interlocutory judgment in an action for injunction or receivership is not stayed during the period after its entry.⁷⁸

§ 1.4.2 Certificate of Immediate Review

For an applicant to seek leave to appeal an interlocutory order, a certificate of immediate review must be issued by the trial court within 10 days of the entry of the order, decision, or judgment at issue.⁷⁹

⁷⁴ O.C.G.A. § 5-6-35(f).

⁷⁵ O.C.G.A. § 5-6-35(g); GA. CT. APP. R. 31(i).

⁷⁶ O.C.G.A. § 5-6-35(g).

⁷⁷ O.C.G.A. § 5-6-35(h).

⁷⁸ O.C.G.A. § 9-11-62(a).

⁷⁹ O.C.G.A. § 5-6-34(b).

§ 1.4.3 Application for Interlocutory Appeal, Response, and Decision

§ 1.4.3.1 Application

An application for interlocutory appeal must be filed within 10 days after a certificate of immediate review is filed by the trial court clerk.⁸⁰ The application must be filed with the clerk of the court to which the appeal will be taken,⁸¹ and simultaneously therewith, a copy of the application, together with a list of those parts of the record included with the application, must be served upon all opposing parties.⁸²

§ 1.4.3.2 Costs

The appellate court's filing fee must be paid at the time the application is filed.⁸³

§ 1.4.3.3 Response

The response to an application for interlocutory appeal must be filed and served within 10 days of the filing of the application.⁸⁴

§ 1.4.3.4 Decision by Court on Application

The appellate court will issue an order granting or denying the application within 45 days of the date upon which the application was filed.⁸⁵

§ 1.4.4 Notice of Appeal

If the court issues an order granting the application, the applicant must file a notice of appeal within 10 days of the filing of the order.⁸⁶ The notice of appeal acts as supersedeas as

⁸⁰ *Id.*; GA. CT. APP. R. 32(a).

⁸¹ The materials from the record included in an application to the Court of Appeals must be tabbed and indexed. GA. CT. APP. R. 30(e). All applications for interlocutory appeal must include a stamp-filed copy of the order to be appealed and a stamp-filed copy of the certificate of immediate review. GA. S. CT. R. 30; GA. CT. APP. R. 30(b).

⁸² O.C.G.A. § 5-6-34(b).

⁸³ GA. S. CT. R. 5; GA. CT. APP. R. 5; GA. CT. APP. R. 30(c).

⁸⁴ O.C.G.A. § 5-6-34(b); GA. S. CT. R. 30; GA. CT. APP. R. 30(h).

⁸⁵ O.C.G.A. § 5-6-34(b).

⁸⁶ *Id.*

provided by O.C.G.A. § 5-6-46, and the procedure thereafter is the same as in an appeal from a final judgment.⁸⁷

If the court issues an order denying the application, the applicant may make a motion for reconsideration or, if the denial is by the Court of Appeals, file a petition for certiorari.

§ 1.5 Motion For Reconsideration

§ 1.5.1 Motion in Supreme Court

A motion for reconsideration may be filed in any matter on which the Supreme Court has ruled, and must be physically received at the court within 10 days from the date of the decision to be considered timely.⁸⁸ No second or subsequent motion for reconsideration may be filed by a party after its first motion has been denied, except by permission of the court.⁸⁹

§ 1.5.2 Motion in Court of Appeals

A motion for reconsideration filed in the Court of Appeals must be filed and served during the term in which the judgment or dismissal sought to be reviewed was rendered⁹⁰ and before the remittitur has been forwarded to the clerk of the trial court; in any event, it must be filed within 10 days from the rendering of the judgment or dismissal.⁹¹ The rule for filing by registered or certified mail does not apply to motions for reconsideration.⁹² No extension of time will be granted for filing, except when the party seeking an extension has made a written application before the expiration of the 10 days, which application must demonstrate “providential cause.”⁹³

By special order, the Court of Appeals may limit the time within which a motion for reconsideration may be filed to a period less than 10 days.⁹⁴ No party may file a second motion for

⁸⁷ *Id.*

⁸⁸ GA. S. CT. R. 27. A copy of the opinion or disposition must be attached thereto. *Id.*

⁸⁹ GA. S. CT. R. 27.

⁹⁰ The Supreme Court has three terms: (i) the January term beginning the first Monday in January; (ii) the April term beginning the third Monday in April; and (iii) the September term beginning the first Monday in September. O.C.G.A. § 15-2-4. The Court of Appeals has the same terms as the Supreme Court. O.C.G.A. § 15-3-2.

⁹¹ GA. CT. APP. R. 37(b).

⁹² GA. CT. APP. R. 4, 37(b).

⁹³ GA. CT. APP. R. 37(b).

⁹⁴ GA. CT. APP. R. 37(c).

reconsideration unless permitted by order of the court.⁹⁵ 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 intention to apply for certiorari to the Supreme Court.⁹⁶

§ 1.5.3 Responding to a Motion for Reconsideration

There is no specific time limit for responding to a motion for reconsideration. In the Supreme Court, responses to motions for reconsideration may be filed at any time.⁹⁷ In the Court of Appeals, any party that wishes to respond to a motion for reconsideration “must do so expeditiously.”⁹⁸

§ 1.6 Certiorari Petitions

§ 1.6.1 Petition for Certiorari to Georgia Supreme Court

Notice of the intention to apply for certiorari must be given to the clerk of the Court of Appeals within 10 days after judgment or the order denying a motion for reconsideration, if one is filed.⁹⁹ The petition for certiorari must be filed with the clerk of the Supreme Court within 20 days after the judgment or the order overruling a motion for reconsideration, if one is filed.¹⁰⁰ If applicable, the petitioner must make payment of costs to the clerk of the Supreme Court simultaneously with his filing of his application for certiorari.¹⁰¹

§ 1.6.1.1 Record

Upon receiving from the clerk of the Supreme Court a copy of the notice of docketing of the petition for certiorari, the clerk of the Court of Appeals prepares and transmits to the Supreme Court the record of the case, including a certified copy of the Court of Appeals opinion and judgment.¹⁰²

⁹⁵ GA. CT. APP. R. 37(d).

⁹⁶ *Id.*

⁹⁷ GA. S. CT. R. 26.

⁹⁸ GA. CT. APP. R. 37(b).

⁹⁹ GA. S. CT. R. 38(1); GA. CT. APP. R. 38(a)(1).

¹⁰⁰ GA. S. CT. R. 38(2).

¹⁰¹ GA. S. CT. R. 5 & 38(2).

¹⁰² GA. S. CT. R. 43.

§ 1.6.1.2 Response

A response to a petition for certiorari must be served within 20 days of the filing of the petition.¹⁰³ Failure to file a response will be deemed an acknowledgment by the respondent that the requirements of the rules for the granting of the petition for certiorari have been met.¹⁰⁴ However, such an acknowledgement is not binding on the Supreme Court.¹⁰⁵

§ 1.6.1.3 Briefs

When a petition for certiorari is granted, the appellant and appellee must file briefs in response to the questions posed by the Supreme Court in its order granting certiorari.¹⁰⁶ The briefing schedule set forth in Supreme Court Rule 10 must be followed, dating from the order granting certiorari.¹⁰⁷

§ 1.6.2 Petition for Certiorari to United States Supreme Court

A notice of intention to petition the United States Supreme Court for certiorari shall be filed in the Court of Appeals no later than 20 days following the denial of a petition for certiorari by the Georgia Supreme Court.¹⁰⁸ Simultaneously with the filing of the petition for certiorari in the United States Supreme Court, the petitioner must file a copy of the same with the Court of Appeals.¹⁰⁹ The petitioner is not required, however, to file a copy of the petition with the Georgia Supreme Court. There is no provision to seek certiorari from the United States Supreme Court to the Georgia Supreme Court

§ 1.7 Stay of Remittitur Pending Petition for Certiorari to the United States Supreme Court

A party desiring to have the remittitur stayed in the Georgia Supreme Court in order to seek a writ of certiorari from the United States Supreme Court must file a motion to stay the remittitur in the Georgia Supreme Court.¹¹⁰ This motion must include a concise statement of the issues to

¹⁰³ GA. S. CT. R. 42.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ GA. S. CT. R. 45.

¹⁰⁷ *Id.*

¹⁰⁸ GA. CT. APP. R. 38(b)(1).

¹⁰⁹ GA. CT. APP. R. 38(b)(2).

¹¹⁰ GA. S. CT. R. 61.

be raised in the petition for certiorari and must be filed at the time of the filing of a motion for reconsideration, or if no motion for reconsideration is filed, within the time allowed for the same.¹¹¹

¹¹¹ *Id.*; see also GA. S. CT. R. 27.

2

JURISDICTION, AVAILABILITY, AND DISMISSALS OF APPEALS

*Nowell D. Berreth**

§ 2.1 Introduction

Although the 1965 enactment of the Appellate Practice Act considerably simplified appellate procedure in Georgia,¹ the law relating to appellate jurisdiction, availability, and dismissal of appeals remains complex. Noncompliance can result in harsh consequences. This chapter is intended to assist the bench and bar in these matters.

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¹ The Appellate Practice Act was enacted “to simplify the procedure for bringing a case to the appellate court[s] and to secure ‘speedy and uniform justice in a uniform and well-ordered manner; . . . not . . . to set traps and pitfalls . . . for unwary litigants.’” *Felix v. State*, 271 Ga. 534, 534-35, 523 S.E.2d 1, 3 (1999) (citation omitted).

§ 2.2 Right of Appeal Generally

Although the United States Constitution does not provide a right to appeal court decisions, states may permit appeals and prescribe conditions and procedures regarding their availability.² The Georgia Constitution and various statutes create and condition the right to appeal in Georgia.

The Georgia Constitution creates the Supreme Court and the Court of Appeals, along with superior, state, probate, magistrate, juvenile and several additional lower courts, and vests them with judicial power:

The judicial power of the state shall be vested exclusively in the following classes of courts: magistrate courts, probate courts, juvenile courts, state courts, superior courts, Court of Appeals, and Supreme Court. Magistrate courts, probate courts, juvenile courts, and state courts shall be courts of limited jurisdiction. In addition, the General Assembly may establish or authorize the establishment of municipal courts and may authorize administrative agencies to exercise quasi-judicial powers. Municipal courts shall have jurisdiction over ordinance violations and such other jurisdiction as provided by law. Except as provided in this paragraph and in Section X, municipal courts, county recorder's courts and civil courts in existence on June 30, 1983, and administrative agencies shall not be subject to the provisions of this article. The General Assembly shall have the authority to confer "by law" jurisdiction upon municipal courts to try state offenses.³

§ 2.2.1 Appeals from Superior and State Courts Generally

Appeals from superior and state courts are provided for in O.C.G.A. § 5-6-33(a)(1):

Either party in any civil case and the defendant in any criminal proceeding in the superior, state, or city courts may appeal from any sentence, judgment, decision, or decree of the court, or of the judge thereof in any matter heard at chambers.

The same laws of appellate practice govern all such appeals, regardless of whether they are taken from superior or state courts.⁴

² *Nat'l Union of Marine Cooks v. Arnold*, 348 U.S. 37, 43 (1954); *Lott v. Pittman*, 243 U.S. 588, 591 (1917); accord *Ex parte McCardle*, 74 U.S. 506 (1868).

³ GA. CONST. art. VI, § 1, ¶ 1; see also *Wickham v. State*, 273 Ga. 563, 565, 544 S.E.2d 439, 442 (2001) (holding that the city court of Atlanta is constitutional).

⁴ O.C.G.A. § 15-7-43.

§ 2.2.2 Appeals from Magistrate, Probate, and Juvenile Courts Generally

Appeals from magistrate, probate, and juvenile courts also are permitted by statute. Judgments and orders from magistrate court are appealable to the superior or state courts;⁵ final judgments and orders of the juvenile courts are appealable to the Court of Appeals or the Supreme Court;⁶ and, with some significant exceptions, decisions of the probate courts are appealable to superior court.⁷

§ 2.3 Jurisdiction of the Georgia Appellate Courts

Various provisions of the Georgia Constitution and Georgia statutes create and condition the jurisdiction of the Supreme Court and the Court of Appeals.

§ 2.3.1 Jurisdiction of the Georgia Supreme Court

Pursuant to Article VI, Section 6, Paragraph 2 of the Georgia Constitution, the Supreme Court has exclusive appellate jurisdiction over:

- All cases involving the construction of a treaty or the construction of the Constitution of the State of Georgia or of the United States;⁸
- All cases in which the constitutionality of a law, ordinance, or constitutional provision is drawn into question;⁹ and
- All cases of election contest.¹⁰

As provided in Article VI, Section 6, Paragraph 3 of the Georgia Constitution, the Supreme Court has appellate jurisdiction over:

- Cases involving title to land;¹¹

⁵ O.C.G.A. § 15-10-41(b)(1).

⁶ O.C.G.A. § 15-11-3.

⁷ O.C.G.A. §§ 5-3-1, 5-3-2, 5-6-33 & 15-9-120 *et seq.*

⁸ GA. CONST. art. VI, § 6, ¶ 2(1).

⁹ *Id.*; *Williams v. State*, 273 Ga. 848, 848, 546 S.E.2d 522, 523 (2001).

¹⁰ GA. CONST. art. VI, § 6, ¶ 2(2).

¹¹ GA. CONST. art. VI, § 6, ¶ 3(1).

- Equity cases;¹²
- Cases involving wills;¹³
- Habeas corpus cases;¹⁴
- Cases involving extraordinary remedies;¹⁵
- Divorce and alimony cases;¹⁶
- Cases certified to it by the Court of Appeals;¹⁷ and
- Cases in which a sentence of death was imposed or could have been imposed.¹⁸

The Supreme Court also has exclusive jurisdiction over questions certified to it from any state or federal appellate court, or from the United States Supreme Court.¹⁹

¹² GA. CONST. art. VI, § 6, ¶ 3(2). The precise nature of the Supreme Court’s equity jurisdiction continues to be refined. As former Chief Justice Fletcher has observed:

We acknowledge that the meaning of equity jurisdiction remains subject to confusion and frustration. This, however, is not a recent occurrence. Equity jurisdiction was problematic for the courts even at a time when the distinction between law and equity was more relevant than it is today. Unfortunately, so long as “equity” continues to be a basis of this court’s jurisdiction, these difficulties will remain and will require this court to continue to define equity jurisdiction.

Elec. Data Sys. Corp. v. Heinemann, 268 Ga. 755, 756, 493 S.E.2d 132, 134 (1997) (footnotes omitted).

For a selection of cases defining the court’s equity jurisdiction in various contexts, see *Reeves v. Newman*, 287 Ga. 317, 695 S.E.2d 626 (2010); *Tunison v. Harper*, 286 Ga. 687, 690 S.E.2d 819 (2010); *Arrington v. Reynolds*, 274 Ga. 114, 115, 549 S.E.2d 401, 401 (2001); *Warren v. Bd. of Regents of the Univ. Sys.*, 272 Ga. 142, 144, 527 S.E.2d 563, 565 (2000); *Lee v. Green Land Co.*, 272 Ga. 107, 108, 527 S.E.2d 204, 205 (2000); *Redfearn v. Huntcliff Homes Ass’n*, 271 Ga. 745, 750, 524 S.E.2d 464, 469 (1999); *Pittman v. Harbin Clinic Prof’l Ass’n*, 263 Ga. 66, 67, 428 S.E.2d 328, 328-29 (1993); *Allen v. Hub Cap Heaven, Inc.*, 225 Ga. App. 533, 535, 484 S.E.2d 259, 263 (1997); *Sysco Food Servs. of Atlanta, Inc. v. Chupp*, 225 Ga. App. 584, 584, 484 S.E.2d 323, 324 (1997).

¹³ GA. CONST. art. VI, § 6, ¶ 3(3).

¹⁴ *Id.*

¹⁵ GA. CONST. art. VI, § 6, ¶ 3(5).

¹⁶ GA. CONST. art. VI, § 6, ¶ 3(6).

¹⁷ GA. CONST. art. VI, § 6, ¶ 3(7).

¹⁸ GA. CONST. art. VI, § 6, ¶ 3(8).

¹⁹ GA. CONST. art. VI, § 6, ¶ 4; O.C.G.A. § 15-2-9.

The introductory language of Article VI, Section 6, Paragraph 3 of the Georgia Constitution allows the General Assembly to modify the Supreme Court’s jurisdiction by statute. Unless this jurisdiction is modified, however, the types of cases listed in Article VI, Section 6, Paragraph 3 must be appealed directly to the Supreme Court. The Supreme Court may also review by certiorari cases from the Court of Appeals that are of gravity or great public importance.²⁰ The court may also review by certiorari decisions by the Court of Appeals in criminal cases that are adverse to the state.²¹

§ 2.3.2 Jurisdiction of the Georgia Court of Appeals

The Court of Appeals has broad jurisdiction over “all cases not reserved to the Supreme Court or conferred on other courts by law.”²² The Georgia Constitution provides:

The Court of Appeals shall be a court of review and shall exercise appellate and certiorari jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts by law. The decisions of the Court of Appeals insofar as not in conflict with those of the Supreme Court shall bind all courts except the Supreme Court as precedents.²³

The Court of Appeals has jurisdiction over criminal appeals unless a death sentence was imposed or could have been imposed in the case.²⁴ The Court of Appeals has jurisdiction over all armed robbery, rape, and kidnapping cases unless the death penalty was imposed.²⁵ The Court of Appeals also has jurisdiction to review trial court orders clarifying judgments under O.C.G.A. § 9-11-60(9).²⁶

As noted above, the Supreme Court has exclusive appellate jurisdiction over cases involving the construction of the Georgia or United States Constitutions, as well as any case involving the constitutionality of a law.²⁷ Nevertheless, if a constitutional provision is unambiguous, the Court

²⁰ GA. CONST. art. VI, § 6, ¶ 5.

²¹ *State v. Tyson*, 273 Ga. 690, 690, 544 S.E.2d 444, 445 (2001).

²² GA. CONST. art. VI, § 5, ¶ 3.

²³ *Id.*

²⁴ GA. CONST. art. VI, § 6, ¶ 3(8).

²⁵ O.C.G.A. § 15-3-3.

²⁶ *Floyd v. Springfield Plantation Prop. Owners’ Ass’n*, 245 Ga. App. 535, 536 n.2, 538 S.E.2d 455, 457 n.2 (2000).

²⁷ GA. CONST. art. VI, § 6, ¶ 2.

of Appeals may apply it without a prior Supreme Court interpretation.²⁸ In addition, the Court of Appeals has jurisdiction over appeals involving constitutional issues if the issue in question has already been decided by the Supreme Court.²⁹

The Court of Appeals may hear appeals contending that the conduct of a trial deprived the appellant of his constitutional rights, and it may hear cases involving constitutional issues if the resolution of those issues is not necessary to decide the appeal,³⁰ or if the issues were not properly raised in the trial court.³¹ However, the Court of Appeals may not determine the constitutionality of a state statute.³²

§ 2.4 Appealability of Judgments and Orders

There are two categories of appeals from final judgments: (i) direct (provided for in O.C.G.A. § 5-6-34(a)); and (ii) discretionary (provided for in O.C.G.A. § 5-6-35). Appeals from non-final judgments, termed interlocutory appeals, are provided for in O.C.G.A. § 5-6-34(b) and are discussed in Sections 2.4.6 through 2.4.8. As the names imply, the appellate courts must hear a direct appeal, while they may decline to hear discretionary appeals. Vastly different procedures apply to the commencement of each appeal.

§ 2.4.1 Direct Appeals Generally

Direct appeals are initiated by filing a notice of appeal with the trial court. The appellant need not obtain the trial court’s or the appellate court’s permission to pursue a direct appeal. Direct appeals are permitted from most final judgments (except those excluded by O.C.G.A. § 5-6-35(a), which are discussed in Section 2.4.5) and from a limited number of statutorily-enumerated non-final judgments.³³ In a direct appeal, any other judgment, ruling, or order in the case that may affect

²⁸ *City of Decatur v. DeKalb Cnty.*, 284 Ga. 434, 437, 668 S.E.2d 247, 250 (2008); *White v. Bd. of Comm’rs*, 252 Ga. App. 120, 122 n.10, 555 S.E.2d 45, 48 n.10 (2001); *Scott v. State*, 157 Ga. App. 608, 608-09, 278 S.E.2d 49, 49-50 (1981).

²⁹ *Williams v. State*, 273 Ga. 848, 848-49, 546 S.E.2d 522, 523 (2001).

³⁰ *Oswell v. State*, 181 Ga. App. 35, 36, 351 S.E.2d 221, 222 (1986); *Brown v. State*, 16 Ga. App. 268, 268, 85 S.E. 262, 262 (1915).

³¹ *Walker v. Hall*, 226 Ga. 68, 69, 172 S.E.2d 411, 411-12 (1970).

³² GA. CONST. art. IV, § 6, ¶ 11(1); *Burson v. State*, 183 Ga. App. 647, 648, 359 S.E.2d 731, 732 (1987).

³³ O.C.G.A. § 5-6-34(a).

the proceedings below, even if not otherwise directly appealable, may be raised and ruled on by the appellate court.³⁴

§ 2.4.2 Direct Appeals from Final Judgments

O.C.G.A. § 5-6-34(a)(1) provides for direct appeals to the Supreme Court or the Court of Appeals from all final judgments (except those final judgments enumerated in O.C.G.A. § 5-6-35 that must be pursued as discretionary appeals by application). A judgment or order is “final” when there is no aspect of the case pending in the lower court.³⁵ In other words, a judgment or order is “final” if there is no remaining issue to be resolved by the trial court, a final ruling on the merits of the matter has been made, and the parties have no further recourse in the trial court.³⁶ A good practical test for making this determination is whether there will be any further role for the trial court, if its decision is affirmed. If further action will be required, the judgment generally is not final. Finality for purposes of an appeal is measured by the same standards as *res judicata* finality.³⁷

The following types of rulings, among others, have been deemed directly appealable:

- Orders denying applications for leave to file *quo warranto*;³⁸
- Contempt orders, even where the contemnor is given the opportunity to purge the contempt before imposition of punishment;³⁹
- Orders denying motions to strike a voluntary dismissal;⁴⁰

³⁴ O.C.G.A. § 5-6-34(d); *Martin v. Williams*, 263 Ga. 707, 710, 438 S.E.2d 353, 355 (1994); *Harrell v. Fed. Nat’l Payables, Inc.*, 284 Ga. App. 395, 397, 643 S.E.2d 875, 876 (2007); *Bradford v. State*, 283 Ga. App. 75, 78 n.4, 640 S.E.2d 630, 633 n.4 (2006); *Benedict v. Snead*, 253 Ga. App. 749, 751, 560 S.E.2d 278, 279 (2002); *Am. Car Rentals, Inc. v. Walden Leasing, Inc.*, 220 Ga. App. 314, 317, 469 S.E.2d 431, 433-34 (1996).

³⁵ *Johnson Real Estate Invs., LLC v. Aqua Indus., Inc.*, 275 Ga. App. 532, 532, 621 S.E.2d 530, 531 (2005); *Ltd., Inc. v. Learning Childbirth Ctr., Inc.*, 255 Ga. App. 688, 689, 566 S.E.2d 411, 412 (2002); *In re M.B.B.*, 241 Ga. App. 249, 250, 526 S.E.2d 76, 77 (1999); *Forrister v. Manis Lumber Co.*, 232 Ga. App. 370, 371, 501 S.E.2d 606, 609 (1998).

³⁶ *Owens v. Green Tree Servicing, LLC*, 300 Ga. App. 22, 24-25, 684 S.E.2d 99, 101 (2009); *Williams v. City of Atlanta*, 263 Ga. App. 113, 114, 587 S.E.2d 261, 262 (2003); *Vurgess v. State*, 187 Ga. App. 700, 701, 371 S.E.2d 191, 192 (1988).

³⁷ *Culwell v. Lomas & Nettleton Co.*, 242 Ga. 242, 243, 248 S.E.2d 641, 642 (1978).

³⁸ *Westberry v. Saunders*, 250 Ga. 240, 242, 296 S.E.2d 596, 598 (1982); *Thibadeau v. Henley*, 233 Ga. 884, 884, 213 S.E.2d 657, 658 (1975).

³⁹ *Hamilton Capital Grp., Inc. v. Equifax Credit Info. Servs., Inc.*, 266 Ga. App. 1, 3, 596 S.E.2d 656, 659 (2004).

⁴⁰ *Pizza Ring Enters., Inc. v. Mills Mgmt. Sources, Inc.*, 154 Ga. App. 45, 46, 267 S.E.2d 487, 487 (1980).

- Judgments in condemnation proceedings stating that no compensation is to be paid to the condemnee;⁴¹
- Orders granting motions to dismiss unless granted as to less than all defendants;⁴²
- Final orders of the director of the Department of Natural Resources entered pursuant to O.C.G.A. § 12-5-189;⁴³ and
- Other orders that affect the rights of the parties to the litigation and leave no further action for the trial court.⁴⁴

§ 2.4.3 Direct Appeals from Non-Final Orders and Judgments

In addition to final judgments, a limited number of non-final judgments or orders also are directly appealable. These orders and judgments, most of which are enumerated in O.C.G.A. § 5-6-34(a), include:

- Orders denying a motion for a speedy trial or denying a motion to dismiss under the speedy trial statute;⁴⁵
- Orders overruling motions to dismiss in an election contest;⁴⁶
- Temporary orders issuing an injunction after an adversary hearing, when the plaintiff is granted all relief sought;⁴⁷
- Judgments involving applications for discharge in bail, trover and contempt cases;⁴⁸

⁴¹ *City of Atlanta v. Turner Adver. Co.*, 234 Ga. 1, 2-3, 214 S.E.2d 501, 502 (1975).

⁴² *Coley Fertilizer Co. v. Gold Kist, Inc.*, 174 Ga. App. 471, 472, 330 S.E.2d 597, 598 (1985); *Lawler v. Ga. Mut. Ins. Co.*, 156 Ga. App. 265, 266, 276 S.E.2d 646, 647-48 (1980), *overruled on other grounds by Becker v. Fairman*, 167 Ga. App. 708, 307 S.E.2d 520 (1983).

⁴³ *City of Rincon v. Couch*, 272 Ga. App. 411, 412, 612 S.E.2d 596, 597 (2005).

⁴⁴ *Padgett v. Cowart*, 232 Ga. 633, 634, 208 S.E.2d 455, 456 (1974).

⁴⁵ *Callaway v. State*, 275 Ga. 332, 332, 567 S.E.2d 13, 14 (2002); *Hubbard v. State*, 254 Ga. 694, 695, 333 S.E.2d 827, 828 (1985); *Reid v. State*, 116 Ga. App. 640, 642-44, 158 S.E.2d 461, 465 (1967).

⁴⁶ *Blackburn v. Hall*, 115 Ga. App. 235, 238-39, 154 S.E.2d 392, 396-97 (1967).

⁴⁷ *Glynn Cnty. Bd. of Tax Assessors v. Haller*, 273 Ga. 649, 649-50, 543 S.E.2d 699, 701 (2001).

⁴⁸ *Dennis v. Dennis*, 302 Ga. App. 791, 793, 692 S.E.2d 47, 49 (2010).

- Judgments or orders directing an accounting;⁴⁹
- Judgments or orders granting or refusing applications for the appointment of receivers or for interlocutory or final injunctions;
- Judgments or orders granting or refusing applications for attachment against fraudulent debtors;
- Judgments or orders granting or refusing to grant mandamus or any other extraordinary remedy, except with respect to temporary restraining orders;
- Judgments or orders refusing applications for dissolution of corporations created by the superior courts;
- Judgments or orders sustaining motions to dismiss a caveat to the probate of a will; and
- Orders within a deprivation proceeding deciding temporary custody of the child.⁵⁰

When an appeal in a case listed in O.C.G.A. § 5-6-34(a), but not in § 5-6-35(a), is begun by filing a timely application for permission to appeal, but without also filing a timely notice of appeal, the appellate court nevertheless will grant the application, and the case will proceed in accordance with O.C.G.A. § 5-6-35(g).⁵¹ There is some support in the case law for the similar treatment of directly appealable cases that are not listed in O.C.G.A. § 5-6-34(a), when such cases are erroneously begun by application instead of a notice of appeal.⁵²

§ 2.4.4 Motions for Summary Judgment

Section 9-11-56(h) of the Georgia Code allows an immediate direct appeal whenever a motion for summary judgment is granted, even in part.⁵³ The party against whom a motion for summary judgment is granted as to fewer than all of the issues or all of the parties in a case has the option of seeking an immediate direct appeal pursuant to O.C.G.A. § 9-11-56(h), or of waiting until

⁴⁹ While orders directing that an accounting be had are directly appealable, orders “performing the accounting” are not directly appealable. *Geslin v. Sheftall*, 263 Ga. App. 827, 827, 589 S.E.2d 601, 601 (2003).

⁵⁰ *In re A.T.*, 309 Ga. App. 822, 825 n.3, 711 S.E.2d 382, 385 n.3 (2011); *In re S.J.*, 270 Ga. App. 598, 608, 607 S.E.2d 225, 233 (2004).

⁵¹ O.C.G.A. § 5-6-35(j); *Fulton Cnty. v. Congregation of Anshei Chesed*, 275 Ga. 856, 857 n.3, 572 S.E.2d 530, 531 n.3 (2002); *Smith v. State*, 257 Ga. App. 468, 469, 571 S.E.2d 446, 448 (2002).

⁵² *In re Carter*, 235 Ga. App. 551, 551, 510 S.E.2d 91, 92 (1998).

⁵³ *Culwell v. Lomas & Nettleton Co.*, 242 Ga. 242, 243, 248 S.E.2d 641, 642 (1978); *Benedict v. Snead*, 253 Ga. App. 749, 751, 560 S.E.2d 278, 279 (2002).

final judgment to directly appeal,⁵⁴ but may not do both. “[W]e hold that a losing party on summary judgment who puts the machinery of intermediate appellate review under O.C.G.A. § 9-11-56(h) into motion, yet commits a procedural default fatal to his appeal, is foreclosed from thereafter resubmitting the matter for review on appeal of the final judgment.”⁵⁵

This exception also applies to the granting of motions for partial summary judgment,⁵⁶ but it does not apply to the denial of summary judgment. Nor does it apply where the appellate court concludes that the underlying order, although denominated a summary judgment, in actuality was not.⁵⁷ An order denying summary judgment may be appealed only on an interlocutory basis in accordance with O.C.G.A. § 5-6-34(b).⁵⁸

In a direct appeal of the granting of a summary judgment motion pursuant to O.C.G.A. § 9-11-56(h), any other judgments, rulings, or orders rendered in the case and which may affect the proceedings below (including the denial of a summary judgment motion) may be raised on appeal and reviewed by the appellate court.⁵⁹

A summary judgment entered by a superior court in a case appealed from magistrate court is not directly appealable under O.C.G.A. § 9-11-56(h). Those types of summary judgment rulings are discretionary appeals governed by O.C.G.A. § 5-6-35.⁶⁰

§ 2.4.5 Final Orders Appealable Only by Application

It is crucial for counsel to review the discretionary appeal statute⁶¹ and related case law before proceeding with an appeal to confirm whether the discretionary appeal statute applies. As the Supreme Court has admonished: “[B]efore proceeding to this Court, a party should always

⁵⁴ *Hooks v. Humphries*, 303 Ga. App. 264, 266 n.3, 692 S.E.2d 845, 847 n.3 (2010); *Benedict*, 253 Ga. App. at 751, 560 S.E.2d at 279; *Perrett v. Sumner*, 286 Ga. App. 379, 380, 649 S.E.2d 545, 547 (2007).

⁵⁵ *Eckerd Corp. v. Alterman Real Estate, Ltd.*, 266 Ga. App. 860, 862, 598 S.E.2d 510, 513 (2004).

⁵⁶ *Adv. Contouring, Inc. v. McMillan Div. of States Eng’g Corp.*, 179 Ga. App. 128, 129, 345 S.E.2d 666, 667 (1986).

⁵⁷ *Clark v. Atlanta Indep. Sch. Sys.*, Nos. A11A0549, A11A0550, A11A0551, 2011 WL 2139006 (Ga. Ct. App. June 1, 2011); *Forest City Gun Club v. Chatham Cnty.*, 280 Ga. App. 219, 222, 633 S.E.2d 623, 626 (2006) (dismissing an appeal of a trial court’s purported grant of partial summary judgment based on the appellate court’s conclusion that the motion was not a summary judgment motion, but instead “was more akin to a motion in limine”).

⁵⁸ O.C.G.A. § 9-11-56(h).

⁵⁹ *Se. Ceramics, Inc. v. Klem*, 246 Ga. 294, 295, 271 S.E.2d 199, 200 (1980); *Payless Car Rental Sys., Inc. v. Elzik*, 306 Ga. App. 389, 393-94, 702 S.E.2d 697, 700-01 (2010).

⁶⁰ *Bullock v. Sand*, 260 Ga. App. 874, 875, 581 S.E.2d 333, 334-35 (2003).

⁶¹ O.C.G.A. § 5-6-35.

review the discretionary application statute to see if it covers the underlying subject matter of the appeal. If it does, then the party *must* file an application for appeal as provided under O.C.G.A. § 5-6-35.”⁶²

Pursuant to O.C.G.A. § 5-6-35, the following final judgments are not directly appealable and require an application for review:

- Appeals from judgments of the superior courts reviewing decisions of the State Board of Workers’ Compensation,⁶³ the State Board of Education, auditors,⁶⁴ state and local administrative agencies,⁶⁵ and lower courts by certiorari or de novo proceedings;⁶⁶
- Appeals from judgments or orders in divorce, alimony, child custody, and other domestic relations cases;⁶⁷
- Dispossession or distress warrant cases where the only issue is the amount of rent due and the amount is \$2,500 or less;
- Cases involving garnishment or attachment except those involving applications for attachment against fraudulent debtors;
- Revocations of probation;⁶⁸

⁶² *Ferguson v. Composite State Bd. of Med. Exam’rs*, 275 Ga. 255, 257, 564 S.E.2d 715, 717 (2002).

⁶³ *Ga. Mountain Excavation, Inc. v. Dobbins*, 309 Ga. App. 155, 155 n.1, 710 S.E.2d 205, 206 n.1 (2011).

⁶⁴ *McCaughey v. Murphy*, 267 Ga. 64, 65, 473 S.E.2d 762, 764 (1996).

⁶⁵ *Ladzinske v. Allen*, 280 Ga. 264, 266, 626 S.E.2d 83, 86 (2006); *Ferguson*, 275 Ga. at 258, 564 S.E.2d at 718; *Consol. Gov’t of Columbus v. Barwick*, 274 Ga. 176, 177, 549 S.E.2d 73, 74-75 (2001).

⁶⁶ *Bullock v. Sand*, 260 Ga. App. 874, 875, 581 S.E.2d 333, 334-35 (2003). This does not apply to decisions of the Public Service Commission and the probate courts, or to cases involving ad valorem taxes and condemnations. O.C.G.A. § 5-6-35(a)(1).

⁶⁷ *Symms v. Symms*, 288 Ga. 748, 748 n.1, 707 S.E.2d 368, 368 n.1 (2011); *Walker v. Estate of Mays*, 279 Ga. 652, 655, 619 S.E.2d 679, 682 (2005). In December 2002, the Supreme Court voted “to launch a one-year experiment in which the court will grant all ‘non-frivolous’ appeal applications from divorce and alimony cases.” Jonathan Ringel, *High Court to Accept All Divorce, Alimony Bids*, FULTON COUNTY DAILY REPORT, Dec. 20, 2002. The Supreme Court extended the pilot project periodically through June 30, 2011. On June 20, 2011, the Supreme Court amended its Rule 34, effective July 1, 2011, to include a new subsection (4), providing that timely applications from a judgment and decree of divorce shall be granted if they are “determined to have possible merit by a majority vote of the Court.” GA. S. CT. R. 34(4).

⁶⁸ *Andrews v. State*, 276 Ga. App. 428, 431, 623 S.E.2d 247, 251 (2005) (“[W]e hold that all direct appeals following probation revocations pursuant to O.C.G.A. § 16-13-2(a), that are filed after the date of this opinion, will be subject to the discretionary appeal procedures of O.C.G.A. § 5-6-35(a)(5).”); *Zamora v. State*, 226 Ga. App. 105, 105-06, 485 S.E.2d 214, 214 (1997).

- Actions for damages where judgment is \$10,000 or less;⁶⁹
- Denials of extraordinary motions for new trials, unless taken as part of a direct appeal;⁷⁰
- Appeals from denial of a motion seeking DNA testing as part of an extraordinary motion for new trial;⁷¹
- Orders under O.C.G.A. § 9-11-60(d) or (e) denying a motion to set aside a judgment;⁷²
- Appeals from orders granting or denying temporary restraining orders;⁷³
- Awards of attorneys' fees or expenses of litigation under § 9-15-14;⁷⁴
- Appeals from decisions of state courts reviewing decisions of magistrate courts de novo so long as the decision is not otherwise subject to a right of direct appeal;⁷⁵
- Appeals from decisions of Superior Courts resolving will construction issues pursuant to O.C.G.A. § 53-7-75;⁷⁶

⁶⁹ *Harpagon Co. v. Davis*, 283 Ga. 410, 411, 658 S.E.2d 633, 634 (2008); *NF Invs., Inc. v. Whitfield*, 245 Ga. App. 72, 72, 537 S.E.2d 207, 208 (2000); *Eberhardt v. Ga. Farm Bureau Mut. Ins. Co.*, 223 Ga. App. 478, 479, 477 S.E.2d 907, 908 (1996); cf. *Kelly v. Pierce Roofing Co.*, 220 Ga. App. 391, 391, 469 S.E.2d 469, 471 (1996) (holding that action on lien for less than \$10,000 does not require discretionary appeal application).

⁷⁰ O.C.G.A. § 5-5-41.

⁷¹ *Crawford v. State*, 278 Ga. 95, 96, 597 S.E.2d 403, 404 (2004).

⁷² O.C.G.A. § 5-6-35(a)(8); *Martin v. Williams*, 263 Ga. 707, 708, 438 S.E.2d 353, 354 (1994); *Rogers v. Estate of Harris*, 276 Ga. App. 898, 899, 625 S.E.2d 65, 67 (2005).

⁷³ O.C.G.A. § 5-6-35(a)(9).

⁷⁴ O.C.G.A. § 5-6-35(a)(10); *Capricorn Sys., Inc. v. Godavarthy*, 253 Ga. App. 840, 841-42, 560 S.E.2d 730, 731 (2002).

⁷⁵ O.C.G.A. § 5-6-35(a)(11).

⁷⁶ *Bandy v. Elmo*, 280 Ga. 221, 222, 626 S.E.2d 505, 506 (2006).

- Appeals from revocation of “first offender probation”;⁷⁷ and
- Appeals from judgments on petitions for writs of habeas corpus.⁷⁸

§ 2.4.6 Orders Requiring Interlocutory Application for Appeal

If the judgment or order from which an appeal is sought is not final and is not covered by O.C.G.A. § 5-6-34(a), the appellant must seek and receive a certificate of immediate review from the trial court before filing an application for interlocutory appeal.⁷⁹ The trial judge must certify, within 10 days of the entry of the order, whether the order or ruling is of such importance to the case that immediate review should be had.⁸⁰ If the trial judge issues the certificate, the appellant must file an application for interlocutory review with the appellate court within 10 days of its issuance.⁸¹ The appellate court will then decide whether to allow an appeal. Failure to follow this procedure will lead to a dismissal of the appeal.⁸²

§ 2.4.7 Basis for Granting Interlocutory Appeal

Applications for interlocutory appeal are not granted automatically. The appellate courts have issued rules providing that applications for interlocutory review will be granted only if: (i) the issue to be decided appears to be dispositive of the case; (ii) the objectionable order appears erroneous and will probably cause a substantial error at trial, or will adversely affect the rights of the appealing party until the entry of final judgment, in which case the appeal will be expedited; or (iii) the establishment of precedent is desirable.⁸³ The Supreme Court has the inherent power to assume jurisdiction over and consider appeals of interlocutory orders in rare instances when it disagrees with the trial court and considers the issues to be of sufficient gravity.⁸⁴

⁷⁷ *Freeman v. State*, 245 Ga. App. 333, 333-34, 537 S.E.2d 763, 763 (2000).

⁷⁸ *Brown v. Crawford*, 289 Ga. 722, 723-24, 715 S.E.2d 132, 133-35 (2011). Prior to *Crawford*, judgments on petitions for writs of habeas corpus had been treated as directly appealable. See, e.g., *Jackson v. Bittick*, 286 Ga. 364, 364-65, 690 S.E.2d 803, 804 (2010). In *Crawford*, however, the Supreme Court held that a 1999 amendment to the Prison Litigation Reform Act, O.C.G.A. §§ 42-12-1 *et seq.*, rendered appeals from such judgments subject to the discretionary review process set forth in O.C.G.A. § 5-6-35.

⁷⁹ O.C.G.A. § 5-6-34(b).

⁸⁰ *Id.*; *Clayton v. Edwards*, 225 Ga. App. 141, 144, 483 S.E.2d 111, 114 (1997).

⁸¹ O.C.G.A. § 5-6-34(b); *Barnes v. Justis*, 223 Ga. App. 671, 672, 478 S.E.2d 402, 403 (1996).

⁸² *Gray v. Springs*, 224 Ga. App. 427, 428, 481 S.E.2d 3, 4 (1997); *Holton v. State*, 173 Ga. App. 249, 249, 326 S.E.2d 240, 240 (1985).

⁸³ GA. S. CT. R. 30; GA. CT. APP. R. 30.

⁸⁴ *Waldrip v. Head*, 272 Ga. 572, 575-77, 532 S.E.2d 380, 385-86 (2000).

§ 2.4.8 Orders Requiring Interlocutory Appeal

Although not intended to be complete, the following is a list of orders that have been held to be appealable only with a certificate of immediate review from the trial court and an application to the proper appellate court:

- Orders denying motions to suppress evidence;⁸⁵
- Orders granting motions to set aside judgments and motions for new trials;⁸⁶
- Orders granting motions to transfer venue where the case remains pending below;⁸⁷
- Orders granting or denying motions to dismiss motions to set aside judgments against garnishees;⁸⁸
- Orders denying motions to require that a garnishment bond be strengthened;⁸⁹
- Orders vacating prior orders substituting parties;⁹⁰
- Orders granting a writ of possession;⁹¹
- Orders sustaining a motion for a directed verdict as to less than all plaintiffs;⁹²
- Orders dismissing one of multiple defendants (unless an express determination of finality as required under O.C.G.A. § 9-11-54(b) is made);⁹³

⁸⁵ *Genter v. State*, 218 Ga. App. 311, 311, 460 S.E.2d 879, 880 (1995); *Holton*, 173 Ga. App. at 249, 326 S.E.2d at 240; *Cody v. State*, 116 Ga. App. 331, 331, 157 S.E.2d 496, 496 (1967).

⁸⁶ *Brooks v. State*, 229 Ga. 593, 593, 194 S.E.2d 256, 256 (1972); *Ferri v. Puckett*, 241 Ga. App. 34, 34, 525 S.E.2d 779, 779 (1999); *Griffith v. Ga. Bd. of Dentistry*, 175 Ga. App. 533, 534, 333 S.E.2d 647, 647-48 (1985); *Franklin v. Collins*, 162 Ga. App. 755, 293 S.E.2d 364 (1982); .

⁸⁷ *Griffith*, 175 Ga. App. at 534, 333 S.E.2d at 647-48.

⁸⁸ *Trust Co. of Columbus v. Ferrior*, 141 Ga. App. 328, 328, 233 S.E.2d 280, 280 (1977); *Finch v. Kilgore*, 120 Ga. App. 320, 320, 170 S.E.2d 304, 305 (1969).

⁸⁹ *Wilson v. Wilson*, 130 Ga. App. 175, 176, 202 S.E.2d 681, 682 (1973).

⁹⁰ *Franklin v. Sea Island Bank*, 120 Ga. App. 654, 658, 171 S.E.2d 866, 870 (1969).

⁹¹ *Golden v. Gray*, 156 Ga. App. 596, 596-97, 275 S.E.2d 162, 162-63 (1980).

⁹² *Rodriguez v. Newby*, 130 Ga. App. 139, 140, 202 S.E.2d 565, 566 (1973).

⁹³ *Stancil v. Gwinett Cnty.*, 259 Ga. 507, 508, 384 S.E.2d 666, 667 (1989); *Home Mart Bldg. Ctrs., Inc. v. Wallace*, 139 Ga. App. 49, 49, 228 S.E.2d 22, 22 (1976).

- Orders regarding discovery, depositions, or interrogatories unless they fall within the very limited collateral orders exception;⁹⁴
- Judgments denying intervention;⁹⁵
- Judgments sustaining or dismissing pleas in abatement;⁹⁶
- Judgments overruling pleas of jurisdiction;⁹⁷
- Orders overruling or dismissing pleas of *res judicata*;⁹⁸
- Orders denying motions for judgment notwithstanding a mistrial;⁹⁹
- Orders failing to declare acts of the General Assembly unconstitutional;¹⁰⁰
- Orders subject to revision;¹⁰¹
- Orders granting relief from supersedeas or permanent injunction;¹⁰²
- Determinations of liability without determination of damages;¹⁰³
- Entries of judgments as to one or more, but fewer than all, claims or parties;¹⁰⁴

⁹⁴ *Gen. Motors Corp. v. Hammock*, 255 Ga. App. 131, 132-33, 564 S.E.2d 536, 538 (2002); *Johnson & Johnson v. Kaufman*, 226 Ga. App. 77, 81-82, 485 S.E.2d 525, 528-29 (1997).

⁹⁵ *Prison Health Servs., Inc. v. Ga. Dept. of Admin. Servs.*, 265 Ga. 810, 811, 462 S.E.2d 601, 603 (1995); *Henderson v. Atlanta Transit Sys., Inc.*, 233 Ga. 82, 82, 210 S.E.2d 4, 4 (1974).

⁹⁶ *Austin v. State*, 179 Ga. App. 235, 235, 345 S.E.2d 688, 689 (1986); *Peach v. State*, 116 Ga. App. 703, 704, 158 S.E.2d 701, 702 (1967).

⁹⁷ *Carlisle v. Carlisle*, 227 Ga. 221, 221, 179 S.E.2d 769, 769 (1971).

⁹⁸ *Gen. Shoe Corp. v. Hood*, 119 Ga. App. 648, 648-49, 168 S.E.2d 326, 326 (1969).

⁹⁹ *Phillips v. State*, 153 Ga. App. 410, 411, 265 S.E.2d 293, 295 (1980).

¹⁰⁰ *Keck v. Harris*, 277 Ga. 667, 668, 594 S.E.2d 367, 369 (2004); *Lane v. Morrison*, 226 Ga. 526, 527, 175 S.E.2d 830, 830 (1970).

¹⁰¹ *Stephens v. State Farm Mut. Auto. Ins. Co.*, 236 Ga. App. 758, 760, 513 S.E.2d 508, 510 (1999); *Davis v. Transairco, Inc.*, 141 Ga. App. 544, 545, 234 S.E.2d 134, 136 (1977).

¹⁰² *Fulford v. Fulford*, 225 Ga. 510, 510, 170 S.E.2d 27, 27 (1969).

¹⁰³ *Havischak v. Neal*, 176 Ga. App. 203, 204, 335 S.E.2d 469, 470 (1985).

¹⁰⁴ *Culwell v. Lomas & Nettleton Co.*, 242 Ga. 242, 243, 248 S.E.2d 641, 642 (1978).

- Orders dismissing complaints where counterclaims remain pending;¹⁰⁵ and
- Orders awarding temporary alimony.¹⁰⁶

§ 2.5 Procedure for Filing Appeal

§ 2.5.1 Procedure for Direct Appeal

A notice of appeal must be filed with the trial court within 30 days after entry of the decision or judgment appealed from unless a motion for a new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed.¹⁰⁷ This includes orders designated as final judgments pursuant to O.C.G.A. § 9-11-54(b).¹⁰⁸ In cases in which a motion for a new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict is filed, the notice of appeal must be filed within 30 days of the entry of the order granting, overruling or otherwise finally disposing of the motion.¹⁰⁹ It is important to note that neither a motion for reconsideration nor a motion to set aside extends the time for filing a notice of appeal.¹¹⁰ In general, a motion for reconsideration that is pending in the trial court does not operate to block the jurisdiction of the Supreme Court or Court of Appeals over a notice of appeal regarding the efficacy

¹⁰⁵ *Yates v. CACV of Colo., LLC*, 295 Ga. App. 69, 70, 670 S.E.2d 884, 885 (2008); *Hadid v. Beals*, 233 Ga. App. 5, 6, 502 S.E.2d 798, 799 (1998); *Hogan Mgmt. Servs., P.C. v. Martino*, 225 Ga. App. 168, 168-69, 483 S.E.2d 148, 148-49 (1997).

¹⁰⁶ *Bailey v. Bailey*, 266 Ga. 832, 833, 471 S.E.2d 213, 214 (1996).

¹⁰⁷ O.C.G.A. § 5-6-38(a); *see also* Chapter 4 of this Handbook.

¹⁰⁸ *Lewis v. Carscallen*, 274 Ga. App. 711, 713, 618 S.E.2d 618, 620 (2005) (“The law is clear that when a trial court designates its order as a final judgment under O.C.G.A. § 9-11-54(b), a party is required to appeal any adverse rulings in that order within 30 days of the entry of judgment.”).

¹⁰⁹ O.C.G.A. § 5-6-38(a); *Heard v. State*, 274 Ga. 196, 197, 552 S.E.2d 818, 821 (2001) (holding that a trial court order resolving a motion for new trial, instead of a voluntary withdrawal of such a motion, is required to extend time for filing notice of appeal beyond 30 days after entry of judgment); *Cooper v. Spotts*, 309 Ga. App. 361, 362, 710 S.E.2d 159, 161 (2011) (overruling *Dept. of Human Res. v. Holland*, 236 Ga. App. 273, 511 S.E.2d 628 (1999), to the extent *Holland* held that the filing of a discretionary application divests the trial court of jurisdiction to rule on a motion for new trial); *see also* Chapter 4 of this Handbook.

¹¹⁰ *Bell v. Cohran*, 244 Ga. App. 510, 510, 536 S.E.2d 187, 187 (2000); *Hardrick v. Morgan*, 240 Ga. App. 155, 155-56, 522 S.E.2d 742, 743 (1999); *MMT Enters., Inc. v. Cullars*, 218 Ga. App. 559, 561, 462 S.E.2d 771, 773 (1995) (holding that a motion to set aside does not extend the time for filing an appeal).

of the order that underlies the motion for reconsideration.¹¹¹ Any cross appeal by the appellee must be filed within 15 days of the service of the appellant's notice of appeal.¹¹²

§ 2.5.2 Procedure for Appeal by Application

§ 2.5.2.1 Appeal of Final Order by Application

If the appeal is of a final judgment enumerated in O.C.G.A. § 5-6-35(a), the appellant must file an application for leave to appeal with the appellate court.¹¹³ The application required is a petition enumerating the errors to be urged on appeal, stating why the appellate court has jurisdiction, and specifying the order or judgment being appealed.¹¹⁴ The application must include as exhibits copies of the order being appealed, the petition or motion that led directly to the order, and any responses to the petition or motion.¹¹⁵ The application may also include copies of other parts of the record as the applicant deems appropriate. Court of Appeals Rule 31 requires that all material submitted be tabbed and indexed. The appellant has the burden of showing error from the material submitted and presenting the necessary portions of the record to the court. The application may be denied if the material submitted is not sufficient for review by the court.¹¹⁶ Accordingly, attorneys should give careful consideration to what portions of the record they choose to submit and should omit portions of the record only after considered deliberation.

The application must be filed with the clerk of the appellate court within 30 days of the entry of the order appealed from.¹¹⁷ A party opposing the application must file a response within 10 days from the date the application is filed.¹¹⁸ The appellate court must then issue an order granting or denying the appeal within 30 days of its filing.¹¹⁹ If the court grants the application, the applicant

¹¹¹ *Threatt v. Forsyth Cnty.*, 250 Ga. App. 838, 844, 552 S.E.2d 123, 128 (2001).

¹¹² O.C.G.A. § 5-6-38(a); *Moon v. State*, 288 Ga. 508, 517, 705 S.E.2d 649, 658 (2011); *see also* Chapter 4 of this Handbook.

¹¹³ *Adivari v. Sears, Roebuck & Co.*, 221 Ga. App. 279, 280, 471 S.E.2d 59, 60 (1996).

¹¹⁴ O.C.G.A. § 5-6-35(b).

¹¹⁵ O.C.G.A. § 5-6-35(c).

¹¹⁶ *Harper v. Harper*, 259 Ga. 246, 246-47, 378 S.E.2d 673, 674 (1989).

¹¹⁷ O.C.G.A. § 5-6-35(d).

¹¹⁸ O.C.G.A. § 5-6-35(e).

¹¹⁹ O.C.G.A. § 5-6-35(f).

must file a notice of appeal within 10 days of the issuance of the order granting the application.¹²⁰ The procedure followed after the filing of the notice is then the same as in other appeals.¹²¹

A failure to follow the discretionary appeal procedure will lead to a dismissal of the appeal.¹²² However, the filing of a notice of appeal after the entry of judgment but before the granting of the application is not a failure to file timely and is not grounds for dismissal.¹²³

§ 2.5.2.2 Appeal of Non-Final Order by Application

A party may appeal, on an interlocutory basis, an otherwise non-appealable order under O.C.G.A. § 5-6-34(b). In order to file such an interlocutory appeal, the appellant must obtain a certificate from the trial judge certifying that the order, decision, or judgment is of such importance to the case that immediate review should be permitted.¹²⁴ This certificate must be obtained within 10 days of the entry of the order. If the trial court issues the certificate, the party must then file an application for interlocutory review with the appellate court within 10 days of the trial court’s issuance of the certificate. Because the appeal is discretionary, the application should articulate the issues involved and the need for interlocutory review. The application may also include a copy of those portions of the record necessary for the court to understand and evaluate the request. These copies need not be certified.¹²⁵

The opposing party must be served with a copy of the application on or before the date it is filed. The opposing party has 10 days from the date the application is filed to tender a response. The response may include those parts of the record the opposing party deems necessary to the evaluation of the application.

The appellate court is required either to grant or deny the application within 30 days. If the application is granted, the moving party must then file a notice of appeal within 10 days of the order granting the application, as required by O.C.G.A. § 5-6-37. The failure to file a notice of appeal will deprive the appellant of the right to prosecute the appeal even if the application is granted.

¹²⁰ O.C.G.A. § 5-6-35(g).

¹²¹ *Id.*

¹²² *Parker v. Bellamy-Lunda-Dawson*, 190 Ga. App. 257, 258, 378 S.E.2d 502, 503 (1989); *AAA Van Servs., Inc. v. Willis*, 182 Ga. App. 46, 46, 354 S.E.2d 631, 632 (1987).

¹²³ *Randall v. Randall*, 274 Ga. 107, 108, 549 S.E.2d 384, 386 (2001); *Wannamaker v. Carr*, 257 Ga. 634, 635, 362 S.E.2d 53, 54 (1987).

¹²⁴ The certificate need not contain any “magic words,” but substantial compliance with the statute is required. *Clayton v. Edwards*, 225 Ga. App. 141, 144, 483 S.E.2d 111, 114 (1997).

¹²⁵ O.C.G.A. § 5-6-34(b).

Once the notice of appeal is filed, it serves as a supersedeas as provided in O.C.G.A. § 5-6-46, and the interlocutory appeal proceeds in the same manner as an appeal from a final judgment.¹²⁶

Before 1995, there was no provision for granting an extension of time to file discretionary and interlocutory applications with the appellate courts. Trial courts still may not grant an extension,¹²⁷ and the rules of the Court of Appeals prohibit such a request.¹²⁸ Current Supreme Court Rule 12, however, allows for the possibility of the grant of an extension of time for filing applications, although an extension will be given only in unusual circumstances and only when the request is filed before the expiration of the original period for filing.

§ 2.6 Nature of Review on Appeal

§ 2.6.1 Appeals Generally Limited to Corrections of Errors of Law

Georgia's appellate courts do not sit as fact-finding bodies and generally review appeals for the correction of errors of law.¹²⁹ Nevertheless, the appellate courts will review a trial court's factual determinations to determine if there is "any evidence" to support them.¹³⁰ Moreover, although the excessiveness or inadequacy of a damages award is a factual question,¹³¹ the appellate court will review the award in light of the evidence to determine whether it is "so flagrantly excessive or inadequate, in light of the evidence, as to create a clear implication of bias, prejudice, or gross mistake."¹³²

¹²⁶ *Id.*

¹²⁷ *Rosenstein v. Jenkins*, 166 Ga. App. 385, 304 S.E.2d 740 (1983).

¹²⁸ GA. CT. APP. R. 16; *Wilson v. Carver*, 252 Ga. App. 174, 174, 555 S.E.2d 848, 849 (2001).

¹²⁹ *Young v. Scott*, 212 Ga. App. 572, 575, 442 S.E.2d 768, 770-71 (1994).

¹³⁰ *Lifestyle Home Rentals, LLC v. Rahman*, 290 Ga. App. 585, 660 S.E.2d 409 (2008); *Cannon v. Wesley Plantation Apartments*, 256 Ga. App. 244, 247, 568 S.E.2d 137, 139 (2002).

¹³¹ *Moody v. Dykes*, 269 Ga. 217, 221-22, 496 S.E.2d 907, 912 (1998); *Riddle v. Golden Isles Broad., LLC*, 292 Ga. App. 888, 889, 666 S.E.2d 75, 77 (2008).

¹³² *Kohl v. Tirado*, 256 Ga. App. 681, 682, 569 S.E.2d 576, 578 (2002); *see also* O.C.G.A. § 51-12-12.

§ 2.6.2 Issue Must Have Been Raised In and Ruled Upon by Trial Court

The appellate courts review only those issues presented to and ruled upon by the trial court *and* properly presented to the appellate court. If an issue, including a constitutional issue,¹³³ is not presented to or ruled upon by the trial court, it typically is waived.¹³⁴ However, the appellate court nevertheless may allow the appeal when manifest injustice would result in the absence of appellate review. The error alleged must appear in the appellate record¹³⁵ and must be specified in the enumerations of error.¹³⁶ Similarly, if an issue raised in the trial court is not raised on appeal, it is waived. If the error is not set forth in the enumerations of error, the appellate court will not hear or decide the issue.¹³⁷ An enumeration of error may not be enlarged by brief on appeal to cover issues not contained in the original enumeration.¹³⁸

§ 2.6.3 Scope of Review of Jury Verdicts

The appellate courts may reverse a judgment entered on a jury verdict if the trial court committed legal error, such as improperly excluding or allowing evidence, or incorrectly charging the jury.¹³⁹ Absent legal error, the appellate courts will not disturb a jury verdict supported by some evidence.¹⁴⁰ However, when a jury returns a general verdict without specifying under what legal theory the award is made, the verdict will be reversed if any of the legal theories submitted to it is held to be improper.¹⁴¹

¹³³ *Kohl v. Manning*, 223 Ga. 755, 755, 158 S.E.2d 375, 376 (1967); *Finnicum v. State*, 296 Ga. App. 86, 88, 673 S.E.2d 604, 605-06 (2009) (“A constitutional issue is waived by the failure of the trial court to rule upon it, and cannot be reviewed on appeal.”) (internal quotation marks omitted); *Bain v. State*, 258 Ga. App. 440, 446, 574 S.E.2d 590, 595 (2002).

¹³⁴ *Dudley v. State*, 197 Ga. App. 877, 877-78, 399 S.E.2d 747, 748 (1990); *MacDonald v. MacDonald*, 156 Ga. App. 565, 566, 275 S.E.2d 142, 144 (1980).

¹³⁵ *Moss v. State*, 194 Ga. App. 181, 181, 390 S.E.2d 268, 269 (1990); *Moye v. State*, 127 Ga. App. 338, 341, 193 S.E.2d 562, 564 (1972).

¹³⁶ O.C.G.A. § 5-6-40.

¹³⁷ *Andrews v. State*, 276 Ga. App. 428, 433 n.7, 623 S.E.2d 247, 252 n.7 (2005) (noting that ““enumerations of error cannot be enlarged in the brief to include other issues not asserted””) (citation omitted).

¹³⁸ *Howe & Assocs., P.C. v. Daniels*, 274 Ga. App. 312, 316, 618 S.E.2d 42, 45 (2005); *Ailion v. Wade*, 190 Ga. App. 151, 154, 378 S.E.2d 507, 509 (1989).

¹³⁹ *Jimenez v. Morgan Drive Away, Inc.*, 238 Ga. App. 638, 640, 519 S.E.2d 722, 725 (1999); *Upchurch v. Upchurch*, 76 Ga. App. 215, 216, 45 S.E.2d 855, 856 (1947).

¹⁴⁰ *S. Co. v. Hamburg*, 220 Ga. App. 834, 840, 470 S.E.2d 467, 472 (1996).

¹⁴¹ *Dep’t of Transp. v. Fru-Con Constr. Corp.*, 206 Ga. App. 821, 825, 426 S.E.2d 905, 909 (1992).

The appellate courts will not disturb the trial court's findings of fact (with or without the assistance of a jury) if they are supported by "any evidence," unless they are premised upon erroneous conclusions of law.¹⁴² If the trial court's decision is correct for any reason, it will not be set aside.¹⁴³ Additionally, an appellate court will not entertain moot cases or rule upon hypothetical issues.¹⁴⁴

§ 2.7 Dismissal of Appeals

Though it is the policy of the Georgia appellate courts to reach the merits of appeals and avoid dismissals,¹⁴⁵ there are several instances in which an appeal must or may be dismissed.

§ 2.7.1 Statutory Grounds for Dismissal

There are three statutory grounds that require the dismissal of an appeal: (i) the failure to file a timely notice of appeal; (ii) the filing of a notice of appeal from a decision or judgment that is not appealable; or (iii) an appeal involving questions that have become moot.¹⁴⁶ In any of these instances, the appeal will be dismissed.¹⁴⁷

¹⁴² *Guye v. Home Indem. Co.*, 241 Ga. 213, 215, 244 S.E.2d 864, 866 (1978); *T&G Enters., LLC v. White*, 298 Ga. App. 355, 356, 680 S.E.2d 196, 197 (2009); *Page v. Braddy*, 255 Ga. App. 124, 126, 564 S.E.2d 538, 541 (2002); *Barber v. Perdue*, 194 Ga. App. 287, 289, 390 S.E.2d 234, 236 (1989).

¹⁴³ *Glynn Cnty. v. Palmatary*, 247 Ga. 570, 574, 277 S.E.2d 665, 668 (1981); *Dempsey v. Se. Indus. Contracting Co.*, 309 Ga. App. 140, 142, 709 S.E.2d 320, 322 (2011); *Gwinnett Place Assocs., L.P. v. Pharr Eng'g, Inc.*, 215 Ga. App. 53, 55, 449 S.E.2d 889, 892 (1994).

¹⁴⁴ *Ray v. Hartwell R.R. Co.*, 289 Ga. 452, 453, 711 S.E.2d 722, 724 (2011); *Rogers v. Composite State Bd. of Med. Exam'rs*, 245 Ga. 364, 364-65, 265 S.E.2d 1, 2 (1980); *Great N. Nekoosa Corp. v. Bd. of Tax Assessors*, 244 Ga. 624, 627-28, 261 S.E.2d 346, 348 (1979).

¹⁴⁵ *Fulton Cnty. Bd. of Tax Assessors v. Love*, 289 Ga. App. 252, 254, 656 S.E.2d 576, 578 (2008); *Bates v. Snelling*, 172 Ga. App. 448, 448, 323 S.E.2d 179, 180 (1984); *Corbin v. First Nat'l Bank of Atlanta*, 151 Ga. App. 33, 34, 258 S.E.2d 697, 698 (1979).

¹⁴⁶ O.C.G.A. § 5-6-48(b).

¹⁴⁷ *Pimper v. State ex rel. Simpson*, 274 Ga. 624, 627, 555 S.E.2d 459, 462 (2001); *Young v. Climatrol Se. Distrib. Corp.*, 237 Ga. 53, 54-55, 226 S.E.2d 737, 738-39 (1976); *Kappers v. DeKalb Cnty. Bd. of Health*, 214 Ga. App. 117, 117, 446 S.E.2d 794, 795 (1994).

§ 2.7.2 Failure to File a Timely Notice of Appeal

The timely and proper filing of a notice of appeal is a jurisdictional condition precedent to the exercise of jurisdiction by either appellate court.¹⁴⁸ If the notice is not properly and timely filed, the appeal must be dismissed.¹⁴⁹

§ 2.7.3 Appealability of Non-Final Orders or Judgments; Issues That Are Moot

An appeal will be dismissed if it is from a non-appealable, non-final order or judgment.¹⁵⁰ The courts will not entertain issues that are moot, and an appeal may be dismissed on this ground as well.¹⁵¹ The courts have had some difficulty articulating exactly when a case is moot, and when it should or should not be dismissed, but a moot case generally is one that seeks to determine an abstract question that does not arise upon existing facts or rights.¹⁵² Although the trial court is not specifically empowered under O.C.G.A. § 5-6-48 to dismiss an appeal for mootness, the appellate courts will affirm the trial court’s dismissal of a notice of appeal when the issues presented are or have become moot.¹⁵³

The courts will not hear appeals from oral orders. Appealable orders must be “reduced to writing, signed by the judge, and filed with the clerk.”¹⁵⁴

§ 2.7.4 Dismissals for Delays in Transmitting the Transcript or Record

Most motions to dismiss appeals are filed with the appellate court. Under O.C.G.A. § 5-6-48(c), however, the trial court may dismiss an appeal if there is an inexcusable delay in the

¹⁴⁸ *Caldwell v. Elbert Cnty. Sch. Dist.*, 247 Ga. 359, 360, 276 S.E.2d 43, 44 (1981); *Hester v. State*, 242 Ga. 173, 175, 249 S.E.2d 547, 549 (1978); *Hammond v. Unified Gov’t of Athens-Clarke Cnty.*, 240 Ga. App. 432, 432, 525 S.E.2d 709, 710 (1999).

