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# CIVIL APPEALS 101

## WHAT EVERY LITIGATOR SHOULD KNOW ABOUT HANDLING APPEALS

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Every civil litigator should be familiar with the important deadlines, the key rules of appellate procedure, and the common pitfalls to avoid when handling appeals. What follows is an overview of the appellate process, from preserving the record to petitioning for a writ of certiorari, and everything in between.

### I. PRESERVING THE RECORD

Without a thorough record, prime arguments for appeal will be lost to even the most brilliant appellate advocate. For that reason, including an experienced appellate specialist on your litigation team from the beginning is a wise decision. If you do not associate with appellate counsel to consult throughout the litigation of a case, your role in preserving the record becomes even more crucial. What follows are key moments to watch for potential preservation of error problems:

In the first responsive pleading.

- Be sure to include all defenses available under Rule 12(b), especially the defenses of lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service, otherwise they will be waived. Ala. R. Civ. P. 12(h).

In the answer.

- Affirmative defenses must be pled in the answer, or in a proper amendment to the answer, otherwise they will be waived. *Regions Bank v. Reed*, --- So. 3d ----, 2010 WL 3798553, at *13 (Ala. Sept. 30, 2010).

In motions for summary judgment.

- Motions for summary judgment must include specific references to the evidence in the record and the arguments advanced in favor of or in opposition to summary judgment. *Horn v. Fadal Machinery Ctrs., LLC*, 972 So. 2d 63, 70 (Ala. 2007).
- Remember, while an appellee may defend the trial court's ruling based upon *any* valid ground, an appellant can only argue error based upon the grounds it adequately raised before the trial court. *Pavillion Development, LLC v. JBJ Partnership*, 979 So. 2d 24, 42 (Ala. 2007).

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In motions in limine, motions to strike, and other objections to evidence.

- To preserve arguments related to the admissibility of evidence, you must object *and* obtain a ruling on the objection.
- Motions in limine are an important part of preserving error related to the admissibility of evidence. Be aware, however, that motions in limine are not enough if the other party seeks to introduce the evidence at trial, despite any rulings to the contrary on your motion in limine. If the other party offers the evidence at trial, you must object contemporaneously, state your reasons, and obtain a ruling to properly preserve any error for appellate review. *Baldwin County Electric Membership Corp. v. City of Fairhope*, 999 So. 2d 448 (Ala. 2008).
- If the trial court sustains an objection to evidence that you offer, you must put an offer of proof on the record to preserve any argument for appellate review. *Thompson v. Patton*, 6 So. 3d 1129, 1138 (Ala. 2008).

In motions for judgment as a matter of law.

- To be able to argue on appeal that there was insufficient evidence, you must move for judgment as a matter of law at the close of all evidence, and the motion must raise insufficiency of the evidence. *Patterson v. Liberty Nat'l Life Ins. Co.*, 903 So. 2d 769, 774 (Ala. 2004).

In relation to jury instructions.

- To be able to assign error regarding the giving of or the failure to give certain jury instructions, or the giving of improper instructions, you must object before the jury retires. Ala. R. Civ. P. 51.
- To properly preserve an argument that the evidence did not raise a jury question, a party must move for judgment as a matter of law. A challenge to the correctness of the jury charges is neither required nor sufficient to preserve this argument. *Cook's Pest Control, Inc. v. Rebar*, 28 So. 3d 716 (Ala. 2009).

In post-judgment motions.

- To be able to argue on appeal that there was insufficient evidence, you must renew your motion for judgment as a matter of law post-judgment, and the motion must raise the same insufficiency of the evidence arguments as your original motion. *Skerlick v. Gainey*, 42 So. 3d 1288 (Ala. Civ. App. 2010); *Patterson v. Liberty Nat'l Life Ins. Co.*, 903 So. 2d 769 (Ala. 2004).
    - *Compare Robertson v. Gaddy Electrict & Plumbing LLC*, --- So. 3d ----, 2010 WL 1424022 (Ala. Apr. 9, 2010) (holding that a party against whom a motion for judgment as a matter of law is entered need not raise the sufficiency of the evidence argument in a renewed motion for judgment as a matter of law).

