

## Special Contribution

# Open Chambers: Demystifying the Inner Workings and Culture of the Georgia Court of Appeals

by **Stephen Louis A. Dillard\***

I vividly remember the day I learned of my appointment to the Georgia Court of Appeals. I was sitting in my cluttered but comfortable office, preparing for what would ultimately be my last hearing as a lawyer, when the phone rang. On the other end of the line was

---

\* Judge, Court of Appeals of Georgia. Samford University (B.A. 1992); Mississippi College School of Law (J.D., cum laude, 1996). Member, State Bar of Georgia. I am grateful to my friends and colleagues Justice Keith Blackwell and Judges Michael Boggs, Lisa Branch, Sara Doyle, Christopher McFadden, Carla McMillian, and Billy Ray for their thoughtful comments on earlier drafts of this essay. I also would like to thank my staff attorneys, P. Robert Elzey, Tiffani Z. Moody, and Tiffany D. Gardner, as well as Michael B. Terry and Grace Mann, for their invaluable feedback and helpful suggestions. I also want to offer my sincere gratitude to Terry Jones, my administrative assistant, for her encouragement and support throughout this process and for everything she does to make my chambers run as smoothly as possible. Finally, I am eternally grateful for the patience and loving support of my wife (Krista) and children (Jackson, Lindley, and Mary Margaret) in this endeavor, as well as in everything I do in my capacity as a judge.

Governor Sonny Perdue's executive assistant: "Mr. Dillard, do you have time to speak with the governor?" I did, of course. And less than two weeks after that brief but life-changing conversation with Governor Perdue, I was one of Georgia's two newly appointed appellate judges (and the seventy-third judge to serve on the court of appeals since 1906).<sup>1</sup>

Almost four years have passed now, and during that time a great deal has changed at the court of appeals. Indeed, after spending less than two months as the junior judge, five additional judges were either elected or appointed to the court in just over two years.<sup>2</sup> In other words, half of the court (six of twelve judges) turned over in a very short period of time; this has undeniably impacted the nature and personality of the court in a number of ways. But one constant remains: Much of what we do as appellate judges on the court of appeals is shrouded in mystery. I am not entirely certain why this is the case. It could be that the culture of the court over the years has been for the judges to be fairly tight-lipped about our internal operating procedures. It may also have something to do with the fact that Georgia's appellate courts have a practice of hiring permanent staff attorneys, and thus, unlike the federal judiciary, we do not send a wave of law clerks out into the workforce every year with "insider knowledge." But regardless of the reasons for its enigmatic character, my hope is that this Article will begin the process of demystifying some of the inner workings of Georgia's intermediate appellate court.

This Article, then, is distinctly personal in nature. Suffice it to say, my perspective of the internal operations of the court of appeals discussed herein is just that, mine and mine alone. And while I am certainly hopeful that the insights and observations I offer prove to be of some use to the bench and bar, they should in no way be understood as being universally accepted or endorsed by my distinguished colleagues. The reader should also understand that this Article is not intended to be academic or comprehensive in nature. It is meant to give practical advice to lawyers who regularly appear before the court of appeals on unique aspects of the court's internal operations, or, at the

---

1. The other judge appointed that day was my friend and colleague, Justice Keith R. Blackwell, who was later appointed by Governor Nathan Deal to the Georgia Supreme Court on June 25, 2012. GEORGIA SUPREME COURT, <http://www.gasupreme.us/biographies/blackwell.php> (Last visited June 10, 2014).

2. Judge Christopher J. McFadden was elected to the court of appeals in November 2010 for a term beginning on January 1, 2011. Governor Nathan Deal then appointed Judge Michael P. Boggs (Jan. 6, 2012), Judge William M. Ray (July 30, 2012), Judge Elizabeth "Lisa" L. Branch (Sept. 4, 2012), and Judge Carla Wong McMillian (Jan. 24, 2013) to the court.

2014]

OPEN CHAMBERS

833

very least, provide practitioners with a useful perspective on certain practices from the viewpoint of a sitting appellate judge.

I. THE COURT OF APPEALS CASELOAD, THE TWO-TERM RULE,  
AND “DISTRESS”

It has been said before, but it bears repeating: The Georgia Court of Appeals is one of the (if not the) busiest intermediate appellate courts in the United States,<sup>3</sup> and the court’s considerable caseload<sup>4</sup> is only exacerbated by the two-term rule mandated by the Georgia Constitution, which requires that “[t]he Supreme Court and the Court of Appeals shall dispose of every case at the term for which it is entered on the court’s docket for hearing or at the next term.”<sup>5</sup> This constitutional rule “imposes strict and (almost) immutable deadlines upon the merits decisions of [Georgia’s appellate courts],”<sup>6</sup> and the Draconian remedy for the failure to abide by this rule is “the affirmance of the lower court’s judgment by operation of law”<sup>7</sup> (something that has never occurred in the history of Georgia’s appellate courts). It should come as no surprise, then, that many of the court’s operations are reflected to some degree by the intense pressure placed upon the judges and staff by an extremely large caseload and the two-term rule. For example:

- Unlike many appellate courts, the court of appeals randomly and immediately assigns each case docketed to a judge for purposes of authoring the opinion.