¹⁴⁹ *Rowland v. State*, 264 Ga. 872, 875, 452 S.E.2d 756, 760 (1995); *Hammond*, 240 Ga. App. at 432, 525 S.E.2d at 710. For a more detailed discussion of the deadline and extensions for filing a notice of appeal, please see Chapter 4 of this Handbook.

¹⁵⁰ *In re G.C.S.*, 186 Ga. App. 291, 291-92, 367 S.E.2d 103, 104 (1988); *D.C.E. v. State*, 130 Ga. App. 724, 725, 204 S.E.2d 481, 482 (1974).

¹⁵¹ *Pimper*, 274 Ga. at 626-27, 555 S.E.2d at 462; *Spear v. State*, 271 Ga. App. 845, 846, 610 S.E.2d 642, 644 (2005); *Kappers*, 214 Ga. App. at 117-18, 446 S.E.2d at 795-96.

¹⁵² *Chastain v. Baker*, 255 Ga. 432, 433, 339 S.E.2d 241, 242 (1986).

¹⁵³ *Grant v. Gaines*, 265 Ga. 159, 159, 454 S.E.2d 481, 481-82 (1995); *Attwell v. Lane Co.*, 182 Ga. App. 813, 814, 357 S.E.2d 142, 143 (1987).

¹⁵⁴ *In re W.P.B.*, 269 Ga. App. 101, 102, 603 S.E.2d 454, 455 (2004) (quoting *Smith v. State*, 242 Ga. App. 459, 459, 530 S.E.2d 223, 224 (2000)).

preparation and filing of the transcript of evidence and proceedings or in the transmission of the record to the appellate court.¹⁵⁵ A hearing is not required on a motion to dismiss an appeal brought in the trial court pursuant to O.C.G.A. § 5-6-48(c) so long as the opposing party is allowed an opportunity to respond on the record to the motion to dismiss.¹⁵⁶

§ 2.7.5 Non-Statutory Grounds for Dismissal

In addition to the statutory grounds for dismissal, the appellate courts will dismiss an appeal if the appellant becomes a fugitive from justice after filing the notice of appeal,¹⁵⁷ or if reversal of the judgment would not benefit the appellant.¹⁵⁸ In addition, an appellant's failure to comply with an order of the appellate court directing the party to file a brief and enumeration of errors may result in the dismissal of the appeal.¹⁵⁹

¹⁵⁵ *Adams v. Hebert*, 279 Ga. App. 158, 159, 630 S.E.2d 652, 653 (2006); *Dye v. U.S. Bank Nat'l Ass'n*, 273 Ga. App. 652, 653, 616 S.E.2d 476, 477 (2005). For a more detailed discussion of this issue, see Chapter 4 of this Handbook.

¹⁵⁶ *Grant v. Kooby*, 310 Ga. App. 483, 486, 713 S.E.2d 685, 688 (2011).

¹⁵⁷ *Russell v. State*, 152 Ga. App. 663, 663, 263 S.E.2d 552, 552 (1979).

¹⁵⁸ *McGalliard v. Jones*, 133 Ga. App. 44, 44, 209 S.E.2d 664, 664-65 (1974).

¹⁵⁹ GA. CT. APP. R. 26; *Crane v. State*, 249 Ga. 501, 501-02, 292 S.E.2d 67, 67-68 (1982); *Reeder v. Gen. Motors Acceptance Corp.*, 235 Ga. App. 617, 618-19, 510 S.E.2d 337, 339-40 (1998).

3

POST-TRIAL MOTIONS AS PART OF THE APPEALS PROCESS

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§ 3.1 Introduction

This chapter will discuss several post-trial motions that litigants may file after the entry of judgment by a Georgia superior or state court, including motions: (i) for new trial; (ii) for judgment

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notwithstanding the verdict (“JNOV”); (iii) to set aside the judgment; (iv) to amend or modify a judgment; (v) for a supersedeas bond; and (vi) for attorneys’ fees and costs.

§ 3.1.1 Post-Judgment Motions for New Trial or JNOV Are Not Ordinarily a Prerequisite to Appeal

The filing of a motion for new trial or for JNOV typically is not a prerequisite to appeal.¹ A party may elect to file either type of motion or simply to appeal directly. There is an exception, however, that applies when there is “newly discovered evidence” that is developed or discovered subsequent to the verdict or judgment and otherwise does not appear in the record,² or in “other like instances.”³ In such cases, a motion for new trial must be filed in the trial court to preserve the issue on appeal. Furthermore, because a claim for ineffective assistance of counsel must be raised at the earliest “practicable moment,” if an appellant files a motion for new trial, failure to raise the claim for ineffective assistance could preclude appellate consideration.⁴

Motions for new trial or for JNOV may not, however, have the same impact upon an appellant’s obligation to enumerate errors on appeal. An appellant first filing a motion for new trial may appeal on points of error different than those enumerated in the motion for new trial, and if the motion for new trial is denied, need not enumerate the denial of the motion for new trial as error.⁵ On the other hand, there is precedent stating that a party who moves for directed verdict, and then later for JNOV, has used the JNOV as a means for reviewing the adverse directed verdict ruling at the trial level. Thus, if the JNOV is denied in this circumstance, then the movant must enumerate the denial “as error on appeal or become bound by the ruling and judgment unexcepted to, which becomes the law of the case.”⁶

¹ O.C.G.A. §§ 5-6-36(a)-(b); *see also Dempsey v. Ellington*, 125 Ga. App. 707, 708, 188 S.E.2d 908, 909 (1972) (recognizing that an unsuccessful litigant generally “may elect to attack the judgment in the court below or to appeal directly”).

² O.C.G.A. § 5-6-36(a).

³ The author is aware of no Georgia authority concerning “other like instances.” Arguably, however, such instances would arise when the validity of the prior adjudication could be affected significantly by facts outside the record.

⁴ *McGhee v. State*, 237 Ga. App. 541, 544-45, 515 S.E.2d 656, 659-60 (1999); *Glover v. State*, 266 Ga. 183, 184, 465 S.E.2d 659, 660-61 (1996). *But see Haggard v. State*, 273 Ga. App. 295, 296, 614 S.E.2d 903, 904 (2005) (describing facts where motion for new trial is not required to raise ineffective assistance of counsel).

⁵ O.C.G.A. § 5-6-36; *Hulsey v. Sears, Roebuck & Co.*, 138 Ga. App. 523, 525, 226 S.E.2d 791, 792 (1976); *State Highway Dep’t v. Hilliard*, 114 Ga. App. 328, 329, 151 S.E.2d 491, 493 (1966).

⁶ *Wood v. Mobley*, 114 Ga. App. 170, 171, 150 S.E.2d 358, 360 (1966). *But see* O.C.G.A. § 9-11-60(h) (formally abolishing the “law of the case” doctrine, but still applying it to rulings by appellate courts; such appellate court rulings are binding in all subsequent proceedings in the same matter).

§ 3.1.2 Tolling of Time for Appeal

The filing of a motion for new trial, motion in arrest of judgment, or motion for JNOV tolls the time for filing a notice of appeal.⁷ The 30-day period for filing a notice of appeal⁸ begins to run anew from the date of the trial court's order granting, overruling, or otherwise finally disposing of the motion.⁹ Note, however, that a motion for new trial that is subsequently withdrawn does not toll the time for appeal because "[a] party's voluntary withdrawal of its motion for new trial, standing alone, is not the statutorily-required court order finally disposing of the motion for new trial."¹⁰

A motion to amend findings of fact under O.C.G.A. § 9-11-52(c) does not toll the time for filing a notice of appeal *unless* the motion to amend findings is joined with a motion for new trial.¹¹ Likewise, neither a motion for reconsideration nor a motion to set aside, vacate, modify, or amend a prior order or judgment tolls the time for filing.¹²

§ 3.1.3 To Warrant Post-Judgment Relief, Any Error Must Be Harmful

The appellate courts have held that the harmful error sufficient to entitle a litigant to post-trial relief must be "legal error," consisting of both error and injury. In the absence of either "constituent element," the grant of a new trial or other post-judgment relief is unwarranted.¹³

⁷ O.C.G.A. § 5-6-38(a); *see also* *Donnelly v. Stynchcombe*, 246 Ga. 118, 118, 269 S.E.2d 10, 11 (1980). *But see* *City of Lawrenceville v. Davis*, 233 Ga. App. 1, 4, 502 S.E.2d 794, 797-98 (1998) (holding that certain municipal courts are not "courts of record" capable of granting new trials and, as such, a motion for new trial filed with such a municipal court does not toll the time for appeal).

⁸ In any criminal case involving a capital offense for which the death penalty is sought, a party wishing to appeal a judgment, ruling, or order in the pretrial proceedings of such a case must bring such an appeal as provided in O.C.G.A. § 17-10-35.1. *See* O.C.G.A. § 5-6-38(c).

⁹ O.C.G.A. § 5-6-38(a); *see also* *Denson v. Kloack*, 177 Ga. App. 483, 484, 339 S.E.2d 761, 762 (1986) (holding that when co-defendants were found liable as joint tortfeasors, a notice of appeal was timely when filed within 30 days after one co-defendant's motion for new trial was denied, even though the other co-defendant appellant did not join in the motion).

¹⁰ *Heard v. State*, 274 Ga. 196, 197, 552 S.E.2d 818, 821 (2001). *But see* *Ailion v. Wade*, 190 Ga. App. 151, 153-54, 378 S.E.2d 507, 508-09 (1989) (stating that withdrawal of motion for new trial by submitting a consent order, which the court signed and entered, creates the court order necessary to toll the time for appeal).

¹¹ *Am. Flat Glass Distribs., Inc. v. Michael*, 260 Ga. 312, 312, 392 S.E.2d 855, 855 (1990); *see also* O.C.G.A. § 9-11-52(c).

¹² *See, e.g., Blackwell v. Sutton*, 261 Ga. 284, 284, 404 S.E.2d 114, 114 (1991); *Adamson v. Adamson*, 226 Ga. 719, 720, 177 S.E.2d 241, 242 (1970); *MMT Enters., Inc. v. Cullars*, 218 Ga. App. 559, 560-61, 462 S.E.2d 771, 773 (1995); *In re A.C.J.*, 211 Ga. App. 865, 866, 440 S.E.2d 751, 752 (1994); *Anton v. Garvey*, 160 Ga. App. 157, 157, 286 S.E.2d 493, 493 (1981); *Robinson v. Carswell*, 147 Ga. App. 521, 522, 249 S.E.2d 331, 331 (1978).

¹³ *Norris v. Sikes*, 102 Ga. App. 609, 610, 117 S.E.2d 214, 215-16 (1960).

The Georgia Code articulates this concept by focusing on whether the “substantial rights” of the parties have been affected:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.¹⁴

Without error of the caliber described above, a motion for new trial will not be granted.

§ 3.1.4 Filing of Post-Trial Motions as Supersedeas

The filing of a motion for new trial or motion for judgment notwithstanding the verdict acts as a supersedeas unless otherwise ordered by the court.¹⁵ Upon motion, the court may condition the supersedeas upon the giving of a bond with good security in such amount as the court may order.¹⁶

§ 3.1.5 Trial Court Jurisdiction When Both a Motion for New Trial and Notice of Appeal Are Filed

Prior to the decision of the Supreme Court in *Housing Authority v. Geeter*,¹⁷ the prevailing party in the trial court could prevent the losing party from filing a motion for new trial by appealing an adverse decision on an ancillary claim (or, in the case of a successful defendant, a counterclaim), such as a claim for attorneys’ fees or bad faith insurance damages, thereby “divesting the trial court of jurisdiction.” The *Geeter* decision put an end to this tactic, holding that a timely notice of appeal does not prevent the trial court from ruling on a motion for new trial:

Even though a notice of appeal may divest the trial court of jurisdiction, we conclude that such divestiture does not become effective during the period in which a motion for new trial may be filed. In the event a motion for new trial is timely filed as provided in O.C.G.A. § 5-5-40 (Code Ann. § 70-301), the effectiveness of the divestiture of jurisdiction is then delayed until the motion for new trial is ruled

¹⁴ O.C.G.A. § 9-11-61.

¹⁵ O.C.G.A. § 9-11-62(b); *see also* discussion *infra* at Section 3.5 and Chapter 5 of this Handbook.

¹⁶ O.C.G.A. § 9-11-62(b).

¹⁷ 252 Ga. 196, 312 S.E.2d 309 (1984).

upon and a notice of appeal to the ruling has been filed or the period for appealing the ruling has expired.¹⁸

The appellate courts have further held that a trial court has jurisdiction to hear and decide a timely filed motion for new trial even if filed by the same party that filed the notice of appeal.¹⁹ Additionally, the trial court may, on its own motion, grant a new trial “within the time in which a motion for new trial may be filed even though a notice of appeal has been filed.”²⁰

Importantly, the *Geeter* court also held that “[t]he proper means of placing this issue before this court would be to file a motion for a stay of the direct appeal with the Court of Appeals, and if the stay were denied, then to petition for writ of certiorari.”²¹ Relying on this language, some appellate cases have held that when a timely notice of appeal and timely motion for new trial are both filed, if a motion to stay is not filed in the Court of Appeals, then the Court of Appeals may move forward and decide the appeal. In such a case, an actual ruling by the appellate court will divest the trial court of “jurisdiction to grant the motion for new trial.”²²

§ 3.2 Methods for Attacking Civil Judgments

In civil matters, O.C.G.A. § 9-11-60 prescribes the “exclusive means” for attacking a judgment,²³ providing for both “collateral” and “direct” attacks.²⁴ A “collateral attack,” which may be made only as to “[a] judgment void on its face,” need not be made in the court where the judgment was rendered, but instead may be made “in any court by any person.”²⁵ A direct attack, however, may be made only by a motion for a new trial or a motion to set aside the judgment, either of which must be filed in the court that rendered the judgment under attack.²⁶

¹⁸ *Id.* at 197, 312 S.E.2d at 311; *see also Jones v. State*, 309 Ga. App. 149, 709 S.E.2d 593 (2011).

¹⁹ *Griffin v. Loper*, 209 Ga. App. 504, 505, 433 S.E.2d 653, 654 (1993); *O’Kelly v. State*, 196 Ga. App. 860, 860, 397 S.E.2d 197, 198 (1990). However, if the losing party files an *untimely* motion for new trial and either party files a timely notice of appeal, the trial court is divested of jurisdiction to entertain the motion for a new trial. *See Andrews v. Rentz*, 266 Ga. 782, 783, 470 S.E.2d 669, 670 (1996).

²⁰ *Geeter*, 252 Ga. at 197, 312 S.E.2d at 311.

²¹ *Id.*

²² *Rich v. Ga. Farm Bureau Mut. Ins. Co.*, 176 Ga. App. 663, 337 S.E.2d 370, 371 (1985); *see also Sharif v. Tidwell Homes, Inc.*, 252 Ga. 205, 206, 312 S.E.2d 114, 115 (1984).

²³ *But see* Section 3.7, *infra*, regarding the inherent powers of the trial court.

²⁴ *Henry v. Adair Realty Co.*, 141 Ga. App. 182, 183, 233 S.E.2d 39, 40 (1977); *Henry v. Polar Rock Dev. Corp.*, 143 Ga. App. 189, 189-90, 237 S.E.2d 667, 668 (1977).

²⁵ O.C.G.A. § 9-11-60(a).

²⁶ O.C.G.A. § 9-11-60(b)-(d).

§ 3.3 New Trial

Motions for new trial are governed by O.C.G.A. § 9-11-60(b), (c), and (f) and O.C.G.A. §§ 5-5-1 *et seq.* Forms for motions for new trial in both civil and criminal matters are set forth in O.C.G.A. § 5-5-42.

§ 3.3.1 General Nature

The Georgia Code grants the superior courts, state courts, juvenile courts, and the city court of Atlanta the power to correct their own errors and grant new trials in such manner and under such rules as they may establish according to the law and the usages and customs of courts.²⁷ Probate courts, in turn, have the power to correct errors and grant new trials in civil cases provided for by O.C.G.A. § 15-9-6, under such rules and procedures as apply to the superior courts.²⁸

A motion for new trial must be based upon “some intrinsic defect which does not appear upon the face of the record or pleadings.”²⁹ Further, a trial court may, in some circumstances, grant a motion for new trial on a limited issue or as to only some of the parties.³⁰

§ 3.3.2 Grounds for New Trial

A trial court may grant a new trial on the general grounds that: (i) the “verdict of a jury is found contrary to evidence and the principles of justice and equity”; or (ii) the “verdict may be decidedly and strongly against the weight of the evidence.”³¹ A motion for new trial on these

²⁷ O.C.G.A. § 5-5-1(a).

²⁸ O.C.G.A. § 5-5-1(b).

²⁹ O.C.G.A. § 9-11-60(b)-(c).

³⁰ *See, e.g., Petty v. Barrett*, 187 Ga. App. 83, 83, 369 S.E.2d 294, 294 (1988); *Anthony v. Anthony*, 143 Ga. App. 691, 694-95, 240 S.E.2d 167, 170 (1977) (holding that a trial court, faced with a motion for new trial “can review a verdict severably rather than as a whole . . . if it can logically separate issues rightly decided from those wrongly decided”) (internal punctuation omitted); *Kimbell v. DuBose*, 139 Ga. App. 224, 227, 228 S.E.2d 205, 207-08 (1976) (explaining when, in joint and several liability context, a new trial is appropriate with respect to some, but not all, defendants).

³¹ *See* O.C.G.A. §§ 5-5-20, -21.

general grounds can be used to challenge not only a finding of guilt or liability, but also, pursuant to O.C.G.A. § 51-12-12, a finding of inadequate³² or excessive damage.³³

Whether to grant or deny a motion for new trial based on the general grounds is left to the trial court's discretion.³⁴ The first grant of a new trial based upon general grounds will not be disturbed by an appellate court unless the appellant shows that: (i) the trial court abused its discretion in granting the new trial; and (ii) the law and facts demand the verdict notwithstanding the judgment of the presiding judge.³⁵ If the grant of a new trial in a civil case is based on the discretion of the judge, the judge must set forth by written order the reason(s) for the exercise of his discretion, though the order need not conform to the provisions of O.C.G.A. § 9-11-52.³⁶

A motion for new trial also may be granted on more particularized special grounds, among which include:

- A juror's failure to answer, or to answer honestly, a material question posed in voir dire, but only if the movant can show that a correct response would have provided a valid basis to challenge the juror for cause;³⁷
- Improper and prejudicial arguments by counsel, such as arguments using facts not in evidence;³⁸
- The trial judge's expression of an opinion to the jury, whether during the charge or the progress of the case, as to what has or has not been proved;³⁹

³² See, e.g., *Brooks v. Williams*, 127 Ga. App. 311, 313-14, 193 S.E.2d 231, 233 (1972). The rule in Georgia used to be that "[w]hen the rule concerning comparative negligence is involved in a case, the verdict of the jury cannot be set aside on the ground that the amount of the damages awarded is inadequate." *Beal v. Braunecker*, 185 Ga. App. 429, 432, 364 S.E.2d 308, 312 (1987) (citations omitted). This holding was overruled by *Robinson v. Star Gas of Hawkinsville, Inc.*, 269 Ga. 102, 103-04, 498 S.E.2d 524, 525-26 (1998). "*Robinson* makes it clear that a jury verdict in a comparative negligence case may be reviewed by the trial court and that a new trial may be awarded under O.C.G.A. § 51-12-12(b)" if the jury award of damages is sufficiently inadequate or excessive. *Dawson v. Fulton-DeKalb Hosp. Auth.*, 236 Ga. App. 96, 97, 511 S.E.2d 199, 200 (1999).

³³ See, e.g., *Baxter v. Weiner*, 246 Ga. 28, 29, 268 S.E.2d 619, 620 (1980).

³⁴ *Kitchin v. Kitchin*, 219 Ga. 417, 419, 133 S.E.2d 880, 882 (1963); *Blanchard v. Westview Cemetery, Inc.*, 133 Ga. App. 262, 263-64, 211 S.E.2d 135, 137-38 (1974), *aff'd*, 234 Ga. 540, 216 S.E.2d 776 (1975).

³⁵ O.C.G.A. § 5-5-50; see also *Thomas v. Wiley*, 240 Ga. App. 135, 136, 522 S.E.2d 714, 716 (1999).

³⁶ O.C.G.A. § 5-5-51.

³⁷ *Gainesville Radiology Grp. v. Hummel*, 263 Ga. 91, 93, 428 S.E.2d 786, 789 (1993).

³⁸ *Locklear v. Morgan*, 129 Ga. App. 763, 767, 201 S.E.2d 163, 167 (1973).

³⁹ O.C.G.A. § 9-10-7.

- Error of the court in failing to give a proper jury charge, or in giving an erroneous charge;⁴⁰
- Instances where “any material evidence may be illegally admitted to or illegally withheld from the jury over the objection of the movant;”⁴¹
- Improper submission of an issue to the jury;⁴²
- Discovery of new, competent, admissible and material evidence if certain conditions are met,⁴³ though it is important to note that this ground is not favored;⁴⁴
- Instances where verdict and judgment are based on testimony of a witness who is subsequently found guilty of perjury;⁴⁵
- A sufficiently close family relationship between a juror and the prosecutor that is not discovered until after trial;⁴⁶ and
- Lack of notice of trial where the lack of notice does not appear on the face of the record but is developed by the evidence.⁴⁷

When the grant of a new trial is based on special grounds involving a question of law, the general rule that the first grant of a new trial will not be disturbed does not apply.⁴⁸ Instead, the first

⁴⁰ O.C.G.A. § 5-5-24(a); *Edwards v. McKenzie*, 114 Ga. App. 395, 399, 151 S.E.2d 469, 472 (1966).

⁴¹ O.C.G.A. § 5-5-22.

⁴² *Denny v. D.J.D., Inc.*, 186 Ga. App. 727, 729, 368 S.E.2d 329, 330-31 (1988).

⁴³ O.C.G.A. § 5-5-23. The six criteria for the grant of a new trial on newly discovered evidence are: (i) the evidence came to the knowledge of the moving party since trial; (ii) it was not due to the lack of due diligence that the moving party did not acquire the evidence sooner; (iii) the evidence is so material that it would probably produce a different verdict; (iv) the evidence is not cumulative only; (v) the affidavit of the witness should be produced or the absence accounted for; and (vi) the effect of the evidence will not be solely to impeach the credibility of a witness. *Hegedus v. Hegedus*, 255 Ga. 44, 45-46, 335 S.E.2d 284, 285 (1985); *Collins v. Kiah*, 218 Ga. App. 484, 486, 462 S.E.2d 158, 160 (1995).

⁴⁴ *Cantrell v. Red Wing Rollerway, Inc.*, 184 Ga. App. 506, 507, 361 S.E.2d 720, 722 (1987); *see also Gill v. Spivey*, 264 Ga. App. 723, 724, 592 S.E.2d 132, 134 (2003).

⁴⁵ *Windsor Forest, Inc. v. Rucker*, 121 Ga. App. 773, 773-75, 175 S.E.2d 65, 65-66 (1970).

⁴⁶ *Tatum v. State*, 206 Ga. 171, 176-77, 56 S.E.2d 518, 522 (1949).

⁴⁷ *Hill v. Bailey*, 187 Ga. App. 413, 414-15, 370 S.E.2d 520, 522 (1988) (citing *Newman v. Greer*, 131 Ga. App. 128, 129-30, 205 S.E.2d 486, 487 (1974)).

⁴⁸ *Armstrong v. Vallion*, 187 Ga. App. 380, 380, 370 S.E.2d 215, 216 (1988) (citing *Cobb Cnty. Kennestone Hosp. Auth. v. Crumbley*, 179 Ga. App. 896, 348 S.E.2d 49 (1986)).

grant of a new trial on special grounds involving questions of law generally is reviewable by the Court of Appeals.⁴⁹

§ 3.3.3 Insufficient Grounds for New Trial

A new trial will not be granted based upon:

- Insufficiency of the pleadings;⁵⁰
- Failure of counsel and client to appear at trial without explanation and without a showing of a meritorious defense;⁵¹
- The trial court's expression of an opinion as to any uncontested and undisputed fact;⁵²
- An inadvertent statement or mere slip of the judge's tongue that is not prejudicial to the complaining party;⁵³
- An erroneous instruction where self-induced by the movant's own written request to charge;⁵⁴ or
- Entry of an invalid default judgment.⁵⁵

§ 3.3.4 Procedure for Filing a Motion for New Trial

The Georgia Code requires motions for new trial to be filed with the clerk of court.⁵⁶ Therefore, a litigant who presents only an oral motion for new trial or merely sends it to a judge, without more, risks the possibility that the motion will be deemed untimely filed or that the court

⁴⁹ *Smith v. Telecab of Columbus, Inc.*, 238 Ga. 559, 559, 234 S.E.2d 24, 24 (1977).

⁵⁰ *Stone v. Cranfield*, 122 Ga. App. 178, 179, 176 S.E.2d 498, 499 (1970); *McJenkin Ins. & Realty Co. v. Burton*, 92 Ga. App. 832, 832, 90 S.E.2d 27, 28 (1955).

⁵¹ *S. Ariz. Sch. for Boys, Inc. v. Morris*, 123 Ga. App. 67, 68, 179 S.E.2d 548, 548 (1970); *see also Scriver v. Lister*, 235 Ga. App. 487, 489, 510 S.E.2d 59, 61 (1998) (holding that counsel's own negligence in failing to appear for trial was insufficient grounds for new trial).

⁵² *Columbus Transp. Co. v. Curry*, 104 Ga. App. 700, 705, 122 S.E.2d 584, 588 (1961).

⁵³ *City of Summerville v. Sellers*, 94 Ga. App. 152, 159, 94 S.E.2d 69, 76 (1956).

⁵⁴ *Reese v. Lyons*, 193 Ga. App. 548, 548, 388 S.E.2d 369, 370 (1989).

⁵⁵ *Royal LePage Real Estate Servs. of Atlanta, Inc. v. Spalding Partners, Ltd.*, 192 Ga. App. 284, 285, 384 S.E.2d 424, 426 (1989).

⁵⁶ O.C.G.A. § 5-5-44.

will refuse to consider the motion.⁵⁷ The trial court's authority to grant a new trial is not dependent, however, upon the filing of a motion by a party to the action. Instead, the court may grant a new trial on its own motion (except in criminal cases in which the defendant was acquitted), so long as this motion is timely made.⁵⁸

A motion for new trial must be filed within 30 days after the "entry of the judgment on the verdict or entry of the judgment where the case is tried without a jury."⁵⁹ A judgment is "entered" when it is signed by the judge and filed with the clerk.⁶⁰ The Georgia Code expressly states that no extension of time may be granted for the filing of a motion for new trial.⁶¹ A motion for new trial filed prior to the entry of judgment is premature, invalid, and void.⁶² Similarly, unless it meets the requirement of an extraordinary motion for new trial,⁶³ a motion for new trial filed subsequent to the 30-day period after the entry of a judgment is a nullity and does not toll the time for filing a notice of appeal.⁶⁴

As a matter of right, a properly filed motion for new trial may be amended to add additional grounds at any time up until the trial court's disposition of the motion.⁶⁵ Further, it should be noted that an appellant is not limited on appeal to the issues presented in the motion for new trial and may argue any additional, properly raised enumeration of error.⁶⁶

⁵⁷ See *Smith v. Forrester*, 145 Ga. App. 281, 282, 243 S.E.2d 575, 576-77 (1978); *Motor Contract Co. of Atlanta v. Wigington*, 116 Ga. App. 398, 400-01, 157 S.E.2d 321, 322-23 (1967).

⁵⁸ See O.C.G.A. § 5-5-40(h).

⁵⁹ O.C.G.A. § 5-5-40(a). An exception to this rule exists when the motion for new trial is joined with a motion under O.C.G.A. § 9-11-52(c) to amend or make additional findings. In such cases, the time for filing is shortened to 20 days after entry of judgment.

⁶⁰ O.C.G.A. § 9-11-58(b).

⁶¹ See O.C.G.A. §§ 5-6-39(b), 9-11-6(b).

⁶² *Harrison v. Harrison*, 229 Ga. 692, 693, 194 S.E.2d 87, 87-88 (1972); *Jessup v. Newman*, 191 Ga. App. 772, 772-73, 383 S.E.2d 136, 137-38 (1989).

⁶³ See discussion *infra* at Section 3.3.5.

⁶⁴ *Johnson v. State*, 227 Ga. 219, 219-20, 180 S.E.2d 94, 94 (1971); *Crolley v. Johnson*, 185 Ga. App. 671, 672, 365 S.E.2d 277, 278 (1988); see also *Porter v. State*, 271 Ga. 498, 498, 521 S.E.2d 566, 567 (1999).

⁶⁵ O.C.G.A. § 5-5-40(b); see also *Hegedus v. Hegedus*, 255 Ga. 44, 45, 335 S.E.2d 284, 285 (1985) (holding that an amendment to a motion for new trial is not required to be filed within 30-day period after entry of judgment during which initial motion for new trial must be filed; amendments to motion for new trial are allowed until trial court's final disposition of the motion). Note, however, that a motion for a new trial may not be amended to add a motion for JNOV more than 30 days after the entry of judgment. See *Preferred Risk Ins. Co. v. Boykin*, 174 Ga. App. 269, 270, 329 S.E.2d 900, 903 (1985).

⁶⁶ O.C.G.A. § 5-5-40(g); see also *Smith v. State*, 244 Ga. App. 165, 169, 534 S.E.2d 903, 907-08 (2000); *Hulsey v. Sears, Roebuck & Co.*, 138 Ga. App. 523, 524-25, 226 S.E.2d 791, 792 (1976).

Although the utility of the requirement is questionable in light of the common practice by which motion hearings are scheduled by the court upon notice to the parties, the Georgia Code still states that service of a motion for new trial must be accompanied by a “rule nisi” setting forth the hearing date for the motion.⁶⁷ Failure to do so may provide the court with discretion to either dismiss the motion for new trial as void or continue the matter until the service imperfection is corrected.⁶⁸ Service of the motion and accompanying rule nisi are governed by O.C.G.A. §§ 5-5-44 and 5-6-32. Service by mail upon opposing counsel⁶⁹ should suffice.⁷⁰ Although neither O.C.G.A. § 5-5-44 nor O.C.G.A. § 5-6-32(a) prescribes a specific time within which service must be perfected, service should be made in ample time to allow the opposite party to prepare for the hearing.⁷¹

§ 3.3.5 Extraordinary Motions for New Trial

Motions for new trial made subsequent to the 30-day period after entry of judgment are referred to as “extraordinary motions.”⁷² Such motions are not favored and are granted only when there is “some good reason” shown as to why the motion was not made during the 30-day period.⁷³ When the trial court considers the ground(s) for an extraordinary motion for new trial, it acts as the trier of fact, and its ruling on the motion will not be disturbed absent a manifest abuse of

⁶⁷ O.C.G.A. § 5-5-44.

⁶⁸ *Craig v. Holsey*, 264 Ga. App. 344, 344 & n.1, 590 S.E.2d 742, 745 & n.1 (2003) (citing *Stoner v. McDougall*, 235 Ga. 171, 172, 219 S.E.2d 138 (1975)); *Griggs v. State*, 167 Ga. App. 581, 584, 307 S.E.2d 75, 78 (1961). In *Craig*, the Court of Appeals affirmed the trial court’s dismissal of a motion for new trial based on the movant’s failure to attach a rule nisi. But the Court of Appeals also found that the motion nevertheless tolled the period for appeal and the dismissal for imperfect service was a disposition under O.C.G.A. § 5-6-38 commencing the 30-day period for appeal. *Craig*, 264 Ga. App. at 345, 590 S.E.2d at 745.

⁶⁹ At least two decisions that predated the Appellate Practice Act of 1965 suggested that personal service on a party might be required. See, e.g., *Braziel v. Hunter*, 103 Ga. App. 854, 854, 121 S.E.2d 39, 39 (1961); *Jones v. Fox*, 49 Ga. App. 573, 573, 176 S.E. 530, 531 (1934).

⁷⁰ See O.C.G.A. § 5-6-32(a); *Hughes v. Newell*, 152 Ga. App. 618, 619, 263 S.E.2d 505, 506 (1979).

⁷¹ See *Trammell v. Throgmorton*, 210 Ga. 659, 661, 82 S.E.2d 140, 141 (1954); *Peavy v. Peavy*, 167 Ga. 219, 220, 145 S.E. 55, 56 (1928).

⁷² O.C.G.A. § 5-5-41.

⁷³ O.C.G.A. § 5-5-41(a); see also *Patterson v. State*, 228 Ga. 389, 390-91, 185 S.E.2d 762, 763 (1971); *Dyal v. State*, 121 Ga. App. 50, 50, 172 S.E.2d 326, 327 (1970).

discretion.⁷⁴ Notice of the motion must be given to the opposing party at least 20 days prior to the hearing.⁷⁵ A party is permitted to file only one extraordinary motion for new trial.⁷⁶

Normally, the “good reason” or “good cause” necessary to justify the filing of an extraordinary motion for new trial consists of newly discovered evidence.⁷⁷ As the Court of Appeals has noted:

On an extraordinary motion for a new trial based on newly discovered evidence, it is incumbent on the movant to satisfy the court: (1) that the newly discovered evidence has come to his knowledge since the trial; (2) that want of due diligence was not the reason that the evidence was not acquired sooner; (3) that the evidence was so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness is attached to the motion or its absence accounted for; and (6) that the new evidence does not operate solely to impeach the credit of a witness.⁷⁸

Moreover, extraordinary motions for new trial cannot be based on matters: (i) that were known to the movant and could have been articulated in a timely-filed motion; or (ii) that could have been discovered in time through the exercise of proper diligence.⁷⁹

The filing of an extraordinary motion for new trial also may be predicated on grounds other than the discovery of new evidence, including:

- Error on the part of the clerk’s office in informing movants of the correct filing date, when the motion would have been timely if the clerk’s representations had been correct;⁸⁰
- Failure of a defendant and his counsel to appear at trial based upon representation of counsel for plaintiff that the case would be removed from the docket to discuss settlement;⁸¹

⁷⁴ See, e.g., *Satterwhite v. State*, 235 Ga. App. 687, 689, 509 S.E.2d 97, 100 (1998); *Cade v. State*, 107 Ga. App. 30, 30-31, 129 S.E.2d 405, 406-07 (1962) (holding that in considering an extraordinary motion for new trial, the trial judge sits as the trier of fact, and in the event of conflicting facts, his discretion in refusing the motion will not be disturbed unless manifestly abused).

⁷⁵ O.C.G.A. § 5-5-41(a).

⁷⁶ O.C.G.A. § 5-5-41(b).

⁷⁷ See, e.g., *Martin v. Children’s Sesame, Inc.*, 188 Ga. App. 242, 242, 372 S.E.2d 648, 649 (1988).

⁷⁸ *Smith v. Dep’t of Human Res.*, 226 Ga. App. 491, 493, 487 S.E.2d 94, 96 (1997).

⁷⁹ See, e.g., *Patterson v. State*, 228 Ga. 389, 390-91, 185 S.E.2d 762, 763 (1971); *Barfield v. McEntyre*, 136 Ga. App. 294, 294, 221 S.E.2d 58, 58 (1975).

⁸⁰ *Martin*, 188 Ga. App. at 242-43, 372 S.E.2d at 649-50.

⁸¹ *Union Life Ins. Co. v. Aaronson*, 109 Ga. App. 384, 384, 136 S.E.2d 142, 143 (1964).

- Conviction of a trial witness on perjury charges arising from testimony at trial;⁸² or
- The discovery that an alleged murder victim is alive after trial.⁸³

As is true with a timely filed motion for new trial, the trial court typically is required to hold a hearing on an extraordinary motion for new trial.⁸⁴ An exception to this rule exists, however, when the extraordinary motion obviously fails to show any merit. In such circumstances, the motion may be denied without a hearing.⁸⁵

§ 3.3.6 Effect of a Motion for New Trial Upon the Time for Filing a Notice of Appeal

As noted supra in Section 3.1.2, a timely filed motion for new trial tolls the time for appeal, and the 30-day period begins anew at such time as the motion for new trial is overruled or dismissed.⁸⁶ However, an improperly filed motion for new trial will not prevent the 30-day appeal period from expiring. For example, since rulings upon the pleadings are not subject to review by motion for new trial, a motion for new trial filed after the court has dismissed a complaint for failure to state a claim will not extend the time for filing a notice of appeal.⁸⁷

§ 3.4 Motions to Set Aside a Judgment

The reasons justifying a motion to set aside a judgment, and the procedures for filing such a motion, are set forth in O.C.G.A. § 9-11-60(b)-(h).

§ 3.4.1 Statutory Grounds

The statute describes three grounds upon which a motion to set aside a judgment may be based.⁸⁸

⁸² *Windsor Forest, Inc. v. Rocker*, 121 Ga. App. 773, 773, 175 S.E.2d 65, 65-66 (1970).

⁸³ *Cox v. Hillyer*, 65 Ga. 57 (1880).

⁸⁴ *Dick v. State*, 248 Ga. 898, 899, 287 S.E.2d 11, 13 (1982).

⁸⁵ *Id.* (“[I]f the pleadings in an extraordinary motion for new trial in a criminal case do not contain a statement of *facts* sufficient to authorize that the motion be granted . . . it is not error for the trial court to refuse to conduct a hearing . . .”).

⁸⁶ O.C.G.A. § 5-6-38(a); *Allen v. Rome Kraft Co.*, 114 Ga. App. 717, 718, 152 S.E.2d 618, 620 (1966) (holding that the filing of a motion for new trial tolls the time for filing appeal from judgment or verdict until the motion for new trial is overruled).

⁸⁷ *See Pillow v. Seymour*, 255 Ga. 683, 683, 341 S.E.2d 447, 447-48 (1986).

⁸⁸ O.C.G.A. § 9-11-60(d).

First, a motion to set aside may be based on a “[l]ack of jurisdiction over the person or the subject matter.”⁸⁹ While a motion to set aside normally must be brought within three years of the judgment complained of, an attack based on lack of jurisdiction may be brought at any time.⁹⁰

Second, a motion to set aside may be based on “[f]raud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the movant.”⁹¹ “A claim of mistake . . . refers to the misapprehension of a past or present fact.”⁹² Similarly, a claim of “accident” must involve “an event, not proximately caused by negligence, arising from an unforeseen or unexplained cause.”⁹³

Lastly, a motion to set aside may be based on “[a] nonamendable defect which appears upon the face of the record or pleadings.”⁹⁴ Under this subsection, “it is not sufficient that the complaint or other pleading fails to state a claim upon which relief can be granted, but the pleadings must affirmatively show that no claim in fact existed.”⁹⁵ For example, the failure of counsel or a party to receive notice of a hearing may constitute a nonamendable defect and serve as the basis for a motion to set aside a judgment.⁹⁶ By contrast, “a matter which is developed by the evidence rather than appearing upon the face of the record or pleadings does not fall within the orbit of a motion to set aside.”⁹⁷

⁸⁹ O.C.G.A. § 9-11-60(d)(1); *Peters v. Hyatt Legal Servs.*, 211 Ga. App. 587, 589, 440 S.E.2d 222, 224-25 (1993).

⁹⁰ O.C.G.A. § 9-11-60(f); *Smyrna Marine, Inc. v. Stocks*, 172 Ga. App. 426, 426, 323 S.E.2d 286, 287 (1984).

⁹¹ O.C.G.A. § 9-11-60(d)(2); *see Porter v. Tissenbaum*, 247 Ga. App. 816, 818, 545 S.E.2d 372, 374 (2001) (denying a motion to set aside judgment and finding that the defendants were at fault for failing to “stay abreast of the pending action against them”).

⁹² *Ne. Atlanta Sur. Co. v. State*, 197 Ga. App. 399, 400, 398 S.E.2d 435, 437 (1990); *see Lee v. Rest. Mgmt. Servs.*, 232 Ga. App. 902, 904, 503 S.E.2d 59, 61 (1998) (finding that the failure of a party’s insurance company to file an answer was not a “mistake” within the meaning of the statute); *Aycock v. Hughes*, 189 Ga. App. 838, 839, 377 S.E.2d 689, 690 (1989) (concluding that a party’s failure to appear at the call of the case for trial did not constitute a “mistake” because it resulted from the defendant and his counsel’s negligence).

⁹³ *Ne. Atlanta Sur. Co.*, 197 Ga. App. at 400, 398 S.E.2d at 437.

⁹⁴ O.C.G.A. § 9-11-60(d)(3).

⁹⁵ *Id.*

⁹⁶ *Hous. Auth. v. Parks*, 189 Ga. App. 97, 98, 374 S.E.2d 842, 843 (1988). *But see Am. Mobile Imaging, Inc. v. Miles*, 260 Ga. App. 877, 878, 581 S.E.2d 396, 398 (2003) (distinguishing *Housing Authority* and holding that a party’s failure to actually receive the notice did not constitute a nonamendable defect because the notice was properly mailed).

⁹⁷ *Gulf Oil Co. v. Mantegna*, 167 Ga. App. 844, 846, 307 S.E.2d 732, 734 (1983).

§ 3.4.2 Procedure

A motion to set aside must be brought within three years from entry of the judgment being attacked (unless the motion is based on a jurisdictional argument) and must be brought in the court that rendered the judgment.⁹⁸ A motion to set aside “may be served by any means by which an original complaint may be legally served if it cannot be legally served as any other motion.”⁹⁹

§ 3.4.3 Relationship to Appeals

A motion to set aside does not toll the time for filing a notice of appeal.¹⁰⁰

§ 3.5 Motions for Judgment Notwithstanding the Verdict

§ 3.5.1 General Nature

After a trial is concluded and judgment is entered, a party who has moved unsuccessfully for a directed verdict during the trial may move in writing for a JNOV.¹⁰¹ The sole purpose of a motion for JNOV is to allow the trial judge to review and reconsider a previously denied motion for directed verdict before appellate judicial resources are expended and additional time and expenses are incurred.¹⁰² Accordingly, the failure of a party to move for a directed verdict during trial will bar a subsequent motion for JNOV.¹⁰³ Moreover, a party moving for JNOV is limited by the grounds asserted in support of the motion for directed verdict.¹⁰⁴

⁹⁸ O.C.G.A. § 9-11-60(b), (f).

⁹⁹ *Id.*

¹⁰⁰ *See supra* note 12.

¹⁰¹ O.C.G.A. § 9-11-50(b). Motions for directed verdict or JNOV are unavailable in nonjury trials because there is no verdict for the judge to direct or to disregard; the judge’s decision is not a *verdict* but a judgment. *Smith v. Gen. Motors Acceptance Corp.*, 98 Ga. App. 840, 842, 107 S.E.2d 334, 336 (1959); *see also Carter v. State*, 196 Ga. App. 226, 229 n.1, 395 S.E.2d 891, 895 n.1 (1990) (noting that a motion for a directed verdict in a nonjury trial is inappropriate).

¹⁰² *Sec. Life & Trust Co. v. Smith*, 220 Ga. 744, 747, 141 S.E.2d 405, 408 (1965); *Crosby Aeromarine, Inc. v. Hyde*, 115 Ga. App. 836, 838, 156 S.E.2d 106, 109 (1967).

¹⁰³ *See* O.C.G.A. § 9-11-50(b); *Whitman v. Burden*, 155 Ga. App. 67, 67, 270 S.E.2d 235, 236 (1980).

¹⁰⁴ O.C.G.A. § 9-11-50(b); *see also S. Land Title, Inc. v. N. Ga. Title, Inc.*, 270 Ga. App. 4, 7, 606 S.E.2d 43, 47 (2004) (“It is patent . . . that [a] j.n.o.v. must be based on grounds raised in the motion for directed verdict initially, for it is in effect only a ruling based on a renewed motion.”).

The standards for granting a directed verdict and a JNOV are the same.¹⁰⁵ A movant for JNOV bears a heavy burden, because the court must be convinced that “there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, shall demand a particular verdict.”¹⁰⁶ Stated somewhat differently, a JNOV is appropriate only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment.¹⁰⁷ If, upon reflection, the trial judge determines that the motion for directed verdict was valid, the judge is to set aside the verdict and the original judgment and enter a new judgment in accordance with the directed verdict motion.¹⁰⁸

The record as it existed at the close of the trial controls whether a JNOV should be granted.¹⁰⁹ The trial court may not eliminate evidence on the grounds that it was received improperly at trial and then dispose of the case on a motion for JNOV based on the diminished record.¹¹⁰ In other words, the jury verdict must be construed by the trial court and appellate courts in the light most favorable to upholding the jury verdict.¹¹¹

Finally, the function of a motion for JNOV is not the same as that of a motion for new trial. JNOV is a summary method of disposing of the “[e]ntire litigation where it is obvious that the party against whom it is directed cannot, under any circumstances, [prevail] in [the] case.”¹¹² A JNOV does not lie in every instance in which a motion for new trial might be granted, even on the general grounds.¹¹³

¹⁰⁵ See O.C.G.A. § 9-11-50(b); *Custom Coating, Inc. v. Parsons*, 188 Ga. App. 506, 507, 373 S.E.2d 291, 291-92 (1988).

¹⁰⁶ O.C.G.A. § 9-11-50(a)-(b); *Hiers-Wright Assocs., Inc. v. Mfrs. Hanover Mortg. Corp.*, 182 Ga. App. 732, 732, 356 S.E.2d 903, 905 (1987).

¹⁰⁷ *Bryant v. Colvin*, 160 Ga. App 442, 444, 237 S.E.2d 238, 240 (1981) (holding that a JNOV “may be granted only when . . . there can be but one reasonable conclusion as to the proper judgment,” and “[w]here there is conflicting evidence, or there is insufficient evidence to make a ‘one-way verdict’ proper, [JNOV] should not be awarded”); see also *Fertility Tech. Res., Inc. v. Lifetech Med. Inc.*, 282 Ga. App. 148, 149, 637 S.E.2d 844, 846 (2006).

¹⁰⁸ *Famiglietti v. Brevard Med. Investors, Ltd*, 197 Ga. App. 164, 166-67, 397 S.E.2d 720, 722-23 (1990).

¹⁰⁹ *De Loach v. Myers*, 215 Ga. 255, 256, 109 S.E.2d 777, 759 (1959).

¹¹⁰ See, e.g., *Mays v. Daniels*, 179 Ga. App. 677, 677-78, 347 S.E.2d 642, 643 (1986); *Wooten v. Life Ins. Co. of Ga.*, 93 Ga. App. 665, 670, 92 S.E.2d 567, 572 (1956); . Furthermore, “[i]n considering whether to grant judgment n.o.v., the trial court should not rely upon certain evidence merely because it is not specifically contradicted, while disregarding other relevant evidence which may be equally undisputed.” *Lawrence v. Russell*, 254 Ga. App. 793, 796, 563 S.E.2d 884, 887 (2002).

¹¹¹ *Bryant*, 160 Ga. App at 444, 237 S.E.2d at 240.

¹¹² *Robbins v. Hays*, 107 Ga. App. 12, 12-13, 128 S.E.2d 546, 548 (1962).

¹¹³ *Id.* at 13, 128 S.E.2d at 548.

§ 3.5.2 Procedure for Filing a Motion for JNOV

As is true with a motion for new trial, a motion for JNOV must be filed within 30 days after entry of judgment, or if a verdict was not returned, within 30 days after the jury was discharged.¹¹⁴ No extensions of time will be granted for the filing of a motion for JNOV.¹¹⁵

A motion for JNOV filed before the entry of judgment is invalid or void.¹¹⁶ Similarly, a motion for JNOV filed after the expiration of the 30-day period under the guise of an amendment to a timely motion for new trial is a nullity and void.¹¹⁷

When the transcript of the evidence is essential for consideration of a motion for JNOV and the movant fails to make a reasonable effort to obtain the transcript, the trial court may exercise its discretion in dismissing the motion.¹¹⁸ However, if the court is familiar with the evidence, the court has discretion to rule on a motion for JNOV, even though the trial transcript is not physically available at the time.¹¹⁹

§ 3.5.3 Combining a Motion for New Trial with a Motion for JNOV

Section 9-11-50(b) of the Georgia Code expressly permits a motion for new trial to be joined with a motion for JNOV. When the two motions are combined, several different procedural outcomes are possible.

First, if the trial court grants the motion for JNOV, O.C.G.A. § 9-11-50(c)(1) instructs the court to issue a conditional ruling on the motion for new trial. Then:

- If the trial court, having granted the motion for JNOV, also conditionally *grants* a new trial, the JNOV remains final and may be examined by the Court of Appeals.¹²⁰ If the order granting the JNOV is reversed on appeal, the new trial will proceed unless the appellate court orders differently.¹²¹

¹¹⁴ O.C.G.A. § 9-11-50(b).

¹¹⁵ O.C.G.A. § 5-6-39(b).

¹¹⁶ *Harrison v. Harrison*, 229 Ga. 692, 693, 194 S.E.2d 87, 88 (1972); *Jessup v. Newman*, 191 Ga. App. 772, 772, 383 S.E.2d 136, 137-38 (1989).

¹¹⁷ *Preferred Risk Ins. Co. v. Boykin*, 174 Ga. App. 269, 270-71, 329 S.E.2d 900, 903 (1985).

¹¹⁸ *Coates v. Mulji Motor Inn, Inc.*, 178 Ga. App. 208, 209, 342 S.E.2d 488, 490 (1986).

¹¹⁹ *Castile v. Rich's, Inc.*, 131 Ga. App. 586, 586, 206 S.E.2d 851, 852 (1974).

¹²⁰ O.C.G.A. § 9-11-50(c)(1).

¹²¹ *Id.*

- If the trial court, having granted the JNOV, conditionally *denies* the motion for new trial, both the grant of the JNOV and the denial of a new trial may be claimed as error and examined on appeal.¹²² If the JNOV is reversed on appeal, subsequent proceedings in the trial court will be in accordance with the appellate court’s order.¹²³

On the other hand, if the motion for JNOV is denied, the trial court may still rule on the motion for new trial. Then:

- If the trial court, having denied the JNOV, grants a motion for new trial, the order denying the motion for JNOV is not a final judgment and may not be appealed.¹²⁴ In such cases, the new trial shall proceed.
- If the trial court, having denied the motion for JNOV, also denies the motion for new trial, then both rulings may be appealed.

The interplay of these two motions can also lead to some interesting post-trial role reversals between the parties. A party who prevailed at trial, but whose verdict is set aside on a JNOV motion, may decide (and is permitted within 30 days of the entry of the JNOV) to move for a new trial.¹²⁵ Likewise, if a party suffers an adverse decision at trial, is denied a JNOV, and then appeals the denial of his motion for JNOV, the party who prevailed at trial may have to advocate for a new trial in the event that the appellate court finds that a JNOV should be entered. If the appellate court reverses the denial of JNOV in this second situation, it also may grant a new trial or remand to the trial court for a determination of whether a new trial should be granted.¹²⁶

When a motion for new trial is made with a motion for JNOV, the court “shall specify the grounds for granting or denying the motion for the new trial.”¹²⁷ Although findings of fact and

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See Days Inn of Am., Inc. v. Sharkey*, 178 Ga. App. 718, 718, 344 S.E.2d 518, 519 (1986) (holding that in the absence of an O.C.G.A. § 9-11-54(b) order, the trial court’s grant of a new trial and denial of the motion for JNOV resulted in the continuing pendency of the cases, preventing the order denying JNOV from becoming “final” for appeal purposes). *But see Gen. Motors Acceptance Corp. v. Bowen Motors, Inc.*, 167 Ga. App. 463, 468, 306 S.E.2d 675, 680 (1983) (holding that the denial of a JNOV can be appealed even though motion for a new trial as to a counterclaim has been granted, if the appeal is taken from a final judgment entered pursuant to O.C.G.A. § 9-11-54(b)).

¹²⁵ O.C.G.A. § 9-11-50(c)(2).

¹²⁶ O.C.G.A. § 9-11-50(d).

¹²⁷ O.C.G.A. § 9-11-50(c)(1); *see also* O.C.G.A. § 5-5-51 (providing that in all civil cases in which a new trial is granted on discretionary grounds, the trial court must set forth the reason(s) for exercising its discretion).

conclusions of law are not required,¹²⁸ failure to specify the grounds upon which a motion for new trial is granted may require that the case be remanded with directions to vacate the prior order and enter a new order specifying the grounds.¹²⁹

§ 3.5.4 Effect of Motion for JNOV on Time for Appeal

The filing of a timely motion for JNOV tolls the time for filing a notice of appeal. The 30-day period begins anew at the time the motion for JNOV is granted, overruled, or “otherwise finally dispos[ed].”¹³⁰

§ 3.6 Motions to Amend or Modify a Judgment

§ 3.6.1 General Provisions

Under O.C.G.A. § 9-11-52, a court ruling on an interlocutory injunction or presiding over a non-jury trial must, upon request made prior to such ruling, issue an order that includes findings of fact and conclusions of law.¹³¹ However, the requirements of O.C.G.A. § 9-11-52(a) “may be waived in writing or on the record by the parties.”¹³² Only where an appellate court determines that the findings of fact are clearly erroneous will they be set aside.¹³³ Further, an appellate court must give deference to the trial judge’s assessment of witness credibility.¹³⁴

§ 3.6.2 Form of the Order

In drafting a judgment for a trial judge sitting without a jury, two principles should be kept in mind. First, the findings of fact must be stated separately from the conclusions of law in the judgment or order.¹³⁵ The purpose of setting forth separate findings of fact is threefold: (i) to aid in the trial judge’s process of adjudication; (ii) to define the facts for purposes of res judicata and

¹²⁸ *Sigmon v. Womack*, 158 Ga. App. 47, 51, 279 S.E.2d 254, 258 (1981).

¹²⁹ *Famiglietti v. Brevard Med. Investors, Ltd.*, 197 Ga. App. 164, 169, 397 S.E.2d 720, 724 (1990).

¹³⁰ O.C.G.A. § 5-6-38(a).

¹³¹ This requirement, however, does not apply to actions involving uncontested divorce, alimony, or custody of minors, nor to motions except as provided in O.C.G.A. § 9-11-41(b). *See* O.C.G.A. § 9-11-52(b).

¹³² O.C.G.A. § 9-11-52(b).

¹³³ O.C.G.A. § 9-11-52(a).

¹³⁴ *Id.*

¹³⁵ *Id.*

collateral estoppel; and (iii) to aid the appellate court on review.¹³⁶ If an opinion or memorandum of decision is filed, it will be sufficient if the findings and conclusions are both contained therein.¹³⁷ When an order fails to specify clearly the findings of fact and conclusions of law, or fails to contain any such recitation, the case will be remanded with direction that the prior order be vacated and a new order containing appropriate findings and conclusions be entered.¹³⁸

Second, although the court's order need not necessarily specify the evidence actually relied upon in making its findings and reaching its conclusions,¹³⁹ neither the mere recitation of events that took place at trial nor a bare statement of what the court considered in reaching its conclusions is sufficient.¹⁴⁰ Instead, the order should state not only the end result of the judge's inquiry, but the process by which it was reached.¹⁴¹

The procedure for filing motions to amend or modify a judgment entered pursuant to O.C.G.A. § 9-11-52(c) is as follows:

Upon motion made not later than 20 days after entry of judgment, the court may make or amend its findings or make additional findings and may amend the judgment accordingly. If the motion is made with a motion for new trial, both motions shall be made within 20 days after entry of judgment. The question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to findings or a motion for judgment. When findings or conclusions are not made prior to judgment to the extent necessary for review, failure of the losing party to move therefor after judgment shall constitute a waiver of any ground of appeal which requires consideration thereof.¹⁴²

¹³⁶ *Spivey v. Mayson*, 124 Ga. App. 775, 776, 186 S.E.2d 154, 155 (1971).

¹³⁷ O.C.G.A. § 9-11-52(a).

¹³⁸ *Fairburn Banking Co. v. Upton*, 172 Ga. App. 81, 82, 321 S.E.2d 814, 815 (1984); *C & H Couriers Inc. v. Am. Mut. Ins. Co.*, 166 Ga. App. 853, 854, 305 S.E.2d 500, 501 (1983).

¹³⁹ *Siegel v. Gen. Parts Corp.*, 165 Ga. App. 339, 339, 301 S.E.2d 292, 293 (1983).

¹⁴⁰ *See, e.g., In re D.L.G.*, 212 Ga. App. 353, 353, 442 S.E.2d 11, 11 (1994); *Moore v. Farmers Bank of Union Point*, 182 Ga. App. 94, 95, 354 S.E.2d 692, 693 (1987); *C & H Couriers*, 166 Ga. App. at 853, 305 S.E.2d at 501; *Woodruff v. B-X Corp.*, 154 Ga. App. 197, 197-98, 267 S.E.2d 757, 758 (1980).

¹⁴¹ *See, e.g., In re D.L.G.*, 212 Ga. App. at 353, 442 S.E.2d at 11; *Woodruff*, 154 Ga. App. at 197-98, 267 S.E.2d at 758; *Beasley v. Jones*, 149 Ga. App. 317, 318-19, 254 S.E.2d 472, 473 (1979).

¹⁴² O.C.G.A. § 9-11-52(c). Importantly, the non-prevailing party in a non-jury trial bears the burden of requesting that the trial court's judgment be made specific enough for the Court of Appeals to review. Accordingly, failure to move for clarification of a vague judgment may constitute waiver of some grounds for appeal.

This code section is not intended, however, to provide a party with a second opportunity to prove his case after he fails to do so in the first instance.¹⁴³ It also bears emphasis that this provision requires a party to file a motion to amend or modify “not later than 20 days after entry of judgment.”¹⁴⁴

§ 3.6.3 Effect of Motion to Amend or Modify on Running of Time Limitations

Motions to amend or modify are not included among the post-trial motions that, by statute, enlarge the time for filing a notice of appeal.¹⁴⁵ Thus, given the decisions concerning other motions that are not listed in O.C.G.A. § 5-6-38, good practice dictates that a notice of appeal be filed within 30 days after the entry of judgment, even if a motion to amend or modify is pending.¹⁴⁶

§ 3.7 The Inherent Power of the Court Over Its Own Orders During the Term of Court

Beyond the aforementioned post-trial motions, longstanding precedent supports the inherent power of trial judges to revise, correct, revoke, modify, or vacate orders through the end of the term of court, for the purpose of promoting justice and in the exercise of sound legal discretion.¹⁴⁷ The

¹⁴³ *Buckley v. Thornwell*, 143 Ga. App. 764, 765, 240 S.E.2d 258, 259 (1977).

¹⁴⁴ O.C.G.A. § 9-11-52(c). *But see infra* Section 3.7.

¹⁴⁵ *See* O.C.G.A. § 5-6-38(a).

¹⁴⁶ *See, e.g., Barlow v. State*, 279 Ga. 870, 872, 621 S.E.2d 438, 440 (2005); *Robinson v. Carswell*, 147 Ga. App. 521, 249 S.E.2d 331 (1978) (holding that a motion to vacate a summary judgment is not listed in O.C.G.A. § 5-6-38 and thus does not extend time for appeal); *Ellis v. Cont'l Ins. Co.*, 141 Ga. App. 809, 234 S.E.2d 377 (1977) (holding that a motion for reconsideration of a judgment awarding a worker's compensation board finding is not listed in O.C.G.A. § 5-6-38 and does not extend the time for appeal).

¹⁴⁷ *Bagley v. Robertson*, 265 Ga. 144, 145-46, 454 S.E.2d 478, 480 (1995); *E. Side Lumber & Coal Co. v. Barfield*, 193 Ga. 273, 276, 18 S.E.2d 492, 494 (1942); *LeCraw v. Atlanta Arts Alliance, Inc.*, 126 Ga. App. 656, 663, 191 S.E.2d 572, 577 (1972); *Armour & Co. v. Youngblood*, 107 Ga. App. 505, 508, 130 S.E.2d 786, 787 (1963). Note that “[t]he rule that a trial judge, in the exercise of a sound discretion, has authority to amend, revise, modify, or set aside a judgment during the term in which it is rendered is not applicable to a judgment based on a jury verdict.” *Dep't of Transp. v. Kenney*, 238 Ga. 173, 174, 231 S.E.2d 767, 769 (1977); *Jones v. Meyers*, 223 Ga. App. 277, 278, 477 S.E.2d 411, 411-12 (1996).

enactment of the Civil Practice Act did not change this rule.¹⁴⁸ In fact, “this inherent power may be exercised in a subsequent term where a motion for modification or other statutorily defined action was filed during the term when the challenged order was entered, and is continued to the subsequent term.”¹⁴⁹ The terms of court vary from county to county, as set forth in O.C.G.A. § 15-6-3.

§ 3.8 Motions for Supersedeas Bond

§ 3.8.1 General Provisions

The filing of a notice of appeal ordinarily serves as supersedeas¹⁵⁰ to enforcement of a civil judgment so long as the appellant has paid all costs into the court.¹⁵¹ The appellee, however, may move the trial court to require the appellant to post a bond.¹⁵² Section 5-6-46 of the Georgia Code provides that the court “shall” require the posting of a bond or other form of security if such a motion is made.¹⁵³ The amount of the bond depends upon the type of civil judgment involved.¹⁵⁴

§ 3.8.2 Time for Filing

Section 5-6-46 of the Georgia Code does not state a definite time period in which a motion for supersedeas bond should be filed. As a matter of course, however, the motion should be filed,

¹⁴⁸ *McCoy Lumber Co. v. Garland Lumber Sales, Inc.*, 182 Ga. App. 75, 75, 354 S.E.2d 686, 686 (1987) (citing *Martin v. Gen. Motors Corp.*, 226 Ga. 860, 862-63, 178 S.E.2d 183, 184 (1970)); *see also City of Cornelia v. Gunter*, 227 Ga. 464, 465, 181 S.E.2d 489, 489 (1971) (“After the expiration of the term at which a decree was entered, it is out of the power of the court to modify and revise it in any matter of substance or in any matter affecting the merits. A decree, during the term at which it was rendered is said to be in the breast of the judge; after it is over, it is upon the roll.” This rule as to the finality of judgments has not been changed by the Civil Practice Act of 1966 (Code Ann. s 81A-160(h)).” (internal citation omitted)).

¹⁴⁹ *Bagley*, 265 Ga. at 146, 454 S.E.2d at 480. Note that “[a]n interlocutory ruling does not pass from the control of the court at the end of the term if the cause remains pending.” *Bradley v. Tattnall Bank*, 170 Ga. App. 821, 823, 318 S.E.2d 657, 661 (1984).

¹⁵⁰ The filing of a notice of appeal does not act as a supersedeas unless all costs in the trial court have been paid. O.C.G.A. § 5-6-46(a); *Duncan v. Ball*, 172 Ga. App. 750, 751, 324 S.E.2d 477, 479 (1984); *Chappelaer v. Gen. G.M.C. Trucks, Inc.*, 130 Ga. App. 664, 665, 204 S.E.2d 326, 327 (1974).

¹⁵¹ O.C.G.A. § 5-6-46(a). See O.C.G.A. § 5-6-45 for operation of notice of appeal as supersedeas in criminal cases.

¹⁵² O.C.G.A. § 5-6-46(a).

¹⁵³ *Id.*

¹⁵⁴ *See generally* Chapter 5 of this Handbook.

heard, and decided prior to the time the case is docketed in the appellate court.¹⁵⁵ Arguably, once the case is docketed, the trial court loses jurisdiction and cannot require a supersedeas bond.¹⁵⁶

§ 3.8.3 Penalties for Failure to Post a Supersedeas Bond

If the appellant fails to post the bond set by the trial court, the appellee is at liberty to enforce the judgment by all legal means, including levy, execution, and garnishment.¹⁵⁷ Failure to post a supersedeas bond is not, however, grounds for dismissing the appeal, and the appellee who levies on the judgment creditor's property acts at its own peril if the judgment is reversed on appeal.¹⁵⁸

§ 3.9 Motions for Attorneys' Fees Under O.C.G.A. § 9-15-14

Section 9-15-14 of the Georgia Code provides for the recovery of attorneys' fees when a litigant asserts "a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position," or when an attorney or party "brought or defended an action, or any part thereof, that lacked substantial justification,¹⁵⁹ was interposed for delay or harassment, or . . . unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures . . ."¹⁶⁰ A motion for attorneys' fees and expenses under O.C.G.A. § 9-15-14 may be filed "at any time during the course of the action but not later than 45 days after the final disposition of the action."¹⁶¹

¹⁵⁵ The trial court is not required to conduct an oral hearing prior to granting a motion to require a supersedeas bond, nor must the trial court give the non-moving party 30 days to respond to the motion. *Rapps v. Cooke*, 234 Ga. App. 131, 134, 505 S.E.2d 566, 570 (1998).

¹⁵⁶ *See Park v. Minton*, 229 Ga. 765, 769-70, 194 S.E.2d 465, 468 (1972). *But see Hughes v. Star Bonding Co.*, 137 Ga. App. 661, 662-63, 224 S.E.2d 863, 863-66 (1976).

¹⁵⁷ *See Crymes v. Crymes*, 240 Ga. 721, 721, 242 S.E.2d 30, 31 (1978).

¹⁵⁸ *Hawn v. Chastain*, 246 Ga. 723, 726-27, 273 S.E.2d 135, 138-39 (1980); *see generally* Chapter 5 of this Handbook.