In preparing the record on appeal.

- The record on appeal is the appellant's responsibility. The appellate court will presume that the trial court acted correctly unless the record makes apparent any alleged error. Ala. R. App. P. 10.

In nonjury trials.

- Generally, a party must argue the sufficiency of the evidence in a Rule 50 motion for judgment as a matter of law at the close of the evidence to preserve the issue for appeal. Alabama Rule of Civil Procedure 52 provides an exemption from this requirement when written findings of fact are made.

    - Parties may move under Rule 52(b) to amend these findings of fact. Rule 52(b) states that objections to the findings of fact are not required in nonjury trials to challenge the sufficiency of the evidence.
- However, when the trial court has made *no* written findings of fact in a nonjury trial, a party must move for a new trial in order to preserve the sufficiency of the evidence question for appellate review. *Compare New Properties, LLC v. Stewart*, 905 So. 2d 797 (Ala. 2004), *with Adams v. Adams*, 21 So. 3d 1247 (Ala. Civ. App. 2009) (acknowledging that where a trial court makes written findings of fact, Rule 52(b) controls and *New Properties* is inapplicable: a party need not object to the findings of fact to preserve the issue for appellate review).

In general.

- The appellate courts will not review an argument not presented to the trial court. *Maloof v. John Hancock Life Ins. Co.*, --- So. 3d ----, 2010 WL 3797979 (Ala. Sept. 30, 2010); s*ee also Prescott v. Prescott* (Ala. Civ. App. 2008) ("[T]he [appellant] had the opportunity to bring this issue to the trial court's attention by filing a postjudgment motion but failed to do so. Because the [appellant] failed to file a postjudgment motion and raises this argument for the first time on appeal, we cannot consider this argument.").
    - Remember that a trial court has discretion to consider a new legal argument in a post-judgment motion. *Woodruff v. Woodruff*, 23 So. 3d 1149 (Ala. Civ. App. 2009). It is better to present arguments for the first time in a post-judgment motion than on appeal, because the trial court may consider it; the appellate court will not.

## II. APPELLATE REVIEW

### A. FINAL JUDGMENTS

With limited exceptions, an appeal can be taken only from the entry of a final judgment. Ala. Code § 12-22-2. What constitutes a final judgment may seem simple, but in fact it can be difficult to determine.

As you might expect, an order adjudicating fewer than all of the claims is not a final judgment. *Lloyd v. Cook*, --- So. 3d ----, 2010 WL 3075280 (Ala. Civ. App. Aug. 6, 2010). The title of the order is not important. If a trial court enters an order labeled as a final judgment, but the order does not fully dispose of all claims or fully declare the rights of the parties, the judgment is not a final judgment from which an appeal may be taken. *Alfa Mutual Ins. Co. v. Bone*, 13 So. 3d 369 (Ala. 2009); *Hall v. Reynolds*, --- So. 3d ----, 2009 WL 1716912 (Ala. June 19, 2009). By the same token, a judgment that conclusively determines the issues before the trial court, even if not labeled "Final Judgment," will support an appeal.

Just as an order is judged by its substance and not its label, so too is a motion judged by its content and not its label. For example, the denial of a motion to dismiss ordinarily is not an appealable final judgment. However, where a motion to dismiss argues that a plaintiff must submit its claims to arbitration, the motion is effectively a motion to compel arbitration. The denial of a substantive motion to compel arbitration, even if titled "Motion to Dismiss," is appealable. *Ex parte Directory Assistants, Inc.*, --- So. 3d ----, 2009 WL 4110528 (Ala. Nov. 25, 2009).

Similarly, dismissals without prejudice typically do not constitute appealable final judgments. However, a dismissal without prejudice can support an appeal if the issues before the trial court are conclusively determined. *J.J. v. J.B.*, 30 So. 3d 453 (Ala. Civ. App. 2009).