---

3. See CHRISTOPHER J. MCFADDEN ET AL., *GEORGIA APPELLATE PRACTICE WITH FORMS* 25-26 (2013-14) (“The record makes clear that both Georgia appellate courts regularly remain in the top four state supreme and intermediate appellate courts in opinion load . . . .”); MICHAEL B. TERRY, *GEORGIA APPEALS: PRACTICE AND PROCEDURE WITH FORMS* 11 (2014) (“The Court of Appeals of Georgia has been for years and remains the busiest intermediate appellate court in the country, with more cases per judge than any other.”); J.D. SMITH, *HOW TO WIN/LOSE YOUR CASE IN THE GEORGIA COURT OF APPEALS: KNOWING HOW THE COURT DOES ITS WORK CAN MAKE THE DIFFERENCE* 4 (11th Annual General Practice & Trial Institute, Mar. 15-17, 2012) (noting that the court of appeals caseload, “by many measures, is the largest of any appellate court in the country, and in terms of published opinions per judge, it is unquestionably the largest”).

4. In 2012, each of the court of appeals twelve judges handled 289 filings, the bulk of which were direct appeals. See *COURT OF APPEALS OF GEORGIA*, <http://www.gaappeals.us/stats/index.php> (last visited June 10, 2014).

5. GA. CONST. art. VI, § 9, para. 2.

6. See TERRY, *supra* note 3, at 29.

7. *In re Singh*, 276 Ga. 288, 290 n.3, 576 S.E.2d 899, 901 n.3 (2003).

- There is no *formal* conferencing between the judges,<sup>8</sup> regardless of whether a case is scheduled for oral argument.
- Oral argument is entirely discretionary,<sup>9</sup> is only granted in about one-third of the cases in which it is actually requested by the parties, will rarely be rescheduled due to personal or professional conflicts,<sup>10</sup> and is not permitted for “whole court” cases<sup>11</sup> or “applications or motions.”<sup>12</sup>
- There are strict time limits for oral argument, strict page limits for appellate briefs,<sup>13</sup> and strict deadlines for filing motions for reconsideration, interlocutory applications and responses, and responses to discretionary applications.<sup>14</sup>

---

8. There is, however, a considerable amount of *informal* conferencing that goes on between the judges. See ALSTON & BIRD, LLP, GEORGIA APPELLATE PRACTICE HANDBOOK 147 (7th ed. 2012) (“Unlike the Supreme Court, the Court of Appeals does not hold regular decisional bancs. Informal bancs do occur, however.”).

9. See CT. APPEALS R. 28(a)(1) (“Unless expressly ordered by the Court, oral argument is never mandatory and argument may be submitted by briefs only.”).

10. See CT. APPEALS R. 28(c) (“Postponements of oral argument are not favored, and no postponement shall be granted under any circumstances that would allow oral argument to take place during a term of the Court subsequent to the term for which the case was docketed.”).

11. See O.C.G.A. § 15-3-1(c)(3) (2012) (noting that oral argument shall not be held in seven-judge or twelve-judge cases).

12. CT. APPEALS R. 28(a)(1); see also CT. APPEALS R. 37(h) (disallowing oral argument on motions for reconsideration); CT. APPEALS R. 44(c) (disallowing oral argument on motions to recuse).

13. See CT. APPEALS R. 24(f) (“Briefs and responsive briefs shall be limited to 30 pages in civil cases and 50 pages in criminal cases including exhibits and appendices, except upon written motion directed to the Clerk and approved by the Court. Appellant’s reply brief shall be limited to 15 pages.”).

14. See CT. APPEALS R. 4(e) (“Any other provision of these rules notwithstanding, a motion for reconsideration shall be deemed filed only on the date on which it is physically received in the office of the Clerk. See Rule 37.”); CT. APPEALS R. 16 (c) (“No extension of time shall be granted to file an interlocutory application or a response thereto. An extension of time may be granted pursuant to [CT. APPEALS R. 31(g)] to file a discretionary application, but no extension of time may be granted for filing a response to such application.”); CT. APPEALS R. 32(a) (“An application for interlocutory appeal shall be filed in this Court within 10 days of the entry of the trial court’s order granting the certificate for immediate review.”); CT. APPEALS R. 32(b) (“An application for discretionary appeal shall be filed in this Court generally within 30 days of the date of the entry of the trial court’s order being appealed.”); CT. APPEALS R. 37(b) (“Motions for reconsideration shall be filed within 10 days from the rendition of the judgment or dismissal . . . . No extension of time shall be granted except for providential cause on written motion made before the expiration of 10 days. No response to a motion for reconsideration is required, but any party wishing to respond must do so expeditiously.”); CT. APPEALS R. 37(d) (“No party shall file a second motion for reconsideration unless permitted by order of the Court. 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 intent to apply for certiorari with the Supreme Court of

- The court frequently remands a case when there has been a significant delay in transmitting the transcript or some other part of the appellate record.<sup>15</sup>
- The court is often unable to hold or delay consideration of a case involving an issue under consideration by the Georgia Supreme Court or the United States Supreme Court.
- The court is often unable to give multiple extensions of time to file an appellate brief.
- The court is often unable to hold a case when there are ongoing mediation or settlement efforts.<sup>16</sup>
- Cases that are ultimately considered by a seven-judge or twelve-judge “whole court” (discussed *infra*) are not re-briefed or re-argued, and the parties are not informed that their case has moved beyond the consideration of the initial three-judge panel until the court’s opinion is published.
- During the final month of a term (which, as explained *infra*, the court refers to internally as “Distress”),<sup>17</sup> the judges are extremely focused on circulating their colleagues’ cases and are often unable to spend as much time as they would like reviewing those cases (while still spending as much time as is needed to thoughtfully consider the merits of each case).
- In the rare cases in which the judgment line “flips” after a motion for reconsideration has been filed and granted, the losing party may be

---

Georgia.”).