¹⁵⁹ As used in this Code Section, "lacked substantial justification" means "substantially frivolous, substantially groundless, or substantially vexatious." O.C.G.A. § 9-15-14(b). Attorneys' fees will not be assessed when it is determined that the attorney or party asserted a claim or defense in a good faith effort to establish a new theory of law in Georgia if such new theory is based on some recognizable precedential or persuasive authority. O.C.G.A. § 9-15-14(c).

¹⁶⁰ O.C.G.A. § 9-15-14(a)-(b).

¹⁶¹ O.C.G.A. § 9-15-14(e).

Unless appealed as part of a judgment that is directly appealable, an appeal from an award of attorneys’ fees under O.C.G.A. § 9-15-14 must be sought through application, and a direct appeal will be dismissed for failure to comply with O.C.G.A. § 5-6-35.¹⁶² An award of attorneys’ fees and expenses under O.C.G.A. § 9-15-14 is determined by the court without a jury, is discretionary, and will be affirmed by the appellate court if: (i) under subsection (a), there is “any evidence” to support it; or (ii) under subsection (b), the trial court did not abuse its discretion.¹⁶³

§ 3.10 Pauper’s Affidavit

Section 5-6-47 of the Georgia Code allows an appellant to file an affidavit stating that he or she is indigent and unable to pay costs or to post a supersedeas bond. Such an affidavit of indigence shall act as supersedeas unless successfully contested, *i.e.*, traversed, under the procedure set forth in O.C.G.A. § 5-6-47(b). The traverse must be filed in the trial court.¹⁶⁴ The trial court’s ruling on issues of fact concerning a party’s ability to pay costs is final and not subject to review.¹⁶⁵

¹⁶² *Martin v. Outz*, 257 Ga. 211, 211, 357 S.E.2d 91, 91-92 (1987); *Cheeley-Towns v. Rapid Grp., Inc.*, 212 Ga. App. 183, 184, 441 S.E.2d 452, 452-53 (1994); *Rolleston v. Huie*, 198 Ga. App. 49, 52, 400 S.E.2d 349, 352 (1990); *Bowles v. Lovett*, 190 Ga. App. 650, 650, 379 S.E.2d 805, 805 (1989).

¹⁶³ *Haggard v. Bd. of Regents of the Univ. Sys.*, 257 Ga. 524, 526, 360 S.E.2d 566, 568 (1987); *Sacha v. Coffee Butler Serv., Inc.*, 215 Ga. App. 280, 282, 450 S.E.2d 704, 706 (1994); *Haywood v. Aerospec, Inc.*, 193 Ga. App. 479, 480, 388 S.E.2d 367, 369 (1989).

¹⁶⁴ *D’Zesati v. Poole*, 174 Ga. App. 142, 143, 329 S.E.2d 280, 281 (1985); *Mark Trail Campgrounds, Inc. v. Field Enters., Inc.*, 140 Ga. App. 608, 609, 231 S.E.2d 468, 467 (1976).

¹⁶⁵ *Cottrell v. Askew*, 276 Ga. App. 717, 719 n.1, 624 S.E.2d 203, 206 n.1 (2005).

4

COMMENCING THE APPEAL: NOTICE OF APPEAL, TRANSCRIPT, AND RECORD

*Daniel C. Norris**

§ 4.1 Notice of Appeal

§ 4.1.1 Time to File

An appeal begins with the filing of a notice of appeal. The proper and timely filing of such a notice is an absolute requirement for conferring jurisdiction on the appellate court.¹

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¹ *Cody v. State*, 277 Ga. 553, 553, 592 S.E.2d 419, 420 (2004); *Schroder v. Murphy*, 282 Ga. App. 701, 704, 639 S.E.2d 485, 488 (2006).

A notice of appeal must be filed with the clerk of the trial court² within 30 days after the trial court enters an appealable decision or judgment³ or within 10 days after the appellate court grants an interlocutory or discretionary appeal.⁴ In a dispossessory action, however, the notice of appeal must be filed within seven days after entry of judgment.⁵ The Georgia Code expressly defines “entry of judgment” to be the filing of a signed judgment with the clerk of court.⁶

Early notices are valid; late ones are not. When a notice of appeal is filed before judgment is formally entered, the notice lies dormant until judgment is entered and then becomes immediately effective.⁷ However, when a notice is filed after the generally applicable 10- or 30-day window has expired, the appeal will be dismissed.⁸

§ 4.1.2 Extensions of Time to File

§ 4.1.2.1 Automatic Extensions

When a party files either a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict, the time for filing a notice of appeal is extended to 30 days after the trial court grants, denies, or otherwise disposes of the motion.⁹ A post-judgment

² Under limited circumstances involving expedited direct appeals by a minor to the Supreme Court, parties must file a notice of appeal with the Supreme Court. GA. S. CT. R. 63.

³ O.C.G.A. §§ 5-6-37, 5-6-38(a); *see also Cody*, 277 Ga. at 553, 592 S.E.2d at 420; *Veasley v. State*, 272 Ga. 837, 839, 537 S.E.2d 42, 43-44 (2000) (holding that opposing counsel’s consent to late filing does not prevent dismissal).

⁴ O.C.G.A. §§ 5-6-34(b), 5-6-35(g). Section 5-6-34(b) requires a two-step process for filing an interlocutory appeal. Within 10 days of rendering an order, decision, or judgment that cannot be directly appealed, the trial court must certify that the issue to be appealed is worthy of immediate review. *Id.* Within 10 days of obtaining such a certificate, the appellant must petition the appropriate appellate court for permission to appeal. *Id.* For a more complete discussion of interlocutory and discretionary appeals, see Chapter 2 of this Handbook.

⁵ O.C.G.A. § 44-7-56.

⁶ O.C.G.A. § 5-6-31; *see also Bd. of Comm’rs v. Guthrie*, 273 Ga. 1, 2, 537 S.E.2d 329, 331 (2000) (“To constitute an ‘entry,’ the decision must be reduced to writing, signed by the judge, and filed with the clerk.”); *Miner v. Harrison*, 205 Ga. App. 523, 524-25, 422 S.E.2d 899, 901 (1992) (holding that when plaintiff elects to have judgment entered on only the first of two counts, the second count is not appealable).

⁷ *Randall v. Randall*, 274 Ga. 107, 108, 549 S.E.2d 384, 386 (2001); *Stone v. State*, 272 Ga. 351, 351 n.1, 529 S.E.2d 136, 137 n.1 (2000).

⁸ *Campbell v. McLarnon*, 265 Ga. App. 87, 90, 593 S.E.2d 21, 24 (2003); *In re H.L.W.*, 244 Ga. App. 498, 498, 535 S.E.2d 834, 835 (2000).

⁹ O.C.G.A. § 5-6-38(a).

motion triggers this extension, however, only when the motion is disposed of by court order. If a motion for new trial, for example, is voluntarily withdrawn, the would-be appellant gains no extension, unless the withdrawal is effected or approved by order of the court.¹⁰

Not all motions will trigger an extension. A motion for reconsideration, for example, does not extend the time for filing a notice of appeal.¹¹ Neither does a motion for new trial if it is untimely filed.¹² Likewise, when a motion for new trial is not the proper vehicle to seek review of a trial court's action, the motion is of no effect and will not extend the deadline for filing a notice of appeal.¹³ A motion to amend findings of fact under O.C.G.A. § 9-11-52(c) will not toll the time for filing a notice of appeal unless it is joined with a motion for new trial.¹⁴ Clerical changes to a trial court order will not extend the time for filing a notice of appeal, but a revised order that changes the parties' substantive rights will.¹⁵

§ 4.1.2.2 Extensions by Motion

When a party does not receive timely notice that an appealable order has been entered, and when the party thus is deprived of its opportunity to file a notice of appeal, the party may file a motion to set the order aside.¹⁶ Upon a finding that the party did not timely receive the order, the trial court should grant the motion to set aside, reenter its original order, and thus give the party its full allotment of time in which to appeal.¹⁷

As noted above, the time in which to file a notice of appeal may sometimes be extended automatically. The parties may also seek an extension, however, by motion. The trial court judge

¹⁰ *Simmons v. State*, 276 Ga. 525, 525 n.1, 579 S.E.2d 735, 736 n.1 (2003).

¹¹ *Majeed v. Randall*, 279 Ga. App. 679, 680, 632 S.E.2d 413, 415 (2006); *South v. Bank of Am.*, 250 Ga. App. 747, 750 n.16, 551 S.E.2d 55, 57 n.16 (2001).

¹² *Peters v. State*, 237 Ga. App. 625, 625, 516 S.E.2d 331, 331 (1999) (holding that untimely motion for new trial does not toll notice of appeal deadline).

¹³ *Turner v. Bynum*, 255 Ga. App. 173, 175, 564 S.E.2d 784, 786 (2002) (noting that a motion for new trial does not extend the deadline for filing a notice of appeal if the motion for new trial is an improper means by which to challenge the trial court's action).

¹⁴ *Am. Flat Glass Distribs. Inc. v. Michael*, 260 Ga. 312, 312, 392 S.E.2d 855, 855 (1990).

¹⁵ *Yancey v. Poe*, 254 Ga. App. 410, 411, 562 S.E.2d 798, 799 (2002) (holding that an amended order that reversed which party's cross-motion for summary judgment had been granted reset the 30-day clock for filing a notice of appeal prescribed by O.C.G.A. § 5-6-38).

¹⁶ *Veasley v. State*, 272 Ga. 837, 838, 537 S.E.2d 42, 43 (2000); *Woods v. Savannah Rest. Corp.*, 267 Ga. App. 387, 387-88, 599 S.E.2d 338, 339 (2004); *Sea Tow/Sea Spill of Savannah v. Phillips*, 247 Ga. App. 613, 614, 545 S.E.2d 34, 35 (2001).

¹⁷ *Veasley*, 272 Ga. at 838, 537 S.E.2d at 43; *Woods*, 267 Ga. App. at 387-88, 599 S.E.2d at 339; *Sea Tow*, 247 Ga. App. at 614, 545 S.E.2d at 35.

or any judge of the appellate court to which an appeal is taken may grant an extension for filing a notice of appeal or cross-appeal.¹⁸ Only one extension is authorized, and it must be obtained before the original deadline for filing the notice of appeal expires.¹⁹ The extension may not exceed the time initially allowed for filing the notice. Thus, a 10-day deadline may be extended for no more than an additional 10 days, and a 30-day deadline may be extended for no more than an additional 30 days.

When requesting an extension from the Court of Appeals, the movant must demonstrate a bona fide effort to obtain an extension in the trial court and explain why the extension could not be obtained.²⁰ A motion for an extension must be accompanied by an \$80 filing fee.²¹ The Court of Appeals will not grant an extension of time to file an interlocutory or discretionary application.²²

No such rules apply in the Supreme Court.²³ Motions filed in that court thus are subject to the general requirements of Supreme Court Rule 26.

§ 4.1.3 Contents

A notice of appeal must set forth the following:

- The title and docket number of the case;
- The name of the appellant and its attorney’s name and address;
- A concise statement of the judgment, ruling, or order entitling the appellant to take an appeal;
- The court appealed to;
- A designation of those portions of the record, if any, to be omitted on appeal;

¹⁸ O.C.G.A. § 5-6-39(a)(1), (2). Extensions are discretionary and may be granted without motion or notice to the other party. *Id.*

¹⁹ O.C.G.A. § 5-6-39(c), (d); *Grovnor v. Bd. of Regents*, 231 Ga. App. 120, 120-21, 497 S.E.2d 652, 653 (1998); *Cody v. State*, 277 Ga. 553, 554, 592 S.E.2d 419, 421 (2004) (holding that double extension was a nullity).

²⁰ GA. CT. APP. R. 16(a).

²¹ *Id.*

²² GA. CT. APP. R. 16(c).

²³ Georgia Supreme Court Rule 12 states that extensions for filing “petitions for certiorari, applications, and motions for reconsideration” will be granted only in “unusual circumstances.” This rule makes no specific mention, however, of extensions for filing a notice of appeal.

- A concise statement of why the appellate court appealed to has jurisdiction rather than another appellate court;²⁴
- In criminal cases, a brief statement of the offense and punishment;²⁵ and
- A statement of whether any transcript is to be prepared and sent as part of the record on appeal.²⁶

Designating the wrong appellate court or failing to include a jurisdictional statement is not fatal to the appeal and is not grounds for dismissal.²⁷

All parties of record to proceedings in the lower court are parties on appeal, and they must be served with the notice of appeal and all other pleadings in the manner prescribed in O.C.G.A. § 5-6-32.²⁸

§ 4.1.4 Cross-Appeal: Time to File and Contents

Cross-appeals in civil cases must be filed within 15 days from the date the notice of appeal is served²⁹ and must contain the following:

- The title and docket number of the case;
- The name of the appellee and the name and address of its attorney;
- A designation of any portions of the record or transcript that the appellant has directed the clerk to omit, but which the appellee desires to include; and
- A statement that the appellee takes a cross-appeal.³⁰

²⁴ Although not required, appellants are encouraged to cite the specific statutory or constitutional provision conferring jurisdiction.

²⁵ Failure to state the offense and punishment prescribed is not grounds for dismissal when notice is otherwise sufficient. *Brumby v. State*, 264 Ga. 215, 217-18, 443 S.E.2d 613, 615 (1994).

²⁶ O.C.G.A. § 5-6-37.

²⁷ *Id.*

²⁸ *Id.*

²⁹ O.C.G.A. § 5-6-38(a); *Mobley v. Coast House, Ltd.*, 182 Ga. App. 305, 309, 355 S.E.2d 686, 690 (1987) (holding appellant's amending notice of appeal does not toll 15-day deadline for filing notice of cross-appeal).

³⁰ O.C.G.A. § 5-6-38(a).

If the notice of appeal does not specify that the transcript should be sent up on appeal, the notice of cross-appeal must state whether the transcript should be included.³¹

The service requirements for a notice of cross-appeal are the same as those for the original notice of appeal.³²

§ 4.2 Transcript and Record

The “record on appeal” consists of two parts: the trial court record, and, if desired, a transcript of trial court proceedings.³³ It is the parties’ responsibility to see that the relevant portions of each are transmitted to the appellate court.

§ 4.2.1 Preparing the Transcript

In all civil cases that can be appealed to the Supreme Court or Court of Appeals, the trial judge may require that the proceedings be reported and that the parties share the cost of reporting equally.³⁴ If the parties are unable to pay reporting costs, the trial may go unreported, and if a transcript is later necessary, the moving party shall prepare the transcript from recollection of the parties.³⁵ A transcript can be prepared from the recollection of the parties only when the trial has not been reported or the transcript is unavailable for some other reason.³⁶

Whenever parties prepare a transcript from recollection, the agreed-upon transcript shall be included as part of the record in the same manner and with the same binding effect as any other

³¹ O.C.G.A. §§ 5-6-38(a), 5-6-42.

³² O.C.G.A. §§ 5-6-32, 5-6-38(a).

³³ *Crown Diamond Co. v. N.Y. Diamond Corp.*, 242 Ga. App. 674, 676, 530 S.E.2d 800, 803 (2000).

³⁴ O.C.G.A. § 5-6-41(c). A party has an absolute right in every case, including misdemeanors, to have the case reported at his own expense. O.C.G.A. § 5-6-41(j); *Dumas v. State*, 131 Ga. App. 79, 83, 205 S.E.2d 119, 122 (1974). A party cannot compel the court reporter to prepare a transcript, even if he offers to pay for it, if he has refused to participate in the takedown costs. *Ruffin v. Banks*, 249 Ga. App. 297, 298-99, 548 S.E.2d 61, 62-63 (2001). *But see Pryor v. State*, 271 Ga. App. 347, 348, 609 S.E.2d 694, 695 (2005) (holding that a criminal defendant’s failure to pay for takedown after being declared indigent is not a “refusal” to pay). However, once a transcript is prepared and filed with the court, it becomes part of the public record, and all members of the public, including a non-paying party, may have access to it. *Ruffin*, 249 Ga. App. at 298-99, 548 S.E.2d at 62-63.

³⁵ O.C.G.A. § 5-6-41(c). Whenever the transcript is prepared from recollection, it may be prepared in narrative form. O.C.G.A. § 5-6-41(d).

³⁶ *Womack v. State*, 223 Ga. App. 82, 82, 476 S.E.2d 767, 769 (1996); *Whitt v. State*, 215 Ga. App. 704, 708, 452 S.E.2d 125, 128 (1994); *Harrison v. Piedmont Hosp., Inc.*, 156 Ga. App. 150, 151, 274 S.E.2d 72, 74 (1980).

transcript.³⁷ If the parties are unable to agree as to whether a transcript prepared from recollection is correct, the trial judge may reconstruct the record herself.³⁸ If the trial judge is unable to recall what transpired, he/she shall enter an order stating that fact.³⁹ If neither an original transcript nor one from recollection is provided, the appellate court must presume the trial court acted correctly.⁴⁰

§ 4.2.2 Stipulation in Lieu of Transcript

In lieu of a transcript, the parties may agree to file a stipulation of the case, showing how the questions arose and how they were decided by the trial court, together with a sufficient statement of facts to allow the appellate court to review the questions presented on appeal.⁴¹ A stipulation must be approved by an appropriate judge from the trial court in which the proceedings were conducted.⁴² If the trial judge does not approve the stipulation of the case, the appellate court must affirm the judgment.⁴³

§ 4.2.3 Physical Evidence

When a party relies on physical evidence, the party may include a photograph or other recording of the evidence as part of the transcript in lieu of sending the original evidence.⁴⁴ If a party wishes to transmit the actual physical evidence to the Court of Appeals, the party first must file a motion with the court.⁴⁵ Before filing actual physical evidence with the Supreme Court, however, the party must seek permission from the trial court.⁴⁶ Upon showing that the trial court's permission could not be obtained, a party may seek permission directly from the Supreme Court.⁴⁷

³⁷ O.C.G.A. § 5-6-41(g).

³⁸ *Id.*; see also *Griggs v. Griggs*, 234 Ga. 451, 454, 216 S.E.2d 311, 315 (1975); *Goodwin v. State*, 251 Ga. App. 549, 550, 554 S.E.2d 317, 318 (2001) (holding that trial judge may reconstruct record from the submission of one or both parties or from judge's own recollection, and correctness of judge's reconstruction is not subject to review).

³⁹ O.C.G.A. § 5-6-41(g).

⁴⁰ *Sterling, Winchester & Long LLC v. Loyd*, 280 Ga. App. 416, 419, 634 S.E.2d 188, 190-91 (2006).

⁴¹ O.C.G.A. § 5-6-41(i); *McMillian v. Rogers*, 223 Ga. App. 699, 701, 479 S.E.2d 7, 10 (1996).

⁴² *McMillian*, 223 Ga. App. at 701, 479 S.E.2d at 10.

⁴³ *Elliott v. Ga. Baptist Convention*, 165 Ga. App. 800, 801, 302 S.E.2d 714, 715 (1983).

⁴⁴ GA. S. CT. R. 71; GA. CT. APP. R. 21.

⁴⁵ GA. CT. APP. R. 21.

⁴⁶ GA. S. CT. R. 71.

⁴⁷ *Id.*

§ 4.2.4 Transmitting the Transcript and Record to the Appellate Court

The notice of appeal must state which portions of the transcript, if any, should be included in the record.⁴⁸ When the appellant states that all or part of the transcript is to be included in the record on appeal, the appellant must ensure that the court reporter prepares and files the transcript with the trial court clerk within 30 days after the notice of appeal is filed.⁴⁹

In addition to ordering a transcript if one is desired, the appellant must designate which portions of the record are to be omitted on appeal.⁵⁰ If the appellant omits any matter from the record, the appellee may, within 15 days after the appellant serves the notice of appeal, file a “designation of record” stating that all or part of the omitted matters should be included in the record.⁵¹

The clerk of the trial court must transmit the transcript and record to the appellate court within five days after the court reporter files the transcript.⁵² However, if neither party requests the transcript, the clerk must prepare and transmit the record within 20 days after the notice of appeal is filed.⁵³ If the record is not prepared within the prescribed time, the clerk shall state by certificate the cause for the delay and include the certificate in the record.⁵⁴

Parties should note that there is a presumption in favor of the regularity of all proceedings in a court of competent jurisdiction. Without a transcript of the proceedings or some other legally acceptable record for review, the appellate court will be bound to assume that the trial court’s factual findings are supported by sufficient competent evidence. Without a transcript or its substitute, therefore, the decision of the trial judge on evidentiary matters is final and not subject to review.⁵⁵

⁴⁸ O.C.G.A. § 5-6-37; *McCormick v. State*, 277 Ga. App. 473, 473, 627 S.E.2d 106, 106 (2006).

⁴⁹ O.C.G.A. §§ 5-6-41(c), 5-6-42. For a discussion of how to extend this deadline, please see Section 4.2.7 of this Chapter.

⁵⁰ O.C.G.A. § 5-6-42.

⁵¹ *Id.*

⁵² O.C.G.A. § 5-6-43(a); *Holy Fellowship Church of God in Christ v. First Cmty. Bank of Henry Cnty.*, 242 Ga. App. 400, 402, 530 S.E.2d 24, 26 (2000) (holding it is the appellant’s obligation to ensure that the transcript is filed and that costs are paid to prepare the record; it is the trial clerk’s obligation to prepare and transmit the record); *see also Long v. City of Midway*, 251 Ga. 364, 364, 306 S.E.2d 639, 640 (1983).

⁵³ O.C.G.A. § 5-6-43(a).

⁵⁴ *Id.*

⁵⁵ *Price v. Price*, 281 Ga. 126, 127, 636 S.E.2d 546, 547 (2006); *Sterling, Winchester & Long LLC v. Loyd*, 280 Ga. App. 416, 419, 634 S.E.2d 188, 190 (2006).

§ 4.2.5 Record Appendix Procedure in the Supreme Court

In the event of a direct appeal to the Supreme Court, in lieu of having the trial court clerk prepare the record on appeal, the parties may submit to the clerk of the Supreme Court a record appendix.⁵⁶ It should be noted, however, that this procedure is only available in the Supreme Court because the Court of Appeals rescinded the procedure and it is no longer available in that court as of December 16, 2011.⁵⁷ Therefore, no record appendix will be accepted by the Court of Appeals in lieu of the trial court clerk preparing the record for an appeal in which a notice of appeal was filed after December 16, 2011.⁵⁸

Nevertheless, the record appendix procedure continues to be available in the Supreme Court,⁵⁹ and parties can make use of it when appealing to the Supreme Court. When doing so, the notice of appeal shall be designated for inclusion in the appellate record, but otherwise the appellant may direct the clerk of the trial court to omit everything else.⁶⁰ Instead, the parties can submit a record appendix, which shall consist of:

- The relevant portions of the pleadings, charge, findings, or opinion;
- The judgment, order, or decision in question; and
- Other parts of the record to which the parties wish to direct the court's attention.⁶¹

The transcript is not part of the record appendix, and it is handled in accordance with Georgia Supreme Court Rule 70.⁶²

In order to establish the contents of the record appendix, the appellant must serve on the appellee a designation of the parts of the record that the appellant intends to include in the record appendix at the time of serving the notice of appeal. The appellee then has 15 days after receiving

⁵⁶ GA. S. CT. R. 67(2).

⁵⁷ Important Notice – Termination of Record Appendix Rule in the Court of Appeals of Georgia (Nov. 21, 2011), http://www.gaappeals.us/termination_of_record.pdf.

⁵⁸ *Id.*

⁵⁹ Of course, the Supreme Court could also rescind the record appendix procedure in the future. Therefore, litigants should check the availability of the record appendix procedure before utilizing it in the Supreme Court.

⁶⁰ GA. S. CT. R. 67(2).

⁶¹ *Id.*

⁶² GA. S. CT. R. 67(3); GA. S. CT. R. 70.

the designation to serve on the appellant a designation of additional parts of the record to be included in the record appendix.⁶³

The record appendix must be transmitted to the Supreme Court within five days after the date of filing the transcript of evidence and proceedings by the appellant or appellee.⁶⁴ The parties should not designate unnecessary portions of the record to be included, and disputes about the correctness of the record appendix should be submitted to the trial court as provided in O.C.G.A. § 5-6-41(f).⁶⁵

The contents of the record appendix, with page numbers at the bottom and a manuscript cover, should be organized in the following order: (i) an index, including page references and dates of filing; (ii) a copy of the notice of appeal; (iii) the other items designated in chronological order; and (iv) a statement of correctness.⁶⁶

§ 4.2.6 Costs

When both parties designate portions of the record and transcript to be sent up on appeal, the cost of obtaining the transcript normally falls on the party who directs it to be transmitted to the appellate court.⁶⁷ However, if the appellee designates additional documents that are necessary to complete the record, then the trial court must tax the additional costs against the appellant.⁶⁸ The cost of preparing the record (and transcript, if required) must also be divided among the parties, either by agreement or by order of the trial court, in the event of a cross-appeal.⁶⁹

⁶³ GA. S. CT. R. 67(4).

⁶⁴ *Id.* “Where no transcript of evidence and proceedings is to be sent up, the record appendix shall be transmitted to this Court within 30 days after the date of filing of the notice of appeal.” *Id.*

⁶⁵ *Id.*

⁶⁶ GA. S. CT. R. 69(2).

⁶⁷ O.C.G.A. §§ 5-6-41(c), 5-6-42; *see also Stone Mountain Mem’l Ass’n v. Stone Mountain Scenic R.R., Inc.*, 232 Ga. 92, 94, 205 S.E.2d 293, 295 (1974) (“The Appellate Practice Act makes it clear that the cost of obtaining from the court reporter a transcript of the evidence falls on the party desiring that the same be transmitted to the appellate court.”); *Dye v. U.S. Bank Nat’l Ass’n*, 273 Ga. App. 652, 616 S.E.2d 476 (2005).

⁶⁸ *See Jones v. Spindel*, 239 Ga. 68, 70-71, 235 S.E.2d 486, 488 (1977) (“[I]f the trial court finds that the additional portions designated by the appellee are necessary to complete the record on appeal, the costs must be paid by the appellant; only if considered unnecessary on appeal, should the costs be taxed against the appellee.”); *Williamson v. Yang*, 250 Ga. App. 228, 235, 550 S.E.2d 456, 463 (2001) (same).

⁶⁹ O.C.G.A. § 5-6-38(b).

The cost of preparing the transcript cannot be recovered; it is not a cost that can be taxed against an appellee if the appellant wins the appeal.⁷⁰

§ 4.2.7 Delays in Preparing the Transcript or Record

Normally, delays in transmitting the transcript or record will not cause the appeal to be dismissed, as long as the delay is not the fault of either party. However, when a party, rather than the court reporter or clerk, is responsible for a significant delay, the appeal may be dismissed.

The trial court may dismiss an appeal, after notice and a hearing, if a transcript is untimely filed and if the delay is: (i) unreasonable; (ii) inexcusable; and (iii) caused by the party who requested that the transcript be filed.⁷¹ An “unreasonable” delay is one that prevents a case from being placed on the earliest possible calendar in the appellate court or that delays the docketing of the appeal.⁷² An “inexcusable” delay is one without just cause, such as when counsel forgets to order the transcript or confirm whether it has been timely filed.⁷³

Where a transcript has been timely ordered, but the court reporter is unable to prepare and file it in time, the party requesting the transcript may seek an extension from the trial court.⁷⁴ The court is required by statute to grant such extensions when necessary to allow a court reporter to complete the transcript.⁷⁵ A party’s failure to seek an extension may factor into the court’s analysis of whether a dismissal is warranted,⁷⁶ but such a failure, standing alone, will not itself cause an appeal to be dismissed.⁷⁷

⁷⁰ *Gwinnett Prop., N.V. v. G+H Montage GmbH*, 215 Ga. App. 889, 896, 453 S.E.2d 52, 59 (1994); *Flight Int’l, Inc. v. Dauer*, 180 Ga. App. 405, 406, 349 S.E.2d 271, 272 (1986).

⁷¹ O.C.G.A. § 5-6-48(c); *Coptic Constr. Co. v. Rolle*, 279 Ga. App. 454, 454-55, 631 S.E.2d 475, 476 (2006); *see also Baker v. S. Ry. Co.*, 260 Ga. 115, 116, 390 S.E.2d 576, 576-77 (1990).

⁷² *Crown Diamond Co. v. N.Y. Diamond Corp.*, 242 Ga. App. 674, 677, 530 S.E.2d 800, 803-04 (2000).

⁷³ *Id.* at 677-78, 530 S.E.2d at 803-04.

⁷⁴ O.C.G.A. § 5-6-39(a)(3).

⁷⁵ O.C.G.A. § 5-6-42.

⁷⁶ *See, e.g., Crown Diamond*, 242 Ga. App. at 678, 530 S.E.2d at 804 (noting that appellant’s failure to seek extension was one but not only factor court took into account).

⁷⁷ *Baker v. S. Ry. Co.*, 260 Ga. 115, 116, 390 S.E.2d 576, 577 (1990) (“The failure to apply for an extension does not automatically convert the delay into one which fits all of the conditions necessary to vest the trial court with the discretion to dismiss the appeal. The court must find all these conditions [*i.e.*, unreasonable, inexcusable delay caused by party] before an exercise of discretion is authorized.”).

An appellant is responsible only for the preparing and filing of the transcript. It is the trial court clerk’s responsibility to prepare the record in accordance with the parties’ request.⁷⁸ Once an appellant has filed a notice of appeal, his only duty regarding the trial court record is to pay costs.⁷⁹ Nevertheless, the trial court may dismiss an appeal if the appellant has caused delay in transmitting the record, such as by failing to pay costs within 20 days of receiving notice of their amount by registered or certified mail.⁸⁰

Only the trial court can dismiss an appeal for failure to timely file the transcript; appellate courts cannot.⁸¹ To obtain a dismissal, the opposing party must file a motion with the trial court.⁸² Dismissing an appeal will not affect the validity of a properly filed cross-appeal.⁸³

§ 4.2.8 Amending and Supplementing the Record

At any point during an appeal, a party may ask to supplement the record. The jurisdiction and procedure for such a request differs, however, depending on when it is made.

If a party wishes to supplement the record at any time before an appeal is concluded, the request is governed by O.C.G.A. § 5-6-41(f) and must be made to the trial court.⁸⁴ If anything material is omitted from or misstated in the record on appeal, the trial court, acting either sua sponte or in response to a party’s motion, may have the record corrected and, if necessary, may direct that a

⁷⁸ *Long v. City of Midway*, 251 Ga. 364, 364, 306 S.E.2d 639, 640 (1983); *Holy Fellowship Church of God in Christ v. First Cmty. Bank of Henry Cnty.*, 242 Ga. App. 400, 402, 530 S.E.2d 24, 26 (2000); *Crown Diamond*, 242 Ga. App. at 676, 530 S.E.2d at 803.

⁷⁹ *Long*, 251 Ga. at 364, 306 S.E.2d at 640; *Holy Fellowship*, 242 Ga. App. at 402, 530 S.E.2d at 26.

⁸⁰ O.C.G.A. § 5-6-48(c); *Cottrell v. Askew*, 276 Ga. App. 717, 718, 624 S.E.2d 203, 205 (2005) (affirming dismissal where appellant failed to pay costs for nearly two years); *Strickland v. State*, 257 Ga. App. 304, 305, 570 S.E.2d 713, 714 (2002) (affirming dismissal where appellant failed to pay costs for three months); *Cody v. Coldwell Banker Real Estate Corp.*, 253 Ga. App. 752, 753-54, 560 S.E.2d 275, 277 (2002) (affirming dismissal where appellant waited 40 days after indigence claim was rejected and two days after motion to dismiss was filed before paying costs).

⁸¹ O.C.G.A. § 5-6-48(c); *Campbell v. Crumpton*, 173 Ga. App. 488, 489, 326 S.E.2d 845, 845-46 (1985).

⁸² *Campbell*, 173 Ga. App. at 489, 326 S.E.2d at 846; *see also* GA. S. CT. R. 74 (“Appellee shall be deemed to have waived any failure of the appellant to comply with the provisions of the Appellate Practice Act relating to the filing of the transcript of the evidence and proceedings or transmittal of the record to this Court unless objection thereto was made and ruled upon in the trial court prior to transmittal, and such order is appealed as provided by law.”); GA. CT. APP. R. 20 (same).

⁸³ O.C.G.A. § 5-6-48(e).

⁸⁴ O.C.G.A. § 5-6-41(f); *Nobles v. Prevost*, 221 Ga. App. 594, 595, 472 S.E.2d 134, 135 (1996) (holding that motion to supplement record must be heard in trial court, even after appeal was docketed in Court of Appeals).

supplemental record be certified and transmitted to the appellate court.⁸⁵ If the trial court refuses to allow an amendment or other pleading to be included in the record, the amendment or pleading may nevertheless be filed, with notation of disallowance thereon, and shall become part of the record for purposes of appeal.⁸⁶

Once an appeal is decided, any motion to amend the record (for example, to support a motion for reconsideration or petition for certiorari) is governed by O.C.G.A. § 5-6-48(d) and must be filed with the appellate court.⁸⁷

⁸⁵ O.C.G.A. § 5-6-41(f).

⁸⁶ O.C.G.A. § 5-6-41(h).

⁸⁷ O.C.G.A. § 5-6-48(d); *State v. Pike*, 253 Ga. 304, 307, 320 S.E.2d 355, 358 (1984) (holding that “[o]nce the appellate court renders its decision, O.C.G.A. § 5-6-48 . . . becomes the exclusive method for supplementing the record”); *Hirsch v. Joint City Cnty. Bd. of Tax Assessors*, 218 Ga. App. 881, 883, 463 S.E.2d 703, 706 (1995).

5

STAYS OF PROCEEDINGS TO ENFORCE A JUDGMENT

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§ 5.1 Introduction

In many cases, parties receiving unfavorable results in the trial court desire to stay enforcement of the judgment pending the resolution of an appeal or post-trial motion. A stay typically can be obtained with relative ease.¹ Counsel should, however, proceed with caution. There are numerous factors that can complicate the process and negatively affect a party's position. These factors include the special procedures that apply to certain types of proceedings, such as

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¹ At common law, a party seeking to stay proceedings would seek a writ of supersedeas. A supersedeas writ would contain a command to the lower court to stay the proceedings. Although a writ is no longer required, the staying power of supersedeas remains intact.

divorce and custody cases. Failure to follow the appropriate procedure can result in the execution and enforcement of the judgment, rendering moot any requested post-trial relief.

Under current Georgia law, there are four basic types of stays of proceedings to enforce a judgment: (i) a limited automatic stay; (ii) a mandatory stay; (iii) a special mandatory stay; and (iv) a discretionary stay. The automatic stay applies for 10 days immediately following most final judgments. A mandatory stay commences upon the filing of post-trial motions or a notice of appeal in civil cases. A special mandatory stay may apply to certain types of judgments, including divorce, child custody, and alimony judgments, as well as interlocutory judgments and injunctions. Finally, courts may grant discretionary stays when appropriate circumstances warrant.

In addition to the four types of stays listed above, this chapter discusses additional considerations when determining whether to seek a stay of proceedings to enforce a judgment. These additional considerations include the jurisdictional consequences of supersedeas and certain bond requirements.

§ 5.2 Limited Automatic Stay

After the entry of a judgment, the 10-day automatic stay prevents the prevailing party from immediately executing and enforcing the judgment.² The purpose of the 10-day stay is to provide the losing party with an opportunity to evaluate its options and determine how to proceed.³ Because the 10-day stay protects the losing party, it can be waived by stipulation so long as the parties' agreement is in writing and filed with the clerk of the court.⁴ In the case of a default judgment,

² O.C.G.A. § 9-11-62(a). A “judgment” for purposes of O.C.G.A. § 9-11-62(a) “includes a decree and any order from which an appeal lies.” O.C.G.A. § 9-11-54(a). Judgments that are directly appealable to the Supreme Court or the Court of Appeals are identified in O.C.G.A. § 5-6-34(a). Judgments that are appealable at the discretion of the appellate court are the subject of O.C.G.A. § 5-6-35. In addition, in cases involving judgments not otherwise subject to direct appeal, the trial court may certify to the Supreme Court or Court of Appeals that the judgment is of such importance to the case that immediate review should be had. O.C.G.A. § 5-6-34(b); *see also infra* Section 5.4.1.

The court may direct the entry of a final judgment as to fewer than all the claims or parties; however, the court may do so only upon an express determination that there is no just reason for delay. O.C.G.A. § 9-11-54(b). When the court so designates, it “may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.” O.C.G.A. § 9-11-62(f).

It is important to note that if a grant of partial summary judgment is not made final pursuant to O.C.G.A. § 9-11-54(b), the party against whom summary judgment was granted has the option either to appeal or not appeal at the time the partial summary judgment is rendered. *Roth v. Gulf Atl. Media of Ga., Inc.*, 244 Ga. App. 677, 679, 536 S.E.2d 577, 580 (2000). If the party chooses to appeal, then the appellate decision on the summary judgment ruling is binding under O.C.G.A. § 9-11-60(h). *Id.*

³ *Landau v. Davis Law Grp., P.C.*, 269 Ga. App. 904, 908, 605 S.E.2d 461, 465 (2005).

⁴ O.C.G.A. § 9-11-62(a).

execution and enforcement proceedings can begin immediately.⁵ Also, when an interlocutory or final judgment is entered in an injunction or receivership action, immediate execution is available unless the court orders otherwise.⁶

§ 5.3 Mandatory Stay

As mentioned above, a party can stay the enforcement of a judgment by filing: (i) post-trial motions; or (ii) a notice of appeal. While a stay is mandatory upon filing of the appropriate papers, certain actions by the court or opposing party can limit the effect of the stay.

§ 5.3.1 Stay Pending the Resolution of Post-Trial Motions

“The filing of a motion for a new trial or motion for judgment notwithstanding the verdict *shall* act as supersedeas” of the judgment and thus prevent the initiation of execution and enforcement proceedings, unless the court orders otherwise.⁷ A party has 30 days after entry of judgment to make such motions.⁸

Stays obtained by filing these post-trial motions may be conditioned on posting bond “in such amounts as the court may order.”⁹ The requesting and posting of bond is addressed more fully *infra* Section 5.7. Additionally, the court has discretion to deny supersedeas even when a proper post-trial motion has been filed.¹⁰

Stays obtained by filing a motion for a new trial or JNOV are not indefinite. Such stays expire upon a final ruling on the motion. If, after disposition of these motions, a party desires an appeal, the party must file a notice of appeal within 30 days.¹¹

⁵ *Id.*

⁶ *Id.*

⁷ O.C.G.A. § 9-11-62(b) (emphasis added).

⁸ O.C.G.A. § 9-11-50(b). For discussion of the relationship between this deadline and the automatic 10-day stay, see *infra* Section 5.3.2.1.

⁹ O.C.G.A. § 9-11-62(b).

¹⁰ *Id.*; see also *Frazier v. Frazier*, 280 Ga. 687, 691, 631 S.E.2d 666, 669 (2006).

¹¹ O.C.G.A. § 5-6-38.

§ 5.3.2 Stay Upon Filing Notice of Appeal in Civil Cases

A properly filed notice of appeal “shall serve as supersedeas upon payment of all costs in the trial court by the appellant and it shall not be necessary that a supersedeas bond or other form of security be filed.”¹² This is by far the most common means to stay a judgment pending appeal.

The requirements for an effective notice of appeal are discussed more fully *supra* Chapter 4. Absent an extension, the notice must be filed within 30 days after entry of judgment or within 30 days after the entry of the order finally disposing of the post-trial motions.¹³

§ 5.3.2.1 Timing of Notice of Appeal

Unless the court has provided otherwise, the appellant can lose the benefit of a stay: (i) during the 20 days after the automatic 10-day stay outlined in O.C.G.A. § 9-11-62(a) expires and before a notice of appeal or post-trial motion is required to be filed; or (ii) during the 30 days after final disposition of post-trial motions and before a notice of appeal is required to be filed. The appellant must thoughtfully consider when to file a notice of appeal because the appellee may otherwise take steps to enforce the judgment, such as by executing on the judgment immediately following the end of the 10-day automatic stay or the final disposition of the post-trial motions. To avoid the possibility of such enforcement actions, the appellant should file its notice of appeal or post-trial motions prior to the end of the 10-day automatic stay. If the appellant files post-trial motions, then the appellant should file its notice of appeal immediately following the final disposition of those motions.

The case of *Bank South, N.A. v. Roswell Jeep Eagle, Inc.*¹⁴ illustrates some of the problems that can occur once a party loses the protection of the 10-day automatic stay. In *Bank South*, a judgment was entered after a jury verdict for the plaintiff, Roswell Jeep Eagle, Inc., in the amount of \$187,681.47.¹⁵ On the 13th day following entry of the judgment, Roswell Jeep began obtaining and filing writs of execution in several counties where the defendant, Bank South, N.A., possessed millions of dollars of real estate.¹⁶ The Court of Appeals held that “O.C.G.A. § 9-11-62(a), by negative implication, clearly allows an execution to issue upon a judgment after the 10-day period has run, if a notice of appeal or post-trial motion acting as a supersedeas has not been filed.”¹⁷ Thus, Roswell Jeep’s actions were authorized by statute.

¹² O.C.G.A. § 5-6-46(a) (emphasis added). However, upon the timely filing of a motion by the appellee, the court “shall require” that a supersedeas bond be given. *Id.*; see *infra* Section 5.7.1.

¹³ O.C.G.A. § 5-6-38(a).

¹⁴ 200 Ga. App. 489, 408 S.E.2d 503 (1991).

¹⁵ *Id.* at 489, 408 S.E.2d at 504.

¹⁶ *Id.* at 489, 491, 408 S.E.2d at 504.

¹⁷ *Id.* at 490-91, 408 S.E.2d at 505.

Bank South moved the trial court for approval of a cash bond and for an order expunging the writs of execution. The Court of Appeals approved the bond,¹⁸ but refused to expunge the writs:

[T]here is a longstanding line of Georgia Supreme Court decisions holding that the only effect of a supersedeas is to stay further action in the case, and a court is without authority to order that the supersedeas operate retroactively so as to undo what has previously been done in execution of the judgment appealed. Consequently, the trial court did not err in denying that portion of the bank's motion which sought affirmative voidance and "removal" of the entry of the judgment on the general execution docket.¹⁹

This holding was of little help to Bank South, which suddenly had millions of dollars in real estate tied up by a judgment worth less than \$200,000.

Ultimately, the Court of Appeals relieved Bank South by finding that the bond mooted the writs:

[Bank South's] cash bond would have the legal effect of standing in lieu of the lien which otherwise attaches and remains by way of the recorded writs although their enforcement is stayed by the supersedeas effected by the filing of the notice of appeal.²⁰

While the mooted of the writs enabled Bank South to obtain clean title on the properties, Bank South still had to resolve any problems which had already been caused by the liens. The lesson from *Bank South* is that an appellant can avoid the risks associated with an aggressive opponent's efforts to execute on a judgment by filing a notice of appeal or post-trial motion before the 10-day automatic stay expires.

For the same reasons, one should file a notice of appeal immediately upon final disposition of post-trial motions.

§ 5.3.2.2 Payment of Costs

The mere filing of a notice of appeal does not trigger a stay. A properly filed notice of appeal serves as a supersedeas only "upon payment of all costs in the trial court by the appellant."²¹

¹⁸ *Id.* at 489-90, 408 S.E.2d at 504.

¹⁹ *Id.* at 491-92, 408 S.E.2d at 506 (internal citations omitted).

²⁰ *Id.* at 492, 408 S.E.2d at 506.

²¹ O.C.G.A. § 5-6-46(a); *see also Lott v. Arrington & Hollowell*, 258 Ga. App. 51, 54-55, 572 S.E.2d 664, 667 (2002); *Chappelaer v. Gen. G.M.C. Trucks, Inc.*, 130 Ga. App. 664, 665, 204 S.E.2d 326, 327-28 (1974).

Once the notice of appeal is filed *and* costs are paid, then “the supersedeas comes into effect and the trial court loses jurisdiction over a given case while the appeal of that case is pending.”²²

When a notice of appeal has been filed but costs have not been paid, the lower court retains jurisdiction to administer the case. For example, absent payment of costs, a trial court retains jurisdiction to consider a motion to enforce a settlement agreement,²³ a motion to set aside a dismissal,²⁴ a motion for additur,²⁵ or a motion for a new trial.²⁶ Not only can the court proceed when costs are unpaid, but it can also dismiss the appeal if a party unreasonably delays in the payment of costs.²⁷

The costs that must be paid are accrued “trial costs,” which do not include those costs associated with preparing the record for appeal.²⁸ A detailed discussion of “trial costs” is beyond the scope of this chapter. Taxable costs are dealt with generally at O.C.G.A. §§ 9-15-1 to -14.

A party that is financially unable to pay costs can still obtain a stay under O.C.G.A. § 5-6-47 by filing an affidavit of indigence and a notice of appeal. An affidavit of indigence is often referred to as a “pauper’s affidavit,” and is discussed in more detail in Chapter 3 of this Handbook.

§ 5.4 Special Mandatory Stays

§ 5.4.1 Interlocutory Judgments

The filing of a notice of appeal of an interlocutory judgment acts as a supersedeas only if the appellant follows the provisions of O.C.G.A. § 5-6-34(b). Specifically, the appellant must: (i) first ask the lower court to certify an issue for immediate review and receive such certification; (ii) make application to the appellate court for review and have that application granted; and (iii) then file a notice of appeal, which acts as a supersedeas pursuant to O.C.G.A. § 5-6-46.

²² *A.R.A. Health Servs. v. Stitt*, 250 Ga. App. 420, 423, 551 S.E.2d 793, 796 (2001); *Duncan v. Ball*, 172 Ga. App. 750, 751, 324 S.E.2d 477, 479 (1984).

²³ *Penny Profit Foods, Inc. v. McMullen*, 214 Ga. App. 740, 741, 448 S.E.2d 787, 789 (1994).

²⁴ *Lunsford v. DeKalb Med. Ctr., Inc.*, 263 Ga. App. 394, 395, 587 S.E.2d 859, 860 (2003).

²⁵ *A.R.A. Health Servs.*, 250 Ga. App. at 423, 551 S.E.2d at 796.

²⁶ *Rockdale Awning & Iron Co. v. Kerbow*, 210 Ga. App. 119, 120-21, 435 S.E.2d 619, 621 (1993); *Chappelaer*, 130 Ga. App. at 665, 204 S.E.2d at 327-28.

²⁷ O.C.G.A. § 5-6-48(c).

²⁸ *J.M. Clayton Co. v. Martin*, 177 Ga. App. 228, 229, 339 S.E.2d 280, 281 (1985).

If the appellant does not follow the interlocutory review procedures of O.C.G.A. § 5-6-34(b), the appellate court does not acquire jurisdiction to hear the appeal, leaving the lower court free to take all action with respect to the judgment that it deems appropriate.²⁹

§ 5.4.2 Divorce, Child Custody, and Alimony Judgments

Divorce, child custody, and alimony decisions are not final judgments appealable as of right pursuant to O.C.G.A. § 5-6-34(a). Such decisions are appealable only after application has been made to and approved by the appellate court pursuant to O.C.G.A. § 5-6-35. A party seeking to appeal a decision respecting “divorce, alimony, child custody, and other domestic relations cases” must file an application for appeal within 30 days of the entry of the order, decision, or judgment.³⁰ The filing of an application in those cases, and in all cases subject to O.C.G.A. § 5-6-35(a), “act[s] as a supersedeas to the extent that a notice of appeal acts as supersedeas.”³¹

In divorce cases, courts typically enter “temporary orders” regarding alimony, child support, and child custody.³² Temporary orders “remain[] in the breast of the trial court and may be revised in the discretion of the trial court at any time prior to final determination of the case.”³³ Such orders are binding on the parties pending appellate review of the final judgment and can be enforced by the parties through contempt proceedings.³⁴

The absence of a temporary order transforms the 10-day automatic stay into a permanent stay pending resolution of the application for appeal and, if the appeal is accepted, consideration of the merits by the appellate court. Absent a temporary order, the trial court may be unable to address a party’s grievance pending appellate review. For example, in *Walker*, the Supreme Court reversed the trial court’s finding of willful contempt against an appellant who refused to relinquish custody

²⁹ *Cherry v. Coast House, Ltd.*, 257 Ga. 403, 404, 359 S.E.2d 904, 906 (1987).

³⁰ O.C.G.A. § 5-6-35(a)(2), (b), (d).

³¹ O.C.G.A. § 5-6-35(h). Appeals requiring applications pursuant to O.C.G.A. § 5-6-35 are discussed more fully in Chapter 2.

³² *Walker v. Walker*, 239 Ga. 175, 176, 236 S.E.2d 263, 263 (1977).

³³ *Shepherd v. Shepherd*, 233 Ga. 228, 232, 210 S.E.2d 731, 734 (1974); see also *Pierce v. Pierce*, 241 Ga. 96, 102, 243 S.E.2d 46, 51 (1978). A subsequent Supreme Court decision states that the filing of a notice of appeal “reinvests the trial court with jurisdiction” over such temporary orders. *Staten v. Staten*, 242 Ga. 399, 400, 249 S.E.2d 81, 82 (1978). The concept of reinvestment appears to presume that jurisdiction over the temporary orders was lost at some point. However, the case cited by the court in *Staten* for this proposition does not support this presumption. Under *Twilley v. Twilley*, 195 Ga. 297, 299, 24 S.E.2d 46, 47 (1943), the court emphasized that as long as the divorce case was still pending in the appellate court, the trial judge was vested with the discretion to “continue in force, or modify, his previous order pertaining to temporary alimony and attorney’s fees.”

³⁴ *Walker*, 239 Ga. at 176, 236 S.E.2d at 264.

of a minor child following entry of a judgment awarding custody to the appellee.³⁵ The court held that because no temporary order (or similar provision in the final judgment) respecting custody was in place, the appellant’s filing of a notice of appeal divested the trial court of jurisdiction to enter its subsequent order of contempt.³⁶

§ 5.4.3 Injunctions

As mentioned above, judgments regarding injunctions are not subject to the 10-day automatic stay. Similarly, the mere filing of a notice of appeal from a judgment regarding an injunction will not stay the judgment from becoming effective during the appeal.³⁷ Trial courts do, however, have the discretion to “suspend, modify, restore, or grant an injunction during the pendency of [an] appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.”³⁸

A party who is aggrieved by a judgment regarding an injunction and desires temporary relief while appealing the judgment must first petition the trial court for relief. The burden of obtaining such an order rests squarely on the appellant.³⁹ If the trial court denies the relief requested, the aggrieved party may then petition the Supreme Court for the relief needed during the pendency of the appeal.⁴⁰

Of course, the party which sought the injunction must be mindful of the risk that the appeal may become moot if the disputed act occurs. It is well established that “if the thing sought to be enjoined in fact takes place, the grant or denial of the injunction becomes moot.”⁴¹ A case is moot, and thus subject to dismissal,⁴² “when the resolution would amount to the determination of an

³⁵ *Id.* at 175, 236 S.E.2d at 263.

³⁶ *Id.* at 175-76, 236 S.E.2d at 263-64. The mere filing of a notice of appeal in *Walker* was sufficient to create a stay because the court’s decision was entered prior to enactment of legislation requiring an application for appeal to be made in divorce cases. *See* O.C.G.A. § 5-6-35.

³⁷ O.C.G.A. § 9-11-62(a); *Knapp v. Cross*, 279 Ga. App. 632, 634, 632 S.E.2d 157, 159 (2006); *Howard v. Smith*, 226 Ga. 850, 850, 178 S.E.2d 159, 159 (1970).

³⁸ O.C.G.A. § 9-11-62(c); *Etheredge v. All Am. Hummer Limousines, Inc.*, 269 Ga. 436, 437 n.1, 498 S.E.2d 60, 61 n.1 (1998).

³⁹ O.C.G.A. § 9-11-62(c); *Jackson v. Bibb Cnty. Sch. Dist.*, 271 Ga. 18, 19, 515 S.E.2d 151, 152-53 (1999).

⁴⁰ O.C.G.A. § 9-11-62(e); *Citizens to Save Paulding Cnty. v. City of Atlanta*, 236 Ga. 125, 125, 223 S.E.2d 101, 101 (1976). *But see Va. Highland Civic Ass’n v. Pace Props., Inc.*, 272 Ga. 723, 723, 535 S.E.2d 230, 230 (2000) (issuing stay “through the pendency of the appeal” despite fact that appellant did not first petition the trial court pursuant to O.C.G.A. § 9-11-62(c)).

⁴¹ *Brown v. Spann*, 271 Ga. 495, 496, 520 S.E.2d 909, 910 (1999); *see also Fincher v. Fleet Mortg. Grp., Inc.*, 251 Ga. App. 757, 758, 555 S.E.2d 120, 121 (2001); *Jackson*, 271 Ga. at 19, 515 S.E.2d at 152-53.

⁴² O.C.G.A. § 5-6-48(b)(3).

abstract question not arising upon existing facts or rights.”⁴³ To prevent an appeal from becoming moot, the appellant must, in addition to filing the appeal, obtain a supersedeas.⁴⁴

The same analysis applies to mandatory injunctions, which seek to compel a particular act. If a mandatory injunction is granted and the party whose performance has been ordered does the thing ordered, its appeal becomes moot.⁴⁵ Thus, in the case of a mandatory injunction, the party subject to the injunction must seek a suspension or modification of the order or, alternatively, defy the order so as to preserve appellate review of the order.

§ 5.4.4 Contempt Cases

Except for actions punishable by contempt that occur “in the presence of the court during the progress of a proceeding,” contemnors are entitled, as a matter of right, to a supersedeas pending appeal.⁴⁶ Section 5-6-13(a) sets forth the procedures that must be followed to enforce a contemnor’s rights:

A judge . . . shall grant . . . a supersedeas upon application and compliance with the provisions of law as to appeal and certiorari, where the person also submits, within the time prescribed by law, written notice that he intends to seek review of the conviction or adjudication of contempt. It shall not be in the discretion of any trial court judge to grant or refuse a supersedeas in cases of contempt.⁴⁷

Once a written notice of intent to appeal a contempt judgment is presented to the court, enforcement of the contempt judgment must halt and the contemnor’s request for a supersedeas must be granted.⁴⁸

⁴³ *City of Comer v. Seymour*, 283 Ga. 536, 537, 661 S.E.2d 539, 540-41 (2008); *Speedwell United Methodist Church v. Chatham Cnty.*, 278 Ga. 234, 235, 599 S.E.2d 185, 185 (2004) (per curiam); *Brown*, 271 Ga. at 496, 520 S.E.2d at 910.

⁴⁴ *See, e.g., Jackson*, 271 Ga. at 19, 515 S.E.2d at 153.

⁴⁵ *Bd. of Comm’rs v. Cooper*, 259 Ga. 785, 387 S.E.2d 138, 139 (1990); *see also Grindle v. Chastain*, 229 Ga. App. 386, 388, 493 S.E.2d 714, 717 (1997) (“To prevent the appeal of a mandatory injunction from becoming moot, ‘it is necessary for the appealing party to obtain a supersedeas. If a supersedeas is not obtained, then the ordered action takes place as ordered, and the appeal becomes moot.’” (citation omitted)).

⁴⁶ O.C.G.A. § 5-6-13(a)-(b).

⁴⁷ O.C.G.A. § 5-6-13(a) (emphasis added); *see also Blake v. Spears*, 254 Ga. App. 21, 25, 561 S.E.2d 173, 177 (2002).

⁴⁸ *See Brinkley v. Flatt*, 256 Ga. App. 263, 265, 568 S.E.2d 95, 98 (2002) (“Under O.C.G.A. § 5-6-13, a trial court has no discretion to grant or refuse a supersedeas in cases of contempt where the defendant has submitted an application and written notice indicating her intention to seek an appeal.”); *Calvert Enters., Inc. v. Griffin-Spalding Cnty. Hosp. Auth.*, 197 Ga. App. 727, 728-29, 399 S.E.2d 287, 288 (1990).

§ 5.5 Discretionary Stays

In addition to the automatic and mandatory stays discussed above, both the trial and appellate courts have discretion to grant supersedeas in appropriate circumstances.

Trial judges have the authority “[t]o grant for their respective circuits writs of . . . supersedeas.”⁴⁹ While a grant of supersedeas usually occurs after a party has followed the procedures outlined in O.C.G.A. § 5-6-46, that section does not deprive the trial or appellate courts of their inherent powers to grant a supersedeas. For example, “where the prevailing party is insolvent and irreparable injury is about to flow from enforcement of the judgment,” trial courts can exercise their discretion and grant a supersedeas notwithstanding a party’s failure to follow the proper procedures.⁵⁰

Consistent with this principle, both the Court of Appeals and the Supreme Court have rules that enable them to grant a supersedeas in appropriate circumstances. The Court of Appeals Rules provide as follows:

In the exercise of its inherent power this Court may issue such orders or give such direction to the trial court as may be necessary to preserve jurisdiction of an appeal or to prevent the contested issue from becoming moot. This power will be exercised sparingly. Generally, no order will be made or direction given in an appeal until it has been docketed in this Court.⁵¹

The Rules of the Supreme Court provide as follows:

The Court may issue supersedeas or other orders whenever deemed necessary. Service of motions for supersedeas shall be made on the opposing party or attorney before filing and so certified. A copy of the order being appealed and a copy of the Notice of Appeal must be included with the motion.⁵²

§ 5.6 Jurisdictional Consequences of Supersedeas

If the appellant does not take the steps necessary to obtain a supersedeas, then the trial court retains jurisdiction over the action. For example, if the appellant appeals an interlocutory order

⁴⁹ O.C.G.A. §§ 15-6-9(1) & 15-7-4(a)(6).

⁵⁰ *Biggers v. Hope*, 176 Ga. 141, 141, 167 S.E. 177, 177 (1932); *see also Scott v. Thompson*, 202 Ga. App. 746, 748, 415 S.E.2d 508, 510 (1992) (declining to find abuse of discretion in entering supersedeas where irreparable harm might have resulted in the absence of the trial court’s order).

⁵¹ GA. CT. APP. R. 40(b).

⁵² GA. S. CT. R. 9.

and does not follow proper procedures, then “the appellate court does not acquire jurisdiction,” no supersedeas is obtained, and the trial court may proceed with all aspects of the case.⁵³

Even when all steps have been taken to obtain a supersedeas, a party may still be subject to the trial court’s jurisdiction pending resolution of the appeal. The trial court’s jurisdiction during a pending appeal depends on the order or judgment to which the supersedeas applies. When the appellant obtains the supersedeas, “the trial court loses all jurisdiction *as to matters contained within the appeal*.”⁵⁴ The supersedeas “does not deprive the trial court of jurisdiction as to other matters in the same case *not affecting the judgment on appeal*.”⁵⁵

Actions that directly affect “the judgment on appeal” include: (i) proceedings to enforce the judgment;⁵⁶ (ii) efforts to modify, alter, or amend the judgment;⁵⁷ (iii) efforts to correct mistakes in judgments pursuant to O.C.G.A. § 9-11-60(g);⁵⁸ and (iv) even the issuance by a court of an amended order.⁵⁹ The supersedeas voids all such actions, even if the parties have consented to them.⁶⁰ Any action taken regarding the judgment while the trial court lacks jurisdiction is a nullity and will be reversed.⁶¹

Actions that do not directly affect the judgment on appeal often arise in the context of appeals from orders or judgments that fail to dispose of the entire case. For example, discovery, and even trial on the merits, may take place during the pendency of an appeal from an interlocutory order denying a motion to dismiss for failure to state a claim.⁶² Discovery may also take place “as to matters pending in the trial courts notwithstanding the grant and appeal of summary judgments

⁵³ *Cherry v. Coast House Ltd.*, 257 Ga. 403, 404, 359 S.E.2d 904, 906 (1987); *see also Amado v. City of Atlanta*, 228 Ga. App. 791, 791, 492 S.E.2d 761, 761 (1997).

⁵⁴ *Cherry*, 257 Ga. at 404, 359 S.E.2d at 906 (emphasis added).

⁵⁵ *Cohran v. Carlin*, 249 Ga. 510, 512, 291 S.E.2d 538, 540 (1982) (emphasis added); *see also Avren v. Garten*, 289 Ga. 186, 190, 710 S.E.2d 130, 137 (2011).

⁵⁶ *Williams v. Natalie Townhouses of Inman Park Condo. Ass’n*, 182 Ga. App. 815, 816-17, 357 S.E.2d 156, 157-58 (2009); *Walker v. Walker*, 239 Ga. 175, 175, 236 S.E.2d 263, 264 (1977).

⁵⁷ *Guthrie v. Wickes*, 295 Ga. App. 892, 894, 673 S.E.2d 523, 525-26 (2009); *Park v. Minton*, 229 Ga. 765, 769-70, 194 S.E.2d 465, 468 (1972).

⁵⁸ *Metro. Atlanta Rapid Transit Auth. v. Doe*, 292 Ga. App. 532, 539, 664 S.E.2d 893, 899 (2008); *Upton v. Jones*, 280 Ga. 895, 896, 635 S.E.2d 112, 112 (2006); *Brown v. Wilson Chevrolet-Olds, Inc.*, 150 Ga. App. 525, 531, 258 S.E.2d 139, 143 (1979).

⁵⁹ *Bryan v. Brown Childs Realty Co.*, 236 Ga. App. 739, 741, 513 S.E.2d 271, 273 (1999).

⁶⁰ *Philips Broad. Equip. Corp. v. Prod. 70’s, Inc.*, 133 Ga. App. 765, 766, 213 S.E.2d 35, 35 (1975).

⁶¹ *Walker*, 239 Ga. at 175-76, 236 S.E.2d at 265; *Park*, 229 Ga. at 769-70, 194 S.E.2d at 468.

⁶² *Argonaut Ins. Co. v. Atl. Wood Indus., Inc.*, 187 Ga. App. 477, 479-80, 370 S.E.2d 770, 772-73 (1988).

as to counterclaims, cross claims and third party complaints or the grant and appeal of partial summary judgments.”⁶³

§ 5.7 Supersedeas Bond

§ 5.7.1 Bond Required Upon Motion of Appellee

A supersedeas bond is not automatically required in cases in which a notice of appeal has been filed and costs have been paid. Nevertheless, “upon motion by the appellee, made in the trial court before or after the appeal is docketed in the appellate court, the trial court *shall* require that supersedeas bond or other form of security be given.”⁶⁴ Generally, a supersedeas bond should be in an amount sufficient to satisfy: (i) the judgment in full; (ii) costs; (iii) interest; and (iv) damages for delay, if the appeal is found to be frivolous.⁶⁵ In cases where the judgment is for “the recovery of money not otherwise secured,” a supersedeas bond shall be fixed in an amount sufficient to satisfy: (i) the whole amount of the judgment remaining unsatisfied; (ii) costs on the appeal; (iii) interest; and (iv) damages for delay, unless the court, for good cause shown, fixes a lesser amount.⁶⁶ Finally, in cases where the judgment “determines the disposition of the property in controversy as in real actions, trover, and actions to foreclose mortgages,” a supersedeas bond shall be fixed in an amount only as will secure: (i) the use and detention of the property; (ii) the costs of the action; (iii) costs on appeal; (iv) interest; and (v) damages for delay.⁶⁷

In a civil case, regardless of the legal theory asserted, the type of damages awarded, and the number of parties, “the total supersedeas bond or other form of security that is required of all appellants collectively shall not exceed \$25 million regardless of the value of the judgment.”⁶⁸

⁶³ *Cohran v. Carlin*, 249 Ga. 510, 512, 291 S.E.2d 538, 540 (1982).

⁶⁴ O.C.G.A. § 5-6-46(a) (emphasis added). Under prior law, motions to require a bond were to be directed to the trial court before the appeal was docketed and to the appellate court after the appeal was docketed. This is no longer the case. *Ruffin v. Banks*, 249 Ga. App. 297, 297, 548 S.E.2d 61, 61 (2001) (holding that the trial court did not err in requiring supersedeas bond after appeal was docketed in the appellate court).

⁶⁵ O.C.G.A. § 5-6-46(a).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ O.C.G.A. § 5-6-46(b). If the court finds that the party on whose behalf a supersedeas bond requirement has been limited to \$25 million is dissipating or secreting assets, or diverting assets outside the ordinary course of business to avoid payment of a judgment, the court may require the appellant(s) to post a bond or other form of security in an amount “not to exceed the total amount of the judgment.” O.C.G.A. § 5-6-46(f).

§ 5.7.2 Failure to Comply Order to Post Bond

“The cases uniformly hold that the failure to post a supersedeas bond neither mandates nor permits dismissal of an appeal but simply allows the prevailing party (the appellee) to enforce the judgment pending appeal.”⁶⁹ “The well recognized sanction for failure to post a supersedeas bond is that the appellee may proceed to enforce . . . the judgment, subject to the outcome of the appeal.”⁷⁰ Thus, where a bond is ordered but not provided, the appellant loses the protection of a supersedeas, but the appellee that chooses to enforce the judgment pending appeal acts at his own risk, since the judgment could be reversed.

§ 5.7.3 No Bond Required for State or Local Governments

Pursuant to O.C.G.A. § 9-11-62(d), “[w]hen an appeal is taken by the state or by any county, city, or town within the state, or an officer or agency thereof, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.”

§ 5.7.4 Jurisdiction Over Surety

“By entering into an appeal or supersedeas bond or other form of security given pursuant to [O.C.G.A. § 5-6-46(d)], the surety submits himself or herself to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety’s agent upon whom any papers affecting the surety’s liability on the bond may be served. The surety’s liability may be enforced on motion without the necessity of notice or an independent action.”⁷¹

⁶⁹ *Hawn v. Chastain*, 246 Ga. 723, 725, 273 S.E.2d 135, 137-38 (1980).