To confuse matters further, the trial court's failure to address every issue before it does not necessarily render a judgment non-final. For example, in issuing a summary judgment, the trial court's failure to assess attorney fees will not necessarily render the judgment non-final, because attorney fees can be collateral to a judgment. *Gonzalez, LLC v. DiVincenti*, 844 So. 2d 1196, 1201 (Ala. 2002). Likewise, failure to tax costs and fees, where a judgment otherwise conclusively determines all issues before the court, will not delay the finality of the judgment. *Liberty Mutual Ins. Co. v. Greenway Enters., Inc.*, 23 So. 3d 52 (Ala. Civ. App. 2009); Ala. R. App. P. 58(c).

Determining when a judgment is final is particularly difficult in cases that are consolidated. For purposes of appeal, there is a procedural difference between claims separated for trial under Rule 42(b) and claims severed for separate trial under Rule 21. If claims are separated for trial under Rule 42(b), all claims must be tried before the trial court can enter a final judgment. Judgments following separate trials for claims severed under Rule 21 can be final judgments, though other claims that were severed may remain pending. *New Acton Coal Mining Co. v. Woods*, --- So. 3d ----, 2010 WL 1424020 (Ala. Apr. 9, 2010); *Hamilton v. CSC Distribution, Inc.*, (Ala. Civ. App. 2008).

### B. ORDERS CERTIFIED UNDER RULE 54(B)

A trial court may certify as final certain partial judgments that resolve some, but not all, of the claims in a case. Ala. R. Civ. P. 54(b). Rule 54(b) certification is only effective if the trial court's order expressly states that "there is no just reason for delay" and that judgment should be entered. Without these "magic words," the certification is not effective; for that reason, quoting from Rule 54(b) in your proposed orders is advisable. If the Rule 54(b) certification order does not contain the requisite language, the appellate court may remand the case for the trial court to make the necessary determinations.

Regardless of the language used in the certification order, keep in mind that Rule 54(b) certification is not available if the claims to be certified are so closely intertwined with the remaining claims that separate adjudication would pose an unreasonable risk of inconsistent results. As a result, Rule 54(b) certification seems to be effective only if the order fully adjudicates one claim or fully disposes of all the claims as they relate to at least one party. *Certain Underwriters at Lloyd's v. S. Natural Gas Co.*, 939 So. 2d 21, 28 (Ala. 2006).

### C. INTERLOCUTORY ORDERS

Alabama Rule of Appellate Procedure 4 allows for appeals from certain interlocutory orders including:

- Appeals from interlocutory orders granting, continuing, dissolving, or modifying an injunction
- Appeals from orders granting or denying motions to compel arbitration
- Appeals from interlocutory orders appointing or refusing to appoint a receiver
- Appeals from interlocutory orders determine the right to public office

Other interlocutory orders that will support an appeal include:

- Appeal from an order denying a petition to intervene as of right. *Mutual Assurance, Inc. v. Chancey*, 781 So. 2d 172, 174 (Ala. 2000).
- Appeal from order granting or denying class certification. Ala. Code § 6-5-642.
- Appeal from order granting or denying a motion for new trial. Ala. Code § 12-22-10.
    - Where the trial court grants a party's alternative motion for new trial, an order denying that party's primary motion for judgment as a matter of law is appealable. *John Crane-Houdaille, Inc. v. Lucas*, 534 So. 2d 1070 (Ala. 1988).

The deadline for filing an appeal from an interlocutory order depends on the kind of order appealed. An appellant has the usual 42 days to file a notice of appeal from orders granting or denying a motion for new trial, a motion to certify a class action, a motion to intervene, orders qualifying for Rule 54(b) certification, and orders related to partial or annual settlements of estates. Ala. R. App. P. 4(a)(1); Ala. Code § 6-5-642. An appellant has only 14 days to file a notice of appeal from orders related to injunctions, the appointment of a receiver, the right to public office, bond validations, and other orders that qualify for permissive appeal under Alabama Rule of Appellate Procedure 5. Ala. R. App. P. 4(a)(1); Ala. R. App. P. 5(a)(2).