15. See CT. APPEALS R. 11(d) (“Any case docketed prior to the entire record coming to the Court, as requested by the parties, may be remanded to the trial court until such time as the record is so prepared and delivered to the Court.”); *cf.* *Rodriguez v. State*, 321 Ga. App. 619, 627, 746 S.E.2d 366, 372 (2013) (Dillard, J., dissenting) (noting that “our constitutional duty to resolve this appeal today—and thus within two terms of docketing—places time constraints upon the reconsideration of this case that also warrant vacating and remanding to the trial court”).

16. See *TERRY*, *supra* note 3, at 32-33 (“Another example of the courts ‘working around’ the Two Term Rule involves settlements reached during the appeal of cases of types requiring trial court approval of any settlement. This would include, for example, cases where one party is a minor, cases involving estates, and class actions. If a settlement requiring trial court approval is reached while the case is pending in the appellate court, the court generally will not stay the appeal to await trial court approval . . . . The appellate court may, however, dismiss the appeal with leave to re-appeal if the trial court fails to approve the settlement.”).

17. See *ALSTON & BIRD, LLP*, *supra* note 8, at 148 (“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.”).

effectively deprived of the opportunity to file a motion for reconsideration from this revised decision.<sup>18</sup>

The internal pressures placed upon the court of appeals by the two-term rule culminate three times a year with the constitutional deadlines for the January, April, and September terms. Indeed, while the court remains busy year-round, things get especially hectic the month before these deadlines—a time period we refer to as “Distress.” Any opinion that circulates during this period is embossed with the attention-getting “DISTRESS” stamp in bright red ink, and is addressed immediately by the judges charged with considering the merits of that case. As my colleague, Judge John J. Ellington, is fond of saying, “Distress brings with it great clarity”; and this is absolutely true. Our Distress period seems to fly by, and there is simply no delaying the inevitable. The judges have to make a decision in each Distress case by the deadline, whether we like it or not. And in most cases, the two-term rule works perfectly and (no doubt) as intended. But in a handful of cases each term, I am reminded (sometimes in rather stark terms) that the tremendous efficiency brought about by the two-term rule<sup>19</sup> can come at a steep price in especially complex cases that—notwithstanding every effort to resolve those cases at an earlier time—are decided during the waning days of Distress. Thus, while I am a strong supporter of the two-term rule, I also firmly believe that litigants are not well served when judges do not have the time they need to thoughtfully reflect upon the merits of an appeal decided during Distress. My hope is that a constitutionally permissible means of addressing this problem will be identified and implemented in the near future.

What lawyers should take away from the foregoing discussion, then, is that the court of appeals continually operates under enormous internal pressures, and that it is absolutely crucial for practitioners appearing before the court to expend a considerable amount of time and effort preparing their appellate briefs and oral-argument presentations with these pressures in mind.

---

18. See *Rodriguez*, 321 Ga. App. at 627 n.20, 746 S.E.2d at 372 n.20 (Dillard, J., dissenting) (“In referencing the time constraints placed upon the Court in this case, I am not only referring to the limited amount of time that many members of the Court had to consider the complex issues presented by this appeal, but also to the fact that our decision to adopt this new, substituted opinion precludes Rodriguez from filing a motion for reconsideration.”).

19. See TERRY, *supra* note 3, at 35 (“On the positive side, the Two Term Rule keeps the courts from falling behind. It imposes discipline and efficiency. It keeps the litigation process moving. It introduces an element of predictability into the timing of judicial decisions that is lacking in other jurisdictions.”).

## II. BRIEFING TIPS

A great deal of ink has been spilled in recent years offering lawyers advice on crafting the perfect appellate brief, and I will refrain from rehashing these important but all-too-familiar pointers in this essay.<sup>20</sup> Instead, I will offer just a few suggestions to lawyers who regularly submit briefs to the court of appeals.

First, consider giving the court a roadmap of your argument at the outset of the brief. Specifically, I strongly recommend including a “Summary of Argument” section, even though our rules do not currently require it.<sup>21</sup> I am constantly amazed at how many times I read briefs that only get to the heart of the argument after spending ten to fifteen pages recounting largely unimportant background information and procedural history. Get to the point quickly. You do not want our judges and staff attorneys reading and re-reading your brief in an attempt to figure out the basis of your client’s appeal, especially given the severe time constraints placed upon the court by its heavy docket and the aforementioned two-term rule.

Second, and I cannot emphasize this enough, be generous and absolutely precise with your record and legal citations. The quickest way to sabotage your appeal is to fail to substantiate legal arguments or key factual or procedural assertions. Court of Appeals Rule 25(a)<sup>22</sup> requires that appellant’s brief, among other things, “contain a succinct and accurate statement of . . . 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,” as well as the “argument and citation of authorities,” and that “[r]ecord and transcript citations shall be to the volume or part of the record or transcript and the page numbers that appear on the appellate record or transcript as sent from the trial court.”<sup>23</sup> And when an appellant fails to support an enumeration of error in its brief by (1) citation of authority or argument, or (2)

---

20. While there are many excellent books and essays on the art of brief writing, I highly recommend ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (2008).

21. *Id.* at 97 (noting that many judges “consider the Summary of Argument indispensable—indeed, the most important part of the brief”).

22. CT. APPEALS R. 25(a).

23. *Id.*; see also CT. APPEALS R. 25(b)(1) (requiring the appellee to “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,” and noting that “[f]ailure to do so shall constitute consent to a decision based on the appellant’s statement of facts,” and that “[e]xcept as controverted, appellant’s statement of facts may be accepted by this Court as true”).

specific reference to the record or transcript, “the Court will not search for or consider such enumeration,” which “may be deemed abandoned.”<sup>24</sup>

Finally, lawyers who regularly practice before Georgia’s appellate court need to understand the significant impact that the court of appeals “physical precedent” rule has on our state’s body of jurisprudence,<sup>25</sup> and briefs to our court should specifically identify these precedents when they are used to support an argument.