⁷⁰ *Id.* at 138-39. The same rule applies equally to appeals to Superior Courts and appellate courts in Georgia. *Id.*; *Jonas v. Jonas*, 280 Ga. App. 155, 157, 633 S.E.2d 544, 548 (2006).

⁷¹ O.C.G.A. § 5-6-46(d).

6

BRIEFS AND ENUMERATIONS OF ERROR

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Both of Georgia’s appellate courts—the Court of Appeals and the Supreme Court—have promulgated sets of rules governing various procedural issues related to the timing, format, and content of appellate briefs. Practitioners before both courts must pay careful attention to the relevant rules, as each court’s rules differ from each other and are occasionally amended.¹

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¹ The Court of Appeals and the Supreme Court publish amendments on their respective websites. For amendments to the Georgia Court of Appeals Rules, see “Recent Amendments,” available at http://www.gaappeals.us/rules2/recent_amendments.php. For amendments to the Georgia Supreme Court Rules, see “Amendments to Rules,” available at http://www.gasupreme.us/rules/amended_rules/.

§ 6.1 Briefs in the Georgia Court of Appeals²

§ 6.1.1 Rules Governing Procedure

§ 6.1.1.1 Docketing and Deadlines

Upon the docketing of every appeal and application for appeal, the clerk of court mails notice of the docketing date and a schedule for briefing to all counsel.³ Failure to receive the court's docketing notice does not relieve counsel of the responsibility to file a timely brief.⁴

Parties are permitted to file an appellant's brief, an appellee's brief, and a reply brief.⁵ An appellant's brief and enumeration of errors must be filed within 20 days after the appeal is docketed.⁶ Failure to file an appellant's brief within that time, unless extended upon motion for good cause shown, may cause the appeal to be dismissed and subject the offender to sanctions for contempt.⁷ A motion for extension of time to file an appellant's brief and enumeration of errors must be filed prior to the date the documents are due, or the court may dismiss the appeal.⁸

An appellee's brief must be filed within 40 days after the appeal is docketed or 20 days after the filing of the appellant's brief, whichever is later.⁹ Failure to file a timely appellee's brief may result in the brief not being considered and may subject counsel to sanctions for contempt.¹⁰

² References in this section to counsel include pro se parties. GA. CT. APP. R. 1(d). References to appellants and appellees include cross-appellants and cross-appellees, respectively.

³ GA. CT. APP. R. 13. The notice contains the docketing date, a schedule for briefing to all counsel, and a warning that failure to timely file responsive briefs may result in their non-consideration or subject counsel to contempt. The notice of docketing of a direct appeal will also include a statement that failure to file the enumeration of errors and appellant's brief within the time required may result in a dismissal of the appeal. *Id.*

⁴ *Id.*

⁵ GA. CT. APP. R. 24(a).

⁶ GA. CT. APP. R. 23(a). With respect to all briefing deadlines in the Court of Appeals, when an expiration date falls on Saturday, Sunday, or an official state or national holiday, the time is extended to the next business day. GA. CT. APP. R. 3.

⁷ GA. CT. APP. R. 23(a).

⁸ *Id.*

⁹ GA. CT. APP. R. 23(b).

¹⁰ *Id.* (requiring the state to file briefs in all criminal cases in which it is an appellee); *see also* GA. CT. APP. R. 13.

An appellant may file a reply brief within 20 days after the appellee's brief is filed.¹¹

§ 6.1.1.2 Extensions of Time

Parties seeking to extend the time for filing a brief must file a motion requesting the extension.¹² The motion, based on good cause, must be filed prior to the date the brief is due, or else the court may decline to consider the motion and may dismiss the appeal.¹³ Extensions of time for filing briefs are discretionary, and the court will grant extensions only by written order.¹⁴ Oral extensions will not be recognized.¹⁵

The court will not grant extensions of time for filing interlocutory or discretionary applications or responses.¹⁶

§ 6.1.1.3 Physical Preparation/Formatting

As with all documents filed with the court, briefs must be typed or printed upon non-transparent, letter-size (8½" x 11") white paper.¹⁷ Physical briefs (*i.e.*, those not filed electronically) must be bound at the top with staples or round-head or Acco fasteners, and must have a non-glossy white back of recyclable paper, heavier than regular stationery-type paper.¹⁸ All text, including quotations and footnotes, must be at least double-spaced.¹⁹ Text cannot be smaller than 10 characters per inch ("cpi").²⁰ Notwithstanding the 10 cpi requirement, the court will accept briefs using Times New Roman Regular 14 point.²¹

¹¹ GA. CT. APP. R. 23(c).

¹² GA. CT. APP. R. 16(b).

¹³ GA. CT. APP. R. 16 (b), 23(a).

¹⁴ GA. CT. APP. R. 16(b).

¹⁵ *Id.*

¹⁶ GA. CT. APP. R. 16(c).

¹⁷ GA. CT. APP. R. 1(c).

¹⁸ *Id.*

¹⁹ GA. CT. APP. R. 1(c), 24(b).

²⁰ Ga. Ct. App. R. 1(c).

²¹ *Id.*

Writing may appear on only one side of each page, with each page having margins of at least two inches at the top, and one inch on the sides and bottom.²² Each page must be numbered sequentially with Arabic numerals at the bottom of the page.²³

Any documents that do not comply with the rules may be returned to counsel with notice of the defect of the pleading, and/or counsel may be ordered to “redact and recast” the brief.²⁴

§ 6.1.1.4 Page Limitations

Briefs and responsive briefs are limited to 30 pages in civil cases and 50 pages in criminal cases (including certificates of service, indices, exhibits, and appendices), except upon the court’s approval of a written motion to exceed this limit filed with the clerk of court.²⁵ Appellant’s reply brief is limited to 15 pages.²⁶ Supplemental briefs, which may be filed only with leave of the court, may not exceed 15 pages.²⁷

§ 6.1.1.5 Copies

As with all documents physically filed with the court, the parties must file an original and two copies of each brief.²⁸ To receive a file-stamped copy of a filed document, a party should

²² GA. CT. APP. R. 24(c).

²³ GA. CT. APP. R. 24(e).

²⁴ GA. CT. APP. R. 1(c). Failure to redact or recast a brief as ordered may lead to the striking of a brief or dismissal of an appeal. *See, e.g., Dep’t of Transp. v. Gaines*, No. A97A2535 (Ga. Ct. App. Oct. 28, 1997) (dismissing appeal after brief ordered to be redacted and recast was resubmitted with same type-size and style errors as original brief, and denying request to file third brief); *compare GLW Int’l Corp. v. Yao*, 243 Ga. App. 38, 40, 532 S.E.2d 151, 154 (2000) (declining to dismiss appeal due to violation of brief type-size rule when court did not order it to be redacted and recast, because plaintiff was not prejudiced enough to “warrant the harsh remedy of dismissal”).

When the court does not return deficient briefs in time for redacting and recasting prior to oral argument, the court may choose to proceed without requiring additional submissions. *See, e.g., Ford v. State*, 274 Ga. App. 695, 696, 617 S.E.2d 262, 265 (2005) (considering brief in excess of page limitation and noting that to the extent the court failed to address arguments raised therein, author would not be heard to complain); *Cooper v. State*, 258 Ga. App. 825, 825-26, 575 S.E.2d 691, 693 (2002) (considering deficient brief despite its “mind numbing” defiance of type-size and line-spacing requirements, “albeit with a difficulty solely of [appellant’s] own making”).

²⁵ GA. CT. APP. R. 24(f).

²⁶ *Id.*

²⁷ GA. CT. APP. R. 27(a).

²⁸ GA. CT. APP. R. 6. Counsel are required to file an original and two copies of their brief for each docketed appeal, including companion cases and cross appeals. GA. CT. APP. R. 24(a).

include an extra copy and, if filed by mail, a pre-addressed stamped envelope with sufficient return postage.²⁹

§ 6.1.1.6 Filing Procedure

The court deems a brief filed on the earlier of:

- (i) The date it is physically delivered to the clerk's office, with sufficient costs, if applicable, and clocked in by the clerk's office staff;
- (ii) The United States Postal Service postmark date or commercial delivery service transmittal date that appears on the envelope or container in which the document was received, if accompanied with sufficient costs, if applicable;³⁰ or
- (iii) If filing electronically, the date and time the document is received by the court's e-filing system, if accompanied with sufficient costs, if applicable.³¹

It should be noted that the filing procedure for briefs is different from those for motions for reconsideration. Motions for reconsideration are deemed filed only on the date of *physical receipt* in the clerk's office regardless of the date of mailing.³²

Filing by facsimile is not permitted.³³

²⁹ GA. CT. APP. R. 2(c).

³⁰ GA. CT. APP. R. 4(c).

³¹ Counsel may electronically file briefs, extensions to file, and requests for oral argument by using the court's electronic filing system ("EFAST"). To file electronically, counsel must: (i) agree to the terms of use and comply with the instructions of the court's e-filing system; and (ii) comply with all other rules of the court except as modified by the e-filing system's terms of use. Note that counsel filing a document electronically is still responsible for official service of his or her document on the opposing counsel or pro se party. GA. CT. APP. R. 46. For further instructions on e-filing, see "EFAST Registration and E-Filing Instructions," available at <http://www.gaappeals.us/eFile2/instructions.pdf> and "Questions and Answers EFAST," available at http://www.gaappeals.us/eFile2/questions_and_answers.pdf.

³² GA. CT. APP. R. 4(b), 37(b). Motions for reconsideration must be filed within 10 days from the rendition of the judgment or dismissal and any response, though not required, must be filed "expeditiously." GA. CT. APP. R. 37(b). *See also* Chapter 10 of this Handbook.

³³ GA. CT. APP. R. 1(e).

§ 6.1.1.7 Clerk’s Office Hours and Contact Information

The clerk’s office is open Monday through Friday between the hours of 8:30 a.m. and 4:30 p.m. E.S.T./E.D.T.³⁴ The address of the clerk’s office is:

Clerk of Court
Court of Appeals of Georgia
Suite 501
47 Trinity Avenue, S.W.
Atlanta, Georgia 30334³⁵

The telephone number of the clerk’s office is (404) 656-3450.³⁶ The court’s web address is <http://www.gaappeals.us>.

The clerk’s office maintains a drop box for filing briefs and other documents after business hours.³⁷ It is located at the street level entrance to the 47 Trinity Avenue Building, which is generally open from 7 a.m. until 5 p.m. (check the court’s website for current hours).³⁸ Court personnel will remove the documents from the drop box each morning and file the documents to the prior business day.³⁹

§ 6.1.1.8 Costs

The Court of Appeals assesses costs of \$300 in civil cases and \$80 in criminal cases. Appellant and appellant’s counsel become liable for costs when the case is docketed, but costs are to be paid upon filing of an actual application or, in direct appeals, upon filing of the appellant’s brief.⁴⁰ The clerk will not receive an application or an appellant’s brief until costs have been paid or waived.⁴¹

³⁴ G.A. CT. APP. R. 2(a).

³⁵ *Id.*

³⁶ *Id.*

³⁷ G.A. CT. APP. R. 4(a).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ O.C.G.A. § 5-6-4; G.A. CT. APP. R. 5. Appeals from probation revocation and juvenile delinquency are considered “criminal cases” for the purposes of this section. *Id.*

⁴¹ G.A. CT. APP. R. 5. Costs are not required to file an appellant’s brief in a direct appeal that is filed pursuant to an order of the court granting an interlocutory or discretionary application. *Id.*

Parties seeking a waiver of costs must file a pauper's affidavit, a form showing a public defender has been appointed to represent the party, or otherwise show evidence of indigency contained in the record.⁴²

Fees must be paid by check or money order. The clerk is not responsible for cash accompanying a filing.⁴³

§ 6.1.1.9 Sealed Filings

The court will not permit parties to file briefs or motions under seal unless it has granted counsel's motion for permission to file such documents under seal.⁴⁴

§ 6.1.2 Rules Governing Structure and Content of Briefs

§ 6.1.2.1 In General

§ 6.1.2.1.1 Record and Transcript References

All record and transcript citations must be to the: (i) volume or part; and (ii) page number of the record or transcript as sent from the court from which the decision is appealed.⁴⁵ Page numbers should be identified with the letter R (for Record), T (for Transcript), or MT (for Motion Transcript) followed by a dash and the page number in the record (*i.e.*, R-Page Number of the Record, T-Page Number of the Transcript, and MT-Page Number of the Motion Transcript and date of the hearing).⁴⁶

⁴² O.C.G.A. § 5-6-4; GA. CT. APP. R. 5.

⁴³ GA. CT. APP. R. 2(b).

⁴⁴ GA. CT. APP. R. 25(c)(3).

⁴⁵ GA. CT. APP. R. 25(a)(1), (c)(2)(iii).

⁴⁶ GA. CT. APP. R. 25(c)(2)(iii); *see also Hay v. Newton Cnty.*, 273 Ga. App. 423, 423, 615 S.E.2d 234, 234 (2005) (“Our requirements as to the form of appellate briefs were created, not to provide an obstacle, but to aid parties in presenting their arguments in a manner most likely to be fully and efficiently comprehended by this court.” (quoting *Bennett v. Moody*, 225 Ga. App. 95, 96, 483 S.E.2d 350, 352 (1997))); *Todd v. Casciano*, 256 Ga. App. 631, 631 n.1, 569 S.E.2d 566, 567 n.1 (2002) (“Use of lengthy titles supplied by court reporters to volumes of the record is not helpful.”); *Kendall v. Griffin-Spalding Cnty. Hosp. Auth.*, 242 Ga. App. 821, 821, 531 S.E.2d 396, 397 (2000) (“References to exhibits introduced in the trial court without further reference to the volume and page of the record do not satisfy the Rule’s requirement to cite to the record on appeal.”). Citations to record indexes may not be used. *Bennett v. Builders II, Inc.*, 237 Ga. App. 756, 756-57, 516 S.E.2d 808, 809 (1999).

§ 6.1.2.1.2 Citations

Citations of cases must include the case name as well as the volume, page, and year of the Official Report. Cases not yet reported must be cited by the Court of Appeals or Supreme Court case number and date of decision.⁴⁷

§ 6.1.2.1.3 Signature

As with all documents filed with the court, briefs must be signed by counsel and include the mailing address and telephone number of the attorney signing the brief, as well as the State Bar of Georgia membership numbers of all submitting attorneys.⁴⁸ Counsel for the defendant in a criminal case must also include the address of the defendant on the face of the brief and notify the court of any change of address.⁴⁹

To sign an electronically-filed document, counsel’s name must be typed, preceded by a “/s/” and underlined; counsel’s typed name must also appear below the underline.⁵⁰ For e-filed briefs signed by multiple parties, use of the filing attorney’s login and password and the conformed signatures of the others will be presumed to mean that the filing attorney has the agreement of the other signatories to the document being filed.⁵¹ For physically filed briefs, however, stamped signatures, conformed signatures, and signatures by express permission do not constitute acceptable signatures for filing.⁵²

⁴⁷ GA. CT. APP. R. 24(d). Note the court’s distinction between its binding precedent and its physical precedent. Binding precedent arises solely from decisions concurred in by all judges of a division or a full concurrence of a majority of a seven- or 12-judge court. Physical precedents, which are not binding precedents, arise from cases in which, within a division, special concurrences without statements of agreement or concurrences in the judgment only are filed or, with a seven- or 12-judge court, less than a majority generally concurs. This rule applies to each section of the opinion; that is, an opinion may have certain sections that are binding precedent and others that are physical precedent only. GA. CT. APP. R. 33(a). Further, cases affirmed without opinion under Rule 36 have no precedential value. GA. CT. APP. R. 36.

Note also that “[a]lthough ‘the law of the case rule has been formally abolished . . . it (still) applies to rulings by one of the appellate courts; they are binding in all subsequent proceedings.’” *Davis v. Silvers*, 295 Ga. App. 103, 105, 670 S.E.2d 805, 807 (2008) (quoting O.C.G.A. § 9-11-60(h)). Still, the law of the case rule only applies to express rulings, not implied rulings. See *Hicks v. McGee*, 289 Ga. 573, 578, 713 S.E.2d 841, 846 (2011).

⁴⁸ GA. CT. APP. R. 1(a).

⁴⁹ GA. CT. APP. R. 24(h).

⁵⁰ See, *supra*, “EFAST Registration and E-Filing Instructions.”

⁵¹ *Id.*

⁵² GA. CT. APP. R. 1(a).

§ 6.1.2.1.4 Certificate of Service

Briefs must be served prior to their filing with the court.⁵³ A certificate of service bearing the name and complete mailing address of all opposing counsel must be attached to all briefs.⁵⁴ Service may be shown by certificate of counsel, written acknowledgement, or affidavit of the server.⁵⁵ The certificate, like all signed documents submitted to the court, should bear the submitting attorney's State Bar of Georgia membership number.⁵⁶

§ 6.1.2.1.5 Attachments and Exhibits

Documents attached to a brief that have not been certified by the clerk of the trial court as part of the appellate record and forwarded to the court will not be considered on appeal.⁵⁷

§ 6.1.2.1.6 Inappropriate Remarks

Personal remarks that are discourteous or disparaging to opposing counsel, any judge, or the court are forbidden in written materials submitted to the court and in oral presentations made to the court, and may subject counsel to penalties including contempt or having such statements stricken from the record.⁵⁸

§ 6.1.2.1.7 Motions and Responses

Motions and responses to motions must conform to the requirements of Rule 24; no party may file a motion in the body of any brief.⁵⁹ Parties may cite to the record, but shall not attach to

⁵³ GA. CT. APP. R. 6.

⁵⁴ *Id.*

⁵⁵ *See id.* (“Any document without a certificate of service shall not be accepted for filing.”); *but see Ellis v. Stanford*, 256 Ga. App. 294, 295, 568 S.E.2d 157, 159 (2002) (despite appellant’s failure to serve brief and include certificate of service, court denied motion to dismiss because appellee did obtain brief, received extension of time for filing responsive brief and was not prejudiced by delay).

⁵⁶ GA. CT. APP. R. 1(a).

⁵⁷ GA. CT. APP. R. 24(g).

⁵⁸ GA. CT. APP. R. 10; *Kappelmeier v. PDQ Prop. Mgmt., Inc.*, 309 Ga. App. 430, 431-32, 710 S.E.2d 631, 634 (2011); *see also Wilson v. Moore*, 275 Ga. App. 493, 494, 621 S.E.2d 507, 508 (2005) (subjecting appellant to contempt when brief contained numerous discourteous and disparaging remarks about the trial court judge); *Anderson v. Ga. Farm Bureau Mut. Ins. Co.*, 255 Ga. App. 734, 737, 566 S.E.2d 342, 345-46 (2002) (denying motion to strike based on personal attacks on counsel because “[a]lthough argumentative, the language in question is not so discourteous and disparaging as to warrant granting the motion to strike”).

⁵⁹ GA. CT. APP. R. 41(b).

the motion or response to a motion exhibits that are included in the trial court record.⁶⁰ Failure to comply with these rules may result in non-consideration of such motions or responses.⁶¹

§ 6.1.2.2 Appellant’s Brief

§ 6.1.2.2.1 Parts

The brief of the appellant must consist of three parts:

(1) *Proceedings Below.* Part One must be a succinct and accurate statement of the proceedings below and the material facts relevant to the appeal. This part must include citations to the parts of the record or transcript essential to the consideration of the enumerated errors, and a statement of the method by which each enumerated error was preserved for consideration.⁶² Facts alleged in the brief must be supported by evidence in the record to be considered.⁶³

(2) *Enumeration of Errors.* Part Two must consist of the enumeration of errors.⁶⁴ An enumeration of errors must be filed within 20 days after the case is docketed (the same deadline for appellant’s brief), but no separately-filed enumeration of errors is required, apart from the enumeration included as part of the brief.⁶⁵ Failure to file an enumeration of errors may result in dismissal of the appeal.⁶⁶

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² GA. CT. APP. R. 25(a)(1); *see also SEC, Inc. v. Puckett*, 252 Ga. App. 422, 422, 555 S.E.2d 198, 200 (2001) (“By failing to cite to the portion of the record showing where it purportedly preserved the enumerated errors, [appellant] risked the Court deeming all its arguments abandoned.”).

⁶³ *In re Ray*, 248 Ga. App. 45, 545 S.E.2d 617 (2001); *see also Stebbins v. Ga. Power Co.*, 252 Ga. App. 261, 262, 555 S.E.2d 906, 907 (2001) (“Exhibits contained in an appellate brief which do not appear in the record or transcript cannot be considered by this court and afford no basis for reversal.” (quoting *Strickland v. Am. Motorists Ins. Co.*, 149 Ga. App. 690, 691, 256 S.E.2d 92, 93 (1979))).

⁶⁴ GA. CT. APP. R. 25(a)(2).

⁶⁵ GA. CT. APP. R. 22(a).

⁶⁶ *See* GA. CT. APP. R. 7; *see also Shell v. Teachers Ret. Sys. of Ga.*, 291 Ga. App. 571, 572, 662 S.E.2d 345, 346 (2008); *State v. McClendon*, 286 Ga. App. 75, 76, 648 S.E.2d 680, 681 (2007) (“The failure to file any enumerations of errors, either in the brief of in a separate document, requires dismissal of the appeal.”); *see also Strom v. London*, 257 Ga. App. 889, 890, 572 S.E.2d 409, 410 (2002) (“This Court and the Supreme Court of Georgia have made clear that failure to file an enumeration of errors requires dismissal of an appeal.” (quoting *Miles v. Emmons*, 234 Ga. App. 487, 487, 507 S.E.2d 762, 762 (1998))).

As required by Georgia statute, an enumeration of errors must set forth separately each error relied upon on appeal.⁶⁷ It must be concise and need not set out or refer to portions of the record on appeal.⁶⁸ Prior to 1999, reported decisions of the court reached different results about whether “multifarious” or compound enumerations of error were properly “set forth and argued separately” and whether they should be considered.⁶⁹ In 1999, the Supreme Court held that such enumerations of error do not violate the statutory requirement as long as they “identif[y] the trial court ruling asserted to be error.”⁷⁰ Thus, for example, an appellant may properly allege in an enumeration that a single trial court ruling was in error and provide multiple subsidiary reasons for this conclusion in the argument section of the brief.⁷¹ Or a single enumeration may contain multiple allegations of related but particularly designated errors, such as refusing to give certain charges or permitting certain witnesses to testify.⁷²

In addition, even if the enumeration of errors fails to identify clearly the errors sought to be reviewed, the appeal will still be considered if it is apparent from the notice of appeal, the filed enumeration of errors, and the record (or any combination of these documents), what errors are sought to be asserted on appeal.⁷³

The enumeration of errors must be served on the appellee as set forth in O.C.G.A. § 5-6-32,⁷⁴ need not have approval of the trial court, and when filed shall become part of the record on

⁶⁷ O.C.G.A. § 5-6-40; *see also Chhina Family P’ship, L.P. v. S-K Grp. of Motels, Inc.*, 275 Ga. App. 811, 811-12, 622 S.E.2d 40, 42 (2005) (deeming claim that was not enumerated as error to be abandoned).

⁶⁸ O.C.G.A. § 5-6-40.

⁶⁹ *Felix v. State*, 271 Ga. 534, 534, 523 S.E.2d 1, 2 (1999). The court has cataloged cases defining an error and in which compound enumerations led to partial dismissal or consideration on appeal. *See id.* at 538 n.3, 523 S.E.2d at 5 n.3.

⁷⁰ *Id.* at 539, 523 S.E.2d at 5; *see also Phillips v. State*, 267 Ga. App. 733, 733, 601 S.E.2d 147, 149 (2004) (court refused to dismiss appeal even where errors were not clearly enumerated, because court could determine from the record what errors were sought to be appealed); *Adams-Cates Co. v. Marler*, 235 Ga. 606, 606, 221 S.E.2d 30, 31 (1975) (“[T]he subject matter need be indicated only in the most general way’” (quoting *Wall v. Rhodes*, 112 Ga. App. 572, 572, 145 S.E.2d 756, 757 (1965))); O.C.G.A. § 5-6-30 (requiring that Appellate Practice Act provisions be “liberally construed so as to bring about a decision on the merits of every case appealed and to avoid dismissal of any case or refusal to consider any points raised therein, except as may be specifically referred to in [the Act]”).

⁷¹ *Felix*, 271 Ga. at 539-40, 523 S.E.2d at 6.

⁷² *Id.* at 538 n.5, 523 S.E.2d at 5 n.5.

⁷³ *Id.* at 538, 523 S.E.2d at 5; *Phillips*, 267 Ga. at 733, 601 S.E.2d at 149; O.C.G.A. § 5-6-48(f).

⁷⁴ O.C.G.A. § 5-6-40. Georgia Code Section 5-6-32 allows for service on counsel, in person or by mail, with proof shown by acknowledgment or certificate. *See also* GA. CT. APP. R. 1(a).

appeal.⁷⁵ The enumeration of errors must also contain a statement of jurisdiction as to why the Court of Appeals—and not the Supreme Court—has jurisdiction.⁷⁶

Errors not set forth in the enumeration of errors will not be considered by the court, even if subsequently argued to the court.⁷⁷ The enumeration of errors may not be amended after the original time for filing the enumeration (20 days after docketing) has expired.⁷⁸ Further, an additional brief filed after that date may not be used to argue an enumerated error not argued in the original brief.⁷⁹

(3) *Argument and Citation of Authorities.* Part Three must contain the argument and citation of specific supporting authorities.⁸⁰ Part Three also must include a concise statement of the applicable standard of review for each issue presented in the brief, with supporting authority.⁸¹

⁷⁵ O.C.G.A. § 5-6-40.

⁷⁶ GA. CT. APP. R. 22(b).

⁷⁷ *Prado v. State*, 306 Ga. App. 240, 249 n.31, 701 S.E.2d 871, 879 n.31 (2010) (“The appellate court is precluded from reviewing the propriety of a lower court’s ruling if the ruling is not contained in the enumeration of errors.” (quoting *Felix*, 271 Ga. at 539, 523 S.E.2d at 6)); *Odum v. State*, 255 Ga. App. 70, 71, 564 S.E.2d 490, 492 (2002).

⁷⁸ *Bryant v. State*, 288 Ga. App. 564, 565 n.4, 655 S.E.2d 247, 248 n.4 (2007); *Hill v. State*, 257 Ga. App. 82, 85, 570 S.E.2d 395, 398 (2002). *But see Blanton v. Duru*, 247 Ga. App. 175, 176, 543 S.E.2d 448, 450 (2000) (exercising discretion under liberal construction of Appellate Practice Act to consider merits of appeal in which untimely brief and enumeration of errors was filed).

⁷⁹ *Bryant*, 288 Ga. App. at 565 n.4, 655 S.E.2d at 248 n.4 (citing *Getty v. State*, 202 Ga. App. 490, 491, 415 S.E.2d 29, 30 (1992)); *see also Hullender v. State*, 256 Ga. 86, 92, 344 S.E.2d 207, 211 (1986).

⁸⁰ GA. CT. APP. R. 25(a)(3); *see Hester v. State*, 304 Ga. App. 441, 444, 696 S.E.2d 427, 430 (2010) (“Rhetoric is not a substitute for cogent legal analysis, which is, at a minimum, a discussion of the appropriate law as applied to the relevant facts.” (quoting *Dixon v. Metro. Atlanta Rapid Transit Auth.*, 242 Ga. App. 262, 266, 529 S.E.2d 398, 402 (2000))); *see also Bonner v. Brunson*, 262 Ga. App. 521, 523, 585 S.E.2d 917, 919 (2003) (declining to consider argument concerning payment of amount owed when party cited to a 28-page list in the record of approximately one thousand checks, which would require the court to sift through all the checks to find and address the six or more payments in question); *Yang v. Washington*, 256 Ga. App. 239, 243, 568 S.E.2d 140, 144 (2002) (“Appellate judges should not be expected to take pilgrimages into records in search of error without the compass of citation and argument.” (quoting *Rolleston v. Estate of Sims*, 253 Ga. App. 182, 185, 558 S.E.2d 411, 415 (2001))); *Gilbert v. Montlick & Assocs., P.C.*, 248 Ga. App. 535, 539, 546 S.E.2d 895, 901 (2001) (“Argument is defined as a reason given in proof or rebuttal, or a coherent series of reasons offered. Clearly, the central element in those definitions is reason. A mere statement of what occurred during the trial, and the contentions of the appellant, does not constitute an argument in support of such contentions. The failure to support the enumerated errors by citation of authority or argument constitutes an abandonment of such enumerated errors.”).

⁸¹ GA. CT. APP. R. 25(a)(3).

Mere restatement or repetition of the enumeration of errors or legal contentions is not argument.⁸² An appealing party may not use this section of the brief to expand its enumeration of errors by arguing the incorrectness of a trial court ruling not mentioned in the enumeration of the errors.⁸³

§ 6.1.2.2 Sequence Of Argument

The sequence of argument or arguments in briefs shall follow the order of the enumeration of errors and be numbered accordingly.⁸⁴

§ 6.1.2.3 Unsupported Enumerated Error

Each enumerated error must be supported in the brief by specific reference to the record or transcript. In the absence of such reference, the court will not search for or consider such an enumeration.⁸⁵ Furthermore, an enumerated error not supported in the appellant's brief by citation of authority or argument may be deemed abandoned.⁸⁶ The function of the brief's argument is to supply the reason why the court should support the party's contentions.⁸⁷

⁸² *Glisson v. Freeman*, 243 Ga. App. 92, 107, 532 S.E.2d 442, 454 (2000); *Green v. State*, 208 Ga. App. 1, 2-3, 429 S.E.2d 694, 695-96 (1993).

⁸³ *Felix v. State*, 271 Ga. 534, 539 n.5, 523 S.E.2d 1, 5 n.5 (1999).

⁸⁴ GA. CT. APP. R. 25(c)(1); *see Stagl v. Assurance Co. of Am.*, 245 Ga. App. 8, 9, 539 S.E.2d 173, 175 (2000) (“The rules of this court require that there be a direct and logical relationship between the enumerations of error and the arguments contained in the brief.”); *see also Kilburn v. Young*, 256 Ga. App. 807, 809-10, 569 S.E.2d 879, 882 (2002) (“Our requirements as to the form of appellate briefs were created not to provide an obstacle, but to aid parties in presenting their arguments in a manner most likely to be fully and efficiently comprehended by this Court; a party will not be granted relief should we err in deciphering a brief which fails to adhere to the required form.” (quoting *Campbell v. Breedlove*, 244 Ga. App. 819, 821, 535 S.E.2d 308, 310 (2000))). *But see Owens v. Dep’t of Human Res.*, 255 Ga. App. 678, 679 n.1, 566 S.E.2d 403, 404 n.1 (2002) (exercising discretion to address argument that “does not follow the order of the enumerations, is not logically linked to them, and is not divided and numbered accordingly” to the extent that the court “can discern the main arguments”).

⁸⁵ GA. CT. APP. R. 25(c)(2)(i); *see, e.g., Bass v. State*, 287 Ga. App. 600, 600 n.1, 653 S.E.2d 749, 749 n.1 (2007) (“It is not the function of this court to cull the record on behalf of a party.” (quoting *Harris v. State*, 256 Ga. App. 120, 122, 567 S.E.2d 394, 398 (2002))); *McLeod v. State*, 251 Ga. App. 371, 373, 554 S.E.2d 507, 510 (2001) (refusing to consider enumeration of error not supported by citation to record or transcript).

⁸⁶ GA. CT. APP. R. 25(c)(2); *see Savage v. State*, 252 Ga. App. 251, 256, 556 S.E.2d 176, 182 (2001); *Davis v. State*, 244 Ga. App. 345, 349, 535 S.E.2d 528, 532 (2000); *Felix*, 271 Ga. at 539 n.6, 523 S.E.2d at 5 n.6.

⁸⁷ *Davis*, 244 Ga. App. at 349, 535 S.E.2d at 533; *Caring Hands, Inc. v. Ga. Dep’t of Human Res.*, 222 Ga. App. 608, 610, 475 S.E.2d 660, 662 (1996).

§ 6.1.2.3 Appellee's Brief

§ 6.1.2.3.1 Parts

The brief of appellee should be divided into two parts:

(1) *Deficiencies in Appellant's Statement of Proceedings Below.* Part One should point out any material inaccuracy or incompleteness of the factual statement in appellant's brief, add any additional statement deemed necessary, and cite any additional parts of the record or transcript deemed material.⁸⁸ Failure to do so constitutes consent to a decision based on the appellant's statement of facts. The court may accept uncontroverted portions of the appellant's statement of facts as true.⁸⁹

(2) *Argument and Citation of Authorities.* Part Two must contain the argument and citation of authorities relevant to each enumeration of error.⁹⁰ In this part, appellee shall also include the standard of review for a particular error if different from the one contended by appellant.⁹¹

§ 6.1.2.3.2 Sequence of Argument

The sequence of argument or arguments in briefs should follow the order of the enumeration of errors and be numbered accordingly.⁹²

§ 6.1.2.3.3 Defending Against Claims of Unsupported Matters

In defending against the contention that certain findings, rulings, or other matters are not supported by the record, counsel may refer to particular pages of the record where they may be found.⁹³

⁸⁸ GA. CT. APP. R. 25(b)(1). This rule applies only to an inaccurate or incomplete statement as evidenced by the transcript and record. The appellee's brief cannot supply evidence not contained in the record or transcript. *See, e.g., Biven Software, Inc. v. Newman*, 222 Ga. App. 112, 115, 473 S.E.2d 527, 530 (1996); *Voxcom, Inc. v. Boda*, 221 Ga. App. 619, 619, 472 S.E.2d 155, 155-56 (1996).

⁸⁹ GA. CT. APP. R. 25(b)(1); *see, e.g., LaBrec v. Davis*, 243 Ga. App. 307, 534 S.E.2d 84 (2000).

⁹⁰ GA. CT. APP. R. 25(b)(2).

⁹¹ *Id.*

⁹² GA. CT. APP. R. 25(c)(1).

⁹³ GA. CT. APP. R. 25(c)(2)(ii).

§ 6.1.2.4 Supplemental Briefs

Supplemental briefs⁹⁴ may be filed only with leave of court.⁹⁵ Leave of court may be obtained by filing a motion for permission to file a supplemental brief. Such motions may be accompanied by a copy of the supplemental brief as an exhibit, but counsel may not file the supplemental brief until permission is granted.⁹⁶ Once permission is granted, counsel must file an original and two copies of the proposed supplemental brief, if physically filed with the court.⁹⁷ Supplemental briefs may not expand the issues beyond the scope of the original enumeration of errors nor resurrect those unsupported and abandoned in the original brief.⁹⁸ Supplemental briefs may not exceed 15 pages.⁹⁹

Parties may not file letter briefs or letter cites.¹⁰⁰ If a party wishes to apprise the court of a recent authority that has come to its attention after the filing of the party's brief or after oral argument, but prior to the court's decision, the party should file a supplemental brief.¹⁰¹ An original and two copies of such a brief, if physically filed, must be filed with the court, and it must be served on opposing counsel.¹⁰² A response to such a filing should be made promptly and in accordance with the procedure for filing supplemental briefs.¹⁰³

§ 6.1.2.5 Amicus Curiae Briefs

Amicus curiae briefs may be filed without leave of court.¹⁰⁴ Such a brief should disclose the identity and interest of the persons or group on whose behalf the brief is filed and be limited to

⁹⁴ Note the difference between a supplemental brief and a motion to supplement the record. In a motion to supplement the record, counsel shall describe the material to be supplemented, but shall not attach the supplemental materials to the motion filed with the court unless directed to do so by the court. If the motion is granted, the clerk of court will obtain the supplemental record from the trial court clerk. GA. CT. APP. R. 41(c).

⁹⁵ GA. CT. APP. R. 27(a).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Holloway v. State*, 245 Ga. App. 510, 513, 537 S.E.2d 708, 713 (2000); *Anderson v. Houser*, 240 Ga. App. 613, 621 n.23, 523 S.E.2d 342, 349 n.23 (1999).

⁹⁹ GA. CT. APP. R. 27(a).

¹⁰⁰ GA. CT. APP. R. 27(b).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ GA. CT. APP. R. 26.

issues properly raised by the parties.¹⁰⁵ The only persons who may file such briefs are members of the bar of the court or attorneys appearing by courtesy.¹⁰⁶

The court has refused to consider portions of amicus briefs that constitute an attempted expansion of the original appeal.¹⁰⁷

§ 6.2 Briefs in the Supreme Court of Georgia¹⁰⁸

§ 6.2.1 Rules Governing Procedure

§ 6.2.1.1 Docketing and Deadlines

The clerk will notify all attorneys by mail of the docketing dates of their appeals.¹⁰⁹ An appellant's brief must be filed within 20 days after the case is docketed.¹¹⁰

The brief of an appellee must be filed within 40 days after the case is docketed or 20 days after the filing of appellant's brief, whichever is later.¹¹¹ An appeal and a cross-appeal may be argued in the same brief, but this does not extend the time for filing.¹¹²

Failure to comply with an order of the court directing the filing of briefs may result in dismissal of the appeal and imposition of sanctions.¹¹³

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Shaver v. Aetna Fin. Co.*, 148 Ga. App. 740, 741, 252 S.E.2d 684, 685 (1979) (decided under prior version of rules).

¹⁰⁸ References in this section to counsel include pro se parties. GA. S. CT. R. 4(7). References to appellants and appellees include cross-appellants and cross-appellees, respectively.

¹⁰⁹ GA. S. CT. R. 8.

¹¹⁰ GA. S. CT. R. 10. To calculate the due date for briefs to be filed in the Supreme Court, begin counting with the day after docketing, including weekends and holidays. When an expiration date falls on Saturday, Sunday, or an official state or national holiday, the time is extended until the next business day. GA. S. CT. R. 11.

¹¹¹ GA. S. CT. R. 10.

¹¹² *Id.*

¹¹³ GA. S. CT. R. 7, 10.

§ 6.2.1.2 Extensions of Time

Requests for extensions of time for filing briefs should be directed by letter to the clerk sufficiently in advance of the due date so that, if the request is denied, the brief may be filed within the required time.¹¹⁴ Requests not showing service on opposing parties will not be honored.¹¹⁵

§ 6.2.1.3 Physical Preparation/Formatting

All briefs must be typed or printed on letter-size (8½" x 11") paper with covers on the front and back and, if physically filed, stapled on the left side in booklet form.¹¹⁶ All physically-filed covers must be of recyclable paper heavier than regular stationery.¹¹⁷ Covers must bear the style of the case, the case number, and the names of the persons preparing the brief, along with their bar numbers, if attorneys.¹¹⁸

All briefs must be printed or typed with not less than double-spacing between the lines, except in block quotations or footnotes.¹¹⁹ Margins must be at least one inch on the top, bottom and each side.¹²⁰ The type size must not be smaller than 12-point Courier font or 14-point Times New Roman.¹²¹ The pages of each brief must be sequentially numbered with Arabic numbers.¹²²

§ 6.2.1.4 Page Limitations

Briefs must be limited to 30 pages in civil cases, except upon written request by letter to the clerk and authorization by the court prior to the filing due date.¹²³

¹¹⁴ GA. S. CT. R. 12.

¹¹⁵ *Id.*

¹¹⁶ GA. S. CT. R. 18.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ GA. S. CT. R. 16.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² GA. S. CT. R. 21.

¹²³ GA. S. CT. R. 20.

§ 6.2.1.5 Copies

For physically filed briefs, an original and seven copies of all briefs must be filed with the clerk.¹²⁴

§ 6.2.1.6 Filing Procedure

The Supreme Court deems a brief filed on the earlier of:¹²⁵

- (i) The date it is physically received in the clerk’s office and stamped filed by the clerk;¹²⁶
- (ii) If sent by priority, express or first-class mail, the date it is postmarked by the United States Postal Service;¹²⁷
- (iii) If sent through a third party commercial carrier, the date shown on the carrier’s transmittal form or envelope if the brief is marked for delivery within three days;¹²⁸
or
- (iv) If filing electronically, on the date it is received by the Supreme Court E-filing/Docket (“SCED”) system.¹²⁹

¹²⁴ GA. S. CT. R. 15.

¹²⁵ If the filer is a pro se prisoner, the Supreme Court deems the brief filed on the date it is given to prison officials. GA. S. CT. R. 13(3). In the absence of an official United States Postal Service postmark showing a date on or before the filing deadline, such delivery shall be shown by the date on the certificate of service or on an affidavit submitted by the prisoner with the document stating that the prisoner is giving the document to prison officials with sufficient prepaid postage for first-class mail. Such a certificate or affidavit will give rise to a presumption that the date of filing reflected therein is accurate, but the state may rebut the presumption with evidence that the document was given to prison officials after the filing deadline or with insufficient postage. If the institution has a system designed for legal mail, the prisoner must use it to benefit from this rule. *Id.*

¹²⁶ GA. S. CT. R. 13.

¹²⁷ GA. S. CT. R. 13(2).

¹²⁸ *Id.* If mailing via the United States Postal Service or a common carrier, the envelope or package must be properly addressed, postage prepaid, and the postmark or transmittal date must be visible and legible. *Id.*

¹²⁹ GA. S. CT. R. 1, 13(1) (permitting counsel to “file electronically with the court” in compliance with “policies and procedures governing electronic filing”). To use the e-filing system, counsel must have a Bar number and must be in good standing with the State Bar and the Supreme Court of Georgia. Counsel appearing pro hac vice must contact the clerk’s office for instructions on use. All e-filed documents must be in PDF searchable format and no larger than 15MB. For further instructions on e-filing procedures, see “SCED Registration and e-Filing Instructions,” available at www.gasupreme.us/efile/.

It should be noted that the filing procedure for briefs is different from those for motions for reconsideration. Motions for reconsideration must be filed within 10 days of the court's decision and are deemed filed only on the date of *physical receipt* in the clerk's office regardless of the date of mailing.¹³⁰

No filing, except requests for an extension of time, oral argument, extra time, or extra pages, will be accepted by facsimile without prior permission of the court.¹³¹ When such permission is granted, facsimile filings will be filed as of the date the facsimile is received, but only after receipt of the original by mail.¹³² Service on an opposing party must also be shown on the facsimile filing.¹³³

§ 6.2.1.7 Clerk's Office Hours and Contact Information

The clerk's office is open Monday through Friday from 8:30 a.m. to 4:30 p.m. E.S.T./E.D.T.¹³⁴ The address of the clerk's office is:

Clerk of Court
Supreme Court of Georgia
Room 572
244 Washington Street
Atlanta, Georgia 30334¹³⁵

The clerk's telephone number is (404) 656-3470.¹³⁶ The facsimile number is (404) 656-2253.¹³⁷ The court's web address is <http://www.gasupreme.us>.¹³⁸

§ 6.2.1.8 Costs

Costs in all civil cases are \$300, unless pauper's status has been granted in the trial court and is reflected in the record, or the filing is accompanied by a form showing a public defender has been appointed to represent the party. Costs in all criminal cases and in habeas corpus cases for

¹³⁰ GA. S. CT. R. 13(4); GA. S. CT. R. 27.

¹³¹ GA. S. CT. R. 2.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ GA. S. CT. R. 1.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

persons whose liberty is being restrained by virtue of a sentence imposed against them by a state court are \$80. Costs must be paid upon filing, except for direct appeals, for which the costs, which accrue on docketing, must be paid upon filing of the original brief. Attorneys are liable for the costs, and failure to pay costs subjects the offender to sanctions.¹³⁹

§ 6.2.2 Rules Governing Structure and Content of Briefs

§ 6.2.2.1 In General

§ 6.2.2.1.1 Record and Transcript References

Page references to the record and transcript are essential and are to be noted with the letters R and T, respectively, followed by the appropriate page number (*i.e.*, R-Page Number and T-Page Number).¹⁴⁰

§ 6.2.2.1.2 Citations

All citations of authority must be complete. Georgia citations must include the volume and page number of the official Georgia reporters (Harrison, Darby, or Lexis).¹⁴¹ Cases not yet reported must be cited by the Supreme Court or Court of Appeals case number and date of decision.¹⁴²

§ 6.2.2.1.3 Certificate of Service

All briefs filed with the court, including those filed by facsimile with permission, must certify service on opposing attorneys and state their names and addresses.¹⁴³ If a brief is not so certified, it will not be accepted for filing.¹⁴⁴ In appeals involving the death penalty, murder, aircraft

¹³⁹ O.C.G.A. § 5-6-4; GA. S. CT. R. 5. Costs need not be paid again when a discretionary or interlocutory application, an application for interim review or for a certificate of probable cause, or a petition for certiorari has been granted. Nor are costs required for certified questions or disciplinary cases. O.C.G.A. § 5-6-4; GA. S. CT. R. 5; *see also Wilson v. Carver*, 252 Ga. App. 174, 174, 555 S.E.2d 848, 849 (2001) (ruling that court did not have jurisdiction to hear appeal when filing fee not paid).

¹⁴⁰ GA. S. CT. R. 19 n.1. With respect to the failure to make specific citations to the record or transcript, *see Glisson v. Morton*, 203 Ga. App. 77, 416 S.E.2d 134 (1992) (“[A]n appellant’s failure to make specific references to the record or transcript will not, in and of itself, warrant a summary refusal to consider an enumeration of error.”) (quoting *Justice v. Dunbar*, 244 Ga. 415, 416, 260 S.E.2d 327, 328 (1979)).

¹⁴¹ GA. S. CT. R. 22.

¹⁴² *Id.* Note that civil cases affirmed by the court without published opinions under Rule 59 have no precedential value. GA. S. CT. R. 59.

¹⁴³ GA. S. CT. R. 14.

¹⁴⁴ *Id.*

hijacking, and treason, copies of briefs must be served on the attorney general, the district attorney, and the attorney for the accused.¹⁴⁵

§ 6.2.2.1.4 Inappropriate Remarks

Personal remarks that are discourteous or disparaging to opposing counsel or any judge are forbidden in written materials, submissions, or oral presentations to the court.¹⁴⁶

§ 6.2.2.2 Appellant's Brief

§ 6.2.2.2.1 Parts

The court prescribes no particular arrangement for briefs. However, the volume of cases received by the court requires all matters to be presented succinctly. The court notes in its rules that inclusion of extraneous facts and frivolous issues tends to obscure critical issues.¹⁴⁷

The court identifies the following order of presentation as the most efficient:

- *Type of case.* This section should show the court's jurisdiction, the judgment appealed, and date of entry.¹⁴⁸
- *Brief statement of facts showing the general nature of the case.*¹⁴⁹ Citations to evidence in the record in this section are essential.¹⁵⁰ The court will not consider factual representations contained in an appellate brief when such evidence does not appear in the record.¹⁵¹

¹⁴⁵ *Id.*

¹⁴⁶ GA. S. CT. R. 29.

¹⁴⁷ GA. S. CT. R. 19 n.1.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Shelby v. McDaniel*, 266 Ga. 215, 216 n.2, 465 S.E.2d 433, 434 n.2 (1996); *see also Rivera v. Harris*, 259 Ga. 171, 171, 377 S.E.2d 844, 845 (1989) (“Exhibits attached to an appellate brief but not appearing in the record transmitted by the trial court cannot be considered by this court and afford no basis for reversal.” (quoting *Taylor v. Bentley*, 166 Ga. App. 887, 887, 305 S.E.2d 617, 618 (1983))).

- *Enumeration of errors.*¹⁵² An enumeration of errors must be stated as a separate part of, and shall be incorporated in, the brief.¹⁵³

As required by Georgia statute, an enumeration of errors must set forth separately each error relied upon on appeal.¹⁵⁴ It must be concise, and need not set out or refer to portions of the record on appeal.¹⁵⁵ The enumeration of errors is deemed to include and present for review all judgments necessary for a determination of the errors specified.¹⁵⁶ The purpose of this rule is to eliminate a litigant’s inadvertent forfeiture of substantial rights through technical error.¹⁵⁷

The enumeration of errors must be served on the appellee as set forth in O.C.G.A. § 5-6-32,¹⁵⁸ need not have approval of the trial court, and when filed shall become part of the record on appeal.¹⁵⁹ The enumeration of errors must also contain a statement of jurisdiction as to why the Supreme Court—and not the Court of Appeals—has jurisdiction.¹⁶⁰

Errors not set forth in the enumeration of errors will not be considered by the court, even if subsequently argued to the court.¹⁶¹ The enumeration of errors generally may not be amended after

¹⁵² GA. S. CT. R. 19 n.1.

¹⁵³ GA. S. CT. R. 19; *see Lamb v. State*, 267 Ga. 464, 465, 479 S.E.2d 719, 721 (1997) (refusing to consider enumerations of error raised outside of appellant’s brief (citing *Brooks v. State*, 265 Ga. 548, 551-52, 458 S.E.2d 349, 353-54 (1995))).

¹⁵⁴ O.C.G.A. § 5-6-40.

¹⁵⁵ *Id.*

¹⁵⁶ GA. S. CT. R. 22.

¹⁵⁷ *Sims v. Am. Cas. Co.*, 131 Ga. App. 461, 484-85, 206 S.E.2d 121, 136 (interpreting prior version of identical Court of Appeals rule), *aff’d sub nom.*, *Providence Wash. Ins. Co. v. Sims.*, 232 Ga. 787, 209 S.E.2d 61 (1974). In 1999, the Supreme Court clarified that enumerations of error are adequately “set out separately” as long as they enable the appellate court to identify the errors of law to be reviewed, as discussed *supra* in § 6.1.2.2.1(2). *See Felix v. State*, 271 Ga. 534, 534-40, 523 S.E.2d 1, 2-6 (1999) (interpreting O.C.G.A. § 5-6-40); *see also* O.C.G.A. § 5-6-48(f) (requiring appellate consideration if it is “apparent” from filings and record what errors are sought to be asserted on appeal).

¹⁵⁸ O.C.G.A. § 5-6-40. Georgia Code Section § 5-6-32 allows for service on counsel, in person, or by mail, with proof shown by acknowledgment or certificate. *See also* GA. S. CT. R. 14.

¹⁵⁹ O.C.G.A. § 5-6-40.

¹⁶⁰ GA. S. CT. R. 19.

¹⁶¹ *Felix*, 271 Ga. at 539, 523 S.E.2d at 6. (“The appellate court is precluded from reviewing the propriety of a lower court’s ruling if the ruling is not contained in the enumeration of errors.”).

the original time for filing the enumeration has expired.¹⁶² An additional brief filed after that date also may not be used to argue an enumerated error not argued in the original brief.¹⁶³

(4) *Argument.* This section should include additional facts, where essential, and citation of authorities.¹⁶⁴ An appealing party may not use this section of the brief to expand its enumeration of errors by arguing the incorrectness of a trial court ruling not mentioned in the enumeration of errors.¹⁶⁵

(5) *Certificate of service.*¹⁶⁶

§ 6.2.2.2.2 Sequence of Argument

It is suggested that arguments in briefs be in sequence with the enumeration of errors.¹⁶⁷

§ 6.2.2.3 Unsupported Enumerated Error

Each enumerated error must be supported in the brief by argument or citation of authority. In the absence of such support, the enumeration of error will be deemed abandoned.¹⁶⁸

§ 6.2.2.3 Appellee’s Brief

§ 6.2.2.3.1 Parts

The court suggests that the elements of the appellee’s brief should be in the same order of presentation as the appellant’s brief.¹⁶⁹

¹⁶² *Harrison v. State*, 268 Ga. 574, 492 S.E.2d 218 (1997). *But see Pittman v. State*, 273 Ga. 849, 850-51, 546 S.E.2d 277, 279 (2001) (permitting motion to supplement enumeration of error because it “raise[d] an issue which could materially affect the fair trial rights of the appellant and cause[d] no delay in the disposition of this case” and noting “plain error” exception in certain criminal cases).

¹⁶³ *Hullender v. State*, 256 Ga. 86, 92, 344 S.E.2d 207, 211 (1986).

¹⁶⁴ GA. S. CT. R. 19 n.1.

¹⁶⁵ *Felix*, 271 Ga. at 539 n.6, 523 S.E.2d at 5 n.6.

¹⁶⁶ GA. S. CT. R. 19 n.1; *see also* GA. S. CT. R. 14.

¹⁶⁷ GA. S. CT. R. 19 n.1.

¹⁶⁸ GA. S. CT. R. 22; *see also Sharpe v. State*, 272 Ga. 684, 691, 531 S.E.2d 84, 90-91 (2000).

¹⁶⁹ GA. S. CT. R. 19 n.1.

§ 6.2.2.3.2 Sequence of Argument

It is suggested that arguments in briefs be in sequence with the enumeration of errors.¹⁷⁰

§ 6.2.2.4 Supplemental Briefs

Supplemental briefs may be filed at any time before decision.¹⁷¹ The court will not consider any supplemental brief that serves only to circumvent the page limitations on briefs in civil cases.¹⁷² Supplemental briefs generally may not expand the issues beyond the scope of the original enumeration of errors.¹⁷³

§ 6.2.2.5 Supplemental Record

If a record is supplemented pursuant to O.C.G.A. § 5-6-41(f) or § 5-6-48(d), a party wishing to present an issue to the court relating to the trial court proceeding wherein the record was supplemented must: (i) raise the issue before the trial court; and (ii) then file additional enumerations of error and a brief within 10 days after docketing of the supplemental record with the court or after the trial court rules on the issue raised, whichever is later.¹⁷⁴ Opposing parties may file a supplemental brief within 20 days after docketing or after the trial court rules on the issue raised, whichever is later.¹⁷⁵

§ 6.2.2.6 Amicus Curiae Briefs

Amicus curiae briefs may be filed without prior permission of the court, but must disclose the identity and interest of the persons on whose behalf they are filed.¹⁷⁶

¹⁷⁰ *Id.*

¹⁷¹ GA. S. CT. R. 24.

¹⁷² *Id.*

¹⁷³ *Saint v. Williams*, 287 Ga. 746, 748, 699 S.E.2d 312, 313 (2010) (“It is improper to use a supplemental brief to expand upon the issues to be decided by this Court.”). *But see Pittman v. State*, 273 Ga. 849, 850-51, 546 S.E.2d 277, 279 (2001) (considering supplemental enumeration of error where issue raised “could materially affect the fair trial rights of the appellant”).

¹⁷⁴ GA. S. CT. R. 25.

¹⁷⁵ *Id.*

¹⁷⁶ GA. S. CT. R. 23.

7

ORAL ARGUMENT

*Doug Scribner**

*Allison S. Thompson***

§ 7.1 Court of Appeals Rules

§ 7.1.1 Oral Argument Is Not Granted as a Matter of Right

Oral argument is not mandatory. Oral argument may be granted upon request of either party or sua sponte by the court.¹

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** Ms. Thompson is a senior associate in the Litigation & Trial Practice Group at Alston & Bird LLP and focuses on civil litigation. She received her undergraduate degree from the Georgia Institute of Technology in 2003 and her J.D. from the University of Georgia in 2006.

¹ GA. CT. APP. R. 28(a)(1).

§ 7.1.2 Request for Oral Argument

A case may be placed on the calendar for oral argument only upon the request of either party or upon a sua sponte order of the court.² Any request must be made within 20 days from the date the case is docketed in the Court of Appeals irrespective of any extensions of time to file written materials.³ A request for oral argument must:

- Be filed as a separate document;
- Be directed to the clerk;
- Certify that the opposing party or attorney has been notified of the request to argue the case orally;
- Certify that opposing counsel does or does not desire to argue the case orally;
- Identify the counsel scheduled to argue; and
- Contain a brief, specific statement demonstrating that the decisional process will be significantly aided by oral argument.⁴

Any change as to the attorney or party who will argue must be communicated in writing to the clerk as soon as practicable.⁵

Court of Appeals Rule 28(a)(4) requires that the request for oral argument explain why oral argument will aid the decision-making process. Counsel should start from the premise that in most cases oral argument will not help the decision-making process beyond the assistance provided by the written briefs. Counsel should explain, with brief but specific references to the case, why the case requires oral as well as written presentation.⁶ In other words, counsel should explain what distinguishes this case from the normal one in which oral argument is not helpful. Statements that oral argument is warranted “because the case is an important one” or that oral argument “is necessary to clarify the issues” are not adequate.

The request for oral argument should be self-contained, and counsel should not assume the appellate brief will be considered in ruling on the request. The request should convey succinctly

² *Id.*

³ GA. CT. APP. R. 28(a)(2).

⁴ GA. CT. APP. R. 28(a)(3)-(4).

⁵ *Id.*

⁶ GA. CT. APP. R. 28(a)(3).

everything the court needs to decide whether to grant the request.⁷ The Court of Appeals has indicated the request will be granted if any of the three judges on the panel to which the case is assigned believes oral argument is warranted. The request should not be another brief, but should state specifically and succinctly why the case should be argued orally.

§ 7.1.3 Time Limitations

Argument is limited to 30 minutes for each case, 15 minutes per side, unless by special leave of court an extension of time is granted.⁸ Appeals, cross appeals, companion cases, and related cases are considered one case for purposes of oral argument. A request to have a companion case treated as a separate case or for an extension of the time allotted for oral argument, must be made in writing at least five days prior to the date set for oral argument. Upon the granting of a request for additional time, the appeal normally will be placed at the end of the argument calendar for that day.⁹

§ 7.1.4 Number of Arguments

Ordinarily, when both sides of an appeal are argued, only two counsel on each side will be heard. When only one side of an appeal is argued, or when arguments are to be made on behalf of more than two parties, no more than one counsel per party may be heard.¹⁰ Where there are third parties, or additional parties of divergent interests, additional time may be requested.¹¹

§ 7.1.5 Opening and Closing

The appellant has the right to open and conclude the argument.¹² The appellant must reserve a portion of the allotted time in order to present concluding statements, and the conclusion should be confined to matters covered in opposing counsel's argument.

§ 7.1.6 Courtroom Decorum

Counsel appearing for oral argument must check in with the clerk in the courtroom at 9:30 a.m. on the date of oral argument, specifying who will argue and for how long. Talking, reading

⁷ *Id.*; see also GA. CT. APP. R. 28(a)(4).

⁸ GA. CT. APP. R. 28(d).

⁹ *Id.*

¹⁰ GA. CT. APP. R. 28(e).

¹¹ GA. CT. APP. R. 28(d).

¹² GA. CT. APP. R. 28(f).

newspapers or other material, audibly studying briefs, and arranging papers are prohibited in the courtroom, as this may be done in the lawyers' lounge.¹³

§ 7.1.7 Order of Argument

The Court of Appeals diverges from the order listed on the calendar when all counsel appearing for argument in a given case inform the clerk that the time of argument will be limited to five or 10 minutes for each side. Ordinarily, five-minute arguments will be heard first, 10-minute arguments will be heard next, and 15-minute arguments will be heard last.¹⁴

§ 7.1.8 Waiver of Argument

A party may waive the right to present oral argument if the party's brief has not been timely filed or if counsel is not actually inside the courtroom when the case is called for argument. Counsel requesting an extension of time to file briefs will waive oral argument if the extension is beyond the end of the term for which the case was originally docketed.¹⁵

After either side has been granted oral argument, a party may voluntarily waive the right to appear for argument by notifying opposing counsel and the court of that fact. A voluntary waiver of argument by the requesting party does not remove the case from the calendar.¹⁶

§ 7.1.9 Miscellaneous

- Oral argument is not permitted for applications or motions.¹⁷
- Oral argument is open to the public, but counsel may submit a written request that the court exclude the public for good cause shown at least 24 hours prior to oral argument.¹⁸
- Personal remarks that are discourteous or disparaging to opposing counsel or to any judge or court are strictly forbidden.¹⁹

¹³ GA. CT. APP. R. 28(g); *see also* GA. S. CT. R. 55(1) (applying same rule in the Supreme Court).

¹⁴ GA. CT. APP. R. 28(d).

¹⁵ GA. CT. APP. R. 28(b).

¹⁶ *Id.*

¹⁷ GA. CT. APP. R. 28(a)(1); *see also* GA. CT. APP. R. 37(h) (disallowing oral argument on motion for reconsideration); GA. CT. APP. R. 44(c) (same regarding motion for recusal).

¹⁸ GA. CT. APP. R. 28(i).

¹⁹ GA. CT. APP. R. 10; *see also* GA. S. CT. R. 29 (applying same rule in the Supreme Court).

- Each docketing notice lists a tentative date for oral argument, but the clerk will mail counsel a calendar fixing the actual date for argument at least 14 days prior to the date set for oral argument.²⁰ Counsel not receiving a calendar at least 10 days prior to the tentative date should contact the clerk to inquire about the oral argument date.²¹
- Postponement of oral argument is not favored and will not be granted under any circumstances that would allow oral argument to occur subsequent to the term for which the case was docketed.²²

§ 7.2 Supreme Court Rules

§ 7.2.1 Oral Argument Is Granted as a Matter of Right Only in Certain Cases

Oral argument is mandatory on direct appeals from judgments imposing the death penalty and all granted writs of certiorari that are not disposed of summarily by the court.²³ Otherwise, unless expressly ordered by the court, oral argument is never mandatory, and argument may be submitted on briefs only.²⁴

§ 7.2.2 Calendaring of Oral Argument

Oral argument will be scheduled by the court as follows:

- Direct appeals from judgments imposing the death penalty are placed on the calendar automatically.
- All granted writs of certiorari are placed on the calendar automatically unless disposed of summarily by the court.
- Other cases will be placed on the calendar upon the request of either party within 20 days from the date the case is docketed by the Supreme Court.²⁵

²⁰ GA. CT. APP. R. 14(a).

²¹ GA. CT. APP. R. 14(b).

²² GA. CT. APP. R. 28(a)(3).

²³ GA. S. CT. R. 50(1) & (2).

²⁴ GA. S. CT. R. 50(3).

²⁵ GA. S. CT. R. 50.

Oral argument will not be granted to parties or attorneys whose briefs have not been timely filed. The court may deny or limit oral argument where appropriate.²⁶

§ 7.2.3 Request for Oral Argument

Requests for oral argument, when required, must be filed by letter directed to the clerk, and must certify that the opposing parties or their attorneys have been notified of the intention to argue the case orally and that an inquiry has been made as to whether they intend also to present oral argument. The request must further certify that the opponents do or do not desire to argue orally. Finally, the request must show service on the opposing parties or counsel.²⁷

A request for oral argument must be renewed upon transfer of an appeal to the Supreme Court from the Court of Appeals.²⁸

§ 7.2.4 Appearance and Waiver

Attorneys appearing for argument are to notify the clerk of their presence upon arrival in the courtroom.²⁹ Argument is deemed to be waived unless the attorneys are prepared to argue in the sequence presented on the calendar.³⁰

§ 7.2.5 Order of Argument

Opening argument is made by the appellant. The appellee or cross-appellant has the right to respond. Rebuttal is limited to one attorney on behalf of the appellant.³¹

§ 7.2.6 Time Limitations

Oral argument is typically limited to 20 minutes for each side, except by leave of court; however, the parties are allotted 30 minutes per side in direct appeals from death penalty cases and 10 minutes per side in divorce appeals granted under Supreme Court Rule 34(4).³²

²⁶ G.A. S. CT. R. 50(3).

²⁷ G.A. S. CT. R. 51.

²⁸ *Id.*

²⁹ G.A. S. CT. R. 52.

³⁰ *Id.*

³¹ G.A. S. CT. R. 53.

³² G.A. S. CT. R. 54.

Appeals, cross appeals, and companion cases are considered one case for purposes of oral argument, and the parties must divide the allotted time by agreement among themselves. The yellow light on the podium indicates five minutes remain in the argument; the red light indicates time has expired.³³

§ 7.2.7 Media Rules

Attorneys are prohibited from giving media interviews in the courtroom or the Judicial Building absent the court's permission,³⁴ except with respect to ceremonial or non-judicial proceedings.³⁵ In the event that the court holds judicial session at any place other than the courtroom of the Judicial Building, the spirit of the court's rules regarding media coverage shall be followed to the extent possible.³⁶

§ 7.3 Use of Visual Aids³⁷

Counsel intending to use any visual aids in connection with oral argument is advised to contact the appropriate clerk to schedule time to become familiar with the podium and document projector prior to the date set for oral argument. Generally, the following rules apply to the use of visual aids.

§ 7.3.1 Court of Appeals

The Court of Appeals provides counsel with access to a document projector and DVD player for use during oral argument. Counsel are advised to bring their own materials and should provide courtesy copies of any documents to each judge on the panel and opposing counsel. The courtroom is also equipped so that counsel may project material stored on a laptop computer.

§ 7.3.2 Supreme Court

The Supreme Court permits counsel to present copies of relevant documents during oral argument through the court's document projection system. Counsel are advised to bring a hard copy of any document to be projected during oral argument and should bring additional courtesy copies to provide to each justice and opposing counsel. The use of any other type of visual aid,

³³ *Id.*

³⁴ GA. S. CT. R. 85.

³⁵ GA. S. CT. R. 88.

³⁶ GA. S. CT. R. 87.

³⁷ The information presented in this Section 7.3 was derived through consultation with the offices of the Clerks of the Georgia Court of Appeals and Georgia Supreme Court.

such as a power point presentation or airing a video clip, requires preapproval from the clerk and generally will require counsel to provide the necessary equipment.

§ 7.4 Professionalism in Oral Argument

In arguing before the courts, counsel are not only advocates for their clients, but also officers of the courts. In discussing the facts of the case and applicable law, counsel must be consistent with the record and true to the authorities upon which they rely. In addition, counsel must be respectful of the appellate process and must refrain from personal remarks that are discourteous and disparaging of opposing counsel or any member of the court.³⁸

³⁸ GA. S. CT. R. 29; GA. CT. APP. R. 10.