## III. WHO CAN APPEAL

In general, only a party prejudiced or aggrieved by a judgment has standing to appeal. *Alcazar Shrine Temple v. Montgomery County Sheriff's Dept.*, 868 So. 2d 1093, 1094 (Ala. 2003). In some circumstances, a verdict winner may file an appeal. For example, if the verdict loser files a renewed motion for judgment as a matter of law, and the trial court grants the motion, the verdict winner may appeal. Note that when a trial court fails to rule on the verdict loser's alternative motion for new trial, the verdict winner must raise on appeal the trial court's failure to enter a conditional ruling on the alternative motion. Otherwise, the verdict winner will waive the right to a new trial in the event the judgment as a matter of law is reversed. *Housing Auth. of Birmingham Dist. v. Pritchett*, 927 So. 2d 825, 831 (Ala. 2005).

If a timely notice of appeal is filed by any party, any other party may file a notice of appeal within 14 days of that notice, or within the original time for appeal, whichever is later. Ala. R. App. P. 4. Failure of a party to take a cross appeal as to an adverse aspect of the judgment that was not included as an issue on appeal by the appellant generally will foreclose appellate consideration of the aspect of the judgment as to which no appeal was taken. *Hitt v. State of Alabama Personnel Bd.*, 873 So. 2d 1080, 1088 (Ala. 2003).

Cross appeals are not necessary to assert arguments for affirming the trial court's ruling. An appellee may offer any argument that is supported by the record when seeking an affirmance, whether the argument was ignored by the court below or flatly rejected. *Henderson v. MeadWestvaco Corp.*, 23 So. 3d 625, 626 n.1 (Ala. 2009).

A cross appeal is necessary if the appellee seeks to attack the judgment of the trial court with the intention of either enlarging his own rights thereunder or lessening the rights of his adversary. *Special Assets, L.L.C. v. Chase Home Finance, L.L.C.*, 991 So. 2d 668, 679-80 (Ala. 2007). An appellee may only assert "any argument supported by the record" if his argument is in *support* of the trial court's judgment.

## IV. THE "WHEN, WHERE, AND HOW"

### A. WHEN TO APPEAL

Alabama Rule of Appellate Procedure 4

- In most cases, the appellant has 42 days from the entry of the judgment to file a notice of appeal.
- In some cases, the appellant has only 14 days from the entry of the judgment to file a notice of appeal:
    - Appeals from interlocutory orders related to injunctions
    - Appeals from interlocutory orders appointing/refusing to appoint a receiver
    - Appeals from interlocutory orders determining the right to public office
    - Appeals from final judgments issued by a juvenile court
- In other cases, the time for filing an appeal is statutorily defined.

Regardless of which deadline applies in your case, the important thing to remember is that the filing of a timely notice of appeal is a jurisdictional act. *Williamson v. Fourth Ave. Supermarket, Inc.*, 12 So. 3d 1200, 1202-04 (Ala. 2009). There is a very limited ability to obtain a 30-day extension for the filing of a notice of appeal, but the extension is rarely available.

In calculating the deadline to file an appeal, keep in mind that certain actions toll the time for filing the notice of appeal. To suspend the time for filing a notice of appeal, a Rule 59 motion to alter must be filed within 30 days of the judgment. *Rhodes v. Fulmer*, 12 So. 3d 1239 (Ala. Civ. App. 2009). Other post-judgment motions that can toll the time for filing an appeal are motions under Rules 50, 52, and 55. Ala. R. App. P. 4(a).

However, a Rule 60 motion for relief does not toll the time for taking an appeal. *Id.* Additionally, a trial court's sua sponte entry of a corrected order pursuant to Rule 60(a) does not affect the deadline for filing an appeal, because a "change to a judgment to correct a clerical error" under Rule 60(a) "relates back to the date of the entry of the final judgment." *Barnes v. HMB, LLC*, 24 So. 3d 460 (Ala. Civ. App. 2009). In other words, the notice of appeal is due within 42 days of the entry of the original order, not the entry of a Rule 60 amendment to the order.