A physical precedent of the court of appeals is neither binding on the state’s trial courts nor on the court of appeals itself, but the opinion is instead merely persuasive authority.<sup>26</sup> Typically, a published opinion becomes a “physical precedent” when an opinion of a three-judge panel<sup>27</sup> includes a “concurrence in the judgment only,”<sup>28</sup> which is referred to internally as a “JO,” or “a special concurrence without a statement of agreement with all that is said [in the majority opinion].”<sup>29</sup> As to the former, it is not always readily apparent that a published opinion includes a concurrence in judgment only by one of the three panel members. This is because the majority of concurrences in judgment only are done without an opinion, so the only way an attorney

---

24. CT. APPEALS R. 25(c)(2); *see also* Woods v. Hall, 315 Ga. App. 93, 95, 726 S.E.2d 596, 598 (2012) (noting that even pro se litigants are required to comply with Court of Appeals Rule 25(c)(2)); Johnson v. State, 313 Ga. App. 895, 897 n.8, 723 S.E.2d 100, 105 n.8 (2012) (noting that the court of appeals will not cull the record on a party’s behalf); Nelson v. Bd. of Regents of Univ. Sys. of Ga., 307 Ga. App. 220, 226 n.22, 704 S.E.2d 868, 874 n.22 (2010) (noting that because “plaintiffs’ arguments do not address the substantive merits of the trial court’s decision . . . those claims are deemed to be abandoned”).

25. *See* Eugene Volokh, *Supermajority Rules for Court Opinions, and “Physical Precedent,”* VOLOKH CONSPIRACY (July 13, 2011, 2:53 PM), <http://www.volokh.com/2011/07/13/supermajority-rules-for-court-opinions-and-physical-precedent/> (“Georgia seems to be one of the few American jurisdictions that requires a supermajority on a court to reach a binding decision—if the three-judge panel splits 2-1, the case must either be reheard by a larger court (if the one judge is in the dissent) or at least will lack full precedential value (if the one judge concurs only in the judgment).”).

26. Chaparral Boats, Inc. v. Heath, 269 Ga. App. 339, 349-50, 606 S.E.2d 567, 575 (2004) (Barnes, J., concurring specially) (noting that a physical precedent “may be cited as persuasive authority, just as foreign case law or learned treatises may be persuasive, but it is not binding law for any other case”).

27. *See* O.C.G.A. § 15-3-1(b) (2012) (“The court shall sit in divisions composed of three Judges in each division.”).

28. *See* Ga. Farm Bureaus Mut. Ins. Co. v. Franks, 320 Ga. App. 131, 137 n.14, 739 S.E.2d 427, 433 n.14 (2013) (“When a panel judge concurs in the judgment only, a case serves as physical precedent only, which is not binding in subsequent cases.”).

29. CT. APPEALS R. 33(a); *see also* Whitfield v. Tequila Mexican Rest. No. 1, Inc., 323 Ga. App. 801, 803 n.2, 748 S.E.2d 281, 285 n.2 (2013) (noting that “[u]nder Court of Appeals Rule 33(a), a special concurrence that does not agree with all that is said renders the opinion to be physical precedent only”).

can identify an opinion as being or including a physical precedent is to read the judgment line (which is easy to overlook).<sup>30</sup> This is why I often write an actual opinion, highlighting my concurrence in judgment only, to make it absolutely clear to the bench and bar that the majority opinion is or includes<sup>31</sup> a physical precedent and is not binding authority.<sup>32</sup> And, as noted *supra*, the only way to tell if a special concurrence triggers the court's physical-precedent rule is to carefully read that concurrence and make sure that it can be reasonably understood as containing a statement of agreement with all that is said in the majority opinion. If no such statement is included, then the opinion (or any identified division of that opinion) is not binding in future cases.<sup>33</sup>

That said, I do not believe that a lawyer should shy away from citing a physical-precedent opinion to our court or the Georgia Supreme Court (especially if you believe that the reasoning contained in that opinion is persuasive), so long as you clearly designate the opinion as being or containing a physical precedent.<sup>34</sup> Indeed, at least some of my col-

---

30. See, e.g., *Jones v. Morris*, 325 Ga. App. 65, 70, 752 S.E.2d 99, 103 (2013); *Nixon v. Pierce Cnty. Sch. Dist.*, 322 Ga. App. 745, 751, 746 S.E.2d 225, 229 (2013).

31. It is important to keep in mind that many of the opinions published by the court of appeals have separate divisions and that our judges can and often do concur in judgment only as to a specific division (rather than the entire opinion). See, e.g., *Monitronics Int'l, Inc. v. Veasley*, 323 Ga. App. 126, 142, 746 S.E.2d 793, 807 (2013) (Boggs & McMillian, JJ., concurring in judgment only as to Division 2 of the majority opinion).

32. See, e.g., *Felton v. State*, 322 Ga. App. 630, 635-36, 745 S.E.2d 832, 837 (2013) (Dillard, J., concurring in judgment only); *Mauldin v. Mauldin*, 322 Ga. App. 507, 518, 745 S.E.2d 754, 763 (2013) (Dillard, J., concurring in judgment only).

33. In opinions published by a seven-judge or twelve-judge "whole court," there must be a majority of the judges fully concurring in the opinion or any particular division of that opinion for it to be binding precedent in future cases (four judges and seven judges, respectively). See *ALSTON & BIRD, LLP*, *supra* note 8, at 148 ("[W]hen fewer than a majority of the judges sitting as a seven-judge or [twelve]-judge court concur with all that is said in the decision, the decision constitutes a nonbinding 'physical' precedent only.").

