UNDERSTANDING THE ALABAMA RULES OF APPELLATE PROCEDURE

Presented by the Clerk's Office of the
Supreme Court of Alabama

I. Appellate practice begins in the trial court

A. Ensure all errors and other issues are adequately preserved to allow for appellate review.

B. There must be a final judgment disposing of all claims against all parties or another order, such as a 54(b) order, capable of supporting an appeal for a case to be considered by an appellate court. Make sure you account for the status of every party and claim within the lawsuit at the time a notice of appeal is filed, or else a show cause order will be sent asking you to demonstrate why your appeal is from a final judgment. Also note that if the issues in claims being appealed under a 54(b) order are so closely intertwined with claims still pending below that a separate adjudication of the claims would pose an unreasonable risk of inconsistent results, a 54(b) order is inappropriate. See Highlands of Lay, LLC v. Murphee, 101 So.3d 206, 208 (Ala. 2012).

C. Appeals must be timely filed with the trial clerk to vest an appellate court with jurisdiction. Parties should meticulously track deadlines for post-judgment motions and the like. If you don't have to wait for the 14th or 42nd day, don't!

II. Initial considerations

A. Read, understand, and comply with the most current rules of appellate procedure; watch for changes in rules and in cases that apply and explain appellate rules, procedure, and jurisdiction. For a current version of the Alabama Rules of Appellate Procedure, go to alacourt.gov and choose the "Law Library" tab. Then choose "Rules of Court" from "Quick links."

B. The filing of a Notice of Appeal and Docketing Statement is mandatory. Rule 3(e). The Docketing Statement provides an overview of the case that is used in determining jurisdiction and the possibility of referral to mediation. Specifically identifying

every party involved in the appeal will help avoid problems with identifying which parties are truly involved in an appeal. Each separate case number requires a separate Notice of Appeal and Docketing Statement, even if the cases are consolidated.

C. Every Record on Appeal is checked by the Clerk's Office. The parties may be ordered to respond to a show-cause order explaining the problem or deficiency (e.g., a post-judgment motion and/or ruling does not appear in the record filed with the appellate court).

D. The appellant is responsible for seeing that the Record on Appeal is certified and filed with the appellate court. Counsel for the appellant should maintain tracking with trial court clerk's office because notice will not issue from the appellate court unless and until the record is late. Court reporters and clerks may seek extensions, but a completed record must be filed within 84 days of the filing of the Notice of Appeal. Rule 11(c). If a case is remanded and appealed again, the previous Record on Appeal is not automatically included in the new case; a party must file a motion to incorporate the previous record.

E. The appellate filing system (ACIS) is a completely different system from Alafile. ACIS is not intended to, and does not, provide service of documents to all parties. For more information about ACIS or for help overcoming any electronic filing problems, call (334) 229-0500.

F. The Alabama Supreme Court's Appellate Mediation Program is one of the top in the country, with a 51% success rate. The mediation office is separate from the Court and from the Clerk's Office. Parties are notified of the possibility of referral to mediation and are provided a copy of mediation procedures. Mediation is absolutely confidential. Once an appeal has been ordered to mediation and is pending on the mediation docket, participation in mediation is mandatory, and mediation deadlines and procedures are strictly enforced.

G. All pleadings filed with the Supreme Court are checked by the Clerk's office for compliance with, and correction under, the Appellate Rules. The Clerk's office will notify a party of any deficiencies which require correction before a pleading may be accepted and submitted to the Court. The correction of a deficiency will not render a timely-filed pleading untimely; however, it will affect the date a pleading is submitted to the court and may affect the deadline of subsequent filings. See Rule 32(c)(5).

III. General Requirements - Rules 25, 25A, 32, and 57

A. All documents must be filed in Courier New 13 and this applies to all portions of the filing, including footnotes. Rule 32(a)(7).

B. All filings must be double-spaced. Quotations from legal authorities may be single-spaced, but only up to 25 lines. Quotations from the record or statutes, and footnotes in their entirety, may be single-spaced without limitation. Rule 32(a)(6).