Likewise, a motion for post-judgment stay under Rule 62 does not suspend the time for filing a notice of appeal. *Graves v. Golthy*, 21 So. 3d 720 (Ala. 2009).

Timely filed post-judgment motions are deemed denied by operation of law after 90 days. Ala. R. Civ. P. 59.1. Careful attention to this potential calendaring trap is required, because a notice of appeal must be filed within 42 days of a denial by operation of law to vest jurisdiction in the appellate court. *Liberty Mutual Ins. Co. v. Greenway Enters., Inc.*, 23 So. 3d 52 (Ala. Civ. App. 2009). The 42-day timeframe shall begin to run on the date of the Rule 59.1 denial by operation of law. *Williamson v. Fourth Ave. Supermarket, Inc.*, 12 So. 3d 1200, 1202-04 (Ala. 2009). In other words, the time for filing a notice of appeal begins to run on the 90th day following the filing of a post-judgment motion, absent a valid extension of the 90-day period. *Id.*

Keep in mind that Rule 60 motions are not subject to "denial by operation of law" under Rule 59.1. The trial court must rule on the Rule 60 motion, otherwise there will not be a final order for purposes of appeal. *Rhodes v. Rhodes*, 38 So. 3d 54 (Ala. Civ. App. 2009).

Corresponding deadlines in juvenile court are much shorter. In juvenile court, post-judgment motions are due within 14 days of the entry of the order. Post-judgment motions in juvenile court are deemed denied by operation of law after 14 days, pursuant to Alabama Rule of Juvenile Procedure 1(B). The notice of appeal must be filed within 14 days of the court's denial of the post-judgment motion (whether ruled upon or denied by operation of law). *R.J.G. v. S.S.W.*, 42 So. 3d 747 (Ala. Civ. App. 2009), *cert. denied Ex parte R.J.G.*, 42 So. 3d 754 (Ala. 2010).

### B. Where to File an Appeal

The notice of appeal is filed in the trial court. Ala. R. App. P. 3. However, technical defects in the filing of the notice do not necessarily render the notice of appeal ineffective. For example, in *Whorton v. Bruce*, 17 So. 3d 661 (Ala. Civ. App. 2009), a party mistakenly filed a notice of appeal in the district court rather than the circuit court. The party also failed to use Form 1. Nevertheless, the court deemed the notice of appeal effective and timely, because it contained all of the information required by law and the district court where it was filed shared the same clerk with the circuit court.

### C. How to File an Appeal

To file an appeal, a party must file a notice of appeal with the trial court. The notice must specify the party or parties taking the appeal, the judgment or order appealed from, and the court to which the appeal is taken. Ala. R. App. P. 3. When an appellant wishes to appeal as to multiple parties, the notice of appeal also must include the name of each appellee. *Veteto v. Swanson Servs. Corp.*, 886 So. 2d 756 (Ala. 2003). With the notice of appeal, the appellant should include a docketing statement, the filing fee, a transcript purchase order, and security for the costs on appeal. Ala. R. App. P. 3, 7, 12, & 35A.

The appellant may also post a supersedeas bond to stay execution of the judgment pending appeal. Rule 62 only provides for a 30-day automatic stay of the judgment. To secure a stay for the duration of the appeal, the party against whom the judgment was entered must post a supersedeas bond in the amount of 125% of the judgment (150% if the judgment is $10,000 or less) and have the bond approved by the clerk of the trial court. Ala. R. Civ. P. 62; Ala. R. App. P. 8.

## V. Petition for Extraordinary Writs

### A. Timeframe to File a Petition

The presumptively reasonable timeframe in which to file a petition for writ of mandamus or prohibition is 42 days. A petition filed outside this presumptively reasonable time must include a statement of circumstances constituting good cause for the appellate court to consider the petition. If the petition does not contain such a statement, it will be dismissed. *Ex parte Hoyt*, 984 So. 2d 424, 425-26 (Ala. Civ. App. 2007).