34. See, e.g., *Whitfield*, 323 Ga. App. at 803 n.2, 748 S.E.2d at 284 n.2 (adopting the reasoning of a physical precedent because "we find the majority's discussion of an owner or occupier of land's potential liability for criminal acts of third parties to be highly persuasive, particularly in light of the similar fact pattern in this case"), *Muldrow v. State*, 322 Ga. App. 190, 195 n.29, 744 S.E.2d 413, 418 n.29 (2013) ("This is not to say, however, that a party on appeal should shy away from citing physical precedent as persuasive authority. . . . Nevertheless, it is crucial that litigants explicitly designate physical precedent as such, and thoroughly explain why this Court should adopt the reasoning from that particular opinion."). Even the Georgia Supreme Court has recognized and relied upon the physical precedents of our court from time to time. See, e.g., *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 365, 729 S.E.2d 378, 383 (2012) (noting that "there is already persuasive Georgia precedent on this issue," citing a physical precedent of the court of appeals).

leagues (and yours truly) believe that the physical precedents of our court are entitled to a greater degree of consideration and respect than opinions from other jurisdictions.<sup>35</sup> And once a physical precedent has been adopted by a unanimous three-judge panel of our court, by a majority of the judges in a seven-judge or twelve-judge “whole court” decision, or by the supreme court, that precedent then becomes binding authority in future cases.<sup>36</sup>

The foregoing briefing suggestions, of course, only begin to scratch the surface of what is necessary to craft a persuasive, “winning” brief with the court of appeals; but they are, in my view, the most overlooked or least known tips. To put it plainly, a lawyer’s likelihood of success on appeal before our court is largely dependent upon the substance of the appellate brief(s). As my former colleague, Judge J.D. Smith, has rightly and astutely observed, “[t]he Court’s procedures and its institutional culture mean that the brief is almost always far, far more important, [and] far more likely to be outcome-determinative than oral argument.”<sup>37</sup>

### III. ORAL ARGUMENT

Nevertheless, oral argument is of great significance to those lawyers who appear before the court of appeals and plead their client’s case. Indeed, as anyone who regularly practices before our court is well aware, the vast majority of oral-argument requests are denied.<sup>38</sup> Naturally, practitioners assume that this is due to the court’s heavy docket. And while this assumption is perhaps accurate as to a minority of the requests, the bulk of motions for oral argument that I deny are rejected

---

35. *Muldrow*, 322 Ga. App. at 195 n.29, 744 S.E.2d at 418 n.29 (noting that “some of the judges on this Court are of the view that our physical-precedent cases should be afforded greater consideration than decisions from appellate courts in other jurisdictions”).

36. *Johnson v. Butler*, 323 Ga. App. 743, 746 n.13, 748 S.E.2d 111, 113 n.13 (2013) (“Assuming arguendo that [*Tanner v. Golden*, 189 Ga. App. 894, 377 S.E.2d 875 (1989)] is only physical precedent, it is ultimately of no consequence because a subsequent, unanimous panel of this Court fully adopted the reasoning of *Tanner* in [*Troup Cnty. Bd. of Educ. v. Daniel*, 191 Ga. App. 370, 381 S.E.2d 586 (1989)] the opinion noted supra. The District’s contention that Court of Appeals Rule 33(a) precludes a panel of this Court from fully adopting, and thus making fully precedential, a prior physical precedent is wholly without merit.”).

37. SMITH, *supra* note 3, at 8.

38. TERRY, *supra* note 3, at 197 (“The Court of Appeals grants oral argument in only about one third of the cases where a request is received.”).

2014]

## OPEN CHAMBERS

841

because they are either untimely<sup>39</sup> or fail to even remotely comply with Court of Appeals Rule 28(a)(4),<sup>40</sup> which provides that

[a] request shall contain a brief statement describing specifically how 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. Counsel should not assume the brief or the record shall be considered in ruling on the request for oral argument.<sup>41</sup>

Most of the requests we receive, however, entirely disregard the requirements of this rule, averring nothing more than the desire to have oral argument or some generalized assertion that the case is “complex” and that the court will “benefit” from discussing this nondescript complexity with the designated attorneys.<sup>42</sup> These generic requests are ultimately denied for failing to comply with the rule, rather than being denied on the merits.

In contrast, a persuasive request for oral argument draws the judge into the case after the first few sentences. A good appellate practitioner treats a request for oral argument as an opportunity to pique the court’s interest in his client’s story and the issues presented by that case. And while this list is far from exclusive, here are some categories of appeals that, in my view, have a strong likelihood of being granted oral argument:

- A case involving an issue of first impression;
- A case involving conflicting lines of jurisprudence;
- A case presenting an issue with statewide implications;
- A case involving the application of settled legal principles to a novel set of facts;
- A case involving an area of law with very little precedent;
- A case involving an area of law in serious need of clarification.

---

39. See CT. APPEALS R. 28(a)(2) (“A request for oral argument shall be filed within [twenty] days from the date the case is docketed in this Court. An extension of time to file brief and enumeration of errors does not extend the time to request oral argument.”).

40. CT. APPEALS R. 28(a)(4).

41. *Id.* (emphasis added).

