

RECENT DEVELOPMENTS IN APPELLATE MOTION PRACTICE

Recent Developments Seminar
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David G. Wirtes, Jr.
George M. Dent, III
Cunningham Bounds, LLC
Mobile, Alabama

Ann Wilson
Staff Attorney
Supreme Court of Alabama

It is apparent from even a cursory reading of the Alabama Rules of Appellate Procedure that appellate motion practice was contemplated by the drafters. Rule 27 is entitled simply "Motions" and provides basic guidelines for drafting and filing motions in cases pending in Alabama's appellate courts. Other requirements applicable to specific motions are found throughout the Rules, and Rule 27 authorizes motions seeking "an order or other relief" not specifically provided for by the Rules (e.g., a motion seeking a stay of all or part of the proceedings in the trial court pending the resolution of a petition for a writ of mandamus or prohibition filed in the appellate court).

It is worth noting, at this point, a general caveat that will be repeated several times: Before filing a motion with an appellate court, determine whether the motion must first be filed with and ruled on by the trial court; and, if the motion was filed with the trial court and there has been no ruling, determine whether sufficient time has passed to allow it to be deemed denied and subject to consideration by the appellate court.

NOTE: All references in this section are to the Alabama Rules of Appellate Procedure unless otherwise specifically noted. Portions of the Rules referenced in this section are attached as an Appendix.

"Routine" motions

Certain motions are, necessarily, filed with such frequency in the appellate courts that their disposition has become a routine procedure in the appellate court. These motions can usually be addressed and ruled on without causing a delay in the appellate process.

Motions for extensions of page limitations and for extensions of time for filing. Rules 28, 31, and 32 set out the form and time requirements for briefs filed in the appellate courts, including very specific provisions

for the number of pages allowed and for the time within which the briefs are to be filed. Rule 28(j)(3) provides: "Permission to exceed the page limitation will not be routinely granted. A motion to file a document that exceeds the applicable page limitation shall show good cause therefor, specifying extraordinary circumstances that warrant a suspension of the rules. Any motion seeking an enlargement of the page limitation for a brief shall be presented at least seven days before the date on which the brief is due." (Emphasis added.)

Rule 32(d) provides that "one extension [of the time for filing a brief] may be granted up to 7 days (1 week)." This is the provision that authorizes the appellate clerk's office to grant a seven-day extension by telephone but to require the party requesting the extension to file a written confirmation of his or her receiving the extension. This "automatic" extension applies only to one principal brief; it does not apply to pleadings filed on rehearing, nor does it apply when the briefing schedule has been set by an order of the appellate court (e.g., order for answer and briefs in a mandamus petition. Any further extensions for filing

principal briefs, and any extensions for filing rehearing pleadings, must be sought by written motion that complies with Rule 26(b):

The court for good cause shown may, upon motion, enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, or a petition for permission to appeal; and the supreme court may not enlarge the time for filing a petition for certiorari to the courts of appeals; except in death cases.

Understanding and complying with the Rules relating to times for filing can be critical. Rule 2(a)(2) authorizes appellate courts to dismiss an appeal for "failure to prosecute" -- which includes the failure to file a brief within the time provided by Rule 31. Dismissal pursuant to Rule 2(a)(2) for failure to prosecute can be instigated by the motion of a party or on the appellate court's own motion. However, an appellate court, pursuant to Rule 2(b), is authorized to suspend "non-jurisdictional" rules such as Rule 2(a)(2) for "good cause shown." See, also, Rule 26(b).

Although the deadline for filing an application for rehearing pursuant to Rule 40 is not designated as a jurisdictional requirement by the Rules, the appellate

courts rarely grant motions for extensions of the time within which to file the application for rehearing. Although it is possible to obtain an extension of time within which to file the brief in support of rehearing, the motion must show good cause for that request.

In the case of extraordinary writs, in which the briefing schedule has been established by order of the appellate court, all requests for extensions (time and number of pages) must be by written motion before the brief is due.

Rule 8. Stay or Injunction Pending Appeal. Rule 8 motions seeking, during the pendency of an appeal, a stay of an order or judgment, approval of a supersedeas bond, or modification of an injunction, "must ordinarily be made in the first instance in the trial court:"

"A motion for [Rule 8] relief may be made to the appellate court in which the appeal is pending, but the motion shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such photocopied parts of the

record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk of the appellate court. (Emphasis added.)