C. Rule 32(b) discusses some miscellaneous requirements for filings brought under other rules.

D. Signatures and Service

1. All filings must be signed twice: once for the filing itself under Rule 25A and a second time as part of the certificate of service under Rule 25(d). An electronic signature is valid only for electronically filed documents. Rule 57(f).

2. All filings must be served either through personal service, U.S. Mail, third-party commercial carrier, or by electronic mail. Rule 25(c).

3. The certificate of service must provide who was served, when they were served, how they were served, and where they were served (either physical address, mailing address, or e-mail address, as appropriate). Rule 25(d) and Rule

57(h)(5). The appellate court filing system (ACIS) **DOES NOT** provide valid service of filings, and filing the document with Alafile does not constitute proper appellate service either.

4. Service on other parties must be made in a manner at least as expeditious as the manner used to file the document with the Court. Rule 25(c).

IV. Briefing the appeal - Rules 28 and 31

A. An understanding of the current appellate rules is crucial to proper briefing. The Clerk's Office is available to help answer any questions attorneys have about the rules. 334-229-0700.

B. In cases involving multiple parties, a party may join in another parties' brief. Rule 28(k). This should be done by filing a notice or motion alerting the Court of a party's desire to join in the brief. This rule does not apply to other filings (e.g., petitions for writ of mandamus).

C. Briefing for cross-appeals consists of four briefs: the Appellant's brief (due within 28 days of the circuit clerk's certification), the Appellee/Cross-Appellant's brief (due within 21 days of the Appellant's brief), the Appellant's reply brief/Cross-Appellee's brief (due within 21 days of the Appellee's brief), and the Cross-Appellant's reply brief (due within 14 days of the Appellant's reply). Rule 28(i).

D. The Appellant's brief is due within 28 days of when the clerk issues a certificate of completion of the record on appeal, **NOT** when the Appellant receives a copy of the record. Rule 31(a).

E. Extensions must be requested on written motion. Rule 31(d). Requests for extensions beyond seven days, or second requests for extensions are disfavored absent extraordinary good cause. As per Court policy, extensions will not be granted once a brief is past-due. If a brief is not timely filed,

a party may file it with a motion requesting the Court accept it as timely filed. Extensions should be requested as soon as the need for an extension is realized, but if an extension must be sought near the brief's due date, a phone call to the Clerk's Office is helpful to alert the Court to the time sensitive nature of the extension request.

V. Petitions for Writ of Certiorari - Rule 39

A. Certiorari petitions are generally only considered if there are important reasons for certiorari review and the petition demonstrates the issue falls into one of the categories enumerated in Rule 39(a). Counsel should clearly state which category their petition concerns: the validity of an ordinance or statute, a constitutional issue, an issue of first impression, a conflict with existing precedent, or to overrule controlling Supreme Court caselaw.

PRACTICE NOTE: Grounds cited most often are "first impression" and "conflict." In each instance, carefully quote the relevant section of the opinion below that is challenged and explain precisely why the Supreme Court should grant certiorari. If you can’t identify specifically and with particularity the conflict or issue, you probably don’t have proper grounds for a cert petition; expect a denial.

B. For review of decisions of the Court of Criminal Appeals, an application for rehearing, except in two instances, must be filed and overruled below before certiorari review may be sought in the Supreme Court. This step, however, is optional for petitions seeking review of decisions made by the Court of Civil Appeals. See Rules 39(b)(1) and 39(c)(1). Certiorari petitions must include the opinion or unpublished memorandum being challenged and a copy of any orders or notices issued on the application for rehearing, if one was filed with the court of appeals. Rule 39(d)(4).

C. Briefs cannot be submitted by any party unless the Court orders briefing. Rule 39(b)(4) and Rule 39(c)(3).

D. Certiorari petitions, except for certain capital cases, must be filed within 14 days of the court of appeals' decision (or within 7 days when the petition arises from a pretrial appeal by the state). Rule 39(b)(3) and Rule 39(c)(2). Under the Appellate Rules the Supreme Court is explicitly forbidden from extending the 14 day deadline for filing a certiorari petition, with the exception of certain cases wherein the death penalty has been imposed, so watch your filing deadlines, because there is no way to fix an untimely filed petition. See Rule 2(b).