8

EXTRAORDINARY WRITS

*Gregory B. Mauldin**

§ 8.1 Petitions for Certiorari

See *infra* Chapter 10, discussing the authority of the Supreme Court, vested by the Georgia Constitution, to review by certiorari Court of Appeals decisions that are of “gravity or great public importance.”¹ The procedure for obtaining a writ of certiorari from the Georgia Supreme Court is governed by Georgia Supreme Court Rules 38 through 45.

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¹ GA. CONST. art. VI, § 6, ¶ 5.

§ 8.2 Petitions for Writ of Habeas Corpus

A petition for a writ of habeas corpus is the procedural vehicle for challenging the legality of a person's restraint or the right of custody over another.² The writ challenges only the legality of the restraint.³ A petition for writ of habeas corpus is a civil, not criminal, proceeding.⁴

§ 8.2.1 Individuals Who May File a Habeas Corpus Petition

A petition for writ of habeas corpus can be utilized by or for two distinct categories of individuals.⁵ The first category encompasses persons who are restrained of their liberty and seek to challenge the legality of such restraint.⁶ Included in this class are persons sentenced by a state court, although O.C.G.A. §§ 9-14-40 *et seq.* provide the exclusive procedure for seeking the writ in such cases.⁷ Habeas corpus is available when a prisoner is unlawfully confined beyond the term of his sentence⁸ or when a prisoner is confined under a sentence longer than that permitted by state statute.⁹ Habeas corpus is also available for cases involving exorbitantly high bail.¹⁰ It is not available, however, as a vehicle for protesting conditions of incarceration.¹¹ Any person may petition for a writ of habeas corpus on behalf of one imprisoned or wrongfully detained.¹²

² For a general discussion of the definition, history, and operation of the writ of habeas corpus, see 14 ENCYCLOPEDIA OF GEORGIA LAW *Habeas Corpus* §§ 1-79 (1999).

³ *Hall v. Hall*, 222 Ga. 820, 821, 152 S.E.2d 737, 738 (1966); *Faughnan v. Ross*, 197 Ga. 21, 26, 28 S.E.2d 119, 122 (1943).

⁴ *Schofield v. Meders*, 280 Ga. 865, 870, 632 S.E.2d 369, 376 (2006); *Slakman v. Cont'l Cas. Co.*, 277 Ga. 189, 190, 587 S.E.2d 24, 26 (2003); *Gibson v. Turpin*, 270 Ga. 855, 857, 513 S.E.2d 186, 187 (1999). When a prisoner files a standard civil complaint against prosecutors for a violation of his constitutional rights and false imprisonment, it will be dismissed, because habeas is the appropriate procedure for challenging such conduct. *Battle v. Sparks*, 211 Ga. App. 106, 107, 438 S.E.2d 185, 186 (1993).

⁵ *Hall*, 222 Ga. at 821, 152 S.E.2d at 738; *Faughnan*, 197 Ga. at 26, 228 S.E.2d at 122.

⁶ O.C.G.A. §§ 9-14-1(a), (c).

⁷ The scope of available habeas relief is expanded in such cases. See O.C.G.A. § 9-14-40(a)(3).

⁸ *Lillard v. Head*, 267 Ga. 291, 291, 476 S.E.2d 736, 737 (1996).

⁹ *Harvey v. Meadows*, 280 Ga. 166, 168, 626 S.E.2d 92, 94 (2006); *Manville v. Hampton*, 266 Ga. 857, 858, 471 S.E.2d 872, 874 (1996).

¹⁰ *Rainwater v. Langley*, 277 Ga. 127, 128, 587 S.E.2d 18, 19 (2003); *Jones v. Grimes*, 219 Ga. 585, 587, 134 S.E.2d 790, 792 (1964).

¹¹ *Lewis v. Griffin*, 258 Ga. 887, 887-88, 376 S.E.2d 364, 365-66 (1989); *Brown v. Caldwell*, 231 Ga. 795, 204 S.E.2d 137 (1974).

¹² *Broomhead v. Chisolm*, 47 Ga. 390 (1872).

The second category of persons who may seek habeas relief is those who claim a right of custody over one who is in the custody of another.¹³ This circumstance might arise, for example, when a person is denied physical custody of a person for whom he or she has legal custody.¹⁴

Georgia Code Section 9-14-1 sets forth the specific persons that may seek a writ of habeas corpus:

- Any person restrained of his liberty under any pretext whatsoever, except under sentence of a state court of record, may seek a writ of habeas corpus to inquire into the legality of the restraint.
- Any person alleging that another person in whom for any cause he is interested is kept illegally from the custody of the applicant may seek a writ of habeas corpus to inquire into the legality of the restraint.
- Any person restrained of his liberty as a result of a sentence imposed by any state court of record may seek a writ of habeas corpus to inquire into the legality of the restraint.¹⁵

§ 8.2.2 Whether a Court Will Issue a Writ of Habeas Corpus

Courts must consider the following four issues when deciding whether to issue a writ of habeas corpus: (i) the origin of petitioner’s right—whether that right arises under state or federal law; (ii) whether that right has been waived; (iii) whether a violation of that right occurred; and (iv) whether the violation was harmless.¹⁶

Although a writ of habeas corpus is a “writ of right,” it does not issue as a matter of course.¹⁷ Instead, it is to be granted only when the application for the writ contains allegations that, if accepted as true, would authorize the release of the person held in custody.¹⁸ These allegations must be specific, not conclusory, and facts substantiating a violation of rights are required.¹⁹ An

¹³ O.C.G.A. § 9-14-1(b).

¹⁴ O.C.G.A. § 9-14-2.

¹⁵ O.C.G.A. § 9-14-1.

¹⁶ *McDuffie v. Jones*, 248 Ga. 544, 545-46, 283 S.E.2d 601, 603 (1981), *overruled on other grounds by West v. Waters*, 272 Ga. 591, 533 S.E.2d 88 (2000).

¹⁷ *Simmons v. Ga. Iron & Coal Co.*, 117 Ga. 305, 311, 43 S.E. 780, 782 (1903).

¹⁸ O.C.G.A. § 9-14-5 (specifying that writ is to be granted “[w]hen upon examination of the petition for a writ of habeas corpus it appears to the judge that the restraint of liberty is illegal”); *Simmons*, 117 Ga. at 311, 43 S.E. at 782.

¹⁹ *Salisbury v. Grimes*, 223 Ga. 776, 777, 158 S.E.2d 412, 414 (1967).

individual need not be presently confined to seek habeas corpus, if he or she can prove adverse collateral consequences from a previous confinement.²⁰

A writ of habeas corpus is not proper when another adequate remedy exists.²¹ For example, a writ will not issue when proceedings under which the petitioner is detained are still pending or when other procedural remedies have yet to be exhausted.²² An exception to this rule arises in the case of committed mental patients, who have a statutory right to seek habeas corpus relief “at any time.”²³ A writ of habeas corpus cannot be used as a substitute for appeal, motion for new trial, writ of error, or other remedial procedures for the correction of errors or irregularities alleged to have been committed by a trial court.²⁴ Further, absent a change in either facts or law, issues decided on appeal cannot be relitigated in habeas proceedings.²⁵ All grounds for habeas relief must be raised in the first petition unless the grounds are constitutionally nonwaivable or the grounds could not reasonably have been raised in the first petition.²⁶ Habeas corpus relief is not available for denial of a nonconstitutional right secured by Georgia law.²⁷

Despite the broad language of O.C.G.A. § 9-14-1(b), a writ of habeas corpus may not be used to effect a change of legal custody over a child.²⁸ Instead, O.C.G.A. § 19-9-23 provides the exclusive remedy for seeking a change of custody in that context, and child custody case law prior to the enactment of that statute in 1981 should be relied upon with caution. The current standard to be used with respect to a change of legal custody is the best interests of the child.²⁹

A petition for a writ of habeas corpus remains the appropriate procedure, however, when an individual with legal custody of a child seeks to enforce a child custody order or to remove the child from wrongful custody.³⁰ Thus, such a petition is appropriate when the petitioner has permanent

²⁰ *Turner v. State*, 284 Ga. 494, 495, 668 Ga. 692, 693 (2008); *Tharpe v. Head*, 272 Ga. 596, 597, 533 S.E.2d 368, 369 (2000).

²¹ *Britt v. Conway*, 281 Ga. 189, 189-90, 637 S.E.2d 43, 44 (2006); *Kearse v. Paulk*, 264 Ga. 509, 510, 448 S.E.2d 369, 370 (1994).

²² *Tabor v. State*, 279 Ga. 98, 99, 610 S.E.2d 59, 60 (2005), *overruled on other grounds by Brown v. Crawford*, 289 Ga. 722, 724-25, 715 S.E.2d 132, 134 (2011).

²³ O.C.G.A. § 37-3-148(a); *see also Hogan v. Nagel*, 273 Ga. 577, 578, 543 S.E.2d 705, 706 (2001).

²⁴ *Archer v. Grimes*, 222 Ga. 8, 9, 148 S.E.2d 395, 396 (1966).

²⁵ *Roullain v. Martin*, 266 Ga. 353, 353-54, 466 S.E.2d 837, 839 (1996).

²⁶ O.C.G.A. § 9-14-51; *Stevens v. Kemp*, 254 Ga. 228, 230, 327 S.E.2d 185, 187 (1985); *Dix v. Zant*, 249 Ga. 810, 811, 294 S.E.2d 527, 528 (1982).

²⁷ O.C.G.A. § 9-14-42(a); *Green v. Dunn*, 257 Ga. 66, 355 S.E.2d 61 (1987).

²⁸ *Douglas v. Douglas*, 285 Ga. 548, 550, 678 S.E.2d 904, 906 (2009).

²⁹ *Stills v. Johnson*, 272 Ga. 645, 650, 533 S.E.2d 695, 701 (2000).

³⁰ *Douglas*, 285 Ga. at 550, 678 S.E.2d at 906; *Johnson v. Smith*, 251 Ga. 1, 2, 302 S.E.2d 542, 543 (1983).

legal custody and seeks the return of a child from one who has temporary custody,³¹ or when the petitioner has prima facie custody under the law and seeks to obtain actual, physical custody from a third party.³² In short, one must have a legal custodial right to a detained child in order to seek habeas corpus relief with respect to that child.³³

§ 8.2.3 Filing a Petition for Writ of Habeas Corpus

To file a habeas corpus petition, the petitioner must complete Administrative Office of the Court (“AOC”) Form HC-1, entitled “Application for Writ of Habeas Corpus.”³⁴ The Georgia Code sets forth the mandatory contents of a habeas petition in criminal cases.³⁵ These include: (i) an identification of the proceeding in which the petitioner was convicted; (ii) the date of the judgment complained of; (iii) the manner in which the petitioner’s rights were violated; and (iv) a specific statement of which claims were raised at trial or on direct appeal, with appropriate citations to the trial or appellate record.³⁶ Affidavits, records, or other evidence supporting the petition must be attached, or the petition must state why they are not attached.³⁷ The petition must also identify any previous proceedings that the petitioner may have undertaken to obtain relief from the conviction, and if the petitioner has filed prior habeas petitions, the claims raised previously must be identified.³⁸ The petition itself cannot contain argument and citations of authority, but those may be set forth in a brief in support of the petition.³⁹ Finally, the applicant (or someone on his or her behalf) must verify the petition.⁴⁰

While the procedural rules governing habeas corpus petitions generally must be followed,⁴¹ the failure to comply with procedural rules does not always preclude consideration of a habeas

³¹ *Alvarez v. Sills*, 258 Ga. 18, 19, 365 S.E.2d 107, 108 (1988).

³² *Columbus v. Gaines*, 253 Ga. 518, 519, 322 S.E.2d 259, 260-61 (1984).

³³ *Spitz v. Holland*, 243 Ga. 9, 10, 252 S.E.2d 406, 408 (1979); *Bennett v. Schaffer*, 228 Ga. 59, 60-61, 183 S.E.2d 760, 761 (1971).

³⁴ *Jones v. Henderson*, 285 Ga. 804, 804, 684 S.E.2d 265, 266 (2009); *Donald v. Price*, 283 Ga. 311, 311-12, 658 S.E.2d 569, 570-71 (2008).

³⁵ O.C.G.A. § 9-14-44.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* The Supreme Court has reversed dismissal of a habeas petition where the petitioner completed the proper AOC form, but failed to provide the verification statement in the traditional format. *Heaton v. Lemacks*, 266 Ga. 189, 190, 466 S.E.2d 7, 8 (1996).

⁴¹ *Jones v. Henderson*, 285 Ga. 804, 804, 684 S.E.2d 265, 266 (2009).

petition.⁴² If a petitioner can demonstrate adequate cause for failing to assert the claim and resulting prejudice, such as when there has been ineffective assistance of counsel,⁴³ an otherwise valid procedural bar will not preclude habeas review.⁴⁴ Similarly, courts will not procedurally bar or default a claim for habeas relief “to avoid a miscarriage of justice,” but this exception is extremely narrow and generally tied to actual innocence.⁴⁵

In all habeas cases except those involving initial challenges of state court proceedings resulting in death sentences, the respondent has 20 days from the filing and docketing of a petition to answer or move to dismiss, though the court may allow more time.⁴⁶ The court must set the case for a hearing on the issues within “a reasonable time after the filing of defensive pleadings.”⁴⁷ The conduct of that hearing, and specific rules governing discovery and the entry of sworn affidavits into evidence, are governed by O.C.G.A. § 9-14-48. Because habeas corpus is a civil proceeding there is no guaranteed right to counsel,⁴⁸ and the Civil Practice Act, O.C.G.A. § 9-11-1 *et seq.*, applies.⁴⁹ Georgia Code Section 9-14-47.1 and Uniform Superior Court Rule 44 govern the initial challenges of state court proceedings that result in death sentences. These authorities contain specific rules for the assignment of such cases, the filing of pleadings, the conduct of evidentiary hearings, and other matters.

§ 8.2.4 Appeals of Habeas Corpus Rulings

Any appeal of a court’s action with respect to a habeas corpus filing by a prisoner must not be direct but instead follow the discretionary review process set forth in O.C.G.A. § 5-6-35.⁵⁰ In fact, appeals in habeas cases are subject to virtually all of the general provisions of Title 5

⁴² *Valenzuela v. Newsome*, 253 Ga. 793, 795-96, 325 S.E.2d 370, 373-74 (1985).

⁴³ *Hall v. Wheeling*, 282 Ga. 86, 87, 646 S.E.2d 236, 238 (2007); *Turpin v. Todd*, 268 Ga. 820, 823-28, 493 S.E.2d 900, 904-07 (1997).

⁴⁴ *Head v. Ferrell*, 274 Ga. 399, 401-02, 554 S.E.2d 155, 160 (2001); *Black v. Hardin*, 255 Ga. 239, 240, 336 S.E.2d 754, 755 (1985); *Valenzuela*, 253 Ga. at 796, 325 S.E.2d at 374; *see also* O.C.G.A. § 9-14-48(d).

⁴⁵ *Perkins v. Hall*, 288 Ga. 810, 824, 708 S.E.2d 335, 347 (2011); *Valenzuela*, 253 Ga. at 796, 325 S.E.2d at 374; *see also* *Head v. Stripling*, 277 Ga. 403, 409, 590 S.E.2d 122, 128 (2003) (authorizing habeas courts to address habeas claims of mental retardation under the miscarriage of justice exception).

⁴⁶ O.C.G.A. § 9-14-47.

⁴⁷ *Id.*

⁴⁸ *Britt v. Conway*, 281 Ga. 189, 189, 637 S.E.2d 43, 44 (2006); *Gibson v. Turpin*, 270 Ga. 855, 857, 513 S.E.2d 186, 187 (1999).

⁴⁹ *Rolland v. Martin*, 281 Ga. 190, 191, 637 S.E.2d 23, 24 (2006).

⁵⁰ *Brown v. Crawford*, 289 Ga. 722, 724-25, 715 S.E.2d 132, 134 (2011).

of the Georgia Code.⁵¹ An unsuccessful petitioner who desires to appeal must file: (i) a written application for a certificate of probable cause to appeal with the clerk of the Supreme Court; and (ii) a notice of appeal with the clerk of the superior court.⁵² Both of these documents must be filed within 30 days from the entry of the trial court order denying relief to the petitioner.⁵³ If, however, the petitioner prevails in the trial court, the respondent need only file a notice of appeal.⁵⁴ Effective January 1, 2012, documents sent by “pro se” prisoners are considered filed in the Supreme Court on the date the prisoner delivers them to prison officials for mailing.⁵⁵

§ 8.3 Other Extraordinary Writs

Title 9, Chapter 6 of the Georgia Code provides for three other types of extraordinary writs: (i) mandamus; (ii) prohibition; and (iii) quo warranto.⁵⁶ The superior and appellate courts have exclusive jurisdiction over these extraordinary writs.⁵⁷ Although the Supreme Court has appellate jurisdiction over cases involving extraordinary writs,⁵⁸ no appeal may be taken until the trial court has rendered a final judgment.⁵⁹

§ 8.3.1 Writ of Mandamus

A writ of mandamus commands an inferior officer or judge to perform a specific duty.⁶⁰ The Georgia Constitution, as well as the Code, vests Georgia’s Supreme Court with the power to “grant any writ necessary to carry out any purpose of its organization or to compel any inferior tribunal or officers thereof to obey its order.”⁶¹ Thus, the Supreme Court has the specific power to

⁵¹ O.C.G.A. § 9-14-52(a).

⁵² O.C.G.A. § 9-14-52(b).

⁵³ *Id.*

⁵⁴ O.C.G.A. § 9-14-52(c).

⁵⁵ GA. S. CT. R. 13.

⁵⁶ *See generally* O.C.G.A. §§ 9-6-1 *et seq.*

⁵⁷ GA. CONST. art. VI, § 1, ¶ 4.

⁵⁸ GA. CONST. art. VI, § 6, ¶ 3(5); *see also Raybestos-Manhattan, Inc. v. Moran*, 248 Ga. 461, 462, 284 S.E.2d 256, 257 (1981) (per curiam) (holding the Court of Appeals also has the power to entertain a petition for a writ of mandamus or prohibition in order to enforce its judgments).

⁵⁹ O.C.G.A. § 9-6-1.

⁶⁰ O.C.G.A. § 9-6-20.

⁶¹ O.C.G.A. § 15-2-8; *see generally* GA. CONST. art. VI, § 1, ¶ 4.

issue a writ of mandamus to compel a lower court to obey its order.⁶² As with other extraordinary writs, mandamus is not meant to replace an appeal, but is an extraordinary remedy used to correct an injustice when other options are not available.⁶³

The procedure to be followed before invoking the Supreme Court’s jurisdiction over this type of mandamus is set forth in *Brown v. Johnson*.⁶⁴ In *Brown*, the Supreme Court held that a petition for writ of mandamus (or quo warranto or prohibition) must be filed in the appropriate superior court, rather than the Supreme Court, even when a superior court judge is named as the respondent.⁶⁵ The respondent judge would then be disqualified, and another superior court judge would be appointed to hear and determine the matter.⁶⁶ This second judge’s decision would then be directly appealable to the Supreme Court.⁶⁷

A writ of mandamus may also be used to compel a public official to perform a duty of his or her office. Georgia Code Section 9-6-20 provides:

All official duties should be faithfully performed, and whenever, from any cause, a defect of legal justice would ensue from a failure to perform or from improper performance, the writ of mandamus may issue to compel a due performance, if there is no other specific legal remedy for the legal rights.⁶⁸

Georgia’s superior courts have exclusive jurisdiction over this second type of mandamus remedy.⁶⁹

A writ of mandamus will be issued only in limited circumstances. Petitions must satisfy a two-pronged test: (i) the applicant must demonstrate a clear legal right to the relief sought;⁷⁰ and (ii) there must be no other adequate remedy.⁷¹ That is, there must be a duty imposed on the

⁶² For a general discussion of the definition, nature, and history of the writ of mandamus, see 20 ENCYCLOPEDIA OF GEORGIA LAW *Mandamus* §§ 1-17 (2001).

⁶³ *Rabun Cnty. v. Mountain Creek Estates, LLC*, 280 Ga. 855, 857-58, 632 S.E.2d 140, 144 (2006); *Ford Motor Co. v. Lawrence*, 279 Ga. 284, 285, 612 S.E.2d 301, 303 (2005); *Smith & Wesson Corp. v. City of Atlanta*, 273 Ga. 431, 433, 543 S.E.2d 16, 19 (2001).

⁶⁴ 251 Ga. 436, 306 S.E.2d 655 (1983).

⁶⁵ *Id.* at 436-37, 306 S.E.2d at 656.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ O.C.G.A. § 9-6-20.

⁶⁹ *Wofford Oil Co. of Ga. v. City of Calhoun*, 183 Ga. 511, 514, 189 S.E. 5, 7 (1936).

⁷⁰ *Willis v. Dep’t of Revenue*, 255 Ga. 649, 650, 340 S.E.2d 591, 593 (1986); *McClure v. Hightower*, 237 Ga. 157, 158, 227 S.E.2d 47, 48-49 (1976).

⁷¹ *Watson v. Matthews*, 286 Ga. 784, 786, 692 S.E.2d 338, 340 (2010); *Tamaroff v. Cowen*, 270 Ga. 415, 415, 511 S.E.2d 159, 160 (1999); *Hunstein v. McDade*, 267 Ga. 515, 515, 480 S.E.2d 192, 193 (1997).

defendant and a pecuniary loss to the plaintiff that cannot be remedied by an award of damages.⁷² An alternative remedy, however, is not adequate if it is not equally convenient, complete, and beneficial.⁷³ Furthermore, although the availability of an administrative process through which redress may be sought constitutes an adequate remedy,⁷⁴ courts often conclude the “no other adequate remedy” prong is satisfied because pursuit of administrative remedies is futile.⁷⁵ A petitioner must also establish that he has demanded (preferably in writing) that the official perform the duty and that such demand has been refused.⁷⁶

The duty to be enforced must exist at the time the petitioner files the application for the writ of mandamus.⁷⁷ The writ will be denied if the time for the discharge of the duty has passed, as its issuance would be “nugatory or fruitless.”⁷⁸ Moreover, the writ of mandamus is for the enforcement of a public duty, not for the “undoing of acts already done or the correction of wrongs already perpetrated.”⁷⁹ The writ of mandamus also will not be granted if it is based on mere suspicion or fear.⁸⁰

Generally, the writ of mandamus is limited to actions taken against a government official in his or her official capacity.⁸¹ A writ of mandamus acts directly on the officer or person; it is a

⁷² *Poole v. Duncan*, 202 Ga. 255, 257-58, 42 S.E.2d 731, 733 (1947); *see also* O.C.G.A. § 9-6-25.

⁷³ *Hall v. Nelson*, 282 Ga. 441, 443, 651 S.E.2d 72, 75 (2007); *N. Fulton Med. Ctr., Inc. v. Roach*, 265 Ga. 125, 127-28, 453 S.E.2d 463, 466 (1995).

⁷⁴ *Van Detta v. Bd. to Determine Character & Fitness of Bar Applicants*, 280 Ga. 157, 157, 625 S.E.2d 752, 753 (2006).

⁷⁵ *DeKalb Cnty. v. Cooper Homes*, 283 Ga. 111, 113, 657 S.E.2d 206, 208 (2008); *Hall*, 282 Ga. at 443, 651 S.E.2d at 75.

⁷⁶ *McDonald v. Schofield*, 216 Ga. 589, 592, 118 S.E.2d 479, 482 (1961).

⁷⁷ *City of Atlanta v. League of Women Voters of Atlanta-Fulton Cnty., Inc.*, 244 Ga. 796, 799, 262 S.E.2d 77, 79 (1979).

⁷⁸ O.C.G.A. § 9-6-26; *Halpern Props., Inc. v. Newton Cnty. Bd. of Equalization*, 245 Ga. 728, 728, 267 S.E.2d 26, 27 (1980); *Skrine v. Kim*, 242 Ga. 185, 187, 249 S.E.2d 534, 535 (1978); *see also Favorito v. Handel*, 285 Ga. 765, 801, 684 S.E.2d 257, 263 (2009) (upholding dismissal of complaint seeking mandamus relief because challenged provisions were repealed).

⁷⁹ *Brissey v. Ellison*, 272 Ga. 38, 39, 526 S.E.2d 851, 853 (2000) (quoting *Hilton Constr. Co. v. Rockdale Cnty. Bd. of Educ.*, 245 Ga. 533, 540, 266 S.E.2d 157, 162 (1980)); *see also Adams v. Ga. Dep’t of Corr.*, 274 Ga. 461, 462, 553 S.E.2d 798, 800 (2001); *Ianicelli v. McNeely*, 272 Ga. 234, 235-36, 527 S.E.2d 189, 191 (2000).

⁸⁰ O.C.G.A. § 9-6-26; *Halpern Props.*, 245 Ga. at 728, 267 S.E.2d at 27.

⁸¹ *Duncan v. Poythress*, 515 F. Supp. 327, 335 (N.D. Ga. 1981); *see generally* O.C.G.A. § 9-6-21(a) (“Mandamus shall not lie as a private remedy between individuals to enforce private rights . . .”).

personal action against the officer and not an action against the office itself.⁸² Although the writ of mandamus is not limited to the enforcement of ministerial duties, it is not available to enforce a duty that is discretionary unless there has been a gross abuse of discretion.⁸³

The General Assembly has specifically provided that the writ of mandamus will issue to compel: (i) the repair of public roads;⁸⁴ (ii) the performance of a duty within Title 5 by a sheriff, clerk, or other officer;⁸⁵ and (iii) the performance by a corporation of a public duty.⁸⁶ Further, a private person may procure the enforcement of a public duty,⁸⁷ a city rule,⁸⁸ or a private right⁸⁹ by seeking a writ of mandamus.

The procedure for a hearing on a mandamus application is set forth in O.C.G.A. § 9-6-27.⁹⁰ If an application for mandamus nisi is granted by the trial court, a trial will be set for not less than 10 but not more than 30 days later.⁹¹ The defendant must be served at least five days prior to the date of the hearing.⁹² If there is no substantial issue of fact, the case will be tried without a jury.⁹³ If an issue of fact exists, a jury will try the case unless the parties agree otherwise.⁹⁴

The Civil Practice Act applies to mandamus proceedings.⁹⁵ Therefore, just as in ordinary civil proceedings, summary judgment is available in mandamus cases.⁹⁶ Appeals may be made to

⁸² *Magis. Ct. of DeKalb Cnty. v. Fleming*, 284 Ga. 457, 458 n.1, 667 S.E.2d 356, 358 n.1 (2008); *HCA Health Servs., Inc. v. Roach*, 263 Ga. 798, 800 n.3, 439 S.E.2d 494, 497 n.3 (1994); *Harper v. State Bd. of Pardons & Paroles*, 260 Ga. 132, 132, 390 S.E.2d 592, 593 (1990).

⁸³ O.C.G.A. § 9-6-21(a); *Nalley v. Howell*, 268 Ga. 63, 63, 487 S.E.2d 600, 600 (1997).

⁸⁴ O.C.G.A. § 9-6-21(b).

⁸⁵ O.C.G.A. § 9-6-22.

⁸⁶ O.C.G.A. § 9-6-23.

⁸⁷ O.C.G.A. § 9-6-24.

⁸⁸ *Morton v. Bell*, 264 Ga. 832, 833, 452 S.E.2d 103, 104 (1995).

⁸⁹ *Poole v. Duncan*, 202 Ga. 255, 257, 42 S.E.2d 731, 733 (1947).

⁹⁰ O.C.G.A. § 9-6-27.

⁹¹ O.C.G.A. § 9-6-27(a).

⁹² *Id.*; see also O.C.G.A. § 9-11-4(j) (permitting ordinary service of process to be used in mandamus cases as an alternative to the issuance of mandamus nisi); *DeKalb Cnty. v. Chapel Hill, Inc.*, 232 Ga. 238, 240, 205 S.E.2d 864, 866 (1974).

⁹³ O.C.G.A. § 9-6-27(b).

⁹⁴ O.C.G.A. § 9-6-27(c).

⁹⁵ *Thompson v. Hornsby*, 235 Ga. 561, 562, 221 S.E.2d 192, 194 (1975).

⁹⁶ *Harrison v. Weiner*, 226 Ga. 93, 94-95, 172 S.E.2d 840, 841-42 (1970).

the Supreme Court upon the denial of a petition for mandamus or upon final judgment after hearing of the mandamus nisi.⁹⁷

§ 8.3.2 Writ of Prohibition

The writ of prohibition is the counterpart to the writ of mandamus.⁹⁸ Rather than compelling action by a lower court, it restrains a lower court from exceeding its jurisdiction.⁹⁹ The same principles of right, necessity, and justice that govern the consideration of a writ of mandamus also govern the grant or denial of a writ of prohibition.¹⁰⁰ Thus, a court will not grant a writ of prohibition if any other adequate remedy exists.¹⁰¹ A writ of prohibition is available only when there is a lack of subject matter jurisdiction, or when the act complained of is outside the jurisdiction of the lower court.¹⁰² It is not available for the relief of grievances that may be addressed in the ordinary course of judicial proceedings,¹⁰³ and it does not serve as a means to review discretionary application of the law, as an appeal does.¹⁰⁴ The petition must be filed in the appropriate superior court rather than in an appellate court, although the superior court's final decision can be appealed to the Supreme Court.¹⁰⁵

The writ of prohibition is available against executive or military officers when acting as a judicial or quasi-judicial tribunal.¹⁰⁶ The writ will lie against a justice of the peace,¹⁰⁷ but not against

⁹⁷ O.C.G.A. § 9-6-28(a).

⁹⁸ O.C.G.A. § 9-6-40.

⁹⁹ *Id.*; *Henry v. James*, 264 Ga. 527, 532, 449 S.E.2d 79, 83 (1994); 24A ENCYCLOPEDIA OF GEORGIA LAW *Prohibition* §§ 1-19 (1994).

¹⁰⁰ O.C.G.A. § 9-6-40.

¹⁰¹ *Watson v. Matthews*, 286 Ga. 784, 786, 692 S.E.2d 338, 340 (2010); *Ford Motor Co. v. Lawrence*, 279 Ga. 284, 285, 612 S.E.2d 301, 303 (2005); *Jersawitz v. Bodiford*, 258 Ga. 829, 829, 377 S.E.2d 502, 502 (1989). *But see Patterson v. Faircloth*, 256 Ga. 489, 493, 350 S.E.2d 243, 247 (1986) (holding that a court may grant the writ to preclude a trial infected by reversible error when considerations of judicial economy urge the granting of a writ of prohibition despite a defendant's failure to seek a direct appeal on an issue).

¹⁰² *Stokes v. Edwards*, 272 Ga. 98, 99, 526 S.E.2d 853, 854 (2000).

¹⁰³ *Jersawitz v. Riley*, 269 Ga. 546, 547, 500 S.E.2d 579, 580 (1998).

¹⁰⁴ *Smith & Wesson Corp. v. City of Atlanta*, 273 Ga. 431, 433-34, 543 S.E.2d 16, 20 (2001).

¹⁰⁵ *Carey Can., Inc. v. Head*, 252 Ga. 23, 24-25, 310 S.E.2d 895, 896 (1984); *see also* GA. CONST. art. VI, § 1, ¶ 4.

¹⁰⁶ O.C.G.A. § 9-6-42.

¹⁰⁷ *Mills v. Bell*, 136 Ga. 687, 71 S.E. 1120 (1911).

the governor¹⁰⁸ or a grand jury,¹⁰⁹ and has been denied as to a probate court,¹¹⁰ tax collector,¹¹¹ and county commissioner.¹¹²

Although the statute provides that a writ of prohibition may be granted at any time,¹¹³ two prerequisites must nonetheless be met. First, the action to which the writ is addressed must be an actual pending controversy.¹¹⁴ Second, the trial court must not have already entered judgment.¹¹⁵ Although a writ of prohibition may be granted at any time, the writ must be returned “in term.”¹¹⁶

§ 8.3.3 Writ of Quo Warranto

A private person may challenge the right of another to occupy a public office by the writ of quo warranto.¹¹⁷ It challenges only title to the office.¹¹⁸ Except for the governor, the remedy of a writ of quo warranto applies to all civil offices of the state.¹¹⁹ Whether an individual is a public officeholder subject to a writ of quo warranto is often litigated, with differing results. While a juvenile intake officer and county board members have been held to constitute public officers,¹²⁰ grand jury members and a college professor have not.¹²¹ Similarly, while a writ of quo warranto has been permitted to challenge the title to an office in a private corporation and to the chairman

¹⁰⁸ O.C.G.A. § 9-6-42.

¹⁰⁹ *Almand v. Brock*, 227 Ga. 586, 587-88, 182 S.E.2d 97, 99 (1971).

¹¹⁰ *Ray v. Jolles*, 280 Ga. 452, 453, 629 S.E.2d 250, 253 (2006).

¹¹¹ *Cody v. Lennard*, 45 Ga. 85, 89 (1872).

¹¹² *Pinkston v. Garrason*, 178 Ga. 814, 174 S.E. 626 (1934).

¹¹³ O.C.G.A. § 9-6-41.

¹¹⁴ *Jersawitz v. Eldridge*, 262 Ga. 19, 20, 413 S.E.2d 725, 727 (1992).

¹¹⁵ *Almand v. Brock*, 227 Ga. 586, 587, 182 S.E.2d 97, 99 (1971).

¹¹⁶ O.C.G.A. § 9-6-41.

¹¹⁷ O.C.G.A. § 9-6-60. For a general discussion of the definition, nature, and history of the writ of quo warranto, see 25 ENCYCLOPEDIA OF GEORGIA LAW *Quo Warranto* §§ 1-21 (1994).

¹¹⁸ *Bowling v. Doyal*, 206 Ga. 641, 644, 58 S.E.2d 173, 175 (1950); see also *Bruce v. Maxwell*, 270 Ga. 883, 515 S.E.2d 149 (1999).

¹¹⁹ O.C.G.A. § 9-6-61.

¹²⁰ *Everetteze v. Clark*, 286 Ga. 11, 12, 685 S.E.2d 72, 74 (2009); *Brown v. Scott*, 266 Ga. 44, 45, 464 S.E.2d 607, 608 (1995).

¹²¹ *MacDougald v. Phillips*, 262 Ga. 778, 778, 425 S.E.2d 652, 653 (1993); *McDuffie v. Perkerson*, 178 Ga. 230, 233, 173 S.E. 151, 153-55 (1933).

of a state party executive committee,¹²² the writ was not the proper remedy for questioning the qualifications of a General Assembly member.¹²³

The petitioner may be one who claims a right to hold the office or who otherwise has some interest in the office.¹²⁴ Any citizen or taxpayer of a community has a sufficient interest to challenge the qualifications of a public official by writ of quo warranto.¹²⁵

A petition for quo warranto may be filed only by leave of court.¹²⁶ The court, in turn, may grant the writ at any time.¹²⁷ A writ of quo warranto will not issue, however, if: (i) the public officer against whom the writ is directed is no longer exercising the duties of the office or claiming title thereto;¹²⁸ (ii) another adequate remedy exists at law or in equity;¹²⁹ or (iii) the Georgia Constitution or a statute provides a superseding remedy.¹³⁰ Although an injunction is the appropriate remedy to restrain public officers from acting illegally, a plaintiff may seek a writ of quo warranto if she alleges irreparable injury and presents a clear case, with a basic and underlying purpose of her suit being to declare the public office vacant or to test the title to an office or the validity of an election to office.¹³¹

Quo warranto proceedings must be brought in the superior court of the defendant's county of residence or the county in which the duties of the office are being performed.¹³² If the defendant is within the state, the writ of quo warranto and process must be personally served upon

¹²² *Morris v. Peters*, 203 Ga. 350, 359-61, 46 S.E.2d 729, 735-36 (1948).

¹²³ *Rainey v. Taylor*, 166 Ga. 476, 478, 143 S.E. 383, 384 (1928).

¹²⁴ O.C.G.A. § 9-6-60.

¹²⁵ *Richardson v. Phillips*, 285 Ga. 385, 385, 677 S.E.2d 117, 118 (2009); *Highsmith v. Clark*, 245 Ga. 158, 158, 264 S.E.2d 1, 1 (1980).

¹²⁶ *Everetteze v. Clark*, 286 Ga. 11, 12, 685 S.E.2d 72, 74 (2009); *Richardson*, 285 Ga. at 385-86, 677 S.E.2d at 117-18.

¹²⁷ O.C.G.A. § 9-6-62.

¹²⁸ *Merry v. Williams*, 281 Ga. 571, 572, 642 S.E.2d 46, 47-48 (2007); *Bruce v. Maxwell*, 270 Ga. 883, 515 S.E.2d 149 (1999); *Holmes v. Sikes*, 113 Ga. 580, 582, 38 S.E. 978, 979 (1901).

¹²⁹ *Stone v. Wetmore*, 42 Ga. 601, 603 (1871).

¹³⁰ *Alexander v. Ryan*, 202 Ga. 578, 579, 43 S.E.2d 654, 656 (1947); *Casey v. McElreath*, 177 Ga. 35, 37, 169 S.E. 342, 343-44 (1933).

¹³¹ *Boatright v. Brown*, 222 Ga. 497, 498, 150 S.E.2d 680, 681 (1966); *see also Hagood v. Hamrick*, 223 Ga. 600, 602, 157 S.E.2d 429, 431 (1967).

¹³² *Smith v. Upshaw*, 217 Ga. 703, 704, 124 S.E.2d 751, 753 (1962).

the defendant.¹³³ Otherwise, service of the writ and process may be perfected by publication as provided in O.C.G.A. § 9-11-4.¹³⁴

The Civil Practice Act applies to quo warranto proceedings.¹³⁵ When the writ of quo warranto involves questions of law, the judge of the superior court will hear and determine the issues within 10 days of the commencement of the action.¹³⁶ When an issue of fact exists, a jury of 12 will try the case beginning not less than 10 nor more than 30 days from the date of the order notifying the parties of the trial.¹³⁷ Once the right to an office is decided, the judgment fixing that right must provide for the delivery of all books and papers belonging to the office to the person held to be entitled to the office.¹³⁸ The Supreme Court has jurisdiction over an appeal from the trial court's judgment in quo warranto cases.¹³⁹

¹³³ O.C.G.A. § 9-6-63(b).

¹³⁴ O.C.G.A. § 9-6-63(c).

¹³⁵ *Anderson v. Flake*, 267 Ga. 498, 500, 480 S.E.2d 10, 12 (1997).

¹³⁶ O.C.G.A. § 9-6-64(a).

¹³⁷ O.C.G.A. § 9-6-65.

¹³⁸ O.C.G.A. § 9-6-66.

¹³⁹ *See generally Casey v. McElreath*, 177 Ga. 35, 169 S.E. 342 (1933).

9

INTERNAL PROCEDURES OF THE APPELLATE COURTS

*Van A. Anderson**

§ 9.1 Introduction

This chapter will outline the composition and organization of Georgia's two appellate courts, the assignment of cases for determination by those courts, the procedure by which cases, motions and petitions are heard and decided, and the power of the Supreme Court to discipline judges.

The following materials could not have been completed without the guidance and efforts of Tee Barnes, Clerk of the Supreme Court, and Holly Sparrow, Clerk of the Court of Appeals, both of whom reviewed these materials prior to publication.

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§ 9.2 Composition and Organization of the Appellate Courts

§ 9.2.1 Composition of the Courts

Although the Georgia Constitution provides that as many as nine justices may sit on the Supreme Court,¹ by statute the Supreme Court has been limited to seven justices.² While the Constitution provides that the Court of Appeals shall consist of not less than nine judges,³ 12 judges currently sit on the Court of Appeals.⁴

§ 9.2.2 Election and Appointment to the Courts

The judges and justices of the appellate courts are elected on a nonpartisan basis for six-year terms that commence on January 1 following their election.⁵ When a seat on either court becomes vacant between elections, the governor appoints a replacement. The replacement serves the remainder of the term until January 1 of the year following the next general election that is more than six months after the appointment.⁶ In other words, if there are fewer than six months of the unexpired term remaining before the election, the replacement appointee will serve for both the limited unexpired term to which the justice or judge was appointed initially and until January 1 following the next general election (two years later).

The Judicial Nominating Commission (“Commission”), composed of members appointed by executive order, helps the governor identify suitable candidates for vacant seats on the appellate courts, as well as other courts of record that involve executive appointment.⁷ Generally, the members of the Commission are appointed by the governor, but the chair of the Commission is authorized to appoint additional members as he or she deems appropriate.⁸ All members of the Commission serve at the pleasure of the governor.⁹

¹ GA. CONST. art. VI, § 6, ¶ 1.

² O.C.G.A. § 15-2-1.1.

³ GA. CONST. art. VI, § 5, ¶ 1.

⁴ O.C.G.A. § 15-3-1(a).

⁵ GA. CONST. art. VI, § 7, ¶ 1; O.C.G.A. § 15-3-4.

⁶ GA. CONST. art. VI, § 7, ¶¶ 3 & 4.

⁷ Executive Order of the Governor of the State of Georgia, dated June 11, 2003.

⁸ *Id.*

⁹ *Id.*

Appellate justices and judges are encouraged by statute to resign once they reach the age of 75.¹⁰ The members of the appellate courts forfeit certain retirement benefits unless they agree to retire on or before the day they attain age 75, or upon completing the term of office in which age 70 is attained, whichever is later.¹¹ Any justice or judge may be retired involuntarily “for disability which constitutes a serious and likely permanent interference with the performance of the duties of office.”¹²

§ 9.2.3 Internal Governance

The Supreme Court is headed by a chief justice,¹³ who is elected by members of the Supreme Court to a four-year term. The Supreme Court traditionally has elected the most senior member of the court who has not already served as chief justice. The members of the Supreme Court also elect a presiding justice,¹⁴ who is traditionally the second most senior justice who has not already served as presiding justice.

The members of the Court of Appeals elect a chief judge,¹⁵ who serves a two-year term. The chief judge, in turn, designates four presiding judges, each of whom presides over one of the four three-judge divisions of the court.¹⁶ The chief judge traditionally is elected on the basis of seniority, with the next-most senior judge who has not served as chief judge customarily being elected each time a two-year term expires. The presiding judges are traditionally the four most senior judges who are not serving as chief judge. At the end of the two-year term, the chief judge traditionally resumes service as a presiding judge.

¹⁰ O.C.G.A. § 47-2-244(l) provides:

Any appellate court judge who elects to receive the benefits provided for by this Code section and who fails to resign his office as appellate court judge on or before the day such judge attains age 75 or on the last day of the term in which such appellate court judge is serving when he or she attains age 70, whichever is later . . . shall not be entitled to receive any benefits under this Code section and shall forfeit all contributions made under it.

¹¹ *Id.*; see *Smith v. Miller*, 261 Ga. 560, 407 S.E.2d 727 (1991).

¹² GA. CONST. art. VI, § 7, ¶ 7(a). The specific rules governing removal, suspension, and discipline of judges are implemented by the Supreme Court. See Rules of the Judicial Qualifications Commission, as adopted and amended by the Supreme Court, *reprinted in* GEORGIA COURT RULES & PROCEDURE (STATE) (West 2011); GEORGIA RULES OF COURT ANNOTATED (LexisNexis 2011 ed.).

¹³ GA. CONST. art. VI, § 6, ¶ 1.

¹⁴ *Id.*

¹⁵ GA. CONST. art. VI, § 5, ¶ 1; O.C.G.A. § 15-3-1(a).

¹⁶ O.C.G.A. § 15-3-1(b).

§ 9.3 Determination of Which Justices or Judges Will Participate in the Decision of a Case

§ 9.3.1 Supreme Court

Every justice of the Supreme Court who has not been disqualified or recused participates in the decision of every matter before the court, whether it be an appeal, certified question, application, petition for certiorari, or motion. When one or more justices are disqualified, the Constitution allows cases to be heard and determined by a majority of the remaining justices.¹⁷ Nonetheless, if the parties desire a hearing by a full court, or upon the court’s own motion, one or more judges from the Court of Appeals or the superior court will be appointed to substitute for the absent justice or justices.¹⁸

A concurrence of a majority of the justices is essential to a judgment of reversal.¹⁹ If the number of justices is reduced, no judgment may be rendered unless at least four justices concur therein.²⁰ If an even number of justices hear a case and they become equally divided on its outcome, the judgment below will stand.²¹

Motions seeking reconsideration of a decision are reviewed by the assigned justice and presented by the justice to the entire court for consideration and vote.

§ 9.3.2 Court of Appeals

The Court of Appeals is divided into “rotating” three-judge “panels” or “divisions.” These three-judge panels ordinarily render the decisions of the Court of Appeals. Each division is headed by a presiding judge, who is selected by the chief judge under the process described in Section 9.2.3 above. Assignments of judges to each division are made by the chief judge, and the personnel of the divisions is changed from time to time in accordance with rules prescribed by the court.²² The divisional assignments are for the duration of the docket year and are altered during the year only

¹⁷ GA. CONST. art. VI, § 6, ¶ 1.

¹⁸ O.C.G.A. § 15-2-2.

¹⁹ O.C.G.A. § 15-2-16(a).

²⁰ *Id.*

²¹ *Id.* However, if the case is heard by only four justices and those justices are evenly divided on the result, the case is to be re-argued before a full bench, if possible, before the term closes. *Id.* If it is not possible for the case to be re-argued before a full bench before the term closes, then the judgment below will stand. *Id.*

²² O.C.G.A. § 15-3-1(b).

for extraordinary circumstances, such as death or retirement. Divisional changes may also be made for particular cases, when one or more judges on a panel are disqualified or recused.

The Court of Appeals decides cases with panels of more than three judges only in limited circumstances. In the event a dissent arises in the division to which the case was originally assigned, a case will be decided by a seven-judge panel consisting of the division to which the case was assigned, the next division in line in rotation, and an additional seventh judge.²³

Further, there are two situations in which a case will be decided by all 12 judges sitting en banc. First, if a majority of the judges of a single division or a majority of the judges of a seven-judge panel determines that a case should be heard by all 12 judges, this determination will be presented to all the judges of the court for a vote as to whether a 12-judge review of the case is warranted.²⁴ If a majority of the judges concur that review by all 12 judges is warranted, the case will be decided by all the judges sitting en banc.²⁵ The second situation in which all 12 judges will decide the case arises when a division or seven-judge panel is considering the issuance of an opinion that would overrule a prior decision of the court.²⁶

Decisions rendered by panels consisting of more than three judges have several important characteristics, as follows:

It being among the purposes of this Code section to avoid and reconcile conflicts among the decisions made by less than all of the Judges on the court and to secure more authoritative decisions, it is provided that when two divisions plus a seventh Judge sit as one court the court may, by the concurrence of a majority, overrule any previous decision in the same manner as prescribed for the Supreme Court. As precedent, a decision by such court with a majority concurring shall take precedence over a decision by any division or two divisions plus a seventh Judge. A decision concurred in by all the Judges shall not be overruled or materially modified except with the concurrence of all the Judges.²⁷

When a judge on a division or seven-judge panel is disqualified or recused, that judge is replaced by another member of the court. In the event that the whole court considers a case and

²³ O.C.G.A. § 15-3-1(c)(1).

²⁴ O.C.G.A. § 15-3-1(c)(2).

²⁵ *Id.*

²⁶ O.C.G.A. § 15-3-1(d).

²⁷ O.C.G.A. § 15-3-1(d).

is evenly divided, the case is transferred to the Supreme Court.²⁸ The Court of Appeals may also certify questions to the Supreme Court to aid it in deciding the cases before it.²⁹

After a judgment has been rendered by the court, a losing party may file a motion for reconsideration, requesting the court to reconsider its decision.³⁰ No oral argument is permitted on such a motion. Initially, a motion for reconsideration is reviewed by the judge who wrote the original opinion. After studying the motion, this judge makes a recommendation to the other judges who participated in the decision of the case. Upon receiving the recommendation, these judges vote on the disposition. If the case was originally decided by a division, the motion for reconsideration will also be decided by the division, unless a new dissent is generated that requires consideration of a seven-judge panel. If the case originally was decided by the whole court, then the whole court also votes on the motion for reconsideration.

§ 9.4 Scheduling of Arguments

§ 9.4.1 Supreme Court

With the exception of criminal cases imposing the death penalty and granted writs of certiorari not disposed of summarily, hearings are not conducted in the Supreme Court unless one of the parties requests oral argument.³¹ Oral argument is mandatory in death penalty appeals and in granted interim review of matters raised in a death penalty proceeding, and such cases automatically will be placed on the oral argument calendar.³² All granted writs of certiorari will be placed on the oral argument calendar unless disposed of summarily by the court.³³ Oral argument in all other cases normally will be placed on the calendar upon request of either party made within 20 days from the date of docketing.³⁴ Oral argument is never mandatory except in death penalty appeals, and the court may deny, limit, or require oral argument where appropriate.³⁵ Oral argument is

²⁸ GA. CONST. art. VI, § 5, ¶ 5.

²⁹ GA. CONST. art. VI, § 5, ¶ 4.

³⁰ GA. CT. APP. R. 37.

³¹ GA. S. CT. R. 50(3). For a more complete discussion of rules and other considerations related to oral argument in the Supreme Court, see *supra* Chapter 7.

³² GA. S. CT. R. 50(1).

³³ GA. S. CT. R. 50(2).

³⁴ GA. S. CT. R. 50(3).

³⁵ *Id.*

limited to 20 minutes per side.³⁶ Each side in a death penalty appeal is given 30 minutes to argue.³⁷ Discretionary applications to appeal a judgment and decree of divorce that are granted under Rule 34(4) of the Georgia Supreme Court Rules are allowed only 10 minutes per side to argue.³⁸

The oral argument calendar in the Supreme Court ordinarily commences on the second Monday of each month (excluding August and December) and lasts for as many days as are necessary to hear the cases assigned for that month. The Supreme Court's monthly argument calendar is ordinarily two to four days with seven cases being heard each day. Four cases are heard in the morning session, and three cases are heard in the afternoon session. Cases are heard in the order listed on the calendar.

The clerk of the Supreme Court arranges the cases for argument and provides notice by publication through the e-file system, mail, and the court's website of scheduled arguments at least 20 days prior to each session. With reasonable notice, the Supreme Court may conduct a special oral argument session at places other than its courtroom in Atlanta or by video-conference.³⁹ Oral argument case summaries detailing information about matters to be presented to the court during an oral argument are available on the court's website a few days before the scheduled argument. All oral argument sessions are broadcasted via webcast and available for viewing via a link on the court's website.

§ 9.4.2 Court of Appeals

The hearings calendar for the Court of Appeals is coordinated by the clerk's office.⁴⁰ The presiding judges, however, choose in order of seniority the days on which their divisions will hear argument. The Court of Appeals ordinarily schedules oral argument for four days during each month (excluding December and August), with each panel hearing arguments once a month.

³⁶ GA. S. CT. R. 54.

³⁷ *Id.*

³⁸ *Id.* On June 20, 2011, the Supreme Court amended Georgia Supreme Court Rules 34 and 54 to incorporate the standards and procedures previously set forth in the Domestic Relations Pilot Project, which was set to expire on June 30, 2011. The amended rules took effect on July 1, 2011. See Order of the Supreme Court of Georgia (June 20, 2011), available at http://www.gasupreme.us/press_releases/Order_PILOT-PROJECT_%20FINAL.pdf.

³⁹ O.C.G.A. § 15-2-5. The Supreme Court has heard oral argument at the state's law schools and in other cities and counties throughout the state, including New Echota, Cassville, Louisville, Talbotton, Augusta, Tifton, Westville, Savannah, Milledgeville, Statesboro, Covington, Griffin, Putnam, Coweta, and Cobb.

⁴⁰ The oral argument calendar is available on the Court of Appeals' website: <http://www.gaappeals.us>. The website also contains a web docket that is updated hourly. For a more complete discussion of rules and other considerations related to oral argument in the Court of Appeals, see *supra* Chapter 7.

Due to the growing number of cases that are appealed and the limited number of judges to hear them, the Court of Appeals does not automatically grant oral argument.⁴¹ Accordingly, a party seeking oral argument must specify why the case is appropriate for oral argument and why oral argument will assist the court in reaching a decision. The party requesting oral argument must convince at least one judge on the panel that “the decisional process will be significantly aided by oral argument.”⁴² The judge to whom the case is assigned initially will consider the plea in favor of oral argument. If the judge concludes that oral argument will help, then the request will be granted. If the judge thinks otherwise, the remaining judges on the panel will consider the merits of the request for oral argument seriatim. If, however, the request for oral argument is not made timely – within 20 days from the date the case is docketed – then the untimely request will be considered only by the judge to whom the case is assigned initially.

The docketing notice sent by the clerk when the case is docketed informs counsel that if requested and granted, oral argument will be calendared on a specified date. This date is tentative. If a request for oral argument is granted, the clerk notifies counsel by mail, at least 14 days before the hearing, of the exact date the case will be heard. Additionally, the docketing notice directs counsel to call the clerk’s office if counsel does not receive a copy of the court’s calendar at least 10 days before the tentative oral argument date.

§ 9.5 Procedure for Decision After Argument, Including Assignment of Cases and Issuance of Opinions

§ 9.5.1 Supreme Court

The Supreme Court customarily takes an informal, preliminary vote immediately after the conclusion of each day’s oral arguments. In general, decisional “bancs” are then held bi-weekly, usually on Thursdays. At the bancs, the justices consider proposals for editorial or substantive changes in opinions, present concurring or dissenting opinions, and take a final vote by show of hands on those cases which all the justices are prepared to decide. The opinion, as agreed upon by all of the concurring justices, then issues from the clerk’s office. Decisions of the Supreme Court are binding on all other Georgia state courts. The opinion is officially issued and released on the Monday following the decisional banc. If the number of sitting justices has been reduced by disqualification or recusal to an even number, and the remaining justices are evenly divided on a case, the judgment of the court below stands affirmed.⁴³ Moreover, no judgment can be rendered without the concurrence of at least four justices.⁴⁴ The justices decide applications, other than

⁴¹ GA. CT. APP. R. 28(a)(1).

⁴² GA. CT. APP. R. 28(a)(4).

⁴³ O.C.G.A. § 15-2-16(a).

⁴⁴ *Id.*

habeas corpus, by a written vote form including a memorandum and recommendation, which the assigned justice circulates to the other justices.

Petitions for certiorari, motions for reconsideration, non-unanimous applications, habeas corpus applications, disciplinary decisions, and other like matters are also discussed during the decisional bancs. Each petition for certiorari is assigned to a justice, who is provided with the record in the case. All the justices review the petition, with the justice to whom the petition was assigned taking responsibility for answering any questions that require a review of the record. A hand vote is then taken at the weekly decisional banc. If the vote is not unanimous, the matter is brought back to a second banc at a later time for a re-vote. If a discretionary application or certiorari is granted, the order will indicate which issues the court wants addressed.

To assure equal and impartial assignment among the seven justices, cases in the Supreme Court are assigned through the use of 19 “wheels.” Within each wheel, cases are assigned to the justices consecutively, so that each justice is assigned every seventh case. The wheels are organized according to subject matter as follows: (i) direct appeals including granted applications and certified questions; (ii) appeals of death sentences; (iii) petitions for certiorari; (iv) cases in which petitions for certiorari have been granted; (v) original matters (motions for supersedeas or other extraordinary motions which relate to appeals); (vi) original petitions for mandamus; (vii) applications for discretionary appeal; (viii) interim review applications involving the death penalty; (ix) habeas corpus applications; (x) habeas corpus applications involving the death penalty; (xi) lawyer disciplinary cases; (xii) bar admissions matters; (xiii) judicial qualifications cases; (xiv) matters related to pending or imminent executions; (xv) domestic relations cases; (xvi) applications for interlocutory appeal; (xvii) emergency motions; (xviii) requests for review before the appeal is docketed; and (xix) certified questions.

§ 9.5.2 Court of Appeals

Cases are assigned to the judges of the Court of Appeals through the use of four “wheels,” one each for: (i) direct appeals for criminal cases; (ii) direct appeals for civil cases; (iii) interlocutory applications; and (iv) discretionary applications. The clerk uses the wheels to assign cases as they are docketed to the four divisions of the court. The first four cases are assigned to the presiding judges, the next four cases are assigned to the second-most senior judges on each panel, and the next cases are assigned to the least senior judges on each panel. The cycle then repeats itself.

The judge to whom the case is assigned is responsible for drafting and submitting a proposed opinion, and ordinarily, the same judge will write the final opinion. When a case is considered by the full court or a seven-judge panel, however, the judge who garners a majority of votes for his or her view authors the majority opinion.

Unlike the Supreme Court, the Court of Appeals does not hold regular decisional bancs. Informal bancs do occur, however.

The precedential value of decisions of the Court of Appeals depends upon how they are decided and reported. Reported decisions, insofar as they are not in conflict with decisions of the Supreme Court, are binding precedent in all Georgia courts except the Supreme Court.⁴⁵ By contrast, cases that are affirmed without opinion in accordance with Rule 36 have no precedential value.⁴⁶ Written but unreported opinions establish only the law of the case.⁴⁷ Furthermore, when one member of a division concurs specially or in the judgment only, or when fewer than a majority of the judges sitting as a seven-judge or 12-judge court concur with all that is said in the decision, the decision constitutes a nonbinding “physical” precedent only.⁴⁸ In all cases, the Court of Appeals has no authority to overrule or modify a decision of the Supreme Court.⁴⁹

§ 9.5.3 Time Limitations for Decisions

The Supreme Court and the Court of Appeals consider cases during three annual “terms,” commencing on the first Monday in January, the third Monday in April, and the first Monday in September.⁵⁰ A Constitutional “two-term” limitation requires each court to “dispose of every case at the term for which it is entered on the court’s docket for hearing or at the next term.”⁵¹ 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.

The time required for a decision depends upon the circumstances of each case and, beyond the “two-term” limitation, the courts follow no specific schedule. However, statutorily, the courts must expedite certain types of cases, including but not limited to civil cases in which the State of

⁴⁵ GA. CONST. art. VI, § 5, ¶ 3; GA. CT. APP. R. 33.

⁴⁶ GA. CT. APP. R. 36.

⁴⁷ GA. CT. APP. R. 33(b).

⁴⁸ GA. CT. APP. R. 33(a).

⁴⁹ *State v. Coe*, 243 Ga. App. 232, 533 S.E.2d 104 (2000); *Adams v. State*, 174 Ga. App. 558, 559, 331 S.E.2d 29, 30 (1985).

⁵⁰ O.C.G.A. §§ 15-2-4(b), 15-3-2; GA. S. CT. R. 3.

⁵¹ GA. CONST. art. VI, § 9, ¶ 2. It should be noted that the key date relates to the term to which the case is docketed for *hearing*, not the term in which the case appeared initially on the court’s docket. Practitioners seeking to determine the opinion due date for a case pending in the Court of Appeals should look to the docketing notice received from the clerk’s office, calculating the due date based upon the term in which oral argument is to be held in the event that oral argument is granted. *See Superb Carpet Mills, Inc. v. Thomason*, 183 Ga. App. 554, 556, 359 S.E.2d 370, 372 (1987) (“The relevant date is . . . the date the case was docketed for hearing.”).

Georgia is a plaintiff,⁵² criminal cases in which the defendant is incarcerated,⁵³ and cases involving the Parental Notification Act.⁵⁴ Also, by policy, the Court of Appeals expedites cases involving child custody, appeal bonds, and emergency motions filed under Court of Appeals Rule 40(b). Judgments are issued on a continuing basis by the Court of Appeals. However, counsel should not expect to receive decisions from either court during the last 15 days of a term. As a general rule, the courts issue only rulings on motions for reconsideration during that period.⁵⁵

§ 9.6 Discipline of Judges

The Supreme Court has inherent authority to regulate the conduct of judges, including the promulgation and enforcement of the Code of Judicial Conduct.⁵⁶ A Georgia judge may be removed, suspended, or otherwise disciplined for willful misconduct in office, willful or persistent failure to perform the duties of office, habitual intemperance, conviction of a crime of moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.⁵⁷ As a practical matter, the power to investigate and recommend the discipline of judges is delegated to the Judicial Qualifications Commission, a seven-member body comprised of two judges, three members of the State Bar, and two non-lawyer citizens.⁵⁸ The Supreme Court reviews the recommendations of the Judicial Qualifications Commission and exercises its power to discipline or remove judges by order or opinion.⁵⁹ Opinions are then published.⁶⁰

⁵² O.C.G.A. § 9-10-1.

⁵³ O.C.G.A. § 5-6-43(c).

⁵⁴ O.C.G.A. § 15-11-114(e).

⁵⁵ See O.C.G.A. § 15-2-4(c). This general rule may be disregarded in extraordinary circumstances. See *Shore v. Shore*, 253 Ga. 183, 184, 318 S.E.2d 57, 59 (1984); *Stuckey v. Richardson*, 188 Ga. App. 147, 148, 372 S.E.2d 458, 459-60 (1988).

⁵⁶ *Jud. Qualifications Comm'n v. Lowenstein*, 252 Ga. 432, 433, 314 S.E.2d 107, 108 (1984).

⁵⁷ GA. CONST. art. VI, § 7, ¶ 7.

⁵⁸ GA. CONST. art. VI, § 7, ¶ 6.

⁵⁹ GA. CONST. art. VI, § 7, ¶ 8.

⁶⁰ See, e.g., *In re Inquiry Concerning a Judge*, 265 Ga. 843, 462 S.E.2d 728 (1995).

10

PROCEEDINGS SUBSEQUENT TO DECISIONS

*Debra D. Bernstein**

*Ellen Persons***

§ 10.1 Decisions of the Georgia Supreme Court and the Georgia Court of Appeals

§ 10.1.1 Entry and Transmittal of Decision

In rendering a decision, an appellate court may make an order or give any directions to the lower court concerning the final disposition of the case that are consistent with the law and justice of the case.¹ A decision by an appellate court usually either affirms or reverses the judgment below, but it may also include further directions to the lower court.

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¹ O.C.G.A. § 5-6-8.

When its decision requires a further hearing in a lower court, the Supreme Court or the Court of Appeals will instruct its clerk to transmit immediately and without charge a copy of the court's opinion to the clerk of the lower court.² The clerk will transmit the opinion as soon as it is available, and a copy of the opinion will remain on file for the information of the court and the parties.³

§ 10.1.2 Transmittal of Remittitur to Lower Court

The remittitur of a case decided by an appellate court shall be transmitted to the clerk of the trial court as soon as practicable after the expiration of 10 days from the date the judgment is entered or a motion for reconsideration is denied, unless otherwise ordered by the court.⁴ The remittitur of a case must contain the decision of the court, any direction made in the case, and an accounting of the costs paid in the appellate court.⁵ The remittitur instructs the lower court to carry into full effect the appellate court's decision and direction.

The filing of a motion for reconsideration stays the remittitur, as does the filing of a notice of intention to apply to the Supreme Court of Georgia for a writ of certiorari. A party who wishes to have a remittitur stayed in order to appeal to, or seek a writ of certiorari in, the United States Supreme Court must file with the Supreme Court of Georgia a motion to stay the remittitur accompanied with a concise statement of the issues to be raised on appeal or in the petition for certiorari.⁶ This notice must be filed at the time of filing a motion for reconsideration or within the time allowed for filing a motion for reconsideration.⁷ The filing of a notice of intent to apply to the Supreme Court of the United States for writ of certiorari, however, does not automatically stay the remittitur.⁸

§ 10.1.3 Effect of Transmittal of Remittitur When Decision Below Is Affirmed

If an appellate court affirms the judgment of the lower court, the transmittal of the remittitur to the clerk of the court terminates the supersedeas earlier imposed by the notice of appeal and instructs the lower court to immediately issue an execution for the amount of the original judgment.⁹

² O.C.G.A. § 5-6-9(a).

³ *Id.*

⁴ GA. S. CT. R. 60(2); GA. CT. APP. R. 39(a).

⁵ O.C.G.A. § 5-6-10.

⁶ GA. S. CT. R. 61.

⁷ *Id.*

⁸ GA. CT. APP. R. 39(b).

⁹ O.C.G.A. § 5-6-12.

If an appellate court determines that an appeal was filed only for delay, the court may award additional damages to the appellee in the amount of 10 percent of the judgment affirmed.¹⁰ Such damages, if awarded, are entered in the remittitur and transmitted to the lower court.¹¹ Damages for delay will be awarded only when no reasonable ground existed upon which the appellant might have anticipated reversal of the trial court's judgment.¹²

§ 10.1.4 Effect of Transmittal of Remittitur When Decision Below Is Reversed

When an appellate court reverses the judgment below, the appellant is entitled, as soon as the remittitur is returned to the lower court, to a judgment against the appellee for the costs incurred in the appellate court.¹³

§ 10.2 Motions for Reconsideration in the Georgia Court of Appeals

§ 10.2.1 Time for Filing Motion

A motion for reconsideration must be filed: (i) no later than the tenth day after the court renders its decision; and (ii) during the term that the judgment or order sought to be reviewed was rendered.¹⁴ A motion for reconsideration must also be filed before the remittitur has been forwarded to the clerk of the trial court.¹⁵ The court may shorten the foregoing time limitation by issuing a special order.¹⁶ Importantly, a motion for reconsideration must be physically received and filed by the clerk within 10 days of the order of judgment for which reconsideration is sought.¹⁷ Note that Court of Appeals Rule 4, providing that properly addressed registered or certified mail packets are deemed filed on the official postmark date, does not apply to motions for reconsideration.¹⁸

¹⁰ O.C.G.A. § 5-6-6. For a more complete discussion of issues related to frivolous appeals, see *infra* Chapter 13.

¹¹ *Id.*

¹² See *Crawford v. Holt*, 172 Ga. App. 326, 327, 323 S.E.2d 245, 246 (1984); see also *Shamsai v. Coordinated Props., Inc.*, 259 Ga. App. 438, 439, 576 S.E.2d 901, 903 (2003).

¹³ O.C.G.A. § 5-6-5.

¹⁴ GA. CT. APP. R. 37(b).