42. ALSTON & BIRD, LLP, *supra* note 8, at 118 (“[C]ounsel 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.”).

But the reality is that there is no magic formula for getting your oral argument request granted.<sup>43</sup> All you can do is present your self-contained request<sup>44</sup> in the most compelling manner possible and hope for the best. The good news is that it only takes one judge to grant oral argument,<sup>45</sup> so you have three opportunities to convince the court that your appeal satisfies the dictates of Rule 28(a)(4).<sup>46</sup>

Once oral argument is granted, the case is then placed on the oral-argument calendar (usually several months from the date of the order), and the appeal then recedes to the back of my mind until a few weeks before the argument is held. Then, about two weeks or so in advance, my administrative assistant emails me PDF versions of the briefs filed in the cases set for oral argument, and shortly thereafter I download those briefs to my iPad. I then do a “quick read” of the briefs to estimate the amount of time I need to set aside to adequately prepare for the argument, which on average is about one and one-half to three hours per case (depending on the complexity of the case). And because the authoring judges are assigned prior to the cases being argued, I spend additional time on any cases assigned to me, knowing that in just a few months I will prepare drafts of those opinions for the panel’s consideration.

If I have more than three cases scheduled for oral argument (usually no more than six), my general practice is to spend the entire day before oral argument reading the briefs and relevant authorities, identifying any key issues of concern in each case, and drafting questions for the attorneys at oral argument. On the other hand, if I only have three or fewer cases, then a half-day before oral argument often allows enough time to adequately prepare for the cases being argued. Either way, I do a mini-review of the oral-argument cases the morning of the arguments. I do not want any distractions during this review or before oral

---

43. According to court folklore, one practitioner’s request for oral argument was based entirely on the fact that the copy of the plat at issue in the appeal was impossible to understand unless viewed as a large exhibit and that oral argument was necessary to walk the court through the details of the plat. A quick glance of the record confirmed the truth of this assertion, and the request for oral argument was granted.

44. ALSTON & BIRD, LLP, *supra* note 8, at 118 (“The request for oral argument should be self-contained, and counsel should not assume that the appellate brief will be considered in ruling on the request.”).

45. *Id.* at 119 (“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.”).

46. It should be noted, however, that as a matter of courtesy, a judge who wishes to grant oral argument in a case that he or she is not assigned to author typically confers with the assigned judge before granting oral argument in that case.

argument. Indeed, to the greatest extent possible, I try to be entirely focused on the issues presented by the appeals and the questions that I am interested in discussing with the parties' counsel at oral argument.

And that's exactly what a productive oral argument should be: a discussion. Counsel should reserve the emotion and theatrics for juries. Appellate judges are neither swayed by nor pleased with such tactics.<sup>47</sup> We are there, primarily, to (1) determine whether the trial court committed a reversible legal error (namely, to ensure fair proceedings and uphold the right to a fair trial),<sup>48</sup> and (2) ensure that the law is consistently followed and fairly applied in each case. It is not the role of an appellate court to "micromanage the manner in which a trial court conducts its proceedings."<sup>49</sup> As such, attorneys who spend precious oral-argument time attempting to make an emotional appeal to us, or suggesting that we act as a de novo appellate fact-finder, waste a valuable opportunity to converse with the judges about the merits of their client's case.<sup>50</sup>

Instead, you should be prepared to speak at length with the judges about your and opposing counsel's strongest arguments. Do not prepare a speech ahead of time or read from your brief to the court, and you should fully expect to receive questions from the bench (especially if I am on the panel). A good oral advocate directly answers the judges' questions, concedes arguments that are not outcome determinative (and should be conceded), and knows when to conclude the argument and sit down. And most importantly, an effective appellate practitioner presents his client's arguments in an honest and forthright manner, scrupulously describing the relevant facts and legal authorities to the court.<sup>51</sup>

But does oral argument really matter? Yes, I think it matters greatly at the court of appeals because it can actually have an impact on the

---

47. See, e.g., ALSTON & BIRD, LLP, *supra* note 8, at 219 ("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.").

48. *Id.* at 35 ("Georgia's appellate courts do not sit as fact-finding bodies and generally review appeals for correction of errors of law.").

49. Whorton v. State, 321 Ga. App. 335 n.24, 340, 741 S.E.2d 653, 658 n.24 (2013).

50. CT. APPEALS R. 28(d) provides, *inter alia*, that "[a]rgument is limited to [thirty] minutes for each case," and that each side will be given [fifteen] minutes to argue, "unless by special leave an enlargement of time is granted."

51. For additional advice on presenting an effective oral argument in Georgia's appellate courts, see generally ALSTON & BIRD, LLP, *supra* note 8, at 217-24; TERRY, *supra* note 3, at 205-11.

outcome of the case.<sup>52</sup> To be sure, in many cases, I already have an idea of how the appeal will ultimately be resolved; but in some cases, oral argument causes me to seriously rethink matters. And even when I do not change my mind as to the ultimate judgment line, frequently oral argument will impact the content, reasoning, or scope of the resulting opinion. I almost always learn something new and interesting about the case from the parties' counsel during oral argument. This is because, unlike the federal judiciary, the amount of time spent by the judges and their staff preparing for oral argument is severely constrained by the court's heavy caseload and the two-term rule, as discussed *supra*.