Remember that a motion to reconsider an *interlocutory order* does not toll the presumptively reasonable time period that a party has to file a petition for writ of mandamus, unlike a *post-judgment* motion to alter. *Id.* Filing a petition for permission to appeal under Rule 5 does not toll the presumptively reasonable timeframe for filing a petition either. *Ex parte Pelham Tank Lines, Inc.*, 898 So. 2d 733, 735 (Ala. 2004).

### B. How to Petition for Extraordinary Writs

A petition for a writ of mandamus must include, as attachments, the evidentiary basis required for the appellate court to make a ruling. Failure to attach all relevant and necessary documents to a petition for writ of mandamus will result in the denial of the petition. *Ex parte Allianz Ins. Co. of N. Am.* (Ala. 2008). When considering what to attach, take note of the appellate court's standard of review. Attaching copies of *pleadings* will not be enough to support the issuance of a writ if the appellate court needs to consider *facts in evidence* to make its determination. *Ex parte Bank of America, N.A.*, 39 So. 3d 113, 119 (Ala. 2009).

### C. When an Extraordinary Writ is Appropriate

Mandamus review of a pre-trial ruling on a motion in limine regarding evidence is not appropriate. A trial court's evidentiary rulings are reviewed for abuse of discretion, and abuse of discretion does not constitute grounds for invoking mandamus proceedings *Ex parte King*, 23 So. 3d 777 (Ala. 2009). Therefore, appellate review of a discovery order by mandamus generally will be available only in exceptional cases, such as, *e.g.*:

- when a privilege is disregarded;
- when a discovery order compels the production of patently irrelevant or duplicative documents;
- when the trial court imposes sanctions or denies discovery, effectively all but determining the outcome such that the petitioner merely would be going through the motions of a trial to obtain an appeal;
- when the trial court impermissibly prevents the petitioner from making a record on the discovery issue so that the appellate court cannot review the effect of the trial court's alleged error.

*Ex parte Carlisle*, --- So. 3d ----, 2009 WL 1875566 (Ala. June 30, 2009).

Note that a timely filed motion for protective order is a jurisdictional prerequisite to mandamus review of an order compelling discovery. *Ex parte The Terminix Int'l Co.*, --- So. 2d ----, 2009 WL 130103 (Ala. Jan. 16, 2009).

In a narrow class of cases involving fictitious parties and the relation-back doctrine, an appeal is not an adequate remedy to review the defense that a claim is barred by the statute of limitations. A petition for writ of mandamus is appropriate in those situations. *Ex parte Nationwide Ins. Co.*, 991 So. 2d 1287 (Ala. 2008).

## VI. Specific Procedures for Appealing Arbitration Awards

Under newly amended rules of civil and appellate procedure, the process for appealing arbitration awards has been clarified:

Alabama Rule of Civil Procedure 71B

- Within 30 days of the arbitration award, file a notice of appeal, with a copy of the award signed by the arbitrator and any record or supporting documents, in the circuit court
- Clerk will enter the arbitration award as the final judgment of the court
- Any party opposed to the award must then file a Rule 59 motion to set aside or vacate
    - A Rule 59 motion is a condition precedent to further review by any appellate court

Alabama Rule of Appellate Procedure 4(e)

- Within 42 days of the order granting or denying the Rule 59 motion, a party may appeal as a matter of right

The Alabama Supreme Court has followed the lead of the U.S. Supreme Court in holding that "manifest disregard for the law" is not a proper ground by which an arbitration award can be challenged where the arbitration was held pursuant to the Federal Arbitration Act. *Hereford v. D.R. Horton, Inc.*, 13 So. 3d 375 (Ala. 2009). *See also Hall St. Assocs., LLC v. Mattel, Inc.*, 128 S. Ct. 1396 (2008).