The most recent Committee Comments highlight a second aspect of motions filed pursuant to Rule 8:

In Ex parte Spriggs Enterprises, Inc., 376 So.2d 1088, 1089 (Ala. 1979), the Alabama Supreme Court held that "[t]he plain meaning of Rule 8(a)(1) is that one who appeals a judgment against him for money damages only must execute a supersedeas bond in an amount equal to 125% of the amount of the judgment when the judgment exceeds \$10,000. The language utilized in the rule is mandatory; the trial judge is given no discretion in setting the amount of the supersedeas bond." Note, however, that the Supreme Court has recognized, for good cause shown (set forth as grounds for a motion filed by the appellant) and pursuant to Rule 8(b) and Rule 2, the need to suspend the requirements of Rule 8(a) in extraordinary circumstances and to direct the trial court to accept a bond in an amount other than that required by Rule 8(a). For example, on December 29, 2003, in case no. 1030488, Ware v. Timmons, in response to a motion to suspend the requirement of Rule 8(a)(1), the Alabama Supreme Court issued an order, providing, in pertinent part:

"It is ordered that the appellants are required to post with the trial court the maximum bond obtainable, based on the appellants' entire net worth and available insurance coverage, to be determined by the trial court, within 14 days from the date of this order."

However, see Scrushy v. Tucker, 955 So.2d 988 (Ala. 2006), in which the appellant sought to stay the execution of a \$47 million judgment pending appeal, but argued he could not obtain a supersedeas bond. The Alabama Supreme Court discussed Rule 8 and "the Ware exception," but found "the evidence did not show that [the appellant] could not obtain a bond, but only that he would first have to obtain a letter of credit. Notably, [the appellant] presented no evidence indicating that he could not obtain a letter of credit." (Emphasis in original.) The Court denied the appellant's motion to stay the execution of the judgment.

Rule 10 motions to correct or supplement the record on appeal. No matter how diligent the parties and the trial court clerk's office are in their efforts to comply with the provisions of Rule 10 (a) through (e) for composing the record on appeal, unexpected problems arise. The remaining subdivisions of Rule 10 provide the procedures for correcting and supplementing a record on appeal that has been determined to be insufficient or simply incorrect.

Rule 10 "encourages designation of material matters, rather than wholesale inclusion of immaterial matters" as the record on appeal in civil cases. But whether a party designates the entire record or designates less than the entire record as the record on appeal, he or she has the burden of making sure the record on appeal filed by the trial court clerk's office is the record that was designated. And if the record certified by the trial court clerk's office is not the record requested by a party, Rule 10 motions are available to correct that deficiency.

Obtaining the relief provided by Rule 10 motions depends upon a compliance with specific procedures; thus, it is important to read Rule 10 carefully before filing a motion to correct or supplement the record on appeal and to be sure a Rule 10 motion contains all the necessary information, is filed in a timely manner and with the correct court, and is served on all parties. For example, if a portion of a designated transcript is omitted from the record in a civil case, the Rule 10(f) motion requesting inclusion of the missing transcript must have attached to it a copy of the transcript

purchase order "as proof that the omitted portions were originally requested."

Motions to correct or supplement the record on appeal are filed in the first instance with the trial court. If the trial court denies the motion, or if fourteen days elapse without a ruling from the trial court so that the motion is deemed denied, the party can renew the motion in the appropriate appellate court. But in either case, the supplemental or corrected record on appeal must comply with the same requirements for filing that apply to records on appeal in general.

It is important to note that a motion to correct or supplement the record on appeal in a civil case does not suspend the time for filing briefs, although a party may move for such a suspension. Rule 10(f)(1). However, when a motion to correct or supplement the record on appeal is filed in a criminal case, the time for filing briefs "shall be suspended ... until the date the motion is denied," or, if the motion is granted, "until the record on appeal is corrected or supplemented and filed." Rule 10(g)(1).

Motion for stay of trial court proceedings. A motion the appellate courts are seeing with more frequency is the motion to stay trial court proceedings during the pendency of a petition for a writ of mandamus or a writ of prohibition. These motions ask for a stay of the trial court proceedings entirely or for a stay of a specific activity such as discovery. Motions seeking this type of relief are given the same expedited treatment as the petitions with which they are filed (Rule 21(b)), unless the filing party pleads and proves the motion presents a situation that requires "emergency" consideration. Occasionally a party files a motion to stay trial court proceedings during the pendency of an appeal from a Rule 54(b) "final" judgment or during the pendency of an appeal challenging the trial court's granting or denying a motion to compel arbitration. As is noted elsewhere in this material, these motions must first be presented to and ruled on by the trial court, and are ordinarily given expedited treatment in the appellate court.

"Non-Routine" motions

Rule 12. Rule 12 (a) and (b) set out the procedures related to docketing an appeal, paying the appellate docket fee, and filing the record on appeal. However, Rule 12(c) allows an appellee to move to dismiss an appeal if the appellant fails to cause the timely completion of the record on appeal. This motion "shall be supported by a certificate of the clerk of the trial court showing the date and substance of the judgment or order from which the appeal was taken, the date on which the notice of appeal was filed, the expiration date of any order extending the time for completing the record on appeal, and proof of service." It should also be kept in mind that dismissal of an appeal is a drastic measure that Alabama's appellate courts do not favor; thus a motion to dismiss an appeal based on a procedural error must be supported by the documentation required by Rule 12(c), and should also be supported by the movant's statement as to why the drastic measure of dismissal is appropriate or necessary.