¹⁵ *Id.*

¹⁶ GA. CT. APP. R. 37(c).

¹⁷ GA. CT. APP. R. 37(b).

¹⁸ *Id.*

An extension of time for filing a motion for reconsideration will be granted only when the requesting party submits a written application and shows “providential cause” for the delay in filing.¹⁹ This written application for extension of time must be made to the court within 10 days of the court’s decision.²⁰

§ 10.2.2 Form, Filing, and Service of Motion

Motions for reconsideration must comply with the requirements of Court of Appeals Rule 24, concerning length, paper quality, spacing, margins, citations, attachments and exhibits, and page numbering.²¹ An original and two clearly legible copies of the motion must be filed with the court.²² Service to opposing counsel must be shown by written acknowledgment, certificate of counsel or affidavit of server, and must include the name and complete mailing address of all opposing counsel.²³ This certificate of service must be attached to the document filed with the court.²⁴

§ 10.2.3 Response to a Motion for Reconsideration and Oral Argument

A response to a motion for reconsideration is not required, but a party who wishes to respond must do so expeditiously.²⁵ It should also be noted that oral argument is never permitted on a motion for reconsideration.²⁶

§ 10.2.4 Grounds for Granting Motion

The Court of Appeals will grant a motion for reconsideration “only when it appears that the Court overlooked a material fact in the record, a statute or a decision which is controlling as authority and which would require a different judgment from that rendered, or has erroneously construed or misapplied a provision of law or a controlling authority.”²⁷

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See* GA. CT. APP. R. 24.

²² GA. CT. APP. R. 6 & 41(a).

²³ GA. CT. APP. R. 6.

²⁴ *Id.*

²⁵ GA. CT. APP. R. 37(b).

²⁶ GA. CT. APP. R. 37(h).

²⁷ GA. CT. APP. R. 37(e).

A motion for reconsideration may be denied even when the movant shows that a material fact or provision of law was overlooked or misconstrued. When such is the case, the court may simply revise its opinion without granting reconsideration.²⁸ The court may also sua sponte reconsider and revise its opinion at any time prior to the printing of the opinion in the official reports.

The decision of whether to reconsider a case is made by the judges who voted on the original opinion.²⁹ If there is a dissent on the motion for reconsideration, the motion is voted on by seven judges, or if the court deems it appropriate, 12 judges.³⁰

§ 10.2.5 Subsequent Motions for Reconsideration

If a party's motion for reconsideration is denied, that party may not file a second motion for reconsideration unless granted permission by order of the court.³¹ The filing of a motion for permission to file a second motion for reconsideration, however, does not toll the 10 days for filing a notice of intent to apply for certiorari with the Supreme Court.³²

§ 10.3 Motions for Reconsideration in the Georgia Supreme Court

§ 10.3.1 Time for Filing Motion

Motions for reconsideration regarding any matter on which the Supreme Court has ruled must be physically received at the court within 10 days of the date of the court's decision to be rendered timely.³³

§ 10.3.2 Form, Filing, and Service of Motion

Requirements and suggestions concerning physical form of motions are contained in Georgia Supreme Court Rules 17 through 21. An original and seven copies of the motion must be filed,³⁴ and a copy of the opinion or disposition, to be reconsidered must be attached to the motion.³⁵

²⁸ GA. CT. APP. R. 37(f).

²⁹ GA. CT. APP. R. 37(g).

³⁰ *Id.*

³¹ GA. CT. APP. R. 37(d).

³² *Id.*

³³ GA. S. CT. R. 27.

³⁴ GA. S. CT. R. 15.

³⁵ GA. S. CT. R. 27.

Additionally, there is a 30 page limit for the motion in civil cases; however, upon written request and authorization by the court, this limitation may be expanded.³⁶

§ 10.3.3 Subsequent Motions for Reconsideration

As in the Court of Appeals, a party may not file a second or subsequent motion for reconsideration with the Supreme Court without express permission of the court.³⁷

§ 10.4 Writs of Certiorari from the Georgia Supreme Court to the Georgia Court of Appeals

§ 10.4.1 Introduction

The Georgia Constitution vests the Supreme Court with authority to review by certiorari Court of Appeals decisions that are of “gravity or great public importance.”³⁸ The procedure for obtaining a writ of certiorari from the Supreme Court is governed by Georgia Supreme Court Rules 38 through 45.

§ 10.4.2 Motion for Reconsideration Not Required for Petition for Writ of Certiorari

The filing and denial of a motion for reconsideration in the Court of Appeals is no longer a prerequisite for filing a petition for writ of certiorari to the Supreme Court.³⁹ Any question that was not raised initially before the Court of Appeals or in a motion for reconsideration, however, will not be considered by the Supreme Court on a writ of certiorari.⁴⁰

§ 10.4.3 Time for Filing Petition for Writ of Certiorari

A notice of intention to petition for writ of certiorari must be filed with the clerk of the Court of Appeals within 10 days of the judgment or the order denying reconsideration.⁴¹ The petition for

³⁶ GA. S. CT. R. 20.

³⁷ GA. S. CT. R. 28.

³⁸ GA. CONST. art. VI, § 6, ¶ 5.

³⁹ GA. S. CT. R. 38; GA. CT. APP. R. 38(a)(1).

⁴⁰ *Orkin v. State*, 239 Ga. 334, 334 n.1, 236 S.E.2d 576, 576 n.1 (1977). Note that Georgia Supreme Court Rule 36(h), cited by the court in *Orkin*, has been rescinded.

⁴¹ GA. S. CT. R. 38(1); GA. CT. APP. R. 38(a)(1).

writ of certiorari itself must then be filed with the clerk of the Georgia Supreme Court within 20 days of judgment or the ruling on a motion for reconsideration, if one was filed.⁴² Simultaneously with the filing of the petition for writ of certiorari in the Supreme Court, counsel must file in the Court of Appeals a notice stating that a petition for writ of certiorari has been filed in the Supreme Court.⁴³

§ 10.4.4 Filing and Service of Petition for Writ of Certiorari

An original and seven copies of the petition for writ of certiorari must be filed in the Supreme Court, and the opposing attorney or pro se party must be served with a copy of the petition.⁴⁴ A copy of the Court of Appeals opinion or order must be attached to each copy of the petition for writ of certiorari.⁴⁵

§ 10.4.5 Transmittal of Record to the Georgia Supreme Court

The clerk of the Court of Appeals is responsible for transmitting the record and a certified copy of the Court of Appeals opinion and judgment to the Supreme Court.⁴⁶

§ 10.4.6 Grounds for Granting Writ of Certiorari

The review of a case on certiorari is not a matter of right, but a matter of judicial discretion.⁴⁷ The Georgia Supreme Court will grant writs of certiorari “only in cases of great concern, gravity, or importance to the public.”⁴⁸ The Supreme Court will not ordinarily grant certiorari: (i) to review the sufficiency of evidence; or (ii) where the Court of Appeals has affirmed the denial of a motion to dismiss, denial of a motion for judgment on the pleadings, or a denial of a motion for summary judgment.⁴⁹

⁴² GA. S. CT. R. 38(2).

⁴³ GA. CT. APP. R. 38(a)(2).

⁴⁴ GA. S. CT. R. 14 & 15.

⁴⁵ GA. S. CT. R. 39.

⁴⁶ GA. S. CT. R. 43.

⁴⁷ See GA. S. CT. R. 40.

⁴⁸ *Id.*

⁴⁹ *Id.* But see *Country Club Apartments, Inc. v. Scott*, 246 Ga. 443, 271 S.E.2d 841 (1980) (granting certiorari where confusion of law regarding important issue was evidenced by split vote in Court of Appeals).

§ 10.4.7 Motion for Reconsideration

If a petition for writ of certiorari is denied, and reconsideration is desired, a motion for reconsideration must be filed in the Supreme Court within 10 days of the date of denial of the petition for writ of certiorari.⁵⁰ A copy of the opinion or other disposition must be attached to the motion for reconsideration.⁵¹ If the motion for reconsideration is denied, no subsequent motion for reconsideration may be filed by the same party except by permission of the court.⁵²

⁵⁰ GA. S. CT. R. 27.

⁵¹ *Id.*

⁵² *Id.*

11

AN OVERVIEW OF THE CRIMINAL APPELLATE PROCESS AND PROCEDURE

*T.C. Spencer Pryor**

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§ 11.1 Introduction

This chapter provides an overview of the various mechanisms available under Georgia law for challenging a criminal conviction or sentence. Although reversals of criminal convictions are the exception to the rule, Georgia law provides a number of opportunities for post-conviction relief.

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This chapter addresses three avenues for challenging a criminal conviction or sentence: (i) post-trial motions in the trial court; (ii) direct appeals; and (iii) state petitions for habeas corpus.¹

§ 11.2 Post-Trial Motions

§ 11.2.1 Motion for New Trial

A motion for new trial is the most commonly utilized means of seeking post-conviction relief. The superior, state, and juvenile courts and the City Court of Atlanta are empowered by statute to grant new trials,² and whether to grant a motion for new trial is committed to the discretion of the trial court.³ A motion for new trial ordinarily must be filed within 30 days of the entry of a judgment of conviction.⁴ When the motion for new trial will require the court to consider trial transcripts—except in cases where a sentence of death has been imposed—the trial court may in its discretion grant an extension of time for the preparation and filing of the transcript.⁵

Georgia law enumerates several grounds upon which a trial court may order a new trial, including:

- A jury verdict “contrary to evidence and the principles of justice and equity”;⁶
- A jury verdict “decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding”;⁷
- Material evidence illegally admitted or withheld from the jury over the objection of the movant;⁸

¹ For a more thorough discussion of Georgia habeas corpus, see 10 GEORGIA PROCEDURE: CRIMINAL PROCEDURE § 35:1 *et seq.*, at 211 (2003); Donald E. Wilkes, Jr., *Postconviction Habeas Corpus Relief in Georgia: A Decade After the Habeas Corpus Act*, 12 GA. L. REV. 249 (1978); 14 E. G. L. HABEAS CORPUS, § 1 *et seq.* (1999 Rev.); and for federal habeas corpus, see JAMES LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (6th ed. 2011); RONALD P. SOKOL, FEDERAL HABEAS CORPUS (2d ed. 1969).

² O.C.G.A. § 5-5-1.

³ O.C.G.A. §§ 5-5-20, 5-5-21.

⁴ O.C.G.A. § 5-5-40(a).

⁵ O.C.G.A. § 5-5-40(c).

⁶ O.C.G.A. § 5-5-20.

⁷ O.C.G.A. § 5-5-21.

⁸ O.C.G.A. § 5-5-22.

- Material evidence discovered by the movant after the verdict and timely brought to the attention of the trial court;⁹ and
- Erroneous jury instructions.¹⁰

In addition, Georgia courts are empowered, in the exercise of “sound legal discretion,” to grant new trials upon other grounds “according to the provisions of the common law and practice of the courts.”¹¹ In that regard, Georgia courts have relied on the following additional grounds in granting new trials:

- Failure of the defendant or counsel to appear, for good cause;¹²
- Juror misconduct;¹³
- Other misconduct, mistake, surprise, or prejudice;¹⁴
- Deprivation of the right of cross examination, of an opening statement, or of a closing argument;¹⁵ and
- The judge’s expression of opinion as to what has or has not been proved.¹⁶

⁹ O.C.G.A. § 5-5-23.

¹⁰ O.C.G.A. § 5-5-24.

¹¹ O.C.G.A. § 5-5-25.

¹² *Melcher v. Melcher*, 274 Ga. 711, 712, 559 S.E.2d 468, 468 (2002); *Vaughan v. Car Tapes, Inc.*, 135 Ga. App. 178, 180, 217 S.E.2d 436, 438 (1975); *Haralson Cnty. Econ. Dev. Corp. v. Hammock*, 233 Ga. 381, 384, 211 S.E.2d 278, 280 (1974). *But see Lett v. Alderman*, 279 Ga. 630, 632, 619 S.E.2d 599, 601 (2005).

¹³ *Schmidt v. Parrish*, 63 Ga. App. 663, 664, 11 S.E.2d 921, 922 (1940).

¹⁴ *Johnson v. State*, 75 Ga. App. 186, 188-89, 43 S.E.2d 119, 121 (1947); *Cent. of Ga. Ry. Co. v. Harden*, 113 Ga. 453, 38 S.E. 949, 951 (1901).

¹⁵ *Thomas v. State*, 262 Ga. App. 492, 497-98, 589 S.E.2d 243, 249 (2003); *Strickland v. State*, 6 Ga. App. 536, 536, 65 S.E. 300, 300 (1909).

¹⁶ O.C.G.A. § 9-10-7; *Wright v. State*, 5 Ga. App. 813, 815, 63 S.E. 936, 937 (1909). *But see Green v. State*, 298 Ga. App. 17, 23, 679 S.E.2d 348, 354 (2009).

Although he or she may do so, a defendant need not file a motion for new trial before taking an appeal.¹⁷ Even when a motion for new trial is filed, a defendant may raise any trial error on appeal, regardless of whether it was raised in the motion for new trial, so long as the error was preserved at trial.¹⁸

In extraordinary cases, a motion for new trial may be filed outside the 30-day limit. These are commonly called extraordinary motions for a new trial. The procedural requirements for these motions are the product of case law and are governed by case law, not the Civil Practice Act.¹⁹ In such cases, however, the defendant must show a good reason why the motion was not timely filed.²⁰ Perhaps the most common reason for filing an untimely motion for new trial is the late discovery of new evidence, but it may be filed and granted for other reasons.²¹ A motion for new trial based upon newly discovered evidence may be filed outside the 30-day limit only when the defendant shows that:

¹⁷ O.C.G.A. § 5-6-36. It bears noting, however, that a claim that the verdict is against the weight of the evidence may be asserted only in the trial court. Appellate courts are not vested with the discretion to overturn a conviction because it is against the weight of the evidence, and they cannot resolve conflicts in trial testimony or reweigh the evidence on appeal. Rather, an appellate court may overturn a conviction for insufficiency of the evidence only where no reasonable jury could conclude beyond a reasonable doubt, based on the evidence viewed in the light most favorable to the state, that the defendant committed the crime of which he was convicted. *Mosley v. State*, 157 Ga. App. 578, 578, 278 S.E.2d 154, 155 (1981).

¹⁸ *Smith v. State*, 244 Ga. App. 165, 169, 534 S.E.2d 903, 907-08 (2000). Claims that a defendant’s trial counsel rendered ineffective assistance, however, sometimes are an exception to this rule. When the original trial counsel continues to represent a defendant on post-trial motions and direct appeal, ineffective assistance need not be raised in a motion for new trial, “[b]ecause an attorney cannot reasonably be expected to assert or argue his or her own ineffectiveness.” *White v. Kelso*, 261 Ga. 32, 32, 401 S.E.2d 733, 734 (1991). But when new counsel is appointed or retained for post-trial proceedings, “[n]ew counsel must raise the ineffectiveness of previous counsel at the first possible stage of post-conviction review.” *Id.* Accordingly, if new counsel first appears on a motion for new trial, or an amended motion for new trial, any claim of ineffective assistance of trial counsel must be raised in the motion (or amended motion) for new trial. *Id.*; see also *Thompson v. State*, 257 Ga. 386, 387, 359 S.E.2d 664, 665 (1987). If new counsel’s first appearance is on direct appeal, a claim of ineffective assistance can then be raised for the first time, but the appeals court will remand the case to allow the trial court the first opportunity to address the ineffective assistance claim. *McCulley v. State*, 273 Ga. 40, 43, 537 S.E.2d 340, 345 (2000).

¹⁹ *Davis v. State*, 283 Ga. 438, 440, 660 S.E.2d 354, 357-58 (2008).

²⁰ O.C.G.A. § 5-6-41(a); *Hight v. State*, 308 Ga. App. 595, 596, 708 S.E.2d 555, 556 (2011); *Van Scoik v. State*, 142 Ga. App. 341, 341, 235 S.E.2d 765, 766 (1977).

²¹ See, e.g., *Fowler Props., Inc. v. Dowland*, 282 Ga. 76, 79, 646 S.E.2d 197, 200 (2007). The Georgia General Assembly recently amended Section (c) relating to DNA testing in criminal cases to apply to all convicted felons as opposed to just persons convicted of serious violent felonies. The convicted felon must then meet all of the other statutory requirements for the motion. *Howard v. State*, 307 Ga. App. 772, 772, 706 S.E.2d 136, 136-37 (2011).

- The evidence has come to his knowledge since trial;
- His failure to discover the evidence at an earlier time is not attributable to a lack of due diligence;
- The evidence is admissible;
- The evidence is so material that it likely would produce a different verdict;
- The evidence is not merely cumulative; and
- The evidence is not admissible merely to impeach the credibility of a witness that testified at trial.²²

§ 11.2.2 Motion in Arrest of Judgment

A motion in arrest of judgment may be used to obtain relief from a nonamendable defect appearing on the face of the record or pleadings.²³ In a criminal case, a motion in arrest of judgment is allowable only to challenge an indictment, plea, verdict, or judgment.²⁴ Either party may move to arrest the judgment during the term in which the judgment was obtained.²⁵ A judgment may not be arrested for any defect in the pleading or in the record that is amendable as a matter of form²⁶ or for any deficiency that does not affect “the real merits of the offense charged in the indictment or accusation.”²⁷ Granting a criminal defendant’s motion in arrest of judgment vacates the judgment, but does not prevent the defendant from being re-indicted and retried.²⁸

²² *Timberlake v. State*, 246 Ga. 488, 491-92, 271 S.E.2d 792, 796 (1980); *Davis v. State*, 283 Ga. 438, 448, 660 S.E.2d 354, 363 (2008); *Fetter v. State*, 271 Ga. App. 652, 652, 610 S.E.2d 615, 616-17 (2005); *Davis v. State*, 221 Ga. App. 375, 377, 471 S.E.2d 307, 309-10 (1996).

²³ *Smith v. State*, 257 Ga. App. 468, 469, 571 S.E.2d 446, 448 (2002); *Hall v. State*, 202 Ga. 42, 45-46, 42 S.E.2d 130, 132-33 (1947).

²⁴ *Hall*, 202 Ga. at 46, 42 S.E.2d at 133.

²⁵ *Bowen v. State*, 144 Ga. App. 329, 336, 241 S.E.2d 431, 437 (1977). A motion in arrest of judgment filed after the term in which the judgment was obtained is untimely. *Orr v. State*, 275 Ga. 141, 141, 562 S.E.2d 498, 498 (2002). However, an untimely motion in arrest of judgment does not preclude a defendant from appealing the trial court’s ruling and the appellate court ruling on the merits of the appeal; instead, “untimeliness of the motion is simply a defect that limits the *trial court’s* authority to grant the motion.” *Lay v. State*, 289 Ga. 210, 212, 710 S.E.2d 141, 143 (2011).

²⁶ O.C.G.A. § 17-9-62.

²⁷ O.C.G.A. § 17-9-63; *Dandy v. State*, 253 Ga. App. 407, 408, 559 S.E.2d 150, 151 (2002).

²⁸ *Hill v. Nelms*, 122 Ga. 572, 50 S.E. 344, 345 (1905).

§ 11.2.3 Writ of *Coram Nobis*

The writ of *coram nobis*, though once one of the most significant common-law writs, largely has fallen out of use because of the availability of other remedies. The writ has been labeled a “procedural fossil” and the Georgia Court of Appeals has refused to “condone [an] attempt to restore it to Georgia practice.”²⁹ The Georgia Supreme Court has recognized that *coram nobis* is available to correct errors of fact that are not apparent on the face of the record, that are not attributable to the negligence of the accused, and that if before the court, would have prevented entry of the judgment.³⁰ To provide a basis for *coram nobis* relief, a factual error must be of sufficient magnitude to undermine confidence in the trier of fact’s verdict.³¹ The writ is not available, however, when the defendant has an adequate statutory remedy such as habeas corpus.³²

The Georgia Supreme Court has expressed its disfavor with the writ and has suggested that a petition for *coram nobis* is more properly labeled an extraordinary motion for new trial based on newly discovered evidence.³³ *Coram nobis* relief is available in federal court, although its usefulness largely has been supplanted by habeas corpus.³⁴

§ 11.3 Appeals

§ 11.3.1 Standing to Appeal

The United States and Georgia Constitutions afford no right, to the state or to defendants, to appellate review in criminal cases. Rather, the right to appeal in a criminal case exists only to the

²⁹ *Harris v. State*, 269 Ga. App. 92, 93, 603 S.E.2d 490, 491 (2004).

³⁰ *Parris v. State*, 232 Ga. 687, 688-89, 208 S.E.2d 493, 495 (1974).

³¹ STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 1628 (7th ed. 2004).

³² *Riley v. State*, 107 Ga. App. 639, 639, 131 S.E.2d 124, 124-25 (1963).

³³ *Waye v. State*, 239 Ga. 871, 873, 238 S.E.2d 923, 925-26 (1977); *see also Moss v. State*, 255 Ga. App. 107, 107-08, 564 S.E.2d 516, 517 (2002).

³⁴ The United States Supreme Court has held that the writ is authorized by the All Writs Statute, 28 U.S.C. § 1651(a), as a means for federal defendants to correct errors of a fundamental nature. *United States v. Morgan*, 346 U.S. 502, 506 (1954); *see also United States v. Swindall*, 107 F.3d 831, 834 (11th Cir. 1997). The availability of habeas review in federal courts has, however, largely supplanted *coram nobis* and made it “difficult to conceive of a situation in a federal criminal case today where [*coram nobis* relief] would be necessary or appropriate.” *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947); *see also Lowery v. United States*, 956 F.2d 227, 230 (11th Cir. 1992).

extent afforded by statute.³⁵ Although Georgia law permits both the state and defendants to appeal in criminal cases, a defendant's authority to appeal is much broader than that of the state.

Georgia statutory law authorizes the state to appeal in a criminal case only from an order, decision, or judgment:

- Dismissing an indictment, accusation, or petition of delinquency;
- Arresting a judgment of conviction or adjudication of delinquency upon legal grounds;
- Sustaining a plea or motion in bar, when the defendant has not been put into jeopardy;
- Suppressing evidence illegally seized or the result of any alcohol or drug test, when no jury has been impaneled and the defendant has not been put into jeopardy;
- Reaching beyond the jurisdiction of the court that issued the order, or otherwise void under the state constitution or statutory law;
- Transferring a case to juvenile court pursuant to O.C.G.A. § 15-11-28(b)(2)(B)
- Granting a motion for new trial or an extraordinary motion;
- Denying a motion by the state to recuse or disqualify a judge if the defendant has not been put into jeopardy; or
- Issued pursuant to O.C.G.A. § 17-10-6.3(c).³⁶

Some appellate cases have interpreted this express statutory authorization to appeal from certain orders as an implicit limitation upon the state's authority, precluding appeals by the state in criminal cases from any order or judgment not enumerated in the statute.³⁷ The Georgia courts, however, typically construe the enumeration of orders appealable by the state liberally.³⁸

³⁵ *Fullwood v. Sivley*, 271 Ga. 248, 250, 517 S.E.2d 511, 514 (1999); *see also Bradford v. S. Ry. Co.*, 195 U.S. 243, 250-51 (1904).

³⁶ O.C.G.A. § 5-7-1. The state has a right to interlocutory appeals in instances in which the trial court has granted a motion to suppress or a motion in limine not involving a search and seizure. *Strickman v. State*, 253 Ga. 287, 288, 319 S.E.2d 864, 865 (1984); *State v. Vansant*, 208 Ga. App. 772, 776, 431 S.E.2d 708, 711 (1993), *aff'd in part, rev'd in part*, 264 Ga. 319, 443 S.E.2d 474 (1994).

³⁷ *State v. Thurmond*, 195 Ga. App. 369, 369, 393 S.E.2d 518, 518 (1990); *State v. Hollomon*, 132 Ga. App. 304, 306, 208 S.E.2d 167, 168 (1974).

³⁸ *State v. Greenwood*, 206 Ga. App. 188, 188, 424 S.E.2d 870, 871 (1992) (citing *Strickman*, 253 Ga. at 288, 319 S.E.2d at 865). *But see In re Interest of D.Q.H.*, 212 Ga. App. 271, 271, 441 S.E.2d 411, 411 (1994) (stating that O.C.G.A. § 5-7-1 is "to be construed narrowly, against the State").

Defendants in criminal cases have a much broader statutory right to appeal. Indeed, O.C.G.A. § 5-6-33 provides:

[T]he defendant in any criminal proceeding in the superior, state, or city courts may appeal from any sentence, judgment, decision, or decree of the court, or of the judge thereof in any matter heard at chambers.

The courts liberally construe this statutory right to appeal to avoid the dismissal of any appeal and to afford defendants a decision on the merits.³⁹

Notwithstanding the broad statutory right of defendants to appeal, a criminal defendant may forfeit voluntarily his right to appeal.⁴⁰ He may do so expressly, in return for the state’s agreement not to seek the death penalty,⁴¹ or by his own conduct, either alone or in concert with his attorney.⁴² Forfeiture may occur, for example, when the defendant and his attorney have intentionally abused or attempted to delay the appellate process,⁴³ such as by failing to file the trial transcript on time or pay the reporter’s costs.⁴⁴

Whether to appeal a criminal conviction is a decision committed to the defendant himself. If counsel has reason to believe that a rational defendant would want to appeal the decision, however, then counsel has a duty to consult on the matter with her client.⁴⁵ The defendant alone determines whether a criminal conviction should be appealed, and he cannot be deprived of that right because his counsel has determined independently that the appeal is unlikely to succeed.⁴⁶

An out-of-time appeal is available only when an appellant can show that: (i) he actually had a right to file a timely direct appeal; and (ii) the right to appeal was frustrated by ineffective assistance of counsel.⁴⁷ A defendant who pleads guilty to a crime is only entitled to a direct appeal from a judgment of conviction and sentence entered on a guilty plea if he establishes that his claims

³⁹ O.C.G.A. § 5-6-30; *Grantham v. State*, 244 Ga. 775, 775, 262 S.E.2d 777, 777 (1979).

⁴⁰ *State v. Denson*, 236 Ga. 239, 240, 223 S.E.2d 640, 641 (1976).

⁴¹ *Thomas v. State*, 260 Ga. 262, 263, 392 S.E.2d 520, 522 (1990).

⁴² *Denson*, 236 Ga. at 240, 223 S.E.2d at 641.

⁴³ *Id.*

⁴⁴ *Denson*, 236 Ga. 239 at 240, 223 S.E.2d at 641; *Langston v. State*, 206 Ga. App. 874, 875, 426 S.E.2d 609, 610-11 (1992).

⁴⁵ *Roe v. Flores-Ortega*, 528 U.S. 470, 478-79 (2000).

⁴⁶ *Lee v. State*, 139 Ga. App. 65, 65, 227 S.E.2d 878, 879-80 (1976).

⁴⁷ *Moore v. State*, 304 Ga. App. 105, 105, 695 S.E.2d 661, 662 (2010) (quoting *Dowling v. State*, 294 Ga. App. 413, 413, 669 S.E.2d 198 (2008)).

can be resolved solely by reference to facts contained in the record.⁴⁸ When a defendant's case meets this threshold requirement and he can prove that his right of appeal was denied through the negligence or ignorance of his counsel, or because he was not adequately informed of his right to appeal, Georgia courts ordinarily will permit the defendant to bring an out-of-time appeal.⁴⁹

§ 11.3.2 Appealable Decisions

A party to a criminal case that has standing to appeal an order of the trial court ordinarily must await a final judgment before taking the appeal.⁵⁰ There are some occasions, however, when an interlocutory appeal may be taken in a criminal case. First, the state has a statutory right to bring an interlocutory appeal of any order, decision, or judgment “suppressing or excluding illegally seized evidence” or granting a motion for new trial or an extraordinary motion for new trial.⁵¹ Second, in all cases in which the state seeks to impose the death penalty, the trial court is obliged to review all pretrial matters and determine whether immediate appellate review of such pretrial matters is warranted, considering the delay caused by interlocutory review and the need for such review.⁵²

If the trial court concludes that interlocutory review is warranted in a capital case, the Supreme Court may conduct an interlocutory review. Finally, in any criminal case, either the state or the defendant may seek a certification from the trial court, within 10 days of the entry of an order, if “the order, decision, or judgment is of such importance to the case that immediate review should be had.”⁵³ If the certificate is issued by the trial court, the party seeking interlocutory review must also file an application with the appropriate appellate court.⁵⁴ As provided in Supreme Court Rule

⁴⁸ *Dowling*, 294 Ga. App. at 413, 669 S.E.2d at 198.

⁴⁹ *Banegas v. State*, 283 Ga. App. 346, 346 n.1, 641 S.E.2d 593, 594 n.1 (2007); *Walker v. State*, 280 Ga. App. 393, 395, 634 S.E.2d 177, 178 (2006); *Harrell v. State*, 257 Ga. App. 525, 525, 571 S.E.2d 502, 503 (2002); *see also Glass v. State*, 248 Ga. App. 91, 93, 545 S.E.2d 360, 362 (2001). A motion for an out-of-time appeal is committed to the discretion of the trial court and the “any-evidence standard” is applied in reviewing a trial court’s findings of fact. *Hill v. State*, 285 Ga. App. 310, 310, 645 S.E.2d 758, 759 (2007); *Butts v. State*, 244 Ga. App. 366, 367, 536 S.E.2d 154, 156-57 (2000).

⁵⁰ *See* O.C.G.A. § 5-6-34(a).

⁵¹ O.C.G.A. § 5-7-2 (*amended by* 2011 Ga. Laws 200).

⁵² O.C.G.A. §§ 17-10-35.1, 17-10-35.2.

⁵³ O.C.G.A. § 5-6-34(b).

⁵⁴ *Id.*

25, the Supreme Court will grant an application for leave to appeal an interlocutory order only when:

- The issue to be decided appears to be dispositive of the case;
- The order appears erroneous and will cause a substantial error at trial; or
- The establishment of a precedent is desirable.⁵⁵

Court of Appeals Rule 30 sets out a similar standard for the Court of Appeals.⁵⁶

§ 11.3.3 Appellate Jurisdiction

The state constitution vests the Georgia Supreme Court with appellate jurisdiction over certain kinds of cases, and a party may bypass the Court of Appeals and appeal directly to the Supreme Court in such cases.⁵⁷ Among the cases in which the Supreme Court has original appellate jurisdiction are all cases in which the constitutionality of a federal or state statute is called into question, habeas corpus cases, and all cases in which the death penalty is imposed or could be imposed.⁵⁸ The death penalty need not be imposed for the Supreme Court to have jurisdiction, but the case must be one in which the trial court could have imposed a penalty of death.⁵⁹ Although Georgia statutes authorize imposing the death penalty for rape, kidnapping, and armed robbery, the Georgia Supreme Court has concluded that such cases are beyond its original appellate jurisdiction, insofar as the death penalty ordinarily cannot be imposed in such cases consistent with the Eighth Amendment.⁶⁰ The Supreme Court has original jurisdiction “regardless of whether the order being appealed is based on facts having some bearing on the underlying criminal trial.”⁶¹

⁵⁵ GA. S. CT. R. 31.

⁵⁶ GA. CT. APP. R. 30.

⁵⁷ GA. CONST. art. VI, § 6, ¶¶ 1, 2. The Supreme Court has exclusive appellate jurisdiction over constitutional challenges to statutes and general appellate jurisdiction in habeas and capital cases.

⁵⁸ *Id.*

⁵⁹ *See* GA. CONST. art. VI, § 6, ¶ 3. In *State v. Thornton*, the Supreme Court exercised appellate jurisdiction in a case where the death penalty could not be imposed because the district attorney did not give the defense timely notice of the state’s intention to seek the death penalty. 253 Ga. 524, 524, 322 S.E.2d 711, 711 (1984). The court went on to state: “As a matter of policy, however, we deem it appropriate, at the present time, that all murder cases be reviewed by this court.” *Id.* Although this holding seems contrary to the express intention of the changes adopted by the 1983 Constitution, the Supreme Court recently concluded that the statement is still good law. *See State v. Murray*, 286 Ga. 258, 259, 687 S.E.2d 790, 790-91 (2009).

⁶⁰ *Jarrell v. State*, 234 Ga. 410, 414-15, 216 S.E.2d 258, 264 (1975).

⁶¹ *Murray*, 286 Ga. at 259, 687 S.E.2d at 790-91.

For those classes of cases in which the Supreme Court lacks original appellate jurisdiction, the Court of Appeals has original appellate jurisdiction. The Supreme Court, of course, may review any decision of the Court of Appeals by writ of certiorari.⁶²

§ 11.3.4 Motion to Stay Execution of Sentence

A motion to stay execution of a sentence is closely connected with the right of the defendant to be released on bond pending appeal. Whether the defendant can be released pending appeal depends initially on whether the underlying offense was a misdemeanor or felony. Appeals of a misdemeanor case automatically entitle the defendant to be released on bond.⁶³ On the other hand, a motion to stay execution of a felony sentence is committed to the discretion of the judge,⁶⁴ and such a motion should be granted “only after careful consideration.”⁶⁵ Indeed, the release of a felony defendant should not be granted unless the court finds satisfaction of the following criteria, known as the “*Birge*” criteria based on the seminal case: (i) there is no substantial risk of the appellant fleeing to avoid judgment at the conclusion of the appellate proceedings; (ii) the appellant is not likely to commit a serious crime, intimidate witnesses, or otherwise obstruct the administration of justice; and (iii) the appeal is not frivolous or taken for delay.⁶⁶ A defendant seeking bail bears the burden of producing evidence on each of these factors, but the state holds the burden of persuasion that the defendant is not entitled to pretrial release.⁶⁷

In *White v. State*,⁶⁸ the Court of Appeals established a procedure for a trial court’s consideration of these factors. After a sentence of imprisonment has been imposed, the trial court should review the request for bail and make a “fresh determination” that includes: (i) giving notice to the applicant of the hearing and the chance to appear and be heard; (ii) requiring at such hearing that the defendant bear the burden of seeking a stay of execution and a release on bond; and (iii) considering all evidence introduced at the trial and all other oral and documentary evidence that the court considers appropriate. After the hearing, the court *must* consider the questions set forth in *Birge*.⁶⁹ *White* held that any affirmative answer, indicating some risk upon the defendant’s

⁶² GA. CONST. art. VI, § 6, ¶ 5.

⁶³ *In re Inquiry Concerning a Judge*, 265 Ga. 843, 848-49, 462 S.E.2d 728, 733-34 (1995).

⁶⁴ *Watts v. Grimes*, 224 Ga. 227, 227, 161 S.E.2d 286, 287-88 (1968); *see also Myers v. St. Lawrence*, 289 Ga. 240, 240-41, 710 S.E.2d 557, 558-59 (2011).

⁶⁵ *Mulligan v. Zant*, 531 F. Supp. 458, 460 (M.D. Ga. 1982).

⁶⁶ O.C.G.A. § 17-6-1(e); *Birge v. State*, 238 Ga. 88, 230 S.E.2d 895 (1976); *Prayor v. State*, 214 Ga. App. 132, 447 S.E.2d 155 (1994).

⁶⁷ *Constantino v. Warren*, 285 Ga. 851, 854, 684 S.E.2d 601, 604 (2009).

⁶⁸ 146 Ga. App. 147, 147-48, 245 S.E.2d 870, 870-71 (1978), *overruled in part by Moore v. State*, 151 Ga. App. 413, 414, 260 S.E.2d 350, 350-51 (1979).

⁶⁹ *Id.* at 148, 245 S.E.2d at 871.

release or some concern that the appeal was frivolous or taken for delay, required the court to set forth findings in support of the affirmative answer(s) and deny the defendant’s request for release. *White* was subsequently overruled to the extent that it required courts to “set forth findings of fact to support the affirmative answer,” but the other requirements remain⁷⁰ and require the court to point to the appropriate basis to justify the denial of release.⁷¹ Failure to set forth the basis of the decision according to the *Birge* criteria will force the appellate courts to vacate the decision below.⁷²

The *Birge* criteria do not apply, however, to applications for bond pending appeal of murder convictions.⁷³ In murder cases, the trial court has sole discretion in considering the bond motions and “need not give any reasons for denying an appeal bond to a convicted murderer.”⁷⁴ Additionally, O.C.G.A. § 17-6-1(g) prohibits the granting of release on bond of any person who has been convicted of “murder, rape, aggravated sodomy, armed robbery, aggravated child molestation, child molestation, kidnapping, trafficking in cocaine or marijuana, aggravated stalking, or aircraft hijacking *and* who has been sentenced to serve a period of incarceration of five years or more.”⁷⁵

Either the state or the defendant can appeal the trial court’s decision regarding release pending appeal.⁷⁶ On appeal, the defendant has the burden of proving a negative by establishing the nonexistence of the *Birge* criteria.⁷⁷

§ 11.3.5 Appeals by Indigent Defendants

Historically, indigent defendants were those persons found by the court to be “financially unable to retain a lawyer.”⁷⁸ Georgia law presently provides more clarity by defining the term “indigent person” as one who earns less than a certain percentage of the income set forth in federal poverty guidelines and lacks other resources “that might reasonably be used to employ a lawyer

⁷⁰ *Moore v. State*, 151 Ga. App. 413, 414, 260 S.E.2d 350, 350 (1979).

⁷¹ *McCormick v. State*, 161 Ga. App. 573, 573, 289 S.E.2d 23, 23 (1982).

⁷² *Leath v. State*, 200 Ga. App. 539, 539, 408 S.E.2d 835, 836 (1991).

⁷³ *Hardin v. State*, 251 Ga. 533, 534, 307 S.E.2d 669, 670-71 (1983).

⁷⁴ *Ayala v. State*, 262 Ga. 704, 706, 425 S.E.2d 282, 285 (1993).

⁷⁵ O.C.G.A. § 17-6-1(g) (emphasis added); *see also Browning v. State*, 254 Ga. 478, 480, 330 S.E.2d 879, 881-82 (1985).

⁷⁶ *Owens v. State*, 141 Ga. App. 154, 154-55, 232 S.E.2d 646, 647 (1977).

⁷⁷ *Jarrett v. State*, 222 Ga. App. 521, 521, 474 S.E.2d 702, 703 (1996); *Pressel v. State*, 161 Ga. App. 488, 488, 287 S.E.2d 780, 781-82 (1982).

⁷⁸ WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 11.1 (4th ed. 2004).

without undue hardship on the person or his or her dependents.”⁷⁹ While providing some guidance, the Georgia statute leaves considerable opportunity for fact finding in defining “undue hardship.” Denial of a motion to proceed *in forma pauperis* is “final and not subject to review.”⁸⁰

As a matter of federal constitutional law, an indigent defendant is entitled to have legal counsel appointed to provide representation through the first level of appellate review.⁸¹ The defendant’s federal constitutional right to appellate counsel, however, does not extend to discretionary appeals and petitions for certiorari, including petitions for certiorari from the United States Supreme Court.⁸²

Similarly, the Georgia Supreme Court has ruled that, even in the absence of a constitutional right to appeal, once the state has established a right to appellate review, it must assure access to this criminal process for all criminal defendants on equal terms and conditions.⁸³ The Georgia Supreme Court also has held that an indigent defendant does not have a constitutional right to appointed counsel for discretionary appeals or to apply for a writ of certiorari from the Georgia Supreme Court.⁸⁴

Once counsel has been appointed to provide representation during an indigent’s first appeal from his conviction, the court-appointed counsel must pursue the appeal to the best of his ability. Indeed, appellate counsel’s conduct, like the conduct of trial counsel, may form the basis for a claim of ineffective assistance of counsel if the appellate counsel fails to raise an error or

⁷⁹ O.C.G.A. § 17-12-2. Determination of a defendant’s status as an indigent during the trial or pretrial stage is governed in some jurisdictions by Uniform Superior Court Rule 29. Although this provision does not specifically apply to appointment or continuation of counsel for appeal, it may also serve useful in those contexts.

⁸⁰ *Harris v. State*, 170 Ga. App. 726, 727, 318 S.E.2d 315, 316 (1984); *see also Morris v. Dep’t of Transp.*, 209 Ga. App. 40, 40, 432 S.E.2d 638, 639 (1993).

⁸¹ *Douglas v. California*, 372 U.S. 353, 356-57 (1963); *Weber v. State*, 203 Ga. App. 356, 356, 416 S.E.2d 868, 868 (1992).

⁸² *Ross v. Moffitt*, 417 U.S. 600, 617-18 (1974); *Strozier v. Hopper*, 234 Ga. 597, 601, 216 S.E.2d 847, 850 (1975).

⁸³ *Cunningham v. State*, 232 Ga. 416, 416, 207 S.E.2d 48, 48-49 (1974).

⁸⁴ *Wooten v. State*, 245 Ga. 724, 724, 266 S.E.2d 927, 927 (1980).

argument that any competent attorney in the same situation would raise.⁸⁵ Appointed counsel does not, however, have any “constitutional duty to raise every nonfrivolous issue” at the request of the defendant or otherwise.⁸⁶ The Supreme Court has recognized the strategic significance of counsel’s determination to delete weaker arguments and focus on one or a few key issues on appeal.⁸⁷

The Georgia Supreme Court has abandoned an approach allowing appointed defense counsel to withdraw from the appeal of a case on grounds that the appeal is frivolous. Formerly, defense counsel could seek to withdraw by complying with the requirements set forth in the United States Supreme Court case of *Anders v. California*.⁸⁸ In federal cases, *Anders* prohibits appointed counsel from withdrawing from a “wholly frivolous” case simply by stating that the appeal is without merit. The *Anders* decision instead requires counsel’s statement that, after fair review, counsel has found the appeal to be “wholly frivolous,” accompanied by a brief, submitted to both the court and the defendant, discussing all points of record that might arguably support the appeal. The appellate court then conducts its own examination of the record and transcript in order to reach a determination with regard to the basis for the appeal. If the court finds that the appeal is in fact “wholly frivolous,” it may dismiss the appeal or affirm the conviction.⁸⁹

In the 1985 case of *Huguley v. State*,⁹⁰ the Georgia Supreme Court held that the *Anders* procedure need not apply to state appeals, stating that, although *Anders* “provides a mechanism for withdrawal of appointed counsel at the appellate level in the event that the appeal would be frivolous, . . . it does not require such withdrawal.”⁹¹ As a result, and because the review required of the court by *Anders* is burdensome, the Georgia Supreme Court no longer entertains *Anders*

⁸⁵ See *Hall v. Lewis*, 286 Ga. 767, 769-70, 692 S.E.2d 580, 585-86 (2010); *Shorter v. Waters*, 275 Ga. 581, 584, 571 S.E.2d 373, 376 (2002); *Battles v. Chapman*, 269 Ga. 702, 703, 506 S.E.2d 838, 839-40 (1998). To prevail on a claim of ineffective assistance of appellate counsel, of course, a defendant must show not only that appellate counsel did not render reasonable assistance, but also that appellate counsel’s unreasonable performance prejudiced the defendant. If the basis for the ineffective assistance of counsel claim is a failure to call a witness, the defendant “cannot use defense counsel’s testimony about what an uncalled witness had been expected to say in order to establish the truth of that uncalled witness’s testimony.” *Dickens v. State*, 280 Ga. 320, 322, 627 S.E.2d 587, 590 (2006). This is hearsay and therefore the uncalled witness must testify or a legally recognized substitute for the witness’s testimony must be produced. *Id.*

⁸⁶ *Jones v. Barnes*, 463 U.S. 745, 746 (1983); *Mullins v. Lavoie*, 249 Ga. 411, 412, 290 S.E.2d 472, 473-74 (1982).

⁸⁷ *Jones*, 463 U.S. at 751-52; *Davis v. Williams*, 258 Ga. 552, 553, 372 S.E.2d 228, 229-30 (1988).

⁸⁸ 386 U.S. 738 (1967). For a thorough overview of *Anders* jurisprudence, see LAFAYE ET AL., *supra* note 78, § 11.2(c).

⁸⁹ See *Bethay v. State*, 237 Ga. 625, 626, 229 S.E.2d 406, 406 (1976); *Fegan v. State*, 154 Ga. App. 791, 791-92, 270 S.E.2d 211, 212 (1980).

⁹⁰ 253 Ga. 709, 324 S.E.2d 729 (1985).

⁹¹ *Id.* at 710, 324 S.E.2d at 731.

motions.⁹² The Georgia Court of Appeals has followed suit.⁹³ Before the Georgia Supreme Court, defendants are “entitled to review of any claim which might afford [them] relief.”⁹⁴ The courts have not yet reconciled this development with counsel’s well-settled discretion to omit weaker arguments on appeal.⁹⁵

The indigent appellant has a federal constitutional right to a trial transcript of the proceedings or adequate substitute, free of cost, when challenging trial errors on an appeal as of right.⁹⁶ This right does not necessarily entitle the defendant to the entire verbatim transcript, but it does guarantee a record of sufficient completeness to permit consideration of all points raised on appeal.⁹⁷ This right arises regardless of whether the appellant was represented by retained counsel at trial.⁹⁸ In cases of partial or limited transcripts, the state must insure that the record is of sufficient completeness to allow full consideration of the indigent appellant’s contentions.⁹⁹

The representation of indigent appellants in capital cases is specifically governed by O.C.G.A. § 17-12-2 et seq. Section 17-12-12 constitutes the Office of the Georgia capital defender division, which serves all Georgia counties. In a capital case, once a defendant is determined to be indigent, the court hearing the case must notify the capital defender division.¹⁰⁰ Barring a conflict of interest, the capital defender division is required to represent all indigent persons charged with a capital felony for which the death penalty is being sought.¹⁰¹ If a conflict of interest precludes the Georgia capital defender division from defending such indigent persons, then its director must appoint counsel to represent the defendant.¹⁰² If counsel is appointed, the director is

⁹² *Id.*; *Saunders v. State*, 254 Ga. 262, 262 n.2, 328 S.E.2d 544, 545 n.2 (1985).

⁹³ *Fields v. State*, 189 Ga. App. 532, 532, 376 S.E.2d 912, 913-14 (1988); *see also Richards v. State*, 288 Ga. App. 578, 579, 654 S.E.2d 468, 468 (2007) (affirming that *Anders* motions have not been permitted since 1988).

⁹⁴ *Huguley*, 253 Ga. at 710, 324 S.E.2d at 731; *see also Saunders*, 254 Ga. at 262, 328 S.E.2d at 544.

⁹⁵ *See Jones v. Barnes*, 463 U.S. 745, 751-52 (1983); *Davis v. Williams*, 258 Ga. 552, 553, 372 S.E.2d 228, 229-30 (1988).

⁹⁶ *Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956); *Stalling v. State*, 231 Ga. 37, 37, 200 S.E.2d 121, 122-23 (1973).

⁹⁷ *Bailey v. State*, 232 Ga. 873, 874, 209 S.E.2d 204, 205 (1974). Motions for new trial and other post-trial motions are included under the definition of “proceeding.” *Mitchell v. State*, 280 Ga. 802, 802, 633 S.E.2d 539, 540 (2006).

⁹⁸ *Coleman v. State*, 293 Ga. App. 251, 252, 666 S.E.2d 620, 621 (2008); *Ga. Pub. Defender Standards Council v. State*, 284 Ga. App. 660, 664, 644 S.E.2d 510, 513 (2007).

⁹⁹ *Sales v. State*, 152 Ga. App. 635, 635, 263 S.E.2d 519, 519 (1979).

¹⁰⁰ O.C.G.A. § 17-12-12(b).

¹⁰¹ O.C.G.A. § 17-12-12(a).

¹⁰² O.C.G.A. 17-12-12.1(a).

charged with establishing a contractual agreement with the defendant’s counsel for payment of the representation.¹⁰³

§ 11.3.6 Mechanics of the Appeal

To perfect an appeal to either the Georgia Supreme Court or Court of Appeals, the defendant generally must file a notice of appeal with the clerk of the trial court within 30 days of the entry of the decision or judgment.¹⁰⁴ The notice must set forth:

- The title and docket number of the case;
- The appellant’s name and his or her attorney’s name and address;
- A concise statement of the judgment, ruling, or order that forms the basis for the appeal;
- The court appealed to;
- A designation of those portions of the record to be omitted from the record on appeal;
- A concise statement of the appellate court’s jurisdiction; and
- A brief statement of the offense and punishment prescribed.¹⁰⁵

If a defendant files a motion for new trial or a motion in arrest of judgment, the notice of appeal must be filed within 30 days after the entry of the order granting, overruling, or otherwise disposing

¹⁰³ *Id.* The statute also advises that when feasible and prudent, a flat fee structure shall be utilized.

¹⁰⁴ O.C.G.A. §§ 5-6-37, 5-6-38; GA. CT. APP. R. 11(a).

¹⁰⁵ O.C.G.A. § 5-6-37.

of that motion.¹⁰⁶ In contrast, motions for reconsideration, motions to vacate an order denying a motion for new trial, and extraordinary motions for new trial do not extend the time for filing a notice of appeal.¹⁰⁷

Failure to file a notice of appeal within the specified time terminates the defendant's right to appeal.¹⁰⁸ Georgia courts may excuse compliance with a statutory requirement for appeal only where necessary to avoid or remedy a constitutional violation concerning the appeal.¹⁰⁹ However, the court to which the appeal is directed may, without motion or notice to the other party, grant a single extension of not more than 30 days for filing a notice of appeal.¹¹⁰ In addition, a defendant who is deprived of his right to appeal through no fault of his own may seek leave from a trial court to file an out-of-time appeal.¹¹¹

For most felony criminal cases, it is the duty of the appellant to cause the transcript to be filed by the court reporter within 30 days after the filing of the notice of appeal, which is the same rule that applies in civil cases.¹¹² If necessary for the court reporter to complete the transcript,

¹⁰⁶ O.C.G.A. § 5-6-38(a). Courts have varied in their treatment of the procedural interplay between motions for new trial and notices of appeal. A notice of appeal should not be filed during the time in which a motion for new trial is pending before the court, but if it is, courts will look past the procedural irregularity and consider the appeal on its merits upon entry of the order denying the motion for a new trial. *Hall v. State*, 282 Ga. 294, 295, 647 S.E.2d 585, 578 (2007); *Livingston v. State*, 221 Ga. App. 563, 564, 472 S.E.2d 317, 319 (1996); see also *Taylor v. State*, 287 Ga. 440, 440 n.1, 696 S.E.2d 652, 653 n.1 (2010), *Krause v. State*, 286 Ga. 745, 745 n.1, 691 S.E.2d 211, 213 n.1 (2010). After the time for filing a motion for new trial has expired, the filing of a notice of appeal divests the trial court of jurisdiction to hear a motion for new trial. *Elrod v. State*, 222 Ga. App. 704, 705, 475 S.E.2d 710, 712 (1996). In the past, the filing of a motion for new trial or motion in arrest of judgment had been held to void the previously filed notice of appeal. See *Ponder v. State*, 164 Ga. App. 574, 574, 298 S.E.2d 561, 561-62 (1982). That rule has changed, however, and courts will not dismiss an appeal on that basis. *Hendrick v. State*, 257 Ga. 514, 514 n.1, 361 S.E.2d 169, 170 n.1 (1987); *McCants v. State*, 222 Ga. App. 75, 75, 473 S.E.2d 514, 516 (1996). Defense counsel nevertheless should refile the notice of appeal following the court's decision on the motion for new trial or motion in arrest of judgment.

¹⁰⁷ *Segura v. State*, 280 Ga. App. 685, 686, 634 S.E.2d 858, 860 (2006); *Campbell v. State*, 192 Ga. App. 316, 316, 385 S.E.2d 14, 15 (1989); *Knox v. State*, 180 Ga. App. 564, 564, 349 S.E.2d 753, 753-54 (1986).

¹⁰⁸ *Mitchell v. State*, 157 Ga. App. 181, 182, 276 S.E.2d 864, 866 (1981), partially overruled on other grounds by *Gable v. State*, No. S11A1070, 2011 WL 4905705 (Ga. Oct 17, 2011).

¹⁰⁹ See *Gable*, 2011 WL 4905705, at *5.

¹¹⁰ O.C.G.A. § 5-6-39. Note that this extension is only permissible in direct, rather than discretionary, appeals. See *Gable*, 2011 WL 4905705, at *3.

¹¹¹ See *Moore v. State*, 304 Ga. App. 105, 105, 695 S.E.2d 661, 662 (2010) (quoting *Dowling v. State*, 294 Ga. App. 413, 413, 669 S.E.2d 198 (2008)).

¹¹² O.C.G.A. § 5-6-42.

extensions of time may be obtained.¹¹³ For death penalty appeals under the Unified Appeal Procedure Act, different time constraints and extension rules apply.¹¹⁴

In misdemeanor cases, the trial judge decides in his or her discretion whether a case will be reported or transcribed at the expense of the state.¹¹⁵ However, the defendant always remains free to have the case transcribed at his or her own expense.¹¹⁶

All felony trials must be reported, or taken down, by a court reporter.¹¹⁷ At the conclusion of a felony trial, if the defendant is convicted, the court reporter must prepare a transcript of the trial, at the expense of the state.¹¹⁸ The court reporter must file an original and one copy of the transcript with the clerk of the trial court, along with a certificate attesting to the accuracy of the transcript.¹¹⁹ If the defendant was convicted of a capital felony, an additional copy of the transcript must be prepared for the attorney general.¹²⁰ On appeal, the trial court transmits the original transcript to the appellate court as part of the record on appeal and retains one copy.¹²¹ Non-indigent petitioners must pay to receive a copy of the transcript; indigent petitioners do not.¹²² In lieu of a transcript, the parties may enter into a stipulation of facts of the case that forms the basis for the appropriate legal questions to be presented to the appellate court.¹²³

Within five days after the transcript is filed with the clerk of the trial court, the clerk must prepare a complete copy of the entire record of the case and transmit it to the appellate court.¹²⁴ In the appeal of a criminal case in which the defendant is confined to jail pending appeal, the trial

¹¹³ *Id.*

¹¹⁴ *See infra* § 11.6.

¹¹⁵ O.C.G.A. § 5-6-41(b); *Johnson v. State*, 280 Ga. App. 882, 883, 635 S.E.2d 267, 268 (2006); *Ward v. State*, 188 Ga. App. 372, 373, 373 S.E.2d 65, 68 (1988). The Georgia Supreme Court has ruled, however, that a misdemeanor guilty plea must be transcribed if the defendant is sentenced to a term of imprisonment. *King v. State*, 270 Ga. 367, 372, 509 S.E.2d 32, 36 (1998).

¹¹⁶ O.C.G.A. § 5-6-41(j).

¹¹⁷ O.C.G.A. § 17-8-5(a).

¹¹⁸ O.C.G.A. § 5-6-41(d); *Ivory v. State*, 199 Ga. App. 283, 283, 405 S.E.2d 90, 90 (1991).

¹¹⁹ O.C.G.A. § 5-6-41(e).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Coleman v. State*, 293 Ga. App. 251, 252, 666 S.E.2d 620, 621-22 (2008); *Carter v. State*, 231 Ga. App. 42, 45, 497 S.E.2d 812, 816 (1998); *Hall v. State*, 162 Ga. App. 713, 715, 293 S.E.2d 862, 865 (1982).

¹²³ O.C.G.A. § 5-6-41(i).

¹²⁴ O.C.G.A. § 5-6-43(a). If unable to transmit the record and transcript within the time required, the clerk “shall state in his certificate the cause of the delay and the appeal shall not be dismissed.” *Id.*

court clerk must notify the appellate court of the defendant's incarceration, and the appellate court must expedite disposition of the case.¹²⁵

Under certain circumstances, a defendant's failure to cause the transcript to be filed in a timely fashion may be grounds for dismissal of the appeal. Although the text of O.C.G.A. § 17-8-5 provides for the state, through the presiding judge, to cause the transcript in a noncapital felony case to be filed without a request by the defendant, it imposes no requirement that the state do so within a particular timeframe.¹²⁶ Under O.C.G.A. § 17-8-5, if the defendant fails to order and file the transcript within reasonable time after the notice of appeal is filed, the trial judge may order the appeal dismissed after notice and opportunity for hearing.¹²⁷

The appellant and, in the event of a cross-appeal, the cross-appellant, are required to file with the clerk of the appellate court, within 20 days after the case is docketed, an enumeration of errors, incorporated as Part 2 of the appellant's brief,¹²⁸ and serve a copy on the opposing party.¹²⁹ The enumeration of errors must concisely describe each error relied upon in the appeal, be thorough and complete, and may not be amended after the time for filing has expired.¹³⁰ Each enumeration must contain only one alleged error.¹³¹ Appellate courts will not consider alleged errors raised only by brief and not contained in the enumeration of errors,¹³² although courts have relaxed the rule for pro se criminal appellants.¹³³ The appellant must file a brief, and failure to do so or to appear at oral argument of the case could result in abandonment or dismissal of the appeal.¹³⁴ Failure of the state to file a brief does not relieve the defendant of his burden, but simply results in the statement of facts as alleged in the appellant's brief being admitted.¹³⁵

¹²⁵ O.C.G.A. § 5-6-43(c).

¹²⁶ *See State v. Hart*, 246 Ga. 212, 213, 271 S.E.2d 133, 134-35 (1980).

¹²⁷ *Id.*

¹²⁸ O.C.G.A. §§ 5-6-40, 5-6-48(f); GA. CT. APP. R. 22.

¹²⁹ O.C.G.A. § 5-6-40.

¹³⁰ *See MacDonald v. MacDonald*, 156 Ga. App. 565, 566, 275 S.E.2d 142, 144 (1980); *Burke v. State*, 153 Ga. App. 769, 770, 266 S.E.2d 549, 550 (1980).

¹³¹ *Pirkle v. Hawley*, 199 Ga. App. 371, 375, 405 S.E.2d 71, 76 (1991); *MacDonald*, 156 Ga. App. at 566, 275 S.E.2d at 144. This does not mean, however, that each legal argument pertaining to a single error must be separately enumerated. *See Felix v. State*, 271 Ga. 534, 539, 523 S.E.2d 1, 6 (1999).

¹³² *Felix*, 271 Ga. at 539, 523 S.E.2d at 6; *Scott v. State*, 302 Ga. App. 111, 112-13, 690 S.E.2d 242, 245 (2010).

¹³³ *Welch v. State*, 207 Ga. App. 27, 29, 427 S.E.2d 22, 25 (1992), *overruled on other grounds*, *Davenport v. State*, 289 Ga. 399, 402-03, 711 S.E.2d 699, 702 (2011).

¹³⁴ GA. CT. APP. R. 16(b).

¹³⁵ *Colson v. State*, 138 Ga. App. 366, 366, 226 S.E.2d 154, 156 (1976).

§ 11.3.7 Perfecting the Record for Appeal

An appellate court will not consider issues that a party fails to preserve for appeal. The burden is on the complaining party to perfect the lower court’s record and designate what should be included for appeal.¹³⁶ In all felony cases, the court reporter must transcribe the evidence and proceedings.¹³⁷ In misdemeanor cases, the court reporter only transcribes the evidence and proceedings at the judge’s discretion.¹³⁸ This transcription shall include all reported “motions, colloquies, objections, rulings, evidence, whether admitted or stricken on objection or otherwise, copies or summaries of all documentary evidence, the charge of the court and all other proceedings which may be called in question on appeal or other posttrial procedure.”¹³⁹ Other matters, such as juror misconduct or objection to oral argument, shall also be transcribed and included as a part of the record upon motion of either party.¹⁴⁰ When any party argues that the record does not accurately state what happened at trial, the court will hold a hearing to ensure that the record comports with the truth.¹⁴¹ Generally, when there are multiple defendants, a specified evidentiary objection by one does not perfect the record as to the other.¹⁴² However, if the other defendant expressly adopts the objections made by his co-defendant, then his objections will also be preserved.¹⁴³

To perfect the record for evidentiary appeals, the attorney must “raise the objection at trial with the necessary degree of specificity [S]tating ‘I object’ without giving grounds is insufficient”¹⁴⁴ For example, when objecting on hearsay grounds, the attorney must identify any portions of a document that are and are not admissible.¹⁴⁵ Any objection on appeal must be the same objection made before the trial court.¹⁴⁶

¹³⁶ *Macias v. State*, 292 Ga. App. 225, 225 n.1, 664 S.E.2d 265, 267 n.1 (2008); *Lee v. State Constr. Indus. Licensing Bd. of Ga.*, 205 Ga. App. 497, 498, 423 S.E.2d 26, 27 (1992).

¹³⁷ O.C.G.A. §5-6-41(a).

¹³⁸ O.C.G.A. §5-6-41(b).

¹³⁹ O.C.G.A. §5-6-41(d).

¹⁴⁰ *Id.*

¹⁴¹ O.C.G.A. §5-6-41(f).

¹⁴² PAUL S. MILICH, *MILICH’S GEORGIA RULES OF EVIDENCE* § 3.1 (2011-2012 ed.).

¹⁴³ *Id.*

¹⁴⁴ HON. NEAL W. DICKERT, *GEORGIA HANDBOOK ON FOUNDATIONS AND OBJECTIONS* § 6:14 (2011).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

An attorney must make evidentiary objections every time his opponent offers the evidence—even if the judge overrules his objection.¹⁴⁷ Standing or continuing objections are sufficient to perfect the record, assuming that the grounds and force of the objection remain the same.¹⁴⁸ Such objections do not prevent attorneys from examining witnesses on and responding to such disputed evidence.¹⁴⁹

Even when a defendant pleads guilty and does not have a trial, he must still perfect the record for appeal. Criminal defendants do not have an “unqualified right to file a direct appeal from a judgment of conviction and sentence entered on a guilty plea.”¹⁵⁰ The right to direct appeal in such cases exists only if “the issue on appeal can be resolved by facts appearing in the record.”¹⁵¹ This record includes the transcript of the defendant’s guilty plea hearing.¹⁵² A defendant attempting to appeal a guilty plea on the ground of ineffective assistance of counsel, however, “must develop those issues in a post-plea hearing and may not file a direct appeal if the only evidence in the record is the transcript of the guilty plea hearing.”¹⁵³ In such a case, the defendant should move to withdraw the plea, or if that would be untimely, should petition for a writ of habeas corpus.¹⁵⁴

§ 11.3.8 Appeal Waivers in Plea Agreements

Georgia courts have held that a criminal defendant may waive his right to appeal without violating public policy.¹⁵⁵ Such waivers are generally constitutional and enforceable and may be upheld even when death sentences are imposed.¹⁵⁶ Waivers must be knowing, intelligent, and voluntary.¹⁵⁷ Courts will enforce waivers if the government proves either that: (i) the district court “specifically questioned the defendant about the waiver during the plea colloquy”; or (ii) the record

¹⁴⁷ MILICH, *supra* note 142, § 3.2; *see Turner v. State*, 281 Ga. 647, 651-52, 641 S.E.2d 527, 531-32 (2007); *Werner v. State*, 246 Ga. App. 677, 678-79, 538 S.E.2d 168, 170 (2000).

¹⁴⁸ MILICH, *supra* note 142, § 3.2 (citing *Norman v. State*, 197 Ga. App. 333, 398 S.E.2d 395 (1990)).

¹⁴⁹ MILICH, *supra* note 142, § 3.2.

¹⁵⁰ *Lee v. State*, 277 Ga. App. 887, 889, 627 S.E.2d 901, 903 (2006).

¹⁵¹ *Id.*

¹⁵² *Shumake v. State*, 257 Ga. App. 209, 209, 570 S.E.2d 648, 648 (2002).

¹⁵³ *Denova v. State*, 268 Ga. App. 16, 17, 601 S.E.2d 400, 403 (2004).

¹⁵⁴ *Id.*; *see also Shelton v. State*, 307 Ga. App. 599, 600-01, 705 S.E.2d 699, 701 (2011).

¹⁵⁵ *Thomas v. State*, 260 Ga. 262, 264, 392 S.E.2d 520, 522 (1990); *see also Baker v. State*, 284 Ga. 280, 281, 663 S.E.2d 261, 262 (2008).

¹⁵⁶ *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

¹⁵⁷ *Thomas*, 260 Ga. at 264, 392 S.E.2d at 522.

demonstrates that “the defendant otherwise understood the full significance of the waiver.”¹⁵⁸ Appellate courts commonly uphold waivers of the right to appeal when they are included in a negotiated agreement for the defendant to receive a lesser sentence.¹⁵⁹ However, in the context of plea negotiations, there must be a real benefit to the defendant and “[a] prosecutor may not induce a plea through a meaningless or illusory promise.”¹⁶⁰ Waivers of the right to seek post-conviction relief from life imprisonment are treated similarly when challenged via habeas corpus proceedings.¹⁶¹ Both types of waiver are thought to foster the finality of proceedings: ““Only by holding the defendant and the state to the bargain is finality achieved.””¹⁶²

§ 11.4 State Habeas Corpus

The Latin term “habeas corpus” translates literally as “that you have the body.”¹⁶³ The writ of habeas corpus is a judicial order directing the appropriate governmental official to deliver an individual within his or her custody before the court.¹⁶⁴ For this reason, writs of habeas corpus are normally directed to the wardens of prisons or sheriffs in charge of jails, because they are responsible for maintaining custody. When a writ of habeas corpus is granted, the person to whom it is directed must produce the individual detained to inquire into the lawfulness of the detention. Thus, a court that grants the writ will not necessarily grant the relief requested. If the detention is found to be unconstitutional, the habeas court will grant the relief requested by the petition, usually vacating the judgment, and remand the defendant to the court in which he or she was convicted.

The Habeas Corpus Act makes the writ of habeas corpus available to criminal defendants under the following circumstances: (i) when any person is restrained of his liberty under any pretext whatsoever, except under sentence of a state court of record; (ii) when a person alleges that another, in whom for any cause he is interested, is kept illegally from the custody of the applicant; or (iii) when any person is restrained of his liberty as a result of a sentence imposed by any state court of record.¹⁶⁵ The writ of habeas corpus is unavailable to a defendant if there are alternative adequate remedies that have not been exhausted before the trial court or on appeal.¹⁶⁶ Special

¹⁵⁸ *United States v. Benitez-Zapata*, 131 F.3d 1444, 1446 (11th Cir. 1997).