## VII. THE RECORD ON APPEAL

Within 7 days of filing the notice of appeal, the appellant must file with the clerk of the trial court a written designation of the portions of the clerk's record that should be included in the record on appeal. Ala. R. App. P. 10. The appellee then has 7 days to designate any additional portions of the record he deems necessary. *Id.* Also within 7 days of filing the notice of appeal, the appellant must complete a transcript purchase order and pay the estimated cost of the transcript to the court reporter. *Id.*

The trial court clerk has 28 days to assemble the clerk's record. The trial court may grant the clerk two 7-day extensions for the completion of the clerk's record. The clerk may seek further extensions from the appellate court. Ala. R. App. P. 11. The court reporter has 56 days to complete the transcript. *Id.* The trial court may grant the court reporter four 7-day extensions for the completion of the transcript. The court reporter may seek further extensions from the appellate court. *Id.* Within 7 days after the completed transcript is filed, the clerk of the trial court must compile the entire record on appeal, including both the clerk's record and the reporter's transcript, and file a certificate of completion with the appellate court. *Id.* This certificate of completion initiates the briefing schedule. *Id.*

The appellant has the burden of offering the appellate court a record sufficient to support a reversal. *Fluker v. Wolff*, --- So. 3d ----, 2010 WL 996527, at *7 (Mar. 19, 2010). An incomplete record may be supplemented pursuant to Alabama Rule of Appellate Procedure 10. Note that when oral testimony is considered by the trial court but is not in the record on appeal, the appellate court will presume that the evidence was sufficient to support the judgment of the trial court. *Cockrell v. Cockrell*, 40 So. 3d 712 (Ala. Civ. App. 2009).

## VIII. BRIEFS

The appellant's brief is due 28 days after the certificate of completion of the record. Ala. R. App. P. 31(a). The appellee's response is due 21 days after the appellant files its principal brief. *Id.* The appellant's response brief is due 14 days after the appellee files its response. *Id.* Each party may request one 7-day extension pursuant to Rule 27, and additional extensions may be available by motion.

The appellant's initial brief must contain: a statement regarding oral argument, a table of contents, a statement of jurisdiction, a table of authorities, a statement of the case, a statement of the issue(s), a statement of the facts, a statement of the standard(s) of review, a summary of the argument, the argument, a conclusion, and a certificate of service. Ala. R. App. P. 28. The appellee's

response must include these same items, except for a statement of the jurisdiction, a statement of the case, a statement of the issues, a statement of the facts, and a statement of the standard of review. *Id.* The appellee may (and usually does) include these items if it is dissatisfied with those statements as made by the appellant. Any reply brief must contain a table of contents, table of authorities, summary of the argument, argument, and certificate of service. *Id.*

Briefs should be double-spaced and typed in 13-point Courier New font. Ala. R. App. P. 32(a)(7). The appellant's initial brief and the appellee's response should not exceed 70 pages each. Ala. R. App. P. 28(j). Any reply brief should not exceed 35 pages. *Id.* Page limitations apply to all portions of the brief beginning with the statement of the case and ending with the conclusion. *Id.* The cover of the appellant's brief should be blue, the cover of the appellee's response should be red, and the cover of the appellant's reply should be grey. Ala. R. App. P. 28(d).

The record on appeal will consist of the clerk's record and the court reporter's transcript. In drafting the briefs, any references to the clerk's record should be followed by citations to that record: (C. ___); references to the reporter's transcript should be followed by citations to the transcript: (R. ___). Ala. R. App. P. 28(g).

An appellant's failure to cite relevant legal authority or reference to materials outside the record will justify an appellate court's affirming the trial court's judgment without further consideration. *Roberts v. NASCO Equip. Co.*, 986 So. 2d 379 (Ala. 2007). The appellate courts will not consider any inadequate arguments raised in a brief, such as one that is supported only by three sentences that cite no legal authority. *Nance v. Southerland*, --- So. 3d ----, 2010 WL 334545 (Ala. Civ. App. Jan. 29, 2010).