Motions to recuse. The primary ground for motions seeking the recusal of appellate judges most is an

alleged violation of Canon 3.C. of the Alabama Canons of
Judicial Ethics:

(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:

(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) He served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer in the matter, or the judge or such lawyer has been a material witness concerning it.

However, it is the sworn constitutional duty of a judge to make decisions based on the application of the law to the facts of the case under consideration, despite any personal views they may have. Judges are presumed to be qualified and unbiased (Gary v. Crouch, 867 So. 2d 310 (Ala. 2003)), and the movant who seeks a judge's recusal based on an allegation of bias or prejudice carries a heavy burden of overcoming that presumption. Ex parte Monsanto Co., 862 So. 2d 595 (Ala. 2003). "Recusal is not required by the mere accusation of bias unsupported

by substantial evidence." Ex parte Potts, 814 So. 2d 836, 839 (Ala. 2001), quoting Henderson v. G&G Corp., 582 So. 2d 529, 530 (Ala. 1991). Pursuant to Canon 3.C., any question as to a judge's impartiality is resolved by answering the question "'would a person of ordinary prudence in the judge's position knowing all the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?' The question is not whether the judge was impartial in fact, but whether another person, knowing all the circumstances, might reasonably question the judge's impartiality -- whether there is an appearance of impropriety." Ex parte City of Dothan Personnel Board, 831 So. 2d 1, 6 (Ala. 2002), quoting Ex parte Duncan, 638 So. 2d 1332, 1334 (Ala. 1994).

Recusal is a matter properly submitted by motion addressed to the judge or justice whose recusal is sought. After the judge or justice issues a statement of recusal or non-recusal, further relief can be sought by motion to the entire court. See Ex parte Ted's Game Enterprises, 893 So. 2d 376, 390, fn. 4 (Ala. 2004).

See Barber v. Jefferson County Racing Association, Inc., 960 So.2d 599 (Ala. 2006) reh'g denied Jan. 12, 2007; Jones v. Kassouf & Co., P.C., 949 So. 2d 136 (Ala. 2006); Brackin v. Trimmier Law Firm, 897 So. 2d 207 (Ala. 2004).

Motions to strike. The Rules do not preclude filing motions that a party deems necessary to apprise the appellate court of a situation that requires the court's attention but does not come under any of the common appellate motions. For example, after beginning work on a brief to the appellate court, a party may find the need to file a motion to strike all or part of a record or a document. Whether a document or portion of a document is appropriately before the appellate court and, more importantly, whether it is appropriately referred to and relied on by a party in fashioning his or her argument to the appellate court, is a determination that needs to be made early in the appeal process but can be considered by the appellate court only if the objecting party files a motion to strike. Motions of this type, requesting truly non-routine relief, should be supported by any available proof in support of the movant's request and argument.

Emergency motions. Occasionally it is necessary to file a motion with one of the appellate courts seeking emergency relief, usually asking the appellate court to stay imminent proceedings in the trial court pending review of a related matter (e.g., a petition for a writ of mandamus). The need for a ruling by the trial court before seeking appellate court consideration is not obviated by the movant's styling the motion as an emergency matter. Therefore, the movant must provide sufficient evidence to support the claim of the emergency nature of the motion, and must show why, in good faith, he or she believes that attempting to obtain a ruling from the trial court would be an exercise in futility or that the trial court will not rule on the motion in a timely manner. Alabama appellate courts prefer to allow time for the opposing party/non-movant to respond to a motion, and the movant should keep the response time in mind when filing a motion that requires the court's immediate attention.

Motion for expedited consideration. The rarely-filed motion for expedited consideration is viewed by the appellate courts with great scrutiny, and on a case-by-

case basis. Filing this motion in connection with an extraordinary writ is somewhat redundant; all extraordinary writs receive expedited consideration. Other cases in which a motion to expedite might be expected (e.g., cases involving election issues or child-custody issues) also receive greatly expedited treatment. However, a motion to expedite pertaining only to the completion and filing of the record on appeal, or only to the briefing schedule, can serve the dual purpose of obtaining the relief sought and drawing the appellate court's attention to a case that may deserve immediate attention.

"GENERALLY SPEAKING ..."

Rule 25. Filing and Service. The provisions of Rule 25 apply to motions: timeliness, manner of service, on whom served, proof of service. Thus, if a deadline applies to a motion, the timeliness of the motion's filing will be determined according to Rule 25(a). Relief from a motion deadline is available under Rule 26 if sought in a timely manner. As with all other pleadings, motions must be filed in the manner accepted by the appellate court. The Alabama Supreme Court does

not accept facsimile filings of motions. The general provisions of Rule 32 (font, style, etc.) are explicitly applicable to appellate motions.