¹⁵⁹ *Bryan v. State*, 296 Ga. App. 341, 342-43, 674 S.E.2d 390, 392 (2009).

¹⁶⁰ *Hooks v. State*, 284 Ga. 531, 535, 668 S.E.2d 718, 722 (2008) (internal quotation marks and citation omitted), *overruled on other grounds*, *Williams v. State*, 287 Ga. 192, 695 S.E.2d 244 (2010).

¹⁶¹ *Allen v. Thomas*, 265 Ga. 518, 520, 458 S.E.2d 107, 108 (1995).

¹⁶² *Id.* (quoting *Thomas v. State*, 260 Ga. at 263, 392 S.E.2d at 522).

¹⁶³ BLACK’S LAW DICTIONARY 778 (9th ed. 2009).

¹⁶⁴ *Id.*

¹⁶⁵ O.C.G.A. § 9-14-1.

¹⁶⁶ *Britt v. Conway*, 283 Ga. 474, 475, 660 S.E.2d 526, 528 (2008).

provisions govern writs by or on behalf of those sentenced by any state court.¹⁶⁷ These special provisions are discussed below in Section 11.4.2.

§ 11.4.1 State Habeas Corpus for Non-Sentenced Detainees

For persons detained for reasons other than the imposition of a sentence, an application for a writ of habeas corpus must be by petition signed by the applicant, his attorney, or some other person on his behalf, and must contain the following: (i) the name or description of the person whose liberty is restrained; (ii) the person restraining, the mode of restraint, and the place of detention; (iii) the cause or pretense of restraint; (iv) the alleged illegality in the restraint, distinctly set forth, or any other reason why the writ is sought; and (v) a prayer for the writ of habeas corpus.¹⁶⁸ A suggested form of the writ appears in the Code.¹⁶⁹

The petitioner or some other person acting on his behalf must verify the writ and present it to the judge of the superior court in the circuit where the defendant is being detained or to the judge of the probate court of that county.¹⁷⁰ Service of a writ of habeas corpus on the detaining party must be made by an officer authorized to make a return of any process or by any other citizen by delivering a copy of the writ.¹⁷¹ If personal service cannot be effected, the applicant may leave the writ at the jail or other place at which the defendant is detained.¹⁷²

The return must be made under oath and at the time and place specified by the court.¹⁷³ If the return admits the custody or detention of the party, the respondent has two days from the time of service for every 20 miles which the party has to travel from the place of detention to the place appointed for hearing, and must produce the individual “unless prevented by providential cause or prohibited by law.”¹⁷⁴ If the return denies custody of the defendant, it must distinctly state the latest date of custody and when and to whom custody of the individual was transferred.¹⁷⁵ Failure to do so may subject the respondent to punishment for contempt, but does not require release of the petitioner.¹⁷⁶

¹⁶⁷ O.C.G.A. §§ 9-14-40 *et seq.*

¹⁶⁸ O.C.G.A. § 9-14-3(1)-(5).

¹⁶⁹ O.C.G.A. § 9-14-6.

¹⁷⁰ O.C.G.A. § 9-14-4; *Dyer v. Allen*, 238 Ga. 516, 516, 233 S.E.2d 772, 773 (1977).

¹⁷¹ O.C.G.A. § 9-14-8.

¹⁷² *Id.*

¹⁷³ O.C.G.A. §§ 9-14-10, 9-14-11.

¹⁷⁴ O.C.G.A. § 9-14-11.

¹⁷⁵ O.C.G.A. § 9-14-12.

¹⁷⁶ *Bailey v. Baker*, 232 Ga. 84, 85, 205 S.E.2d 278, 279 (1974).

The court may dismiss the petition without a hearing if “the petition and exhibits attached thereto disclose without contradiction that the petition is without merit.”¹⁷⁷ If, however, the judge determines that the detention might be illegal, the judge must grant the writ and order the person restraining the defendant to deliver the defendant to the court at a specified time to determine the cause of the detention.¹⁷⁸ The court must notify the district attorney, if he is in the county.¹⁷⁹ The court may not discharge the petitioner if “it appears that the detention is authorized by law,” or if the irregularity is minor.¹⁸⁰ Where “the principles of law and justice” require, the court shall discharge the petitioner or admit him to bail.¹⁸¹

Appeals in preconviction habeas corpus proceedings fall under the laws governing all appeals as they relate to the time and manner of signing, filing, serving, transmitting, and hearing.¹⁸² The Supreme Court must “give a speedy hearing and determination” under the applicable appellate rules.¹⁸³

§ 11.4.2 State Habeas Corpus for Sentenced Detainees

The Habeas Corpus Act also provides an exclusive procedure for seeking a writ of habeas corpus for individuals in custody by virtue of a sentence imposed by a state court.¹⁸⁴ An individual so imprisoned may institute a habeas corpus proceeding by filing a petition with “the superior court of the county in which the petitioner is being detained”¹⁸⁵ that asserts a “substantial denial” of his rights under the United States Constitution or the Georgia Constitution.¹⁸⁶

¹⁷⁷ *Daker v. Warren*, 288 Ga. 799, 800, 709 S.E.2d 222, 223 (2011) (internal quotation marks and citation omitted).

¹⁷⁸ O.C.G.A. § 9-14-5.

¹⁷⁹ O.C.G.A. § 9-14-15. If the district attorney is not in the county, notice shall be given to the prosecutor. *Id.*

¹⁸⁰ O.C.G.A. § 9-14-16; *see also* O.C.G.A. § 9-14-17.

¹⁸¹ O.C.G.A. § 9-14-19.

¹⁸² *See* O.C.G.A. § 9-14-22.

¹⁸³ *Id.*

¹⁸⁴ O.C.G.A. §§ 9-14-40 *et seq.*; *Battle v. Sparks*, 211 Ga. App. 106, 106, 438 S.E.2d 185, 185-86 (1993).

¹⁸⁵ O.C.G.A. § 9-14-43.

¹⁸⁶ O.C.G.A. § 9-14-42. Although a mere statutory violation once could provide a predicate for a habeas petition, *see McDuffie v. Jones*, 248 Ga. 544, 544-45, 283 S.E.2d 601, 602-03 (1981) (Jordan, J., concurring), *overruled by West v. Waters*, 272 Ga. 591, 533 S.E.2d 88 (2000), habeas corpus now is available only to vindicate constitutional rights. *Smith v. State*, 287 Ga. 391, 403-04, 697 S.E.2d 177, 188 (2010); *Britt v. Smith*, 274 Ga. 611, 612, 556 S.E.2d 435, 437 (2001).

The petition must identify the proceeding in which the petitioner was convicted, provide the date of final judgment, set forth the aspect of the proceeding violating the petitioner's rights, and state with specificity which claims were raised at trial or on direct appeal and provide appropriate citations to the record.¹⁸⁷ The applicant should attach all necessary affidavits and other evidence, but omit argument and citations of authorities.¹⁸⁸ He or she, however, may file a brief in support of the petition.¹⁸⁹ The applicant should serve the petition on the person having custody of him or her.¹⁹⁰ If custody is with the Department of Corrections, the applicant should serve an additional copy on the attorney general by mailing a copy of the petition and a proper certificate of service.¹⁹¹ The respondent must answer or move to dismiss the petition within 20 days from its filing or docketing.¹⁹²

If a petition for the first time challenges a state court proceeding that resulted in a death sentence, that procedure is governed by O.C.G.A. § 9-14-47.1. Within 10 days from the receipt of the petition, the superior court clerk must notify the Council of Superior Court Judges.¹⁹³ The Council then has 30 days to assign the case to a judge in the circuit where the conviction was imposed for further proceedings pursuant to Uniform Superior Court Rules 44.1-44.13.¹⁹⁴

For all other petitions, the court is required to set a hearing on the petition within a reasonable time after the filing of the defensive pleadings.¹⁹⁵ Because a habeas corpus proceeding is a civil and not a criminal action, the burden of proof lies on the defendant to establish his claim by a preponderance of the evidence,¹⁹⁶ which can include depositions, oral testimony, sworn affidavits, or other evidence in consideration of the petition.¹⁹⁷ Additionally, the court shall review the trial record and transcript and consider whether the petitioner complied with Georgia procedural rules at trial and on appeal regarding the timeliness of his motions or objections.¹⁹⁸ If the court determines

¹⁸⁷ O.C.G.A. § 9-14-44.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ O.C.G.A. § 9-14-45.

¹⁹¹ *Id.*

¹⁹² O.C.G.A. § 9-14-47.

¹⁹³ O.C.G.A. § 9-14-47.1(b).

¹⁹⁴ *Id.*

¹⁹⁵ O.C.G.A. § 9-14-47.

¹⁹⁶ *Stynchcombe v. Rhodes*, 238 Ga. 74, 74, 231 S.E.2d 63, 63-64 (1976). One exception to this rule is that the state bears the burden—even on habeas review—of establishing that a guilty plea was voluntarily entered. *Roberts v. Greenway*, 233 Ga. 473, 475, 211 S.E.2d 764, 766 (1975).

¹⁹⁷ O.C.G.A. § 9-14-48(a)-(c).

¹⁹⁸ O.C.G.A. § 9-14-48(d).

that the defendant has not properly complied with Georgia procedural rules at trial and on appeal, it will not grant habeas corpus relief, absent a showing of cause for non-compliance and of actual prejudice.¹⁹⁹ The Code, however, specifically states that habeas corpus relief shall be granted in all cases to avoid a “miscarriage of justice.”²⁰⁰ After a review of all evidence introduced in the habeas corpus proceeding and of the trial record and transcript, the court must make written findings of fact and conclusions of law upon which its judgment is based.²⁰¹

Appeals in habeas corpus proceedings regarding sentenced detainees are governed by Title 5, Chapter 6 of the Georgia Code, except that orders adverse to the petitioner may not form the basis of an appeal unless the Supreme Court certifies probable cause for the appeal.²⁰² The appellant must apply to the clerk of the Supreme Court for a certificate of probable cause within 30 days from the entry of the order denying relief, and a notice of appeal must also be filed within that time.²⁰³ For a pro se prisoner appealing from a decision on a habeas corpus petition, the application for certificate of probable cause to appeal and notice of appeal will be deemed filed “on the date he delivers [the notices] to prison authorities for forwarding to the clerk of the superior court.”²⁰⁴ Under the Supreme Court Rules, a certificate of probable cause to appeal will be granted where there is “arguable merit,” provided there has been compliance with *Fullwood v. Sivley*, 271 Ga. 248, 517 S.E.2d 511 (1999), and *Hicks v. Scott, Warden*, 273 Ga. 358, 541 S.E.2d 27 (2001).²⁰⁵ *Fullwood* and *Hicks* emphasize that the Supreme Court has jurisdiction to consider an application

¹⁹⁹ *Id.*

²⁰⁰ O.C.G.A. § 9-14-48(c). Although the courts have not offered a precise definition of “miscarriage of justice,” the Supreme Court has explained that:

[T]he term is by no means to be deemed synonymous with procedural irregularity, or even with reversible error. To the contrary, it demands a much greater substance, approaching perhaps the imprisonment of one who, not only is not guilty of the specific offense for which he is convicted, but, further, is not even culpable in the circumstances under inquiry.

Valenzuela v. Newsome, 253 Ga. 793, 796, 325 S.E.2d 370, 374 (1985); *see also Perkins v. Hall*, 288 Ga. 810, 824-25, 708 S.E.2d 335, 347-48 (2011).

²⁰¹ O.C.G.A. §§ 9-14-48, 9-14-49.

²⁰² O.C.G.A. § 9-14-52.

²⁰³ *Id.*

²⁰⁴ *Ferguson v. Freeman*, 282 Ga. 180, 182, 646 S.E.2d 65, 67 (2007) (citing *Massaline v. Williams*, 274 Ga. 552, 555, 554 S.E.2d 720, 720 (2001)). This is referred to as the “mailbox rule.” The date on the certificate of service gives rise to a rebuttable presumption that it was delivered to authorities on that date. *Id.* The Supreme Court has clarified that the mailbox rule is a “judicially-created rule of accommodation” and that it only applies to appellate jurisdiction, to prisoners not represented by counsel, and in actions for habeas relief. *Roberts v. Cooper*, 286 Ga. 657, 661, 691 S.E.2d 875, 878 (2010). In the Supreme Court, all documents sent by pro se prisoners are considered filed on the date the prisoner delivers them to prison officials for mailing. GA. S. CT. R. 13.

²⁰⁵ GA. S. CT. R. 36.

only if the prisoner timely files both an application for a certificate of probable cause and a notice of appeal as required by O.C.G.A. § 9-14-52(b).²⁰⁶

For the 30 days following the entry of the habeas order denying relief to begin running, the Georgia Supreme Court has required that the defendant be informed of the proper appellate procedure for appealing a denial of habeas relief.²⁰⁷ Furthermore, “the mere reference to the statute outlining the procedure to be followed to appeal the denial of habeas relief is an *insufficient* method by which to notify a habeas petitioner.”²⁰⁸

As in any other case, the clerk of the superior court from which the case is being appealed must provide the court with a copy of the record and transcript when the notice of appeal is filed²⁰⁹ and may not refuse to do so on the grounds that the indigent petitioner has not paid previously assessed costs.²¹⁰

§ 11.5 Federal Habeas Corpus

After a state inmate has exhausted his or her state court remedies, he or she may then seek relief through the federal court system.²¹¹ While this chapter focuses on remedies available in state court, the potential for federal habeas relief and a brief overview of the key deadlines are included herein, because of their importance to many state criminal appellants.

According to the federal habeas corpus statute, a state prisoner who seeks federal habeas corpus relief is required to file his or her federal petition within one year after “the date on which the [state court conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review.”²¹²

For example, assume that a petitioner pleaded guilty to a crime on March 25, 1990. Under Georgia law, the petitioner would not have an unqualified right to pursue a direct appeal from a guilty plea, and if he or she did attempt to appeal the plea, the court could only address those issues

²⁰⁶ *Fullwood*, 271 Ga. at 250-51, 517 S.E.2d at 514 (holding that jurisdiction depends on full compliance with O.C.G.A. § 9-14-52(b)); *Hicks*, 273 Ga. at 359, 541 S.E.2d at 28 (suggesting that the habeas court must inform pro se petitioner of proper procedure to obtain appellate review).

²⁰⁷ *Thomas v. State*, 284 Ga. 327, 327, 667 S.E.2d 375, 376 (2008).

²⁰⁸ *Id.* at 327, 667 S.E.2d at 376-77 (emphasis added).

²⁰⁹ O.C.G.A. § 9-14-52(b).

²¹⁰ *Brand v. Szabo*, 263 Ga. 119, 119, 428 S.E.2d 325, 325-26 (1993).

²¹¹ *See King v. Chase*, 384 F. App'x 972, 974 (11th Cir. 2010).

²¹² 28 U.S.C. § 2244(d)(1)(A).

that could be resolved from the face of the pleadings.²¹³ Under O.C.G.A. § 5-6-38(a), to seek a direct appeal from the guilty plea, the petitioner would need to file a notice of appeal within 30 days after the plea was entered. If the petitioner did not file a petition by April 24, 1990, the conviction would be “final” on April 24, 1990, since the time for filing a notice of appeal would have expired. In theory, then, the petitioner would be required to file the federal habeas petition within one year of the April 24, 1990, date. The petitioner would be required to exhaust state habeas options before seeking federal habeas relief, however, and could toll the one-year period with a “properly filed application for State post-conviction or other collateral review” of the judgment.²¹⁴ Importantly, if the petitioner allowed the year to pass and then filed a federal habeas petition without having filed a state habeas petition, the warden or custodian would move to dismiss the petitioner’s federal habeas petition for failure to exhaust the potential for state habeas relief. Following such dismissal, the petitioner might then pursue state habeas relief but would be unable to re-file the federal habeas petition because the one-year period of 28 U.S.C. § 2244(d) would have run.²¹⁵

§ 11.6 Unified Appeal Procedure

The Unified Appeal Procedure Act (“UAP Act”) requires the Supreme Court to establish a unified review procedure for the presentation of all possible challenges to the conviction, sentence, and detention of defendants sentenced to death.²¹⁶ The UAP Act further requires the Supreme Court to establish a series of checklists to be utilized by the court and parties in cases where the death penalty is sought or imposed.²¹⁷ The UAP Act is to “make certain that all possible matters which could be raised in defense have been considered . . . and either asserted in a timely and correct

²¹³ *Smith v. State*, 266 Ga. 687, 470 S.E.2d 436 (1996).

²¹⁴ 28 U.S.C. § 2244(d)(2).

²¹⁵ The U.S. Supreme Court has explained that such operation of the tolling provision further encourages petitioners to begin by seeking relief in state court, as follows:

By tolling the limitation period for the pursuit of state remedies and not during the pendency of applications for federal review, § 2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts. But if the statute were construed so as to give applications for federal review the same tolling effect as applications for state collateral review, then § 2244(d)(2) would furnish little incentive for individuals to seek relief from the state courts before filing federal habeas petitions. The tolling provision instead would be indifferent between state and federal filings.

Duncan v. Walker, 533 U.S. 167, 180 (2001).

²¹⁶ O.C.G.A. § 17-10-36(a). For an article evaluating the impact of the UAP Act, see Marion T. Pope, Jr., *A Study of the Unified Appeal Procedure in Georgia*, 23 GA. L. REV. 185 (1988).

²¹⁷ *Id.*

manner or waived in accordance with applicable legal requirements.”²¹⁸ Significantly, the UAP Act does not limit or restrict the defendant’s customary grounds of review, including a writ of habeas corpus.

The title “Unified Appeal Procedure” may be a misnomer in some respects, because the vast majority of the Act pertains to pretrial proceedings and the trial.²¹⁹ The Act does, however, establish some significant procedures for death penalty appeals, which are set out below.

§ 11.6.1 Review Proceedings in the Superior Court

The Unified Appeal Procedure recognizes the absence of any requirement for a death penalty defendant to file a motion for a new trial as a prerequisite for appellate review. If the superior court does not conduct a post-trial review of the case, it must transmit the case to the Supreme Court for review, regardless of whether a motion for new trial or direct appeal has been filed.²²⁰ No provision of the Code or the Supreme Court Rules in any way limits a death penalty defendant’s right also to proceed by writ of habeas corpus.²²¹ The criminal death penalty defendant may now choose to pursue review by way of a motion for new trial or by direct appeal, or he may just allow the case to be presented directly to the Supreme Court for review.²²² However, the Supreme Court must review all death penalty cases under the Unified Appeal Procedure, notwithstanding a death penalty defendant’s request that all appeal efforts be halted.²²³ The Unified Appeal Procedure also does not limit the grounds of review available to a defendant.²²⁴

The trial court reporter must file a complete transcript of all phases of the case within 45 days from the jury verdict.²²⁵ The trial judge may grant one extension for an additional 15 days.²²⁶ A “complete transcript” includes: (i) all pretrial hearings; (ii) the selection of jurors, including challenges for cause; (iii) the voir dire examination and the striking of the jury; (iv) the opening statement and closing arguments of counsel; (v) the examination of all witnesses; (vi) all

²¹⁸ O.C.G.A. § 17-10-36(b); *Gibson v. Turpin*, 270 Ga. 855, 858, 513 S.E.2d 186, 189 (1999).

²¹⁹ The pretrial and trial procedures set forth under the Unified Appeal Procedure rules have been scrutinized and ultimately upheld on numerous constitutional grounds. *Sliker v. State*, 248 Ga. 316, 317-18, 282 S.E.2d 291, 292-93 (1981); *Meders v. State*, 260 Ga. 49, 55, 389 S.E.2d 320, 324 (1990).

²²⁰ UNIFIED APP. P. R. IV.A.1.

²²¹ O.C.G.A. § 17-10-36(c).

²²² *Id.*

²²³ *Patillo v. State*, 258 Ga. 255, 255 n.1, 368 S.E.2d 493, 494 (1988).

²²⁴ UNIFIED APP. P. R. IV.A.1.b.

²²⁵ UNIFIED APP. P. R. IV.A.1. *But see* O.C.G.A. § 17-8-5(a) (providing for 90 days).

²²⁶ UNIFIED APP. P. R. IV.A.1. *But see* O.C.G.A. § 17-8-5(a) (authorizing the chief justice to grant an extension of up to 60 days).

documentary evidence, including photography; (vii) all oral motions and all hearings on oral and written motions; (viii) all oral objections and all hearings on oral and written objections; (ix) all conferences and hearings of every description and for every purpose conducted between court and counsel, including all bench and chamber conferences; (x) all oral stipulations of counsel; (xi) the charges of the court to the jury during the guilt/innocence and sentencing phases of the proceedings; (xii) the publication of the verdict and the polling of the jury; (xiii) the pronouncement of sentence; and (xiv) all oral comments, instructions, directions, admonitions, rulings, and orders of the court.²²⁷

If the defendant files a motion for new trial, the transcript of the motion for new trial must be taken down, transcribed by the court reporter, and filed within 20 days of the hearing.²²⁸ The judge who imposed the death sentence may grant an extension in writing, not to exceed 15 days.²²⁹

§ 11.6.2 Appeal Proceedings in the Supreme Court

Once a death penalty case is docketed in the Supreme Court, the Supreme Court may direct the superior court to conduct additional hearings or conferences or to make additional finding of facts or conclusions of law regarding issues raised by the parties on appeal or by the Supreme Court sua sponte.²³⁰ The Supreme Court, however, retains jurisdiction over the case, notwithstanding any matter referred to the superior court for further review.²³¹

The Supreme Court determines whether the evidence at trial supports the verdict.²³² The court must review each assertion of error timely raised by the defendant during trial proceedings. If necessary, the Supreme Court may direct defense counsel and counsel for the state to brief and argue any and all additional grounds not previously briefed or argued.

§ 11.6.3 The Unified Appeal Procedure Checklist

The checklist for the Unified Appeal Procedure provides an extensive list of categories of possible errors at the pretrial, trial, and post-trial stages.²³³ Such errors include warrantless arrests, failure to preserve evidence, prohibited prosecutorial comments, and faulty jury instructions. The

²²⁷ UNIFIED APP. P. R. IV.A.1.

²²⁸ UNIFIED APP. P. R. IV.A.2.e.

²²⁹ *Id.*

²³⁰ UNIFIED APP. P. R. IV.B.1.

²³¹ *Id.*

²³² UNIFIED APP. P. R. IV.B.2.

²³³ A copy of the checklist is available online from the Supreme Court’s website. *See* http://www.georgiacourts.org/files/Supreme%20Court%20Rules/UNIFIED+APPEAL_08_10.pdf.

checklist represents a significant and useful tool for counsel involved in the conduct of a death penalty case.

§ 11.7 Overview of Appellate Options

The following table provides a quick overview of appellate options available to criminal defendants through the Georgia courts. Please also refer to the underlying laws and statutes covering these motions.

Motion	Time Limit	Procedural Requirement	Section of Chapter
Motion for New Trial	File within 30 days of entry of judgment of conviction. O.C.G.A. § 5-5-40 (a).	Petitioner files motion.	§ 11.2
Motion in Arrest of Judgment	File during term of court in which judgment is obtained.	Petitioner files motion. Opposite party must have reasonable notice.	§ 11.2.2
Motion to Set Aside Judgment	File within three years from entry of the judgment complained of. O.C.G.A. § 9-11-60(f).	If it cannot be legally served as any other motion, then it may be served by any means by which an original complaint may be legally served.	N/A
Direction of Verdict of Acquittal	Move at the close of the evidence offered by the prosecuting attorney or at the close of the case.	Defendant makes motion.	N/A
Coram Nobis	May be filed at any time.	Petitioner files motion.	§ 11.2.3

Motion	Time Limit	Procedural Requirement	Section of Chapter
Appeal	File within 30 days of entry of final judgment. O.C.G.A. § 5-6-38 (a).	File notice with the clerk of the trial court. O.C.G.A. §§ 5-6-37, 5-6-38, Ga. Ct. App. R. 11 (a). File appeal with appropriate appellate court.	§ 11.3
Interlocutory Appeal	File within 10 days of the entry of a qualifying order. O.C.G.A. § 5-7-2.	Either party seeks certification and if granted, the party may file the application with the appropriate appellate court.	§ 11.3.2
State Habeas Corpus	File within one year in the case of a misdemeanor or within four years in the case of a felony. O.C.G.A. § 9-14-42 (c).	<p>Non-Sentenced Detainees: File signed petition and present to judge of the superior court in the circuit where defendant is detained or to the judge of the probate court in that county</p> <p>Sentenced Detainees: File signed petition attaching necessary affidavits and evidence. May file a brief in support of petition.</p>	§ 11.4
Appeals from Habeas Corpus Procedures	File within 30 days of the entry of the order denying relief. O.C.G.A. § 9-14-52.	Appellant must apply for a certificate of probable cause to the clerk of the Georgia Supreme Court and file a notice of appeal.	§ 11.4.2

Motion	Time Limit	Procedural Requirement	Section of Chapter
Federal Habeas Corpus	File within one year of state conviction being final. 28 U.S.C. § 2244(d)(1)(A).	Petition is generally filed in United States District Court for the district in which petitioner is in custody or the district in which petitioner was convicted and sentenced.	§ 11.5

12

CIVIL APPEALS INVOLVING PRO SE PARTIES

*Samuel R. Rutherford**

§ 12.1 Introduction

The Georgia Constitution states: “No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person’s own cause in any of the courts of this state.”¹ This provision has been interpreted to guarantee the right of self-representation.²

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¹ GA. CONST. art. I, § 1, ¶ 12.

² *Johnston v. Aderhold*, 216 Ga. App. 487, 487, 455 S.E.2d 84, 86 (1995).

The number of pro se cases both at the trial and the appellate level continues to rise.³ Cases involving at least one pro se party take place in a broad range of contexts, including disputes regarding divorce, child custody, adoption, employment, estate matters, breach of contract, slander, libel, and professional malpractice. This chapter provides an outline of appellate procedure as it relates to civil cases involving pro se litigants.

§ 12.2 Pro Se Parties Generally

§ 12.2.1 No Constitutional Right to Be Represented by an Attorney in a Civil Case

A civil litigant has no constitutional right to effective representation by counsel or to appointment of counsel when the party is indigent. “The Sixth Amendment to the federal Constitution and Art. I, Sec. I, Par. XIV of the Georgia Constitution provide for effective assistance of counsel for one charged with a criminal offense, not participants in a civil dispute.”⁴ Georgia courts have interpreted this explicit constitutional guarantee of counsel in criminal actions as an implicit denial of a right to effective counsel in other contexts. Accordingly, case law holds that an indigent’s constitutional right to appointed counsel in criminal actions does not extend to civil actions.⁵ Moreover, pro se appellants cannot challenge the actions of their chosen trial counsel in civil cases by contending they were denied the right of effective assistance of counsel.⁶

³ See Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 440 (2009) (reviewing the limited statistical data available regarding pro se filings and observing that “America’s courts appear to be facing an inexorably rising tide of pro se litigation”).

⁴ *Bergmann v. McCullough*, 218 Ga. App. 353, 356, 461 S.E.2d 544, 548 (1995) (quoting *Calhoun v. Maynard*, 196 Ga. App. 219, 220, 395 S.E.2d 645, 646 (1990)).

⁵ See, e.g., *Stegeman v. Heritage Bank*, 304 Ga. App. 172, 175, 695 S.E.2d 340, 342 (2010) (recognizing that “[a] trial court lacks authority to appoint counsel to represent an indigent civil litigant absent clear statutory or constitutional authority allowing appointed counsel to be compensated from state or county funds”); *Mingledorff v. Stokely*, 223 Ga. App. 183, 184, 477 S.E.2d 374, 375 (1996) (observing that pro se indigent prisoner was not entitled to appointed counsel in civil proceedings).

⁶ See generally *Johnson v. Smith*, 260 Ga. App. 722, 580 S.E.2d 674 (2003) (finding without merit pro se appellant’s enumeration of ineffective assistance of counsel where appellant had petitioned the trial court for a civil protective order); *Finch v. Brown*, 216 Ga. App. 451, 452, 454 S.E.2d 807, 809 (1995) (holding in declaratory judgment action involving real estate dispute that pro se appellant had not been denied effective assistance of trial counsel because the federal and state constitutions only provide such guarantees with respect to defense of criminal offenses).

While rejecting any claim of a constitutional right to counsel in a civil case, Georgia courts repeatedly have recognized the strength of the constitutional right to self-representation.⁷ This right has been limited in very few circumstances. For example, a party cannot file pro se pleadings with the court if the party is at the same time represented by counsel of record.⁸ Some courts have restricted particular pro se litigants' ability to file future lawsuits, in cases in which the court found repeated case filings by the litigant to be without merit.⁹ Generally, though, Georgia courts firmly have upheld a party's right to self-representation in civil cases. "[M]eaningful access to the courts must be scrupulously guarded, as it is a constitutional right universally respected where the rule of law governs."¹⁰

§ 12.2.2 Pro Se Parties Are Not Permitted to Violate Georgia Rules Regarding the Unauthorized Practice of Law

It is unlawful for a non-attorney to "practice or appear as an attorney at law for any person *other than himself* in any court of this state or before any judicial body."¹¹ Despite attempts by pro se parties to circumvent this prohibition, Georgia courts construe the statute strictly and do not allow a layperson to represent another individual in a judicial proceeding.¹²

Non-attorneys are likewise prohibited from representing corporations in courts of record. Although Georgia courts formerly permitted a corporation to appear pro se in a lawsuit if an

⁷ See *Johnston*, 216 Ga. App. at 487-88, 455 S.E.2d at 85-86 (permitting attorney to represent himself as plaintiff in action involving promissory note despite defendant's allegations of attorney-client privilege and violation of bar rules).

⁸ See *Ervin v. Turner*, 291 Ga. App. 719, 723-24, 662 S.E.2d 721, 725 (2008) (holding that a party did not have the right to act pro se while represented by counsel of record); *Jacobsen v. Haldi*, 210 Ga. App. 817, 819, 437 S.E.2d 819, 821 (1993) (refusing to accept pro se filings by litigant represented by counsel because "[t]he court is not required to accept random appearance and filings by both the client and his attorneys").

⁹ See, e.g., *Smith v. Adamson*, 226 Ga. App. 698, 699-700, 487 S.E.2d 386, 388 (1997) (affirming order which required pro se litigant's future suits to be approved by a judge and accompanied by two affidavits and noting that limitation placed on ability to file pro se actions did not deprive litigant of meaningful access to the courts); cf. *In re Lawsuits of Carter*, 235 Ga. App. 551, 554, 510 S.E.2d 91, 94 (1998) (vacating order which required pro se party to hire an attorney to gain access to trial court).

¹⁰ *In re Lawsuits of Carter*, 235 Ga. App. at 554, 510 S.E.2d at 94.

¹¹ O.C.G.A. § 15-19-51(a)(1) (emphasis added).

¹² See *Keith v. Alexander Underwriters Gen. Agency, Inc.*, 219 Ga. App. 36, 38, 463 S.E.2d 732, 733-34 (1995) (holding that father, a non-lawyer, could not file pro se answer for defendant daughter and defendant business, despite "power of attorney" daughter had previously granted to father to operate business); see also *O'Kelley v. Skinner, Wilson & Beals*, 132 Ga. App. 792, 793, 209 S.E.2d 242, 243 (1974) (holding trial court correctly refused to allow a non-lawyer to represent the plaintiffs during motion hearing).

individual such as the corporation’s chairman or president filed pro se pleadings on behalf of the corporation,¹³ the Supreme Court has now held that “only a licensed attorney is authorized to represent a corporation in a proceeding in a court of record, including any proceeding that may be transferred to a court of record from a court not of record.”¹⁴ This holding is in accordance with the majority of other jurisdictions that have found non-lawyer representation of a corporation contrary to the public interest.¹⁵ “Having accepted the benefits of incorporation [*i.e.*, protection of individual shareholders from personal liability], a corporation must also accept the burdens, ‘including the need to hire counsel to sue or defend in court.’”¹⁶ The requirement of representation by a licensed attorney has also been extended to limited liability companies under the same reasoning.¹⁷

§ 12.3 Failure to Follow Procedural Rules Can Be Fatal

Appellate courts have provided deference to the pro se status of appellants and afforded some measure of liberality to their filings.¹⁸ As noted by the Court of Appeals in *Bennett v. Moody*, “Our requirements as to the form of appellate briefs were created, not to provide an obstacle, but to aid parties in presenting their arguments in a manner most likely to be fully and efficiently comprehended by this Court.”¹⁹ Despite such examples of leniency, failure to comply with the rules of appellate procedure can prove fatal to a pro se appellant’s appeal.

¹³ *Universal Scientific, Inc. v. Wolf*, 165 Ga. App. 752, 752, 302 S.E.2d 616, 616 (1983), *overruled by Eckles v. Atlanta Tech. Grp., Inc.*, 267 Ga. 801, 485 S.E.2d 22 (1997); *Knickerbocker Tax Sys., Inc. v. Texaco, Inc.*, 130 Ga. App. 383, 383-84, 203 S.E.2d 290, 291 (1973), *overruled by Eckles*, 267 Ga. 801, 485 S.E.2d 22.

¹⁴ *Eckles*, 267 Ga. at 805, 485 S.E.2d at 26. The Supreme Court has recognized the potential difficulty posed by lack of notice of this requirement to small business owners who may be served with a complaint in both their individual capacity and in their capacity as chief executive officer or president of the corporation. *Temp-N-Around Med. Res., Inc. v. Avondale Joint Venture*, 248 Ga. App. 231, 546 S.E.2d 23 (2001). Nevertheless, the requirement has been strictly enforced by the appellate courts.

¹⁵ *Eckles*, 267 Ga. at 805, 485 S.E.2d at 26.

¹⁶ *Id.* (quoting *Woodford Mfg. Co. v. A.O.Q., Inc.*, 772 P.2d 652, 654 (Colo. App. 1988)).

¹⁷ *See Sterling, Winchester & Long, LLC v. Loyd*, 280 Ga. App. 416, 417, 634 S.E.2d 188, 189 (2006) (citing *Winzer v. EHCA Dunwoody, LLC*, 277 Ga. App. 710, 713-14, 627 S.E.2d 426, 430 (2006)).

¹⁸ *See Bennett v. Moody*, 225 Ga. App. 95, 96, 483 S.E.2d 350, 351 (1997) (considering pro se appellant’s contentions despite fact that enumerations of error did not comply with rules of appellate procedure); *Hickey v. Kostas Chiropractic, P.A.*, 259 Ga. App. 222, 223, 576 S.E.2d 614, 615 (2003) (applying less stringent standards to pro se appellant’s brief, and attempting to address the merits of appeal despite noncompliance with rules).

¹⁹ 225 Ga. App. at 96, 483 S.E.2d at 351 (citations and internal quotation marks omitted); *see also Portee v. State*, 277 Ga. App. 536, 536, 627 S.E.2d 63, 65 (2006) (exercising discretion in reviewing claims of error by pro se appellant despite failure to abide by appellate rule requiring statement of how error was preserved for appeal).

§ 12.3.1 Failure to Pay Costs

In the Supreme Court and the Court of Appeals, costs in civil cases are \$300.²⁰ A pro se appellant is not excused from payment of such costs unless the pro se party has obtained pauper's status.²¹ In the Court of Appeals, absent payment of costs or submission of a pauper's affidavit, the clerk cannot accept the appellant's brief.²²

§ 12.3.2 Failure to Appeal to Proper Court or Seek Certificate of Immediate Review

Georgia courts frequently dismiss pro se appeals when the court lacks jurisdiction over the appeal or the appeal otherwise is not justiciable. For example, the Court of Appeals will dismiss a pro se party's appeal where the appellate court does not have jurisdiction over another court's challenged actions.²³ Likewise, a pro se appeal will be dismissed if the appellant was not a party to the lower court's proceedings.²⁴ Additionally, a pro se appeal is subject to dismissal if "the decision or judgment is not then appealable," if the issue has been rendered moot, or if the issue was specifically reserved by the trial judge for later ruling.²⁵

Two of the most common reasons for dismissals in the pro se context, however, involve a pro se party's failure to seek a certificate of immediate review when required under O.C.G.A. § 5-6-34(b) or to properly to set forth an application for appeal in special cases pursuant to O.C.G.A. § 5-6-35.²⁶ Failure to follow such procedural requirements has resulted in the dismissal

²⁰ GA. S. CT. R. 5; GA. CT. APP. R. 5.

²¹ See GA. S. CT. R. 5; GA. CT. APP. R. 5.

²² GA. CT. APP. R. 5.

²³ See *Denson v. Chase Manhattan Mortg. Corp.*, 219 Ga. App. 320, 320, 464 S.E.2d 906, 906 (1995) (dismissing challenge to actions taken by federal bankruptcy court because state appellate court did not have jurisdiction over that court).

²⁴ See *Coffield v. Kuperman*, 269 Ga. App. 432, 604 S.E.2d 288 (2004) (dismissing appeal of pro se party based on lack of jurisdiction because appellant failed to follow statutory requirements governing intervention in lower court case); *Gates v. Rutledge*, 151 Ga. App. 844, 844, 261 S.E.2d 757, 757 (1979) (dismissing appeal from child custody award by juvenile court because pro se appellant/father was not a party to the juvenile court proceeding and did not have standing to appeal that court's decision).

²⁵ O.C.G.A. § 5-6-48(b)(2)-(3); *St. Clair v. Robert A. McNeil Corp.*, 151 Ga. App. 876, 877, 261 S.E.2d 782, 783 (1979) (holding appeal from grant of writ of possession moot because appellant was no longer in possession of premises).

²⁶ See, e.g., *Amaechi v. Lib Props., Ltd.*, 254 Ga. App. 74, 561 S.E.2d 137 (2002) (dismissing appeal by pro se appellant where appellant failed to timely apply for discretionary appeal).

of pro se appeals in a wide range of proceedings.²⁷ Likewise, under the Prison Litigation Reform Act,²⁸ Georgia courts will dismiss prisoners' appeals in civil actions when they do not adhere to discretionary appeal procedures set forth in O.C.G.A. § 5-6-35.²⁹ As noted in *Jarallah v. Pickett Suite Hotel*, while pro se litigants are entitled to avail themselves of the courts in civil matters to the same degree as litigants represented by counsel, "where one elects to use the court system, court orders and rules may not be totally ignored with impunity."³⁰

§ 12.3.3 Failure to File Notice of Appeal in Timely Manner

The requirements for timely filing an appeal pose another frequent pitfall for pro se litigants. Under Georgia law, a party must file a notice of appeal within 30 days of the entry of an appealable decision or judgment, or within 30 days following entry of an order disposing of a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict.³¹

Although pro se parties' pleadings are construed liberally, the Court of Appeals consistently has dismissed appeals by pro se parties if those appellants do not timely file a notice of appeal or seek an extension of time for filing, even when the filing is only one day late.³² Moreover, a court can properly deny a motion to extend the deadline to file a notice of appeal when the appellant

²⁷ *Kappelmeier v. Homer*, 226 Ga. App. 379, 380, 486 S.E.2d 612, 613 (1997) (dismissing pro se party's appeal of trial court's refusal to set aside judgment in libel action because appellant did not obtain order allowing discretionary appeal); *Ware v. Handy Storage*, 222 Ga. App. 339, 339, 474 S.E.2d 240, 240 (1996) (dismissing appeal in conversion action due to appellant's failure to comply with interlocutory appeal procedures); *Brown v. Dep't of Human Res.*, 204 Ga. App. 27, 28, 418 S.E.2d 404, 404 (1992) (dismissing appeal from paternity petition because pro se appellant did not follow discretionary appeal procedures set forth in O.C.G.A. § 5-6-35(a)(2)); *Jarallah v. Pickett Suite Hotel*, 193 Ga. App. 325, 326-27, 388 S.E.2d 333, 335 (1989) (dismissing appeal in employment dispute because pro se appellant did not adhere to discretionary appellate procedures); *Calloway v. Calloway*, 161 Ga. App. 752, 753, 289 S.E.2d 559, 559 (1982) (dismissing appeal of denial of a recusal motion because pro se appellant failed to obtain a certificate of immediate review or grant of permission to appeal from Court of Appeals).

²⁸ O.C.G.A. § 42-12-8.

²⁹ *Syms v. West*, 234 Ga. App. 674, 674, 507 S.E.2d 530, 530 (1998) (dismissing pro se appeal because inmate failed to comply with discretionary appeal procedure); *Gates v. Yeager*, 232 Ga. App. 91, 91, 498 S.E.2d 372, 372 (1998) (same).

³⁰ 193 Ga. App. at 327, 388 S.E.2d at 335.

³¹ O.C.G.A. §§ 5-6-38, 5-6-48(b)(1).

³² *See Banks v. Green*, 205 Ga. App. 589, 423 S.E.2d 31 (1992) (dismissing appeal where pro se appellant filed notice of appeal 33 days after entry of order); *Jones v. Perkins*, 192 Ga. App. 343, 343, 384 S.E.2d 927, 927 (1989) (dismissing pro se party's appeal when notice of appeal was filed one day late, reasoning that party had not requested an extension of time pursuant to O.C.G.A. § 5-6-39); *see also In re Doe*, 188 Ga. App. 255, 255-56, 372 S.E.2d 822, 823 (1988) (upholding dismissal of appeal because notice of appeal was filed 33 days after entry of judgment).

does not file the motion in a timely manner.³³ Motions for reconsideration of the grant or denial of a motion for summary judgment or motion for new trial do not operate to extend the deadline for filing the notice of appeal.³⁴ Likewise, an order of the trial court granting a pro se appellant an extension of time to file the transcript does not extend the time to file the notice of appeal.³⁵

§ 12.3.4 Deficiencies in or Lack of Record on Appeal

The failure to hire a court reporter at the trial court level often causes additional difficulty in litigation involving pro se parties. Although, in such cases, Georgia statutory law allows the parties to prepare a transcript in narrative form that is based on the collective recollection of the parties, this substitute for a transcript is rarely used and requires mutual agreement or resolution by the trial judge.³⁶ Just like any other litigant, a pro se party is obligated “to compile a complete record of what happened at the trial level which, at a minimum, includes a transcript of that portion of the proceedings in which the error is alleged to have occurred or alternatively, a stipulation of the case approved by the judge who conducted the proceeding.”³⁷ Accordingly, when a pro se appellant fails to file a transcript or its statutorily-authorized substitute, the appeal will fail.³⁸

In cases where the proceedings are reported, a pro se appellant’s failure to transmit any or all of the needed transcripts to the Court of Appeals may preclude appellate review. “Where no transcript is provided, it is presumed that the findings of the trial court were supported by the

³³ *Grovnor v. Bd. of Regents of the Univ. Sys.*, 231 Ga. App. 120, 121, 497 S.E.2d 652, 653 (1998) (affirming denial of motion for extension of time within which to file notice of appeal where motion for extension was filed three months after order dismissing lawsuit).

³⁴ *See Majeed v. Randall*, 279 Ga. App. 679, 680, 632 S.E.2d 413, 415 (2006) (“A motion for reconsideration does not extend the time for filing a notice of appeal.” (citation and internal quotation marks omitted)); *Tel. Adver. Corp. of Am. v. Aaron Rents, Inc.*, 206 Ga. App. 493, 494, 426 S.E.2d 54, 54 (1992) (holding that pro se party’s motion for reconsideration did not operate to extend the 30-day period for filing the notice of appeal).

³⁵ *Campbell v. McLarnon*, 265 Ga. App. 87, 593 S.E.2d 21 (2003).

³⁶ O.C.G.A. § 5-6-41(c), (d), (g), (i); *see also, e.g., Woods v. Gatch*, 272 Ga. App. 642, 642 n.1, 613 S.E.2d 187, 188 n.1 (2005) (refusing to consider narrative transcript prepared by pro se appellant because of failure to adhere to requirements set forth in O.C.G.A. § 5-6-40).

³⁷ *Ueal v. AAA Partners in Adoption, Inc.*, 269 Ga. App. 258, 260, 603 S.E.2d 672, 674 (2004) (affirming trial court’s decision where neither the trial transcript nor an approved stipulation was included by pro se appellant in record on appeal) (quoting *Alexander v. Mosley*, 271 Ga. 2, 2, 515 S.E.2d 145, 146 (1999)).

³⁸ *See McKinney v. Alexander Props. Grp., Inc.*, 228 Ga. App. 77, 77-78, 491 S.E.2d 131, 132 (1997) (affirming grant of writ of possession and noting that court could not consider merits of pro se party’s claims without transcript of proceedings or attempt to recreate the record through a statutorily-authorized substitute for a transcript).

evidence.”³⁹ Georgia courts do not allow a pro se appellant to rely on factual allegations in a brief instead of transmitting and relying on the transcript.⁴⁰ Even in cases in which appellants have attached specially-prepared affidavits to their briefs, the Court of Appeals has held that it could not consider the merits of their contentions.⁴¹

§ 12.3.5 Unreasonable Delay in Transmitting Record or Failure to Pay Transcription Costs

The procedural requirements for transmitting the record to the appellate court apply equally to pro se parties and those represented by counsel.⁴² After notice and an opportunity for hearing, the trial court may order an appeal dismissed “where there has been an unreasonable delay in the transmission of the record to the appellate court, and it is seen that the delay was inexcusable and was caused by the failure of [the appellant] to pay costs in the trial court or file an affidavit of indigence.”⁴³ A pro se appellant’s failure to pay transcription costs or communicate with the court

³⁹ *Butler v. First Family Mortg. Corp. of Fla.*, 191 Ga. App. 360, 361, 381 S.E.2d 551, 552 (1989) (rejecting pro se appeal because failure to provide Court of Appeals with a transcript provides no basis to reverse trial court’s judgment); *see also Lamb v. T-Shirt City, Inc.*, 272 Ga. App. 298, 302, 612 S.E.2d 108, 112 (2005) (declining to review pro se appellant’s assertion of error where appellant specifically requested that transcript of lower court hearing be excluded from the the record on appeal); *Thomas v. RGL Assocs.*, 200 Ga. App. 283, 283, 407 S.E.2d 420, 421 (1991) (affirming trial court where facts alleged by pro se appellant in her brief as errors did not appear in any record transmitted on appeal, despite the fact that the court was “conscious of [its] responsibility to ensure access to the courts, particularly to pro se litigants”).

⁴⁰ *See* GA. CT. APP. R. 25(c)(2)(i); *see also Keita v. K&S Trading*, 292 Ga. App. 116, 119, 663 S.E.2d 362, 364 (2008) (acknowledging sympathy for pro se appellant, but stating “we have made no exceptions to the rule where the deficiency [in the record] is attributable to the fact that the responsible party is pro se or unfamiliar with appellate procedure”); *Williams v. Lemon*, 194 Ga. App. 249, 252, 390 S.E.2d 89, 92 (1990) (affirming trial court’s grant of a directed verdict against pro se party because contested “off the record” remarks by judge were not reflected in the record on appeal and could not be established by appellant’s brief alone).

⁴¹ *Leathers v. Timex Corp.*, 174 Ga. App. 430, 431, 330 S.E.2d 102, 103 (1985) (holding that Court of Appeals must take its evidence from the record and could not consider brief and attached affidavits specifically prepared by the pro se appellant as part of the appeal); *see also Jones v. Powell*, 190 Ga. App. 619, 620, 379 S.E.2d 529, 530 (1989) (affirming trial court’s grant of summary judgment to defendant and holding that pro se appellant could not supplement the record on appeal by attaching documents to brief).

⁴² *See Ware v. Vaughn*, 225 Ga. App. 303, 305-06, 483 S.E.2d 698, 700 (1997) (dismissing appeal due to pro se appellant’s unreasonable and deliberate delays in filing transcript); *Gerdes v. Dziewinski*, 189 Ga. App. 802, 803-04, 377 S.E.2d 550, 551-52 (1989) (dismissing appeal due to pro se appellant’s unreasonable delay in forwarding transcript despite appellant’s contention of communication problems with court reporter).

⁴³ O.C.G.A. § 5-6-48(c).

reporter charged with transcribing and transmitting the record to the appellate court will not be excused.⁴⁴

§ 12.3.6 Deficiencies in or Lack of Enumeration of Errors, Citation of Authority

A pro se appellant's complete failure to file any form of a brief or enumeration of errors may cause the appeal to be dismissed.⁴⁵ Even when an enumeration of errors and a brief are filed, the failure to accurately or clearly enumerate errors on appeal or provide citations to support arguments may be fatal for an appeal. The Court of Appeals has shown some willingness, however, to be more lenient with pro se appellants' attempts to enumerate error and support their arguments with legal authority.⁴⁶

§ 12.3.6.1 Failure to Properly Enumerate Error

All appellants have the burden of showing error affirmatively by the record.⁴⁷ In the case of pro se appellants, however, Georgia courts may look beyond the appellant's enumeration of errors (or lack thereof) and examine the entire record on appeal to determine whether the pro se appellant has met his or her burden.⁴⁸

Under O.C.G.A. § 5-6-48(f):

Where it is apparent from the notice of appeal, the record, the enumeration of errors, or any combination of the foregoing . . . what errors are sought to be asserted upon

⁴⁴ *Gerdes*, 189 Ga. App. at 803-04, 377 S.E.2d at 551-52.

⁴⁵ *See* GA. S. CT. R. 10; GA. CT. APP. R. 23(a); *see also Florence v. Green Acres Mobile Home Estates, Inc.*, 230 Ga. App. 91, 91, 495 S.E.2d 346, 347 (1998) (dismissing appeal in possession action where pro se appellant failed to comply with order directing her to file an enumeration of errors and brief); *Trimble v. Colonial Fin. Servs., Inc.*, 163 Ga. App. 193, 193, 293 S.E.2d 404, 404 (1982) (dismissing pro se appeal for failure to file brief or enumeration of errors by deadline ordered by court even though appellant filed a request for a continuance on date of deadline).

⁴⁶ *See, e.g., Cotton v. Bank S., N.A.*, 212 Ga. App. 1, 3, 440 S.E.2d 704, 706 (1994) (noting that as a general matter “[p]ro se pleadings are held to less stringent standards than pleadings that are drafted by lawyers” (quoting *Thompson v. Long*, 201 Ga. App. 480, 481, 411 S.E.2d 322, 323 (1991))).

⁴⁷ *Collier v. S.C. Ins. Co.*, 205 Ga. App. 323, 324, 422 S.E.2d 52, 53 (1992).

⁴⁸ *See Jorisch v. Rhythm Festival, Inc.*, 247 Ga. App. 470, 472, 544 S.E.2d 459, 461-62 (2001) (noting that pro se pleadings are held to less stringent standards than those drafted by attorneys and looking beyond enumeration of errors to notice of appeal and entire record in considering appeal); *McHaffie v. Decatur Fed. Sav. & Loan Ass'n*, 214 Ga. App. 368, 369, 448 S.E.2d 36, 36-37 (1994) (noting that although pro se appellant's “brief” and “enumerations of error” did not assert alleged errors by trial court, deference to appellant's pro se status required Court of Appeals to examine the record to ascertain whether the evidence generally supported the judgment).

appeal, the appeal shall be considered in accordance therewith notwithstanding . . . that the enumeration of errors fails to enumerate clearly the errors sought to be reviewed.⁴⁹

Georgia courts have frequently interpreted this provision more liberally in the case of pro se appellants out of deference to their status and a concern for due process. However, when review of the record in its entirety shows the allegations “to be so deficient in specificity, clarity, and substance as not to present any colorable issue upon which reversal of the judgment below might be predicated,” the court will dismiss the appeal despite the leniency afforded pro se pleadings.⁵⁰

§ 12.3.6.2 Abandonment of Enumerated Errors

When a pro se appellant does enumerate error, but the enumeration is not argued or addressed in the appellant’s brief, the matter will be deemed abandoned.⁵¹ As noted by the court in *Sulejman v. Marinello*, “[a]ppellate judges should not be expected to take pilgrimages into records in search of error without the compass of citation and argument.”⁵² Attempts by pro se appellants to file supplemental briefs or other documents to rectify failure in the initial brief to address an enumerated error have been rejected.⁵³

With respect to the preservation or abandonment of error in the trial court proceeding, the appellate courts have not accorded pro se litigants a high degree of latitude. If a pro se party fails to object at trial or fails to preserve an alleged error by perfecting the record for appeal, the courts

⁴⁹ O.C.G.A. § 5-6-48(f); *see also* *Hopkinson v. Labovitz*, 231 Ga. App. 557, 558, 499 S.E.2d 338, 339 (1998) (noting that pro se appellant’s misnomers in enumerations of error did not require dismissal).

⁵⁰ *Seligman v. Milam Builders, Inc.*, 191 Ga. App. 224, 224-25, 381 S.E.2d 401, 402 (1989); *see also* *Riley v. Ga. Dep’t of Revenue*, 295 Ga. App. 656, 657, 673 S.E.2d 49, 49-50 (2009) (dismissing appeal where pro se appellant “failed completely to follow the rules”); *Moss v. Rutzke*, 223 Ga. App. 58, 59, 476 S.E.2d 770, 771-72 (1996) (dismissing pro se appellant’s appeal where in response to court order to file enumeration of errors, appellant merely re-filed verbatim 20 pages of his original appellate brief).

⁵¹ GA. S. CT. R. 22; *see also* GA. CT. APP. R. 25(c)(2).

⁵² 217 Ga. App. 319, 320, 457 S.E.2d 251, 252 (1995); *see also* *Bennett v. Quick*, 305 Ga. App. 415, 416-17, 699 S.E.2d 539, 540-41 (2010).

⁵³ *See, e.g., Bicknell v. Joyce Sportswear Co.*, 173 Ga. App. 897, 897, 328 S.E.2d 564, 565 (1985) (holding that pro se appellant’s supplemental brief did not “resurrect from abandonment enumerations not addressed in the initial brief”).

will find a subsequent enumeration of error as to that ground to be without merit.⁵⁴ Similarly, if a pro se party objects to a matter in the proceeding below, but does not argue the matter on appeal, the courts consider the matter abandoned.⁵⁵

§ 12.3.6.3 Citation of Authorities

Georgia courts have held enumerations of error not supported by citations of authority to be abandoned, even if such omissions are committed by pro se appellants.⁵⁶ “Any enumerated error not supported by argument or citation of authority in the brief shall be deemed abandoned.”⁵⁷ Citations of authority that are unrelated to the enumerations of error set forth by an appellant or irrelevant to matters at issue in the trial below are likewise insufficient, even when filed by a pro se litigant.⁵⁸

⁵⁴ See, e.g., *Williams v. Lemon*, 194 Ga. App. 249, 252, 390 S.E.2d 89, 92 (1990) (affirming trial court’s grant of directed verdict and finding no error in trial court’s exclusion of a certified copy of the defendant’s prior conviction when pro se party failed to tender the document into evidence in order to perfect the record for appeal); *In re J.E.L.*, 189 Ga. App. 203, 205, 375 S.E.2d 490, 492 (1988) (holding that pro se appellant/father could not challenge on appeal the trial court’s admission of a deposition in a juvenile court proceeding where the deposition was admitted without objection).

⁵⁵ See *Ehlers v. Schwall & Heuett*, 177 Ga. App. 548, 550-51, 340 S.E.2d 207, 210-11 (1986).

⁵⁶ *Sulejman*, 217 Ga. App. at 320, 457 S.E.2d at 252; *Ehlers*, 177 Ga. App. at 550, 340 S.E.2d at 210 (noting that “[i]t is basic appellate practice that . . . error enumerated but neither argued in the brief nor supported by citation of authority is considered abandoned”).

⁵⁷ GA. S. CT. R. 22; see also GA. CT. APP. R. 25(c)(2); *Hall v. Hall*, 281 Ga. App. 256, 257, 635 S.E.2d 847, 848 (2006) (affirming trial court’s grant of writ of possession in dispossessory action where pro se appellant failed to support arguments by citation to the record or citation of authority).

⁵⁸ See *Leroy v. Atlanta Protective Assocs., Inc.*, 255 Ga. App. 849, 849, 567 S.E.2d 93, 93-94 (2002) (affirming trial court in appeal in which brief was comprised of less than three pages and contained only a single citation of authority to a Code section of general application); *McHaffie v. Decatur Fed. Sav. & Loan Ass’n*, 214 Ga. App. 368, 369, 448 S.E.2d 36, 36 (1994) (affirming trial court where pro se appellant supported his “statement of the issues” with citations of authority completely irrelevant to the enumerations of error or the issues at trial).

§ 12.4 Frivolous Appeal

§ 12.4.1 The Appellate Courts May Impose Monetary Sanctions Against Pro Se Appellants for Frivolous Appeals

Pursuant to statutory authority and appellate court rules, litigants filing frivolous appeals are subject to the imposition of monetary penalties or sanctions.⁵⁹ In cases in which a judgment for a sum certain has been affirmed, the Georgia Code permits courts to assess a penalty of 10 percent of the damages against appellants who pursue appeals solely for the purpose of delay.⁶⁰ This statutory provision has been applied to appeals by pro se appellants in cases in which the court determines that there was “no valid reason to anticipate reversal of the trial court’s judgment.”⁶¹

In addition to the statutory penalty provided in O.C.G.A. § 5-6-6, the rules of both the Supreme Court and the Court of Appeals provide for monetary sanctions against appellants for frivolous appeals. Under those rules, the courts may impose a penalty not to exceed \$2,500 against any party in a civil case in which the appeal is determined to be frivolous.⁶² This penalty may be imposed with or without motion.⁶³

§ 12.4.2 Sanctions Are Generally Limited to Egregious Cases

Georgia courts typically have limited monetary penalties against pro se appellants to cases in which appellants acted egregiously in pursuing frivolous appeals. For example, the Court of Appeals has assessed monetary penalties against pro se appellants when they have filed multiple

⁵⁹ See, e.g., *Popham v. Garrow*, 275 Ga. App. 499, 500, 621 S.E.2d 468, 469-70 (2005) (imposing penalty of \$1,000 in favor of appellees where pro se appellant failed to support any of the enumerated errors in his appellate brief with citations to the record or legal authority). For a more complete discussion of frivolous appeal issues, see Chapter 13 of this Handbook.

⁶⁰ See O.C.G.A. § 5-6-6.

⁶¹ See, e.g., *Holland v. Tri-City Hosp. Auth.*, 162 Ga. App. 256, 256, 291 S.E.2d 107, 108 (1982) (awarding 10 percent damages for frivolous appeal where pro se appellant had no reason to anticipate reversal of the trial court’s decision because appellant had not filed any response to motion for summary judgment).

⁶² GA. S. CT. R. 6; GA. CT. APP. R. 15(b); see also, e.g., *Rolleston v. Kennedy*, 277 Ga. 541, 542, 591 S.E.2d 834, 836 (2004) (assessing \$2,500 frivolous appeal penalty against pro se appellant under Supreme Court Rule 6); *Hightower v. Kendall Co.*, 225 Ga. App. 71, 73, 483 S.E.2d 294, 297 (1997) (assessing \$500 penalty for frivolous appeal against pro se appellant pursuant to Court of Appeals Rule 15(b)).

⁶³ GA. S. CT. R. 6; GA. CT. APP. R. 15(b).

frivolous pro se lawsuits and appeals,⁶⁴ proceeded with an appeal despite assessment of costs and attorneys' fees by the trial court on grounds that the original action constituted frivolous litigation,⁶⁵ or intentionally delayed appellate proceedings by failing to include a transcript from the lower court ruling.⁶⁶

Notwithstanding these instances, the Court of Appeals has often declined to impose monetary penalties against pro se parties when the circumstances were less egregious. For example, in cases in which a pro se appellant has failed to present enumerations of error clearly or has presented arguments without proper legal citations or support, the Court of Appeals has acknowledged a reluctance to impose monetary penalties.⁶⁷ Likewise, when an appeal by a pro se appellant lacks merit, but the appellate court cannot conclude that the appeal was undertaken solely for purposes of delay or harassment, the Court of Appeals has declined to impose monetary sanctions.⁶⁸

⁶⁴ *Dean v. Nationsbank*, 226 Ga. App. 370, 372-73, 486 S.E.2d 647, 648 (1997) (assessing \$1,000 penalty to discourage pro se party from filing further frivolous appeals); *King v. Gilman Paper Co.*, 184 Ga. App. 228, 229, 361 S.E.2d 390, 391-92 (1987) (assessing \$500 frivolous appeal penalty against pro se appellant in second suit against same employer, asserting same allegations, and noting that the appellant “apparently has impressed no one but himself with the logic of his arguments”).

⁶⁵ *Hightower*, 225 Ga. App. at 73, 483 S.E.2d at 297 (holding that “[pro se appellant’s] pursuit of the claim after having been apprised of the law constituted frivolous litigation” and imposing monetary penalty).

⁶⁶ *Trevino v. Flanders*, 231 Ga. App. 782, 782, 501 S.E.2d 13, 14 (1998) (imposing \$500 penalty for frivolous appeal in dispossessory proceeding where appellant intentionally failed to include hearing transcript or statutorily authorized substitute); *Kulkov v. Botvinik*, 230 Ga. App. 204, 204, 495 S.E.2d 662, 663 (1998) (assessing \$500 penalty for frivolous appeal in suit between father and son where appellant intentionally failed to include hearing transcript or statutorily authorized substitute).

⁶⁷ *See Antonone v. Atl. Mut. Fire Ins. Co.*, 191 Ga. App. 457, 457, 382 S.E.2d 126, 128 (1989) (refusing to impose penalty against pro se appellant for frivolous appeal and noting that court was “reluctant to penalize a pro se litigant for what may have been a deficiency in his brief rather than a deficiency in the merits of his case in the court below”).

⁶⁸ *Seligman v. Milam Builders, Inc.*, 191 Ga. App. 224, 224, 381 S.E.2d 401, 402 (1989) (declining to impose 10 percent penalty on pro se appellant under O.C.G.A. § 5-6-6 when court did not find that appeal was undertaken solely for purposes of delay or harassment).

13

FRIVOLOUS APPEALS

*Christopher A. Riley**

*Lisa K. Bojko***

[W]e must remember that a frivolous appeal is a grave injustice, not only to the opposite party to the case, but to the state itself; for every case brought to this court entails an expense upon the state greater than the sum which it receives from the maximum costs collectible.¹

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¹ *Moore & Jester v. H.B. Smith Mach. Co.*, 4 Ga. App. 151, 154, 60 S.E. 1035, 1036 (1908).

§ 13.1 Introduction

Georgia appellate courts police the filing of frivolous appeals with three provisions. One is statutory; the other two are rules of court.² Although some overlap exists, particularly in the central determination of when an appeal has been taken solely for delay, these three provisions differ in several respects. Most significantly, O.C.G.A. § 5-6-6 applies only to cases in which there has been a money judgment.³ In contrast, Supreme Court Rule 6 and Court of Appeals Rule 15(b) may be invoked regardless of whether there has been a money judgment.⁴ Additionally, when a sum certain has been awarded, Rule 15(b) may be invoked simultaneously with O.C.G.A. § 5-6-6.⁵ These and other distinctions are discussed in the sections that follow.

Aside from the potential pecuniary losses the offending party may incur, there are ethical considerations an attorney contemplating filing an appeal should keep in mind. The Rules and Regulations of the State Bar of Georgia provide guidelines for ethical considerations associated with filing an appeal.⁶

§ 13.2 Statutory Damages for Frivolous Appeals

Section 5-6-6 of the Georgia Code provides as follows:

When in the opinion of the court the case was taken up for delay only, 10 percent damages may be awarded by the appellate court upon any judgment for a sum certain which has been affirmed. The award shall be entered in the remittitur.⁷

Section 5-6-6 penalizes appellants who bring baseless appeals to delay paying money judgments. For this provision to apply, the judgment must be affirmed; a dismissal of the appeal cannot serve as a basis for an award under the statute.⁸ Once a decision is affirmed by the appellate court, the case is remitted and the damages award is increased by 10 percent. To impose this

² See O.C.G.A. § 5-6-6; GA. CT. APP. R. 15(b); GA. S. CT. R. 6.

³ *Shepherd v. Epps*, 242 Ga. 322, 323, 249 S.E.2d 33, 33 (1978).

⁴ See GA. S. CT. R. 6 (permitting imposition of penalty “in any civil case”); GA. CT. APP. R. 15(b) (same).

⁵ See, e.g., *Kent v. David G. Brown, P.E., Inc.*, 248 Ga. App. 447, 450, 545 S.E.2d 598, 600 (2001), *aff’d*, 274 Ga. 849, 561 S.E.2d 89 (2002).

⁶ The Rules appear in the current State Bar of Georgia Directory & Handbook. See <http://www.gabar.org/handbook/>.

⁷ O.C.G.A. § 5-6-6.

⁸ *Noaha, LLC v. Vista Antiques & Persian Rugs, Inc.*, 306 Ga. App. 323, 326, 702 S.E.2d 660, 663 (2010) (“We are unable to assess damages under OCGA § 5-6-6 because that Code section does not authorize damages when an appeal is dismissed.”); *Scott v. McLaughlin*, 192 Ga. App. 230, 230, 384 S.E.2d 212, 213 (1989).

sanction, the appellate court must find that there is a judgment for a sum certain and that the appeal was filed only for delay.⁹

This last requirement, the intent to delay, is at the core of the frivolous appeal statute: it determines whether the appeal is in fact frivolous. Likewise, courts determining whether penalties are appropriate under Court of Appeals Rule 15 or Supreme Court Rule 6 will also consider whether the appeal has been brought “solely for delay” and frequently rely on case law applying O.C.G.A. § 5-6-6 when imposing penalties under these rules.¹⁰

§ 13.2.1 Requirement of Judgment for a Sum Certain

A money judgment for a sum certain is an essential element of O.C.G.A. § 5-6-6.¹¹ Thus, even where the court concludes that the appeal was taken only for delay, if there is no definite money judgment, a motion for statutory sanctions must be denied.¹² Without a money judgment, the aggrieved appellee turns to court rules. In the Court of Appeals, one looks to Rule 15; in the Supreme Court, to Rule 6.