Indeed, when I clerked for Judge Daniel A. Manion of the United States Court of Appeals for the Seventh Circuit, our chambers spent a considerable amount of time on each case prior to oral argument. In addition to Judge Manion's extensive preparations, I would also read the briefs, exhaustively research the relevant issues, examine the entire record, and write a detailed bench memo for each case. Then, the day before oral argument, Judge Manion and I would spend anywhere from five to six hours discussing, among other things, the issues presented by those cases. As such, by the time oral argument occurred, Judge Manion was already prepared to begin drafting an opinion for each case.<sup>53</sup>

In stark contrast, as a judge on the Georgia Court of Appeals, I do almost all of the preparation for oral argument by myself. I do not have the benefit of much (if any) input from my staff attorneys because they are constantly assisting me with draft opinions for the current term and working diligently on my behalf to ensure that the court meets its constitutional deadline for these cases. Thus, while I always strive to be well prepared for oral argument, the reality is that only so much can be done in advance given the current time constraints placed upon the court. And what this means for you, the advocate, is that oral argument is of much greater importance at the court of appeals than in any federal court in which you will ever practice. Indeed, if you are intimately familiar with the record and relevant authorities, you will be in a unique position to educate the court about your case before the judges on the

---

52. For this reason, lawyers should not take too much comfort in (or walk away despondent because of) the questions posed by the judges at oral argument. Until the judges have had an opportunity to fully immerse themselves in the case, it is simply premature to conclude that the case has either been won or lost.

53. Because I believe very strongly in the absolute confidentiality of the judge-law clerk relationship, I received permission from Judge Manion to disclose, in very general terms, the preparations that he and his law clerks go through in preparing for oral argument, as well as the term his clerks use for spading, i.e., "clerkulation". See also *infra* note 59.

2014]

OPEN CHAMBERS

845

panel have made up their minds. So, yes, Virginia, oral argument matters greatly at the court of appeals.

And there are other reasons, entirely unrelated to the merits of an appeal, why holding oral argument on a regular basis is important. For example, the practice of holding oral argument by an appellate court furthers the worthy goal of professionalism in the practice of law. It is absolutely essential for Georgia lawyers to understand how to present a compelling and effective appellate argument, and this simply cannot happen if the court of appeals, which handles approximately eighty-five percent of all appeals in Georgia,<sup>54</sup> does not hold oral argument on a regular basis. Thankfully, Georgia is blessed to have many outstanding appellate practitioners, and I am grateful for the amount of time and effort these lawyers expend in their preparations for oral argument. As Justice David Nahmias of the Georgia Supreme Court has aptly noted, “good oral advocacy improves the quality of Georgia’s appellate courts and the decisions that they issue.”<sup>55</sup>

Finally, oral argument is a vital aspect of the court’s transparency to the people we serve. At least three to four times per month, ten months per year, any citizen can attend our oral arguments and witness their judges in action. And our supreme court now broadcasts live streams of its oral arguments over the Internet and maintains archives of those arguments on its website—a practice I hope the court of appeals will emulate in the very near future. It is absolutely crucial for Georgia’s appellate courts to do everything in their power to educate citizens about the manner in which they operate and the important role that the appellate courts have in the state’s tripartite system of government. And by holding oral argument on a regular basis, Georgia’s appellate courts play an integral role in educating the public in this regard, as well as providing a significant degree of transparency when it comes to the judiciary’s operations.

#### IV. OPINION WRITING

A month or so after oral argument, the most important part of the appellate process begins: the drafting of the appellate opinion. And it is this aspect of my job that garners the greatest interest from lawyers at seminars and bar-related functions. “Do you write your own opinions?” “What tasks do your staff attorneys perform to assist you in drafting opinions?” “Do you conference with the other judges on the panel about

---

54. SMITH, *supra* note 3, at 3 (“[R]oughly 85% of Georgia’s appellate business is handled by the Court of Appeals.”).

55. ALSTON & BIRD, LLP, *supra* note 8, at 217.

your opinions?” These are just a few of the questions lawyers ask about the opinion-writing process, and I hope this essay will offer some degree of insight as to how at least one appellate judge approaches the task of drafting opinions.

So, do I write my own opinions? Yes, I do. To be sure, I have a tremendous amount of assistance in drafting these opinions. Indeed, it would be virtually impossible for me to *publish* approximately sixty-eight opinions per year—which has been my publication rate since joining the court—without any assistance and to have those opinions be of any use to the bench and bar. Thankfully, I have three extremely talented and dedicated staff attorneys who are intimately involved in the opinion-writing process. This process, of course, varies from chambers to chambers, and I am in no way suggesting that my method of opinion writing is superior to that of my colleagues. What follows, then, is simply the process that works best for my chambers.

But at the outset, it is helpful to first understand how cases are assigned to each judge. First, the clerk’s office randomly assigns a proportional share of the court’s cases for each term to the judges via a computer-generated system, or “wheel.”<sup>56</sup> After those assignments are made, every judge’s chambers receives a “yellow sheet” for each case that identifies the parties, the attorneys involved in the appeal, and the trial judge who handled the case below. In my chambers, upon receiving these documents, my administrative assistant immediately and randomly assigns a staff attorney to assist me with these cases in a proportional manner (after any necessary recusals are made). She does this by creating “term sheets” for each staff attorney, which list the assigned case numbers, style of the cases, and status of the cases (that is, not drafted, drafted, circulating, dismissed, withdrawn, transferred, and clerk/publication). And while my assistant is busy making the foregoing arrangements for the upcoming term, the court’s central-staff attorneys are skillfully examining each and every appeal and application to determine whether the jurisdictional requirements have been satisfied.<sup>57</sup> If so, then a purple check mark is placed on the first

---

56. *Id.* at 147 (“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.”).

57. In addition to conducting an initial jurisdictional review of every appeal and application docketed with the court, our central-staff attorneys also assist the judges in reviewing the merits of discretionary and interlocutory applications and occasionally serve

volume of the record to indicate to the judges that the case has passed the *initial* jurisdictional review.<sup>58</sup> If not, then the case is dismissed by the court on jurisdictional grounds.