Rule 25A. Signing briefs, motions, and other papers; representations to court. In 2005, the Alabama Supreme Court approved the adoption of Rule 25A, and all documents, including motions, filed with Alabama's appellate courts must comply with this rule. There are some lawyers who confess to being unaware of this rule, and it is set out here, with the Court Comment, as a matter of emphasizing its significance:

(a) Signature. Every brief, motion, or other paper presented to an appellate court for filing must be signed by at least one attorney of record or, in a case in which a party is proceeding pro se, by the party. The brief, motion, or other paper must include the signer's address and telephone number. Unless a rule or statute provides otherwise, a brief, motion, or other paper need not be verified or accompanied by an affidavit.

The court shall strike an unsigned brief, motion, or other paper unless the omission is promptly corrected after it is called to the attention of the attorney or party filing it. The signature requirement is to be interpreted broadly, and the attorney of record may designate another attorney to sign the brief, motion, or other paper for him or her. When a party is represented by more than one counsel and counsel reside in different locations, it is not necessary to incur the expense of sending

the brief, motion, or other paper from one person to another for multiple signatures. If a brief, motion, or other paper is filed electronically, an electronic signature is an original signature under this rule.

(b) Representations to Court. By presenting to the court, whether by signing, filing, submitting, or later advocating a brief, motion, or other paper, an attorney or unrepresented party certifies that, to the best of the person's knowledge, information, and belief, formed after inquiry reasonable under the circumstances:

(1) the brief, motion, or other paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or expense in the litigation;

(2) the issues presented are warranted either by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law; and

(3) the factual contentions or denials in the brief, motion, or other paper are supported in the record.
[Adopted effective June 1, 2005.]

Court Comment to Rule 25A
Adopted Effective June 1, 2005

Rule 25A combines parts of the rule on signing papers used in the United States Courts of Appeals for the Fifth Circuit and the Tenth Circuit. The second paragraph in section (a) covers situations where counsel for a party may have offices in different towns throughout the state or in different states. The rule allows another attorney designated by counsel to sign for him or her.

Although this rule does not specifically provide for sanctions for improper or untrue representations to the court, appellate courts may impose sanctions pursuant to Rule 2 for noncompliance with the appellate rules and may impose the penalty of contempt of court pursuant to Rule 48 for willful noncompliance with the appellate rules.

Rule 27. Rule 27(a) authorizes a response to an appellate motion, which must be filed within seven days (1 week) after service of the motion (which time can be extended or shortened by the appellate court). However, Rule 27(b) provides:

Notwithstanding the provisions of the preceding paragraph as to motions generally, motions for procedural orders, including any motion for an enlargement of time prescribed by these rules or by order of the court for doing any act or to permit any act to be done after the expiration of such time, may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

Rule 27(d) allows up to ten pages for an appellate motion and for the motion in opposition, and allows up to fifteen pages for the supporting memorandum. This subsection also requires that appellate motions comply with the applicable provisions of Rule 32. See Rule 32(b), "Form and Length of Applications for Rehearing, Petitions, Motions, and Other Papers." See, also, the

2005 Committee Comments to Rule 32 ("[Rule 32] has been amended to indicate that subdivision (a) is applicable to all documents filed with an appellate court").

Loose ends. Depending upon the relief sought and the status of the case to which it relates, a motion may be considered and ruled on immediately or it may be submitted for consideration with the merits of the case on appeal.

A motion to dismiss a pending appellate case that has not progressed to the briefing stage can ordinarily be dismissed on motion of the appellant. However, once the parties have begun to brief a case, and clearly once the briefing is complete and the case has been assigned, a motion to dismiss should be filed as a joint stipulation and signed by all parties to the appeal. A motion to dismiss filed by the appellee at any time must be supported by good grounds and will be submitted for in-depth consideration by the court.

To reach the personnel of the clerks' offices of the three appellate courts (docketing personnel and staff attorneys) if you have questions about filing motions (or about any other aspect of an appeal):

Alabama Supreme Court Clerk's Office
300 Dexter Avenue
Montgomery, Alabama 36104

Robert G. Esdale, Clerk
Phone: 334.242.4609
Fax: 334.242.0588

Alabama Court of Criminal Appeals Clerk's Office
300 Dexter Avenue
Montgomery, Alabama 36104
Lane Mann, Clerk
Phone: 334.242.4590
Fax: 334.242.4689

Alabama Court of Civil Appeals Clerk's Office
300 Dexter Avenue
Montgomery, Alabama 36104
John Wilkerson, Clerk
Phone: 334.242.4093
Fax: 334.242.4017