In certain situations, only part of a judgment can be determined as a sum certain. For instance, in *Refrigerated Transport Co. v. Kennelly*,¹³ the defendant employer took a frivolous appeal of the trial court’s affirmance of an award of damages by the Workers’ Compensation Board.¹⁴ Because the award was for continuing payments for partial disability and a period of total disability, the Court of Appeals instructed that 10-percent damages be computed against only the compensation that was definitely ascertainable at the date of judgment.¹⁵

§ 13.2.2 “Solely for Delay”: What Makes an Appeal Frivolous

Determining whether an appeal is frivolous and therefore subject to penalties under any of the three provisions requires an assessment of the appellant’s motive in seeking review. The

⁹ *Hatchett v. Hatchett*, 240 Ga. 103, 103, 239 S.E.2d 512, 513 (1977).

¹⁰ *See, e.g., Powell v. Bank S., N.A.*, 202 Ga. App. 852, 854, 415 S.E.2d 543, 544 (1992).

¹¹ *Shepherd v. Epps*, 242 Ga. 322, 323, 249 S.E.2d 33, 34 (1978) (denying motion to assess damages under predecessor statute in appeal from summary judgment for defendants because appeal was not taken from a judgment for a sum certain).

¹² *See Fawcett v. Fawcett Contracting, Inc.*, 252 Ga. 242, 243, 312 S.E.2d 790, 791 (1984) (holding that even if defendants’ appeal of trial court decision finding an implied trust was brought only for delay, award of 10-percent damages under O.C.G.A. § 5-6-6 would not lie without judgment for sum certain).

¹³ 144 Ga. App. 713, 242 S.E.2d 352 (1978).

¹⁴ *Id.* at 714-15, 242 S.E.2d at 353-54.

¹⁵ *Id.* at 714-15, 242 S.E.2d at 354.

hallmark of the frivolous appeal is that it is brought merely to stave off the inevitable, with the attendant waste of judicial resources and frustration of the process for the appellee and the court. Such an appeal is brought “solely for delay.”

The relevant language appears in O.C.G.A. § 5-6-6, which requires a court to determine that “the case was taken up for delay only” before adding 10-percent damages to the judgment below.¹⁶ The determination that an appeal was taken “solely for delay” is frequently applied in the context of Court of Appeals Rule 15 and Supreme Court Rule 6 as well.¹⁷ To make an award under the statute, however, the court must be completely satisfied that the appeal was initiated for no purpose other than delay.¹⁸

In the often-quoted case of *Moore & Jester v. H.B. Smith Machine Co.*,¹⁹ the Court of Appeals provides a framework for determining whether an appeal has been brought solely for delay:

[W]hen a motion for damages is filed, [the court] will carefully examine the record, and will pass upon the motion in the light of the entire history of the case as there presented. If, after reviewing the whole matter, [the court] believe[s] that the plaintiff in error is presenting a bona fide contest over a colorable matter, though his view of the law may not in fact be well founded, or that he is seeking a ruling upon an open or doubtful question, damages will be refused. But, when the record discloses that the plaintiff in error has no just case, that no new question of law is involved, and the record is full of those things which every judge and every lawyer recognizes as indicia of an attempt to fight merely for time, justice demands that [the court] overcome any personal hesitancy [that it] may have, and that [it] add an award of damages to the judgment of affirmance.²⁰

As might be expected, it is difficult to articulate a precise standard for such a context-driven inquiry. Instead of a rigid formulation, however, the *Moore & Jester* passage presents a cogent method for resolving the question. First, the court is to determine, based upon the whole record, whether the matter argued on appeal is in fact “colorable.” If it is, the appeal is not frivolous, and no sanction is imposed.

¹⁶ O.C.G.A. § 5-6-6.

¹⁷ See, e.g., *Powell v. Bank S., N.A.*, 202 Ga. App. 852, 854, 415 S.E.2d 543, 544 (1992).

¹⁸ *Realty Lenders, Inc. v. Levine*, 286 Ga. App. 326, 330-31, 649 S.E.2d 333,337 (2007) (“While we ultimately have found no merit to this appeal, we cannot conclude that [appellant] has pursued it for purposes of delay only.”); *Rackard v. Merritt*, 114 Ga. App. 743, 744, 152 S.E.2d 701, 702 (1966); *Stone v. Cook*, 190 Ga. App. 11, 14, 378 S.E.2d 142, 145 (1989).

¹⁹ 4 Ga. App. 151, 60 S.E. 1035 (1908).

²⁰ *Id.* at 154, 60 S.E. at 1036.

If the first question is answered in the negative, the court looks to what might be called “badges of delay”—*i.e.*, those indicators “which every judge and every lawyer recognize[]” as an attempt to “fight merely for time.”²¹ In some cases, a particularly baseless appellate issue may alone provide sufficient indicia of delay.²² More frequently, though, the reviewing court will find additional factors that evidence the appellant’s intent to forestall enforcement of the judgment.

§ 13.2.2.1 “Colorable” Issues: Distinguishing the Frivolous Appeal

A frivolous appeal is not merely an argument that lacks merit: “Even slight grounds for bringing the case up will prevent the award of damages for frivolous exception.”²³ As the Court of Appeals has noted:

This question is often quite difficult for an appellate court to determine, for the reason that good attorneys often, in good faith, have differences of opinion in applying facts to the law, and we are therefore reluctant to impute bad motives to an attorney for fear that he might have been honestly mistaken in his application of the facts to the proper legal principles governing the same.²⁴

Doubtful cases do not support imposing sanctions for a frivolous appeal.²⁵

A meritless argument may not be frivolous if it is based on arguable logic,²⁶ if it is not specious,²⁷ or if appellant’s counsel has made a cogent argument predicated on diligent research efforts.²⁸ Even when the legal issue is itself not in doubt, the argument may be colorable because there is no prior decision on the precise question raised.²⁹ Notably, the merits of an appeal must be

²¹ *Id.* (noting that “[t]his case is full of badges of intention to fight for time only”).

²² *See, e.g., Davita, Inc. v. Othman*, 270 Ga. App. 93, 96, 606 S.E.2d 112, 115 (2004) (concluding appeal was frivolous where tenant pursued appeal to remain in possession where foreign authority cited on appeal was neither controlling nor suggestive of result sought); *Hatchett v. Hatchett*, 240 Ga. 103, 103, 239 S.E.2d 512, 513 (1977).

²³ *Stripling v. Calhoun*, 98 Ga. App. 354, 359, 105 S.E.2d 923, 927 (1958) (citing *Maxelbaum v. Limberger*, 78 Ga. 43, 46, 3 S.E. 257, 259 (1887)).

²⁴ *Roach v. Roach*, 68 Ga. App. 10, 11-12, 21 S.E.2d 859, 860 (1942).

²⁵ *Hargett v. Dickey*, 304 Ga. App. 387, 389-90, 696 S.E.2d 335, 338 (2010) (denying motion for sanctions where the “question [was] close as to whether [appellant] had any reasonable basis to believe that she could prevail” on appeal); *Almond v. Bentley Gray, Inc.*, 138 Ga. App. 508, 508, 226 S.E.2d 776, 777 (1976).

²⁶ *Benchmark Carpet Mills, Inc. v. Fiber Indus., Inc.*, 168 Ga. App. 932, 935, 311 S.E.2d 216, 219 (1983).

²⁷ *Ale-8-One of Am., Inc. v. Graphicolor Servs., Inc.*, 166 Ga. App. 506, 509, 305 S.E.2d 14, 17 (1983).

²⁸ *Prattes v. Se. Ceramics, Inc.*, 132 Ga. App. 584, 587, 208 S.E.2d 600, 602 (1974).

²⁹ *Schnuck v. Riales*, 106 Ga. App. 647, 648, 127 S.E.2d 825, 826 (1962).

judged solely on the arguments raised on appeal; the appellee cannot show an appeal is frivolous by pointing to a meritless position the appellant took in the court below.³⁰

An argument is not “colorable,” however, if the law is so indisputably clear that there is simply no room for argument on the subject.³¹ This is particularly so when the issues raised on appeal have been settled by previous decisions in the same case,³² or when the court made it clear to the party in previous cases that the argument presented on appeal has no merit.³³ If an appellant knows or should know from a careful reading of the facts and relevant law that the argument advanced on appeal is without foundation, the reviewing court may impose a penalty under one of the three frivolous appeals provisions.³⁴

§ 13.2.2.2 Badges of Delay

Because the court reviews the whole record to determine whether an appeal has been brought solely for delay,³⁵ dilatory conduct in the proceeding below may support a frivolous appeal award.³⁶ Thus, when the trial court has imposed discovery sanctions³⁷ or awarded attorneys’ fees

³⁰ *Brown v. Rooks*, 139 Ga. App. 770, 770, 229 S.E.2d 548, 549 (1976), *overruled on other grounds by Miller Grading Contractors, Inc. v. Ga. Fed. Sav. & Loan Ass’n*, 247 Ga. 730, 279 S.E.2d 442 (1981). However, as discussed *infra*, the conduct of the litigation in the lower court may serve as an indicator that the appeal was brought solely for delay.

³¹ *See Henderson v. Schklar*, 303 Ga. App. 875, 877, 695 S.E.2d 323, 326 (2010) (imposing the maximum \$2,500 penalty under Court of Appeals Rule 15(b) where “the law [was] indisputably clear concerning the issues raised on appeal”); *Pacheco v. Charles Crews Custom Homes, Inc.*, 289 Ga. App. 773, 776 658 S.E.2d 396, 399 (2008) (imposing \$1,000 penalty under Court of Appeals Rule 15(b) where release executed by appellant clearly barred her claims); *Baxley v. Baldwin*, 287 Ga. App. 245, 246, 651 S.E.2d 172, 174 (2007) (assessing \$500 penalty against appellant’s counsel under Court of Appeals Rule 15(b) where claim was plainly time-barred on its face); *Hightower v. Kendall Co.*, 225 Ga. App. 71, 73, 483 S.E.2d 294, 297 (1997) (assessing \$500 penalty against pro se appellant pursuant to Court of Appeals Rule 15(b) where, prior to appeal, appellant was apprised of clear Georgia law on at-will employment).

³² *Pinkerton & Laws Co. v. Robert & Co. Assocs.*, 129 Ga. App. 881, 885, 201 S.E.2d 654, 658 (1973).

³³ *Crane v. Poteat*, 282 Ga. App. 182, 183-85, 638 S.E.2d 335, 336-37 (2006).

³⁴ *See, e.g., Golden Atlanta Site Dev., Inc. v. R. Nahai & Sons, Inc.*, 299 Ga. App. 654, 656, 683 S.E.2d 627, 629 (2009); *Heritage Creek Dev. Corp. v. Colonial Bank*, 268 Ga. App. 369, 375, 601 S.E.2d 842, 848 (2004); *Marchelletta v. Seay Constr. Servs., Inc.*, 265 Ga. App. 23, 29, 593 S.E.2d 64, 69 (2004); *Ray v. Standard Fire Ins. Co. of Ala.*, 168 Ga. App. 116, 118, 308 S.E.2d 221, 223-24 (1983).

³⁵ *See Moore & Jester v. H.B. Smith Mach. Co.*, 4 Ga. App. 151 at 154, 60 S.E. 1035, 1036 (1908).

³⁶ *See Revels v. Wimberly*, 223 Ga. App. 407, 409, 477 S.E.2d 672, 674 (1996) (finding indicia of delay in conduct of litigation); *Suchnick v. S. Gen. Ins. Co.*, 196 Ga. App. 687, 688, 396 S.E.2d 609, 609 (1990) (granting motion for \$500 penalty pursuant to precursor of Rule 15(b)).

³⁷ *See Revels*, 223 Ga. App. at 409, 477 S.E.2d at 674; *Suchnick*, 196 Ga. App. at 688, 396 S.E.2d at 609.

for litigating in bad faith,³⁸ the presentation of a less-than-colorable argument on appeal may result in sanctions.

Additionally, if the litigant fails to prosecute her case at the appellate stage, the reviewing court may conclude that the case has been taken up solely for delay. For example, when a claim is totally dependent on the appellate court's review of a trial court proceeding, and no transcript is forwarded, the court may deduce that the appellant is stalling for time.³⁹ A similar conclusion may be warranted when the appellant fails to appear for oral argument,⁴⁰ the submitted brief gives only cursory treatment to the issues,⁴¹ there is no factual support in the record for the appellant's position on appeal,⁴² or the appeal was plainly improper as a procedural matter.⁴³ In addition, a party who attempts to relitigate matters already settled by a binding settlement agreement may be subject to sanctions for pursuing a frivolous appeal.⁴⁴

³⁸ See *Thompson Enters., Inc. v. Coskrey*, 168 Ga. App. 181, 187, 308 S.E.2d 399, 403-04 (1983).

³⁹ See *Malin Trucking, Inc. v. Progressive Cas. Ins. Co.*, 212 Ga. App. 273, 274, 441 S.E.2d 684, 686 (1994) (finding argument wholly devoid of support in the record when appellant failed to supply record); see also *Webb v. Sheu*, 201 Ga. App. 769, 770-71, 412 S.E.2d 289, 291 (1991) (rejecting claim of error in trial court's finding on alleged ex parte contact when no record was forwarded with appeal).

⁴⁰ See *Craton v. Hackney*, 91 Ga. 192, 192, 17 S.E. 124, 124 (1893).

⁴¹ See *Popham v. Garrow*, 275 Ga. App. 499, 500, 621 S.E.2d 468, 469 (2005); *Med. Ctr. of Cent. Ga., Inc. v. Landers*, 274 Ga. App. 78, 88, 616 S.E.2d 808, 816 (2005); *Arnold v. Gwinnett Cnty. Bd. of Tax Assessors*, 207 Ga. App. 759, 760, 429 S.E.2d 146, 147 (1993).

⁴² See *Farr v. Rice*, 300 Ga. App. 247, 248, 684 S.E.2d 370, 371 (2009) (assessing \$130,000 penalty under O.C.G.A. § 5-6-6 where appellants "failed to cite to any evidence demonstrating that they had a meritorious defense"); *Katz v. Crowell*, 302 Ga. App. 763, 767, 691 S.E.2d 657, 660 (2010) (assessing the maximum \$2,500 penalty under Court of Appeals Rule 15(b) where record was devoid of any evidence supporting appellant's position).

⁴³ See *Noaha, LLC v. Vista Antiques & Persian Rugs, Inc.*, 306 Ga. App. 323, 326, 702 S.E.2d 660, 663 (2010) (imposing \$1,000 penalty under Court of Appeals Rule 15(b) where appellant "admit[ted] that it had no grounds to collaterally attack [the subject] judgment[s]").

⁴⁴ See *Ruskin v. AAF-McQuay, Inc.*, 294 Ga. App. 842, 844, 670 S.E.2d 517, 520 (2008) (assessing \$2,000 penalty against appellants, and another \$2,000 penalty against their appellate counsel, under Court of Appeals Rule 15(b)).

§ 13.3 Court Rules

§ 13.3.1 Supreme Court Rule 6

Supreme Court Rule 6 provides as follows:

The Court may, with or without a motion, impose a penalty not to exceed \$2,500 against any party and/or party's counsel in any civil case in which there is a direct appeal, application for discretionary appeal, application for interlocutory appeal, petition for certiorari, or motion which the Court determines to be frivolous. The party or party's counsel may respond to such a motion or, if no motion was filed, file a motion for reconsideration within 10 days of receipt of the order. The imposition of such penalty shall constitute a money judgment in favor of appellee against appellant or appellant's counsel or in favor of appellant against appellee or appellee's counsel, as the Court directs. Upon filing of the remittitur in the trial court, the penalty may be collected as are other money judgments.

Rule 6 penalties may be assessed against a party or its counsel. Both Rule 6 and O.C.G.A. § 5-6-6 may be raised by motion or by the court. While O.C.G.A. § 5-6-6 imposes a penalty of 10 percent of the damages awarded below, the maximum penalty under Rule 6 is \$2,500.

§ 13.3.2 Court of Appeals Rule 15

Court of Appeals Rule 15, subparts (b) and (c), provides as follows:

(b) The panel of the Court ruling on a case, with or without motion, may by majority vote impose a penalty not to exceed \$2,500.00 against any party and/or party's counsel in any civil case in which there is a direct appeal, application for discretionary appeal, application for interlocutory appeal, or motion which is determined to be frivolous.

(c) The imposition of such penalty shall constitute a money judgment in favor of appellee against appellant or appellant's counsel or in favor of appellant against appellee or appellee's counsel, as the Court directs. Upon filing of the remittitur in the trial court, the penalty may be collected as are other money judgments.

Court of Appeals Rule 15 provides for a penalty of up to \$2,500 against any party or party's counsel when there is a direct appeal, application for discretionary appeal, application for interlocutory appeal, or motion that is deemed frivolous. Court of Appeals Rule 15 applies to "any

civil case,” including appeals from money judgments. Thus, in money judgment cases, Rule 15 may be invoked simultaneously with O.C.G.A. § 5-6-6.⁴⁵

§ 13.4 Unavailability of Other Provisions

In civil cases, a party may recover attorneys’ fees in the trial court under O.C.G.A. § 9-15-14 when the opposing party has asserted frivolous claims, defenses or other positions.⁴⁶ Section 9-15-14 is not available in proceedings before an appellate court, however.⁴⁷ Furthermore, a trial court may not award attorneys’ fees and litigation expenses under O.C.G.A. § 9-15-14 for conduct that occurred before the appellate court.⁴⁸

Georgia Code Section 13-6-11 also allows for the award of litigation expenses when the plaintiff specially pleads and the defendant “has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense.”⁴⁹ The conduct that authorizes an award under O.C.G.A. § 13-6-11, however, relates to the transaction underlying the cause of action, not conduct during the litigation itself.⁵⁰ Necessarily, O.C.G.A. § 13-6-11 is not an available remedy for the appellant’s conduct on appeal.⁵¹

⁴⁵ See *Ferdinand v. City of East Point*, 301 Ga. App. 333, 340, 687 S.E.2d 617, 623 (2009); *Austin v. Austin*, 292 Ga. App. 335, 335-36; 664 S.E.2d 780 (2008); *Kent v. David G. Brown, P.E., Inc.*, 248 Ga. App. 447, 450, 545 S.E.2d 598, 600 (2001), *aff’d*, 274 Ga. 849, 561 S.E.2d 89 (2002).

⁴⁶ See O.C.G.A. § 9-15-14(a).

⁴⁷ *Dep’t of Transp. v. Franco’s Pizza & Delicatessen, Inc.*, 200 Ga. App. 723, 409 S.E.2d 281 (1991), *overruled on other grounds by White v. Fulton Cnty.*, 264 Ga. 393, 444 S.E.2d 734 (1994).

⁴⁸ See *Castro v. Cambridge Square Towne Houses, Inc.*, 204 Ga. App. 746, 420 S.E.2d 588 (1992).

⁴⁹ O.C.G.A. § 13-6-11.

⁵⁰ *David G. Brown, P.E., Inc. v. Kent*, 274 Ga. 849, 850, 561 S.E.2d 89, 90 (2002).

⁵¹ *Id.*

14

TIPS ON EFFECTIVE ORAL ARGUMENT

*Hon. David E. Nahmias**

§ 14.1 Introduction

I appreciate the opportunity to offer some tips on effective oral argument, because good oral advocacy improves the quality of Georgia's appellate courts and the decisions that they issue. Let me make three points at the outset. First, I will offer below, in fairly short form, my views on what is effective, but there are many other sources you can consult for more comprehensive tips, some of which may diverge from mine.¹

* Justice Nahmias was appointed to the Supreme Court of Georgia in August 2009 and elected to a full term in November 2010. Before joining the court, he served as the U.S. Attorney for the Northern District of Georgia, having previously practiced law as a federal prosecutor, government lawyer, and in private practice. Justice Nahmias clerked for Judge Laurence H. Silberman of the U.S. Circuit Court for the District of Columbia and Justice Antonin Scalia of the U.S. Supreme Court. He graduated from Duke University in 1986 and Harvard Law School in 1991.

¹ A recent and, I think, particularly good guide to appellate advocacy is ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (2008).

Second, while I learned and taught much of what I say below at appellate advocacy classes and seminars when I was in practice, I *believe* it much more now that I have seen my Court actually decide cases based in part on the advocacy of the lawyers that appear before us.

Finally, I would like to make a point that I first heard made at an appellate practice seminar by Judge J.D. Smith of the Court of Appeals. If you are reading this chapter and the rest of this book, you are probably already a pretty good appellate advocate, because you care enough to take the time to study appellate practice. But I hope I can at least remind you of some tips, and I also hope you will share your interest and knowledge—and perhaps even this book—with colleagues and friends who may not be as motivated to improve their appellate skills.

§ 14.2 Oral Argument Matters, Especially for My Court—But It Doesn’t Matter that Much

During my two years on the bench, I have found that oral arguments produce more changes in the views of the justices on the Georgia Supreme Court than I saw during the year I clerked at the U.S. Supreme Court. This may be due to the much higher volume of cases we have to decide (about 350 a year, including cases that are not orally argued, compared to fewer than 100 at the High Court) which means that we are rarely as immersed in the facts and the law—and fixed in our view of the right result—going into the oral argument. This uncertainty provides more opportunities for good appellate advocates to affect the outcome of their cases, especially noting that my Court usually takes its initial vote on the case just after the oral argument.

But don’t get too optimistic. No matter how skilled the advocate, the outcome of most appeals is driven not by the lawyers but by the facts, the law, and what happened in the trial court.

§ 14.3 Your Argument Starts, and Often Ends, with Your Brief

Oral argument can be important, but it is rarely as important as your brief. The briefs frame the judges’ view of the case (and of the lawyers); when drafting an opinion, I rarely will go back and review the tape of the oral argument, but I often will go back and re-read key portions of the briefs. A bad brief is hard to salvage at oral argument.

This is not a chapter on brief-writing, but I do want to emphasize three critical points. First, focus and brevity are essential. You would not believe how much paper comes across the desk of a Georgia appellate judge; it is humanly impossible to read every word. So if you bury your best argument on the thirtieth page of your thirty-five-page brief (which really should have been edited down to a twenty-five-page brief), it will not get the focus it deserves. Second, write correctly, and try to write well. With all the reading we do, a beautifully written brief stands out and gets more attention; a brief with grammatical and spelling errors may make a judge wonder if you paid the same attention to the quality of your statements about the facts and the law. Finally, and most importantly, be entirely honest and forthright about the facts and the law. I will discuss this point

again below, but remember that fudging is easier to catch and harder to forgive in a brief, where it's written down instead of said on the fly.

§ 14.4 Oral Argument Is for the Judges, Not the Lawyers (or Your Clients)

There is some dispute among judges on this point, but I firmly believe that oral argument is most important for the judges. Lawyers have the opportunity to make their points in the briefs, so conscientious judges should be familiar with your arguments and do not need to hear you simply read them out loud. But judges want to hear what your *best* points are and, even more important, judges want to have *their* questions about the case answered. So be prepared to make your key points, but don't expect to get very far into your prepared remarks. Your goal should be to make sure you know if any issue in the case is troubling one of the judges, and then to help the judge and his or her colleagues resolve that issue in your client's favor.

So don't be stuck to your notes or the order you planned to present issues. When he was preparing for an oral argument, now-Chief Justice John Roberts would write the questions he expected on index cards and then shuffle them, to work on being able to answer the questions in the random order they might actually be asked, while still blending in his key arguments. Focus on your strongest arguments and respond to your opponent's best points, especially as the appellee. Appellants should also try to save time for rebuttal, because it can help to have the last word. But don't count on having rebuttal time, because in Georgia's appellate courts, the lawyers are responsible for preserving any time for rebuttal. If your time is being eaten up by questions, you may need to remind the court, politely, that you were hoping to save a little time for rebuttal.

Finally, if you are not getting questions, especially as the appellee, summarize your key points, ask if there are any questions, and then say you will rely on your brief and *sit down*. I have seen little good come to lawyers who simply drone on reading their briefs to the court.

§ 14.5 It Is an *Appellate* Argument to *Judges*, Not a *Trial* Argument to a *Jury*

The rule of law is about independent judges applying the law to the facts without passion or prejudice. So if you try to be dramatic or appeal to emotion, for example by focusing on the horrible facts of a case and ignoring the applicable law, it may backfire, because you are implicitly telling the judge that passion rather than law should dictate the result. As Scalia and Garner have explained, you want to show the judges that you are a reasonable, smart, careful, and pleasant lawyer—just like most judges believe they are—and together you and the court will work through any concerns and see that the facts and the law favor your client. This also means not playing to your clients. They have had their “day in court”—the trial court. They may attend the appellate argument, but they should be spectators, not your audience.

§ 14.6 Answer the Questions

As I mentioned earlier, questions are almost always good for you, even when they are hard, because they let you know what the judge is thinking and give you the opportunity to respond, instead of leaving the judge to guess at your answer (which, if the judge is not inclined to your position, may not be a guess you like). So listen carefully and answer directly. Don't ever evade or dismiss a question; remember that however irrelevant or even stupid you may think a question is, it was important enough for a judge to ask you. You will naturally be on guard for tough questions, but remember that some questions will be softballs, and try to recognize them and knock them out of the park. Be careful about conceding issues; it is one way to lose an otherwise winnable case. Have a prepared response to ward off requests for concessions that will defeat your position—"I don't know that I would concede that point, but it's not necessary to decide this case" On the other hand, if a point cannot be fairly defended, don't be stubborn about acknowledging that fact; again, it is important to show you are reasonable.

§ 14.7 Know How Your Case Fits into the Law as a Whole and How the Result You Seek Will Affect the *Next* Case

Trials are about a particular case. Appeals are about that case but also about setting precedent for future cases. This is not so much true if the appellate court is simply applying binding precedent to clear facts and will not even write or publish an opinion, but that is rare in any case for the Georgia Supreme Court and rare in the Court of Appeals for cases in which oral argument has been granted.

Because appellate judges will be thinking about the precedent the case will set, you need to do the same, and be prepared to answer lots of questions about it. Think about how the opinion you seek will affect the existing precedent in the area. Will it be consistent or will some prior decisions need to be reconciled, distinguished, or overruled? If it is the latter, be prepared to answer questions about *stare decisis*. Think about what related areas of the law your case may affect. For example, will a ruling on an issue in your criminal case apply equally to the same issue in civil cases? Think about the logical extension of the decision you are seeking—the slippery slope. If a related area or slippery slope leads to problems, think about how the rationale might be limited to avoid those problems. Also think about whether the result you seek seems to make sense applied to other scenarios; the law sometimes requires a result the judge believes is nonsensical, but that may also suggest to the court that it is not analyzing the matter correctly. Finally, know *exactly* what you want the court to do—how you want the judgment line at the end of the opinion to read, especially whether a remand is needed and on what issues.

§ 14.8 Know the Standards of Review and How They Affect Your Arguments—and Make Sure the Case and the Issues Are Properly Before the Appellate Court

For each issue you raise on appeal, make sure you understand the standard and burden of proof on that issue at trial and the standard of appellate review that will apply given the ruling of the trial court. As the appellant, for example, if the “any evidence” standard of review applies and there was some evidence supporting the trial court’s ruling, don’t waste a lot of time recounting all the evidence you believe weighs against that ruling; that’s a loser argument. Your strongest arguments are about legal errors that are subject to *de novo* review or that demonstrate an abuse of discretion. But also make sure you can explain why the error was not harmless. For appellees, the standard of review is often your best friend, allowing you to acknowledge that there was evidence going both ways, or that the trial judge might have ruled the other way, but you still win because the factual ruling was not clearly erroneous or the evidentiary ruling was not an abuse of discretion. And when you need to concede or sense that the court will find an error, be ready to explain why it was harmless and does not require reversal.

Appellants must also make sure they know how each issue was properly preserved for review on appeal (timely and specific objection with a ruling by the trial court, etc.) and how the issue and the case as a whole is within the particular appellate court’s jurisdiction. Waiver and lack of jurisdiction may be raised *sua sponte* by the court, and you don’t want to be standing there with a deer-in-the-headlights look when a judge asks you why the court even needs to decide the case or the issue.

§ 14.9 Always Be Accurate and Forthcoming About the Facts and the Law and Be Prepared to Discuss Them in Detail

In both your brief and at oral argument, you must be honest and forthright about the record and the legal authority in the case. This requires that you know the record cold, even if you were not the lawyer who tried the case. If you didn’t try the case, you should also talk to trial counsel, if possible, about any “atmospherics” not evident from the record that may help you understand and present an issue in context. If you did try the case, *please* don’t rely on your memory of what happened perhaps several years and many other trials ago—re-read the record.

Make sure you re-read your brief before the oral argument, because the argument will be an extension of what you have said before. But because oral argument sometimes occurs months after your brief was filed, make sure that you don’t just re-read your brief to prepare. You also need to re-read the key authorities that you—and your opponent—cited. You want to be able to answer fluently when a judge asks you what a particular precedent held, or whether the facts were different in that case, or if subsection (d) of the statute should be read in conjunction with subsection (a). You should also read the advance sheets and remember to cite-check your main cases again shortly before the oral argument to make sure you are aware of recent related decisions. Recent decisions are often at the forefront of the judges’ minds, since their court just issued them.

But always keep this at the forefront of your mind: if you don't know or can't recall the answer to a factual or legal question, *don't fudge a response*. Just admit it and ask permission to file a supplemental brief. Both Georgia appellate courts are generous about allowing supplemental briefs, and indeed the court will often ask on its own for a supplemental brief on a question that arose unexpectedly during oral argument.

§ 14.10 It's Worth Repeating One More Time: Be Accurate and Forthcoming

Appellate judges are too busy to double-check everything they are told by the lawyers; we rely on you to be ethical and professional and to state with complete reliability the facts in the record and the relevant legal authorities. If we catch you in a misstatement about the record or the law, we may need to confirm everything else you say. And the damage to your credibility will not be limited to that particular case; it will carry over to other cases you handle on appeal, and even to your work in other courts. Like lawyers, judges talk amongst themselves, and we often talk about the quality of the lawyers who appear before us.

§ 14.11 Moot Your Case at Least Once

Many lawyers hate moot courts. They don't like asking other lawyers to take the time to help them prepare for an oral argument; they don't like feeling dumb when they can't answer a question from a colleague; and they feel silly "play acting" the argument. But as with anything else in life, practice makes perfect. Not mooting your argument at least once, under conditions as realistic as possible (standing up behind a podium, multiple judges, time limits, etc.), means you have never really practiced it, and that will show when game day comes. In the moot court, you need to answer the questions as you would in real court, meaning as clearly, succinctly, and persuasively as you can. No "I'll need to think about what I'd say if I get asked that" or "how about this . . ." or asking for a do-over or mumbling for several minutes. You won't be able to get away with that in the real argument. It's fine to test-drive different answers, but do it in a brainstorming session before the formal moot court. Finally, always try to include at least one lawyer who isn't an expert on the case or the area of the law at issue, to make sure your argument will make sense and be persuasive to the court—generalist judges who deal with hundreds of cases a year and likely will hear several other oral arguments on the day you present yours.

§ 14.12 During Oral Argument, Use the ELMO Device

Unlike the federal appellate courts, both of Georgia's appellate courts have available and encourage the use of an ELMO digital display device, which projects onto monitors built into the bench in front of each judge. Appeals have no live witnesses; the judges will decide the appeal based on paper—what's in the record and the law books. So figure out what paper is key to your position, be it the text of a constitutional provision or a statutory subsection, a passage from a precedent, a paragraph in a contract or deed, a crime scene photo or copy of a land plat, or a page

of the transcript or court order; and display it to the court when you discuss it. You can blow up the size for emphasis, or present the key words in bold or color. This is much more powerful than simply trying to describe the document or read it to the judges; legalese can be particularly hard to read and comprehend orally. Likewise, if you get a question that can be answered by reference to a document—exactly what the trial court order said on a point or where in the contract it says something—don’t hesitate to put that document on the ELMO, even if it is your working copy with your underlining all over it. As good lawyers learned long ago with jurors in a television age, the spoken word is much more persuasive when coupled with a visual image. Judges grew up watching TV, too.

§ 14.13 Be Professional

Make sure you look and act like a professional: (i) be on time; (ii) dress conservatively (don’t let your appearance draw the judges’ attention away from what you are saying); (iii) enunciate clearly and speak into the microphone (the judges may not all have perfect hearing); and (iv) turn *off* your cell phone and other electronic devices. Don’t waste time complaining about things that don’t matter to the merits of your case; if the court cares that your opponent’s brief was in the wrong font or two pages too long, the court will deal with it. The court may be strict about compliance with its rules, and even if it lets a violation pass, the judges may make a mental note that they are dealing with a lawyer who doesn’t know or bother to follow rules. Finally, unless it is truly important to your case *and* you can support your claim without equivocation and by reference to objective evidence, don’t accuse the opposing lawyers or the judges below of misconduct or bad faith.

§ 14.14 Spread the Word

As I noted at the outset, if you are reading this, you are probably already a decent appellate advocate. I hope you still picked up something new from these tips, or at least reminded yourself to do (or avoid doing) something the next time you have an oral argument. I also hope that you will help teach and mentor other lawyers about how to better handle their appeals. I’ll thank you in advance for doing that, because Georgia’s appellate courts rely heavily on the members of our bars to make the justice system work in our state.

15

Professionalism in Appellate Practice: The Importance of Selectivity

*Hon. Christopher J. McFadden**

This essay discusses professionalism in appellate practice, offering a few observations from the perspective of a long-time appellate practitioner and short-time appellate judge.

Among the most important principles of professionalism for appellate lawyers is *selectivity*.

Abraham Lincoln urged lawyers to “[d]iscourage litigation. Persuade your neighbors to compromise whenever you can As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.”¹

That admonition applies with particular force to appellate litigation. Indeed, the first thing prospective appellants are entitled to receive from appellate lawyers is *discouragement*.

* Judge McFadden was elected to the Georgia Court of Appeals in November 2010. Before joining the court, he practiced appellate litigation as a solo practitioner in Decatur, Georgia. Judge McFadden graduated from Oglethorpe University in 1980 and from the University of Georgia School of Law in 1985.

¹ ABRAHAM LINCOLN, *Notes for a Law Lecture, in 2 COLLECTED WORKS OF ABRAHAM LINCOLN* 81 (Roy P. Basler ed., 1953).

Prospective appellants should be advised that, in our system, the trial is the main event; the appeal is a sideshow. That arrangement is reflected in preservation-of-error requirements, presumptions of regularity, standards of review, and—most significantly—reversal rates.

A prospective appeal should be evaluated in light of those realities. Was the alleged error preserved? Can the error be shown on the record? Can the error be presented as a mistake of law rather than an exercise of the trial court’s discretion or fact-finding authority? If the issue is one of law, is the law favorable?

In my appellate practice, I tried to help prospective clients weigh and evaluate those considerations by setting them out harshly. I would tell prospective appellants that appellants usually lose. Of course those considerations should be weighed against the importance of the case to the prospective appellant. So I would explain that there were, from my perspective, three types of prospective appeals:

- (i) There were some cases in which an appeal would be a sound, and perhaps the best decision. (I was never willing to say that I would encourage an appeal—but in some cases I would come close.) The best argument an appellant can make is that a well-settled, straightforward, plainly-controlling rule has been violated. The most promising appeals are cases where the appellant’s task is simply to set out facts so as to make clear the applicability of a settled rule and then set out authority for that rule. If the appellant’s task is to advocate an extension or disapproval of existing law, the prospects are less bright.
- (ii) Other cases involved claims with arguable merit, but dim prospects. In such instances, I would offer strong discouragement. In such cases, it is most essential that prospective clients understand the harsh reality. So I would tell them that, if I could not talk them out of an appeal, I would take their money, but perhaps there were better things they could do with that money.
- (iii) Finally, of course, there were some occasions when the claims lacked even arguable merit; and I would simply refuse to take the case.

Even if indications as to those considerations are favorable, reversal rates are daunting. My own experience representing appellants before the Georgia appellate courts was marked by a number of unpleasant surprises. On such occasions, I was very glad that I had not overpromised. Candor at the beginning of an appellate representation made a difficult telephone call at the end less difficult. Of course, the dynamic is different in appointed criminal cases. In such cases, the client has a right to a free appeal, nothing to lose, and a great deal to gain. But even there, candor is in order. We should not offer false hope.

Once the decision is made to appeal, selectivity is again important as to the issues raised. At a national appellate practice conference a few years ago, I heard a well-respected senior federal

circuit judge declare that an appellate lawyer who raises a single issue is akin to a king or queen. A lawyer who raises only two issues is a duke or duchess. Three, a knight. Four or more, a peasant.

As an appellate lawyer in solo practice, I came to believe that one of my advantages was often that the opposing party was represented by a team of lawyers, more of whom had the authority to *add* than to their brief than to *cut* from it. Now, as an appellate judge, when I read the briefs in a case I start with the appellant's brief. Sometimes I read it through before turning to the appellee's. Sometimes I flip back and forth. An appellant should prefer the former. One of the things that cause me to flip from brief to brief is a multiplicity of issues. While I had long understood the importance of brevity as an advocate, I have been surprised by the extent to which my attention, as a judge, is riveted by a brief that raises a single issue. As an appellate judge I sometimes wonder, when I see briefs enumerating seven or eight errors, if I am in fact the principal target audience.

Of course there are cases in which it is necessary to raise multiple issues. And a decision to forgo issues entails risk. One can never be sure what a particular appellate panel will do, so one might argue that it is safer to include every conceivable argument. Law is not mathematics. If a case has any complexity at all, no two people will see it exactly the same way.

But a brief is like a short story or a poem. Every word that does not add, detracts. And the process is not random. As noted above, sufficiency of the record, preservation of error, standards of review, and existing substantive law provide a basis for sound exercise of professional judgment. There are no guarantees, and selectivity entails risk. But the risk is worth taking.

To illustrate my point, I cite in closing to that great font of wisdom, *Star Trek*. In the film *Star Trek III: The Search for Spock*,² Captain Kirk finds himself piloting the Enterprise with a skeleton crew. They are set upon by a much smaller, but fully-manned, Klingon ship. Soon the Enterprise is gravely damaged, and Kirk is faced with a demand to surrender. So Kirk tricks the Klingons. He invites them to board, sets the auto destruct, and beams down with his crew to the planet below. He has evened the odds, but at a high price. Watching the iconic starship burning as it falls, Kirk turns to Dr. McCoy and asks, "My God Bones . . . what have I done?"³ McCoy answers, "What you had to do, what you always do: turn death into a fighting chance to live."⁴

Professor Alan Dershowitz has described appellate lawyers as "lawyers of last resort."⁵ Appellate lawyers are in the last-chance business. That requires courage.

² STAR TREK III: THE SEARCH FOR SPOCK (Paramount Pictures 1984).

³ *Memorable Quotes for Star Trek III: The Search for Spock*, INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0088170/quotes> (last visited Nov. 23, 2011).

⁴ *Id.*

⁵ See, e.g., Tom Goldstein, *The Lawyer of Last Resort*, N.Y. TIMES (June 13, 1982), <http://www.nytimes.com/1982/06/13/books/the-lawyer-of-last-resort.html> (describing Dershowitz himself as a "lawyer of last resort").

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FORMS

*Stephanie B. Driggers**
*Andrew J. Tuck***

Note: The forms included in this chapter are for illustrative purposes only. Due to the configuration of the forms for inclusion in this publication, the forms do not conform to the typeface/font size or margin requirements of the Georgia appellate courts.

* Ms. Driggers is a senior associate with the law firm of Alston & Bird LLP. She received a B.A. from Stetson University in 2000, and a J.D. from Vanderbilt University School of Law in 2003.

** Mr. Tuck is a senior associate with the law firm of Alston & Bird LLP. He received a B.E. from Vanderbilt University in 2000, and a J.D. from the University of Georgia School of Law in 2006.

FORM 1
NOTICE OF APPEAL: CIVIL
(O.C.G.A. § 5-6-51(1) - Statutory Form)

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____]	
]	
Plaintiff[s],]	
]	
vs.	]	Civil Action
	]	File No. _____
]	
_____]	
]	
Defendant[s].]	
_____]	

NOTICE OF APPEAL

Notice is hereby given that _____ and _____, [*Plaintiff(s)/ Defendant(s)*] above-named, hereby appeal[s] to the _____ [*Court of Appeals/Supreme Court*] from the _____ [*describe order or judgment*] entered in this action on _____, 20__.

Motion for new trial [*or motion for judgment n.o.v., etc.*] was filed and overruled [*or granted, etc.*] on _____, 20__.

The Clerk will please omit the following from the record on appeal:

- 1.
- 2.
- 3.

Transcript of evidence and proceedings [*in its entirety/certain portion*] [*will/will not*] be filed for inclusion in the record on appeal.

This Court, rather than the [*Court of Appeals/Supreme Court*], has jurisdiction of this case on appeal for the reason that _____.

This ____ day of _____, 20____.

[NAME]

Georgia Bar No. _____

[FIRM]

[Address]

[City, State, Zip]

[Telephone]

Attorney[s] for Appellant[s]

[Certificate of Service]

FORM 2
NOTICE OF CROSS-APPEAL: CIVIL
(O.C.G.A. § 5-6-51(3) - Statutory Form)

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____]	
]	
Plaintiff[s],]	
]	
vs.	]	Civil Action
	]	File No. _____
]	
_____]	
]	
Defendant[s].]	
_____]	

NOTICE OF CROSS-APPEAL

Notice is hereby given that _____, one of the [*Plaintiff(s)/Defendant(s)*] above-named, hereby cross-appeal[s] to the _____ [*Court of Appeals/Supreme Court*] from the _____ [*describe order or judgment*] entered in this action on _____, 20____.

Notice of Appeal was heretofore filed on _____, 20____.

The Clerk will please include the following from the record on appeal, all of which were designated for omission by Appellant:

- 1.
- 2.
- 3.

Transcript of evidence and proceedings [*in its entirety/certain portion*] [*will be filed*] [*will not be filed*] [*has already been designated to be filed by Appellant*] for inclusion in the record on appeal.

This ____ day of _____, 20____.

[NAME]

Georgia Bar No. _____

[FIRM]

[Address]

[City, State, Zip]

[Telephone]

Attorney[s] for Cross-Appellant[s]

[Certificate of Service]

FORM 3
NOTICE OF APPEAL: CRIMINAL
(O.C.G.A. § 5-6-51(2) - Statutory Form)

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

The State,]	
	]	[Indictment]
vs.	]	[Accusation]
	]	No. _____
_____,]	
]	
Defendant.]	
_____]	

NOTICE OF APPEAL

Notice is hereby given that _____, Defendant above-named, hereby appeals to the _____ [Court of Appeals/Supreme Court] from the judgment of conviction and sentence entered herein on _____, 20____.

The offense[s] for which Defendant was convicted [is/are] _____, and the sentence[s] imposed [is/are] as follows: _____.

Motion for new trial [or motion in arrest of judgment, etc.] was filed and overruled on _____, 20____.

The Clerk will please omit the following from the record on appeal:

- 1.
- 2.
- 3.

Transcript of evidence and proceedings [in its entirety/certain portion] [will/will not] be filed for inclusion in the record on appeal.

This Court, rather than the [*Court of Appeals/Supreme Court*], has jurisdiction of this case on appeal for the reason that _____.

This ____ day of _____, 20____.

[NAME]

Georgia Bar No. _____

[FIRM]

[Address]

[City, State, Zip]

[Telephone]

Attorney[s] for Appellant[s]

[Certificate of Service]

FORM 4
APPELLEE'S DESIGNATION OF RECORD
(Based on O.C.G.A. § 5-6-42)

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____]	
]	
Plaintiff[s],]	
]	
vs.	]	Civil Action
	]	File No. _____
]	
_____]	
]	
Defendant[s].]	
_____]	

APPELLEE'S DESIGNATION OF RECORD

[*Plaintiff(s)/Defendant(s)*] hereby designate[s] [*all/part*] of the omitted matters in the record on appeal, [*including the transcript of (date, etc.)*].

This ____ day of _____, 20____.

[NAME]
Georgia Bar No. _____

[FIRM]
[Address]
[City, State, Zip]
[Telephone]

Attorney[s] for Appellant[s]

[Certificate of Service]

FORM 5
APPELLANT'S/APPELLEE'S BRIEF: COVER PAGE
(Based on SUPREME COURT RULE 18)

IN THE SUPREME COURT
STATE OF GEORGIA

_____,]	
]	
Plaintiff[s],]	
]	
vs.	]	Case No. _____
]	
_____],]	
]	
Defendant[s].]	
_____]	

BRIEF OF [APPELLANT/APPELLEE]

[NAME]
Georgia Bar No. _____

[FIRM]
[Address]
[City, State, Zip]
[Telephone]

Attorney[s] for _____

FORM 6
APPELLANT'S/APPELLEE'S BRIEF: BODY
(Based on SUPREME COURT RULES 18-20)

IN THE SUPREME COURT
STATE OF GEORGIA

_____]	
]	
Plaintiff[s],]	
]	
vs.	]	Case No. _____
]	
_____]	
]	
Defendant[s].]	
_____]	

BRIEF OF [APPELLANT/APPELLEE]

- I. [Statement describing the type of case within the Supreme Court’s jurisdiction, the judgment appealed, and the date of entry.]
- II. [Brief statement of facts showing the general nature of the case.]
- III. [Enumeration of errors.]
- IV. [Argument in sequence with the enumeration of errors, including additional facts where essential and citation of authorities.]

This ____ day of _____, 20____.

[NAME]

Georgia Bar No. _____

[FIRM]

[Address]

[City, State, Zip]

[Telephone]

Attorney[s] for Appellant[s]

[Certificate of Service]

FORM 7
APPELLANT’S BRIEF: BODY
(Based on COURT OF APPEALS RULE 25(a))

IN THE COURT OF APPEALS
STATE OF GEORGIA

_____]	
]	
Plaintiff[s],]	
]	
vs.	]	Case No. _____
]	
_____]	
]	
Defendant[s].]	
_____]	

BRIEF OF APPELLANT[S]

Part I –

[Part I must contain a succinct and accurate statement of the proceedings below and the material facts relevant to the appeal and the citation of such parts of the record or transcript essential to a consideration of the errors complained of, and a statement of a method by which each enumeration of error was preserved for consideration.]

Part II –

[Part II must contain an enumeration of errors.]

Part III –

[Part III must contain the argument and citation of authorities, including a concise statement of the applicable standard of review with supporting authority for each issue presented in the Brief.]

This ____ day of _____, 20____.

[NAME]

Georgia Bar No. _____

[FIRM]

[Address]

[City, State, Zip]

[Telephone]

Attorney[s] for Appellant[s]

[Certificate of Service]

FORM 8
APPELLEE’S BRIEF: BODY
(Based on COURT OF APPEALS RULE 25(b))

IN THE COURT OF APPEALS
STATE OF GEORGIA

_____]	
]	
Plaintiff[s],]	
]	
vs.	]	Case No. _____
]	
_____]	
]	
Defendant[s].]	
_____]	

BRIEF OF APPELLEE[S]

Part I –

[Part I must point out any material inaccuracy or incompleteness of Appellant’s statement of facts and any additional statement of facts deemed necessary, plus such additional parts of the record or transcript deemed material. Failure to do so shall constitute consent to a decision based upon the Appellant’s statement of facts. Except as controverted, Appellant’s statement of facts may be accepted by this Court as true.]

Part II –

[Part II must contain the Appellee’s argument and citation of authorities as to each enumeration of error. It shall also include the standard of review if different from that contended by the Appellant(s).]

This ____ day of _____, 20____.

[NAME]

Georgia Bar No. _____

[FIRM]

[Address]

[City, State, Zip]

[Telephone]

Attorney[s] for Appellee[s]

[Certificate of Service]

FORM 9
MOTION FOR NEW TRIAL: CIVIL
(O.C.G.A § 5-5-42(b) - Statutory Form)

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____]	
]	
Plaintiff[s],]	
]	
vs.	]	Civil Action
	]	File No. _____
]	
_____]	
]	
Defendant[s].]	
_____]	

MOTION FOR NEW TRIAL

[*Plaintiff(s)/Defendant(s)*] move[s] the Court to set aside the verdict returned herein on _____, 20____, and the judgment entered thereon on _____, 20____, and to grant a new trial on the following grounds:

1. The verdict is contrary to law.
2. The verdict is contrary to the evidence.
3. The verdict is strongly against the weight of the evidence.
4. The Court erred in permitting Witness _____ to testify as follows:
_____.
5. The Court erred in failing to charge the jury on _____ as requested in writing by [*Plaintiff(s)/Defendant(s)*].

6. The Court erred in charging the jury as follows: _____
_____.

This ____ day of _____, 20____.

[NAME]

Georgia Bar No. _____

[FIRM]

[Address]

[City, State, Zip]

[Telephone]

Attorney[s] for Appellant[s]

[Here set forth Rule Nisi and Certificate of Service]

FORM 10
MOTION FOR NEW TRIAL: CRIMINAL
(O.C.G.A § 5-5-42(d) - Statutory Form)

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

The State]	
]	
vs.	]	[INDICTMENT]
	]	[ACCUSATION]
_____ ,	]	FILE NO. _____
]	
Defendant.]	
_____]	

MOTION FOR NEW TRIAL

Defendant moves the Court to set aside the verdict returned herein on _____, 20____, and the sentence entered thereon on _____, 20____, and to grant a new trial on the following grounds:

1. The Defendant should be acquitted and discharged due to the State’s failure to prove guilt beyond a reasonable doubt.

2. Although the State proved the Defendant’s guilt beyond a reasonable doubt, the evidence was sufficiently close to warrant the trial judge to exercise [his/her] discretion to grant the Defendant a retrial.

3. The Court committed an error of law, warranting a new trial.

This ____ day of _____, 20____.

[NAME]

Georgia Bar No. _____

[FIRM]

[Address]

[City, State, Zip]

[Telephone]

Attorney[s] for Appellant[s]

[Here set forth Rule Nisi and Certificate of Service]

FORM 11
REQUEST FOR ORAL ARGUMENT
(Based on COURT OF APPEALS RULE 28(a))

IN THE COURT OF APPEALS
STATE OF GEORGIA

_____]	
]	
Plaintiff[s],]	
]	
vs.	]	Case No. _____
]	
_____]	
]	
Defendant[s].]	
_____]	

REQUEST FOR ORAL ARGUMENT

To: Clerk
Court of Appeals of the State of Georgia
47 Trinity Avenue S.W., Suite 501
Atlanta, Georgia 30334

[Appellant/Appellee], _____, hereby requests oral argument pursuant to Rule 28 of this Court.

The undersigned counsel for [Appellant/Appellee] hereby certifies that counsel for [Appellee/Appellant] has been notified of the [Appellant's/Appellee's] request to argue the case orally, and inquiry has been made of said counsel of the intent to request oral argument, and counsel for [Appellee/Appellant] [desires/does not desire] to argue the case orally. Appellant's counsel, _____, will make oral argument. Appellee's counsel, _____, will make oral argument.

[Brief specific statement demonstrating that the decisional process will be significantly aided by oral argument. The request should be self-contained and should convey the specific reason or reasons oral argument would be beneficial to the Court.]

This ____ day of _____, 20____.

[NAME]

Georgia Bar No. _____

[FIRM]

[Address]

[City, State, Zip]

[Telephone]

Attorney[s] for

[Appellant(s)/Appellee(s)]

[Certificate of Service]

FORM 12
REQUEST FOR ORAL ARGUMENT
(Based on SUPREME COURT RULE 51)

Clerk
Supreme Court of Georgia
244 Washington Street
Room 572, State Office Annex Building
Atlanta, Georgia 30334

RE: [*Case Name and Number*]

Dear [*Clerk's Name*]:

[*Appellant/Appellee*], _____, requests that this case be placed on the Court's calendar for oral argument pursuant to Rule 51 of this Court.

The undersigned counsel for [*Appellant(s)/Appellee(s)*] certifies that counsel for [*Appellee/Appellant*] has been notified of the [*Appellant's(s')/Appellee's(s')*] intention to argue the case orally, and that inquiry has been made whether said counsel intends also to argue the case orally. Counsel for [*Appellee(s)/Appellant(s)*] [*does/does not*] desire to argue the case orally. Thank you for your assistance in this matter.

Sincerely,

[*NAME*]

cc: [*Opposing Counsel*]

FORM 13
PETITION FOR LEAVE TO APPEAL
(Based on O.C.G.A. § 5-6-35 and COURT OF APPEALS RULE 31)

IN THE COURT OF APPEALS
STATE OF GEORGIA

_____]	
]	
Plaintiff[s],]	
]	
vs.	]	Civil Action
	]	File No. _____
_____]	
]	
Defendant[s].]	
_____]	

APPLICATION FOR LEAVE TO APPEAL

- I. [Enumeration of errors.]
- II. [Statement of jurisdiction.]
- III. [Specification of the order or judgment being appealed and, if interlocutory, the need for interlocutory appellate review.]
- IV. [Argument regarding (a) error and (b) why establishment of precedent would be desirable.]

This ____ day of _____, 20 ____.

[NAME]

Georgia Bar No. _____

[FIRM]

[Address]

[City, State, Zip]

[Telephone]

Attorney[s] for Petitioner[s]

[Exhibits to Attach:

- Stamped “filed” copy of the order or judgment being appealed bearing the signature of the trial court judge.
- A copy of the petition or motion which led directly to the order or judgment being appealed, and a copy of any responses to the petition or motion.
- Copies of other parts of the record or transcript the Applicant(s) deem(s) appropriate.
- All exhibits must be tabbed, indexed and securely bound at the top with staples or fasteners (round head or Acco).]

[Certificate of Service (averring that service perfected at or prior to filing)]

FORM 14
APPLICATION FOR LEAVE TO APPEAL INTERLOCUTORY ORDER
(Based on O.C.G.A. § 5-6-34(b) and COURT OF APPEALS RULE 30)

IN THE COURT OF APPEALS
STATE OF GEORGIA

_____]	
]	
Plaintiff[s],]	
	]	Civil Action
vs.	]	File No. _____
]	
_____]	
]	
Defendant[s].]	
_____]	

APPLICATION FOR LEAVE TO APPEAL INTERLOCUTORY ORDER

- I. [Statement of jurisdiction.]

- II. [Statement of the need for such an appeal and the issues involved therein. This section must show that: (a) the “issue to be decided appears to be dispositive of the case”; (b) the “order appears erroneous and will probably cause a substantial error at trial or will adversely affect the rights of the appealing party until entry of final judgment in which case the appeal will be expedited”; or (c) “the establishment of precedent is desirable.”]

This ____ day of _____, 20 ____.

[NAME]

Georgia Bar No. _____

[FIRM]

[Address]

[City, State, Zip]

[Telephone]

Attorney[s] for Applicant[s]

[Exhibits to Attach:

- Stamped “filed” copy of the order or judgment being appealed and the certificate of immediate review bearing the signature of the trial court judge.
- A copy of the petition or motion that led directly to the order or judgment being appealed, and a copy of any responses to the petition or motion.
- Copies of other parts of the record or transcript needed to sufficiently apprise the Court of the appellate issues, in context, and support the arguments advanced.
- All exhibits must be tabbed, indexed, and securely bound at the top with staples or fasteners (round head or Acco).]

[Certificate of Service (averring that service perfected at or prior to filing)]

FORM 15
APPLICATION FOR DISCRETIONARY APPEAL
(Based on O.C.G.A. § 5-6-35 and SUPREME COURT RULE 33)

IN THE SUPREME COURT
STATE OF GEORGIA

_____]	
]	
Plaintiff[s],]	
	]	Civil Action
vs.	]	File No. _____
]	
_____]	
]	
Defendant[s].]	
_____]	

APPLICATION FOR DISCRETIONARY APPEAL

- I. [Enumeration of errors.]
- II. [Statement of jurisdiction.]
- III. [Description of the order or judgment appealed from and the issues involved. Also, if the order is interlocutory, a description of the need for interlocutory appellate review.]

This ____ day of _____, 20____.

 [NAME]
 Georgia Bar No. _____

[FIRM]
 [Address]
 [City, State, Zip]
 [Telephone]

Attorney[s] for Applicant[s]

[Exhibits to Attach:

- Stamped copy of the trial court's order or judgment being appealed showing the date of filing and the certificate of immediate review.

- A transcript is not necessary, but affidavits, exhibits, and relevant portions of the transcript should be attached to the application to demonstrate to the Court what the record will show if the application is granted.]

[Certificate of Service (averring that service perfected at or prior to filing)]

FORM 16
APPLICATION FOR LEAVE TO APPEAL AN INTERLOCUTORY ORDER
(Based on O.C.G.A. § 5-6-34(b) and SUPREME COURT RULE 30)

IN THE SUPREME COURT
STATE OF GEORGIA

_____]	
]	
Plaintiff[s],]	
	]	Civil Action
vs.	]	File No. _____
]	
_____]	
]	
Defendant[s].]	
_____]	

APPLICATION FOR LEAVE TO APPEAL INTERLOCUTORY ORDER

- I. [Statement of jurisdiction.]

- II. [Enumeration of errors and statement specifying order or judgment being appealed from and why interlocutory review is necessary.]

This ____ day of _____, 20____.

[NAME]
Georgia Bar No. _____

[FIRM]
[Address]
[City, State, Zip]
[Telephone]

Attorney[s] for Applicant[s]

[Exhibits to Attach:

- Copies of the trial court's order to be appealed and stamped copy of certificate for immediate review showing the date of filing.

- A transcript is not necessary, but affidavits, exhibits, and relevant portions of the transcript should be attached to the application to demonstrate to the Court what the record will show if the application is granted.]

[Certificate of Service (averring that service perfected at or prior to filing)]

FORM 17
NOTICE OF INTENTION TO APPLY FOR CERTIORARI
(Based on SUPREME COURT RULE 38 and COURT OF APPEALS RULE 38)

IN THE COURT OF APPEALS
STATE OF GEORGIA

_____]	
]	
Plaintiff[s],]	
]	
vs.	]	Case No. _____
]	
_____]	
]	
Defendant[s].]	
_____]	

NOTICE OF INTENTION TO APPLY FOR CERTIORARI

To: Clerk
Court of Appeals of the State of Georgia
47 Trinity Avenue S.W., Suite 501
Atlanta, Georgia 30334

Notice is hereby given that [*Appellant(s)/Appellee(s)*], _____, intend(s) to apply to the Supreme Court for a writ of certiorari to review the judgment of the Court of Appeals rendered in the above-styled case on _____, 20____ [*in which case a motion for rehearing was denied on _____, 20____*].

This ____ day of _____, 20 ____.

[NAME]

Georgia Bar No. _____

[FIRM]

[Address]

[City, State, Zip]

[Telephone]

Attorney[s] for Appellant[s]

[Certificate of Service]

FORM 18
APPLICATION FOR WRIT OF HABEAS CORPUS*
 (Based on O.C.G.A. § 9-14-44)

IN THE SUPERIOR COURT OF _____ COUNTY
STATE OF GEORGIA

_____]	
]	
Petitioner,]	
]	
Inmate Number]	
	]	Civil Action
vs.	]	File No. _____
]	
_____]	
]	
Respondent.]	
_____]	

APPLICATION FOR WRIT OF HABEAS CORPUS

- I. [Identify the proceeding in which the Petitioner was convicted.]

- II. [Date of rendition of the final judgment.]

- III. [Clearly set forth the respects in which the Petitioner’s[s]’ rights were violated.]

- IV. [State with specificity which claims were raised at trial or on direct appeal, providing appropriate citations to the trial or appellate record.]

* Some Superior Courts have prepared forms that must be used. This form is based on the requirements contained in O.C.G.A. § 9-14-44. Note that under O.C.G.A. § 9-14-45, service of a petition of habeas corpus shall be made upon the person having custody of the Petitioner[s]. If Petitioner[s] is being detained under the custody of the Department of Corrections, an additional copy of the Petition must be served on the Attorney General. If Petitioner[s] is being detained under the custody of some authority other than the Department of Corrections, an additional copy of the Petition must be served upon the District Attorney of the county in which the Petition is filed. Service upon the Attorney General or the District Attorney may be had by mailing a copy of the Petition and a proper Certificate of Service.

- V. [Identify any previous proceedings that the Petitioner may have taken to secure relief from his or her conviction and, in the case of prior habeas corpus petitions, state which claims were previously raised.]

- VI. [Attach to the petition affidavits, records, or other evidence supporting the allegations or state why the same are not attached.]

- VII. [Argument and citation of authorities shall be omitted from the petition. A brief may be submitted in support of the petition, setting forth any applicable argument.]

WHEREFORE, Petitioner prays that the Court grant Petitioner relief to which [he/she] may be entitled in this proceeding.

This ____ day of _____, 20____.

[NAME]
Georgia Bar No. _____

[FIRM]
[Address]
[City, State, Zip]
[Telephone]

Attorney[s] for Petitioner

I [declare certify, verify or state] under penalty of perjury that the foregoing is true and correct. Executed this ____ day of _____, 20____.

Signature of Petitioner

[Certificate of Service]

FORM 19
MOTION FOR RECONSIDERATION
(Based on SUPREME COURT RULE 27 and COURT OF APPEALS RULE 37)

IN THE [COURT OF APPEALS/SUPREME COURT]
STATE OF GEORGIA

_____]	
]	
Plaintiff[s],]	
	]	Civil Action
vs.	]	File No. _____
]	
_____]	
]	
Defendant[s].]	
_____]	

MOTION FOR RECONSIDERATION

Pursuant to [Court of Appeals Rule 37/Supreme Court Rule 27], [Appellee(s)/Appellant(s)] hereby move[s] this Court to reconsider its Order entered on _____, 20____ in the above-referenced case. A copy of that Order is attached hereto as Exhibit "A."

[Brief in support of motion].

This ____ day of _____, 20____.

[NAME]
Georgia Bar No. _____

[FIRM]
[Address]
[City, State, Zip]
[Telephone]

Attorney[s] for
[Appellant(s)/Appellee(s)]

[Certificate of Service]

FORM 20
APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL
FROM ORDER DENYING WRIT OF HABEAS CORPUS
(Based on O.C.G.A. § 9-14-52(b) and SUPREME COURT RULE 36)

IN THE SUPREME COURT
STATE OF GEORGIA

_____]	
]	
Petitioner,]	
]	
_____]	
Inmate Number]	
	]	Civil Action
vs.	]	File No. _____
]	
_____]	
]	
Respondent.]	
_____]	

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE

[Neither statute nor Supreme Court Rules dictate the required contents of this application. The Court will grant such an application “where there is arguable merit.”]

This ____ day of _____, 20____.

[NAME]
Georgia Bar No. _____

[FIRM]
[Address]
[City, State, Zip]
[Telephone]

Attorney[s] for
[Appellant(s)/Appellee(s)]

[Certificate of Service]

FORM 21
NOTICE OF APPEAL WHEN USING RECORD APPENDIX*
(Based on O.C.G.A § 5-6-51(1) and SUPREME COURT RULE 67)

IN THE _____ COURT OF _____ COUNTY
 STATE OF GEORGIA

_____]	
]	
Plaintiff[s],]	
	]	Civil Action
vs.	]	File No. _____
]	
_____]	
]	
Defendant[s].]	
_____]	

NOTICE OF APPEAL

Notice is hereby given that _____ and _____,
 [Plaintiff(s)/Defendant(s)] above-named, hereby appeal[s] to the Supreme Court from
 the _____ [describe order or judgment] entered in this action on
 _____, 20__.

Motion for new trial [*or motion for judgment n.o.v., etc.*] was filed and overruled
 [*or granted, etc.*] on _____, 20__.

Because [Plaintiff(s)/Defendant(s)] will file a Record Appendix pursuant to
 Supreme Court Rule 67, the Clerk will please include the Notice of Appeal in the appellate

* Note that the Court of Appeals has rescinded its practice of accepting record appendices. See Important Notice – Termination of Record Appendix Rule in the Court of Appeals of Georgia (Nov. 21, 2011), http://www.gaappeals.us/termination_of_record.pdf; see also Chapter 4 of this Handbook.

record, but omit everything else. A designation of the record on appeal follows this notice, to be served contemporaneously on opposing counsel.

Transcript of evidence and proceedings [*in its entirety/certain portion*] [*are/are not*] to be transmitted for inclusion in the record on appeal.

The Supreme Court, rather than the Court of Appeals, has jurisdiction of this case on appeal for the reason that _____.

This ____ day of _____, 20____.

[NAME]
Georgia Bar No. _____

[FIRM]
[Address]
[City, State, Zip]
[Telephone]

Attorney[s] for Appellant [s]

[Designation of Record on Appeal:

Plaintiff(s)/Defendant(s)] hereby designate[s] to [*Plaintiff(s)/Defendant(s)*] that the following parts of the record will be included in the Record Appendix:

- (a) *The Notice of Appeal;*
- (b) *If applicable, the order granting the right to an interlocutory or discretionary appeal;*

- (c) *The relevant portions of the pleadings, charge, findings, or opinion, including the Complaint and Answer (or Charge and Sentence in a criminal case), any Motion for New Trial, and any order disposing of a Motion for New Trial;*
- (d) *All judgments, orders, or decisions in question, all of which must be reduced to writing; and*
- (e) *Other parts of the record to which the parties wish to direct the Court's attention.]*

[*Certificate of Service*]

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WASHINGTON, D.C.

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