E. A certiorari petition is limited to 15 pages and must contain: 1) a cover containing the style of the case, name of petitioner, and case numbers from both the trial court and appeals court below; 2) the date of release of the decision below for which review is being sought (as well as the date any application for rehearing was overruled); 3) a concise statement of the grounds upon which the petition is being sought; 4) copies of the opinion or unpublished memorandum below (and the order overruling an application for rehearing, if one was sought) as exhibits; and, 5) an argument which amplifies the grounds upon which the writ is being sought. See Rule 39(d).

F. Be aware a certiorari petition must have attached to it copies of the opinion or unpublished memorandum below and the order overruling an application for rehearing, if one was sought. Rule 39(d)(4) (effective 08/2015).

The Court can only review the facts contained in the court of appeals's decision unless the petitioner provides a separate statement of facts. Rule 39(k). If rehearing was sought from the court of appeals, the statement of facts provided in the application for rehearing must be copied verbatim in the certiorari petition and verified by counsel if the court of appeals did not rely on those facts. Rule 39(d)(5)(A) & (B). Any statement of facts may be attached to the petition; if provided as an attachment, these pages are not counted against the 15-page limitation. Rule 39(d)(5). Providing a

copy of the application for rehearing filed with the court of appeals does not satisfy these requirements.

G. The appropriate court of appeals must be served with a copy of the petition for writ of certiorari. Rule 39(e).

H. Certain certiorari petitions involving the death penalty may enjoy special provisions. However, these provisions only apply to petitions arising from the direct appeal from a death sentence, and not from decisions on petitions brought under Rule 32, Ala. R. Crim. P. Any request for extensions on page length and/or filing deadlines in these types of cases should be made as soon as possible to insure that counsel has a definitive answer on requested extensions well before the 14-day filing deadline arrives.

I. If a certiorari petition is denied, quashed, or stricken, no application for rehearing on that ruling is permitted under the Appellate Rules. See Rule 39(l).

VI. Petitions for Writs of Mandamus - Rule 21

A. Mandamus relief is very limited in scope and only available to challenge actions brought in the wrong court, actions involving the wrong parties, certain discovery rulings, and erroneous decisions where there is a compelling reason not to wait for an appeal. Ex parte U.S. Bank Nat. Ass'n, 148 So. 3d 1060, 1064-65 (Ala. 2014).

B. Mandamus petitions must be brought within a "reasonable time" from the order being challenged. The time for bringing an appeal of the underlying action is generally considered a presumptively reasonable time to bring a mandamus petition. However, even a petition filed within that time period can be found untimely if it causes prejudice to a party and/or affects the trial court's administration of the litigation. A mandamus petition filed outside of the presumptively reasonable time period may be considered by the

appellate court if it contains a statement providing good cause for the delay in bringing the petition. Rule 21(a)(3).

C. The appendix to a mandamus petition is the only record the Court will consider. The appendix must contain the order challenged and all other parts of the record essential to understanding the issues presented. Each document in the appendix must be tabbed. Rule 21(a)(1)(E). Failing to provide all necessary documents will result in the denial of a mandamus petition. *See* Ex parte M & F Bank, 58 So. 3d 111, 117 (Ala. 2010) (because petitioner did not include copies of the motion or its responses, the Court could not determine whether the arguments presented were considered by the trial court and thus could not grant mandamus relief).

D. Review of a court of appeals' decision on a mandamus petition can be had in the Supreme Court either as a new mandamus petition or as a certiorari petition. If the losing party requests rehearing with the court of appeals, the Supreme Court will review the matter only as a certiorari petition. If rehearing is not sought, *de novo* review can be had if a new mandamus petition is filed with the Supreme Court within 14 days. Rule 21(e).

E. Filings in opposition to mandamus petitions are required to be filed only if the Court calls for briefing on the petition. Rule 21(b).

F. The judge whose order is being challenged is a party to the mandamus proceedings and thus should be served and may file his/her own response. Rule 21(a)(1) and Rule 21(b).