## IX. ORAL ARGUMENT

Oral argument is granted only in a small number of cases. When the appellate courts do grant oral argument, often they will limit the scope of issues to be addressed during the oral argument. In the event oral argument is granted, remember that preparation is key. Each side will have only 30 minutes to present arguments, and the appellant, who argues first, may reserve some of that time for rebuttal arguments.

## X. AFTER THE OPINION IS ISSUED

The average number of days between the assignment of a case and the release of a decision for the Alabama Supreme Court's 2010 term was 98 days for certiorari petitions and 171 days for original appeal. From start to finish, certiorari petitions remained pending for an average of 111 days, and original appeals remained pending for 377 days.

After the opinion is issued, a party dissatisfied with the court's decision may have two options for further relief:

Applications for Rehearing

- Applications for rehearing are due within 14 days of the issuance of the court's opinion. Applications should not raise new arguments, nor should they rehash arguments raised in the principal briefs. The application may not exceed 15 pages, and it should state with particularity the points of law or the facts the applicant believes the court overlooked or misapprehended. Ala. R. App. P. 40.

    - If you wish to correct the facts as stated in the court's opinion, you must include a statement of proposed additional or corrected facts in the application. Otherwise, the court will assume that you agree with the facts as stated by the court. Ala. R. App. P. 40(e).
- A party may file a brief in opposition to an application for rehearing within 14 days of the application. Ala. R. App. P. 40(f).
- Where a party applying for rehearing merely repeats the arguments made in the principal submissions, the court will deny rehearing. *G.P. v. Houston County Dept. of Human Resources*, 42 So. 3d 112 (Ala. Civ. App. 2009).

Petitions for a Writ of Certiorari

- Pursuant to Alabama Rule of Appellate Procedure 39, petitions for a writ of certiorari are due within 14 days of the lower appellate court's decision (or within 14 days of the court's order on any application for rehearing). Review by cert petition is discretionary, and the Supreme Court will only consider granting a cert petition in one of the following five circumstances:
    - The initial decision construes the validity of a statute or constitutional provision
    - The initial decision affects a class of constitutional, state, or county officers
    - The initial decision involves a question of first impression
    - The initial decision conflicts with precedent
    - The initial decision followed precedent that the petitioner seeks to overturn
- Cert petitions may not exceed 15 pages.
- A party opposed to the cert petition may not file any brief in opposition until so ordered by the Supreme Court.

Once an opinion is issued, the case (or a portion thereof) may be remanded to the trial court for further proceedings. Even if the opinion resolves the case, you may still have matters to resolve to fully wrap up the case.

The appellate court will issue the certificate of judgment 18 days after the entry of judgment, unless the time is shortened or enlarged by order of the court. Timely filed applications for rehearing or petitions for writ of certiorari will stay the issuance of the certificate of judgment. Once issued, the losing party must satisfy the judgment, including post-judgment interest, and release the surety and supersedeas bond.

## XI. APPELLATE MEDIATION

Pursuant to Alabama Rule of Appellate Procedure 55 and Alabama Rules of Appellate Mediation 1 through 9, all civil matters in which the parties are represented by counsel are eligible for appellate mediation. Administrators in the appellate mediation office screen every case, based upon the information in the notice of appeal and docketing statement, for suitability. If this initial screening indicates that the case may be suitable for appellate mediation, the appellate mediation office sends the parties mediation screening forms to obtain further information. At that point, the appellate court will order that preparation of the record be stayed and the case is placed on the mediation office's docket.

Each party must then complete a mediation case-screening form, which asks if the case was mediated at the trial level and whether issues not raised in the notice of appeal will also be raised. The appellant also must submit a copy of the docketing statement, the complaint and any amendments, the order or judgment appealed from, and any post-judgment motions and orders. Each party must also complete a confidential mediation statement, which, unlike the case-screening form, is not served upon the other party.

Based upon this information, the appellate mediation office evaluates whether the case should proceed to appellate mediation or be returned to the court's active docket. If the case proceeds to mediation, the appeal deadlines are stayed for 63 days plus any extensions requested by the mediator or the parties. All aspects of appellate mediation are confidential and handled separately by the appellate mediation office.