VII. Petitions for Permission to Appeal - Rule 5

A. There are times when an interlocutory appeal may be appropriate in a civil case; such appeals are governed by Rule 5, Ala. R. App. P., and involve questions of law which have the potential to materially alter, or perhaps even end, a case. Under Rule 5(a)(1), a trial judge must certify the issue sought to be appealed within twenty-eight (28) days

of the interlocutory order which is the subject of the appeal, and under Rule 5(a)(2) the parties have fourteen (14) days from the trial court's certification of the issue to file a petition for a permissive appeal with the Supreme Court. A trial judge should certify for an interlocutory order for an appeal when that order "involves a controlling question of law as to which there is substantial ground for difference of opinion, [and when] an immediate appeal from the order would materially advance the ultimate termination of the litigation and ... would avoid protracted and expensive litigation." Precision Gear Co. v. Continental Motors, Inc., 135 So.3d 953, 956 (Ala. 2013).

B. It should be noted that issues which present questions of fact are generally inappropriate subjects for a permissive appeal, and the Supreme Court is limited to the issue presented as it is set out by the trial court, so it is important to present the issue in a clear and precise manner. If the issue is vaguely worded, or fails to indicate the difference in opinion between the parties in a manner which is easily understandable, it is likely the Supreme Court will deny the petition. For an example of a recent successful permissive appeal, see ENT Associates of Alabama v. Hoke, — So.3d — , Ms. 1141396 (Ala. 2016).

VIII. Motion Practice - Rule 27

A. There is no strict protocol for consideration of motions. Parties opposing motions generally have seven days to file a response. Procedural motions, however, may be acted on at any time without awaiting a response. Rule 27(a) and Rule 27(b). Counsel who wish to respond to such a motion should alert the Clerk's Office via telephone of said intention, and file the response as quickly as possible.

B. Motions cannot exceed 10 pages. Motions may be supported by a memorandum of up to 15 pages, however. Rule 27(d).

C. Motions to supplement the Record on Appeal and

motions for a stay of trial court proceedings must first be filed with the trial court. Rule 8(b), Rule 10(f), and Rule 10(g). These motions do not stay the briefing schedule.

D. Motions seeking to extend the page limitations of briefs are strongly disfavored and must be the product of extraordinary circumstances. Such motions must be filed at least seven days prior to the day the brief is due. Rule 28(j)(3). If such a request must be made, counsel should endeavor to seek the smallest amount of extra pages as possible and to provide good cause for the request.

E. Motions seeking to suspend the rules brought under Rule 2(b) must be substantially supported and demonstrate good cause.

F. Motions requesting emergency relief are not precluded by the rules. However, the Court typically only provides emergency relief if the motion is well-supported and brought without any unnecessary delay. Emergency motions are **never** guaranteed to be addressed in the time frame requested by the movant. Counsel who procrastinate in filing such motions, and then request a quick response time from the Court once the motion is filed, do so at their client's peril. Paper copies of emergency motions and their accompanying materials must also be delivered to the Court before an emergency motion can be circulated.

G. Motions must be filed together with an appeal or mandamus or in an appeal already docketed for the Court to have jurisdiction to address it.

IX. Specific/anecdotal areas of concern

A. There is currently no provision authorizing the electronic filing of notices of appeal. See, e.g., Ala. Dept of Revenue v. Frederick, 166 So. 3d 123 (Ala. Civ. App. 2014).

B. The Clerk's office personnel cannot explain why the appellate court ruled as it did, what the ruling means legally, why the appellate court has yet to

rule upon a pending matter, or when the appellate court will issue a ruling in a particular case.

C. Do not expect an immediate ruling on a motion or petition filed at the "eleventh hour." This includes motions for extension of time.

D. Read Clerk's Office notices and Court orders carefully. They often modify pertinent rules and deadlines. Do not ever assume!

E. Briefs of amicus curiae must be accompanied by a motion and are only accepted if that motion is granted. See Rule 29.

F. In cases involving juveniles or sensitive information, review Rule 52 and Rule 56 before filing a Notice of Appeal. Records of the appellate courts are generally public, and the appropriate steps may need to be taken to prevent the public disclosure of certain types of information.

G. The Clerk's Office is a resource for attorneys. If you have any questions about the Appellate Rules or Court procedures, we are happy to help. Our main number is 334-229-0700.