Each term begins with my administrative assistant retrieving the original briefs and records for all of my cases from the clerk's office and then delivering those documents to the staff attorneys assigned to assist me with those cases. My staff attorneys are then charged with drafting memoranda that summarize the cases assigned to my chambers. This allows me to identify cases that may be more complex in nature and to formulate a game plan for the best way to approach drafting the opinions. In some cases, I may draft the opinion without any initial assistance from the assigned staff attorney. And in other cases (indeed in the majority of cases), I direct the assigned staff attorney to prepare an initial draft of the proposed opinion, which then serves as a starting point or template for my own drafting and review process. But regardless of the manner in which the initial draft opinion is prepared, I personally work through numerous drafts of any opinion before it ever circulates to my colleagues for their consideration.

In preparing an initial rough draft of an opinion, my staff attorney or I will, without exception, perform the following tasks: (1) thoroughly examine the appellate record, (2) carefully and repeatedly read the parties' briefs, (3) copiously outline the parties' arguments, (4) exhaustively research the relevant issues, and (5) extensively cite the relevant parts of the record and applicable legal authorities. This initial draft opinion then goes through a rigorous vetting process that we refer to internally as "spading,"<sup>59</sup> which, in a nutshell, involves the other two staff attorneys mirroring the aforementioned tasks—that is, thoroughly examining the appellate record, carefully reading the parties' briefs, extensively researching the relevant issues, Bluebooking, and the like. This process also often involves extended discussion with my staff

---

as "floating" staff attorneys to the judges (i.e., they temporarily work "in chambers" when one of the judge's staff attorneys is sick or is taking an extended leave).

58. Each judge conducts a separate and distinct jurisdictional review of each appeal and application, and, on occasion, this review results in the dismissal of the case.

59. The origin of "spading" at the court of appeals is a bit of a mystery, but it is a fairly common term that derives from the idea of "digging" into a case. See Darby Dickerson, *Citation Frustrations—and Solutions*, 30 STETSON L. REV. 477, 478 (2000) (referring to "spading" as the "process through which law review members check the substantive accuracy of articles, place citations in the proper form, ensure that cited sources are still good law, and correct grammatical and typographical errors"). At the Seventh Circuit, we referred to this process as "clerkulation," but, regardless of the terminology, it is typical for there to be an in-depth analysis of every case handled in chambers prior to giving that case to the judge for his or her consideration.

attorneys both before and after a draft opinion is produced. Indeed, it is not at all unusual for me to conference with all three of my staff attorneys in particularly difficult cases. This does not happen every day or even every week because many of our cases are fairly straightforward; but, when the issues presented in an appeal are novel or especially complex, I do not hesitate to collaborate with my entire staff.<sup>60</sup>

Throughout the drafting and review process, there are core principles of my judicial philosophy that my staff attorneys employ when providing assistance in each and every case when those principles are applicable. They are aware, in no uncertain terms, that I am an originalist and a textualist with an abiding commitment to (1) adhere to the plain or original meaning of the statutory and constitutional provisions that I am charged with interpreting;<sup>61</sup> (2) faithfully follow and apply the precedents of the Georgia Court of Appeals, the Georgia Supreme Court, and the United States Supreme Court;<sup>62</sup> (3) clarify and stabilize, to the greatest extent possible, the court of appeals case law;<sup>63</sup> and (4) honor the separation-of-powers doctrine by respecting the strict demarcation line between judicial interpretation and legislative policy making.<sup>64</sup> My staff attorneys, then, are guided by these core principles in each opinion with which they assist me in drafting, and these principles are clearly reflected in the opinions I author.

After an initial draft opinion is completed, I go through several levels of review before circulating that final opinion to the other judges on the panel (in order of seniority) for their consideration. Initially, my primary focus is to reconsider whether the judgment line is correct. And

---

60. I also do not hesitate to consult with my colleagues or their staff attorneys if they have previously dealt with or have specialized knowledge in certain areas of law, or if I want a perspective from someone outside of my own chambers. It sounds trite, but there really is a familial-like collegiality at the court of appeals. And while the court's judges may operate as "twelve sovereigns," we all have the same goal—to get it right.

61. *State v. Able*, 321 Ga. App. 632, 636, 742 S.E.2d 149, 152 (2013) (Dillard, J.) ("A judge is charged with interpreting the law in accordance with the original and/or plain meaning of the text at issue (and all that the text fairly implies), as well as with faithfully following the precedents established by higher courts.").

62. *See id.*; *State v. Smith*, 308 Ga. App. 345, 352, 707 S.E.2d 560, 566 (2011) ("[T]he doctrine of stare decisis prohibits this Court from ignoring the valid precedent of a higher court.").

63. *See, e.g., Nelson*, 307 Ga. App. at 225-26, 704 S.E.2d at 873-74 (Dillard, J.) (clarifying language in prior opinion and reconciling that decision with other opinions).

64. *See, e.g., Able*, 321 Ga. App. at 636, 742 S.E.2d at 152 ("Suffice it to say, it is not the role of a judge to 'interpret' constitutional or statutory provisions through the prism of his or her own personal policy preferences."); *see also Colon v. Fulton Cnty.*, 294 Ga. 93, 97, 751 S.E.2d 307, 311 (2013) (citation and punctuation omitted) (noting that "under our system of separation of powers this Court does not have the authority to rewrite statutes").

in all but a small percentage of the cases, I come away from this reading of the opinion with the same view I held after my initial examination of the case. This is because, as noted *supra*, any particularly difficult cases are thoroughly discussed in my chambers and vetted long before I begin my final examination of the draft opinion.

If, for some reason, I do have any lingering questions about the judgment line, I will confer with my staff attorneys to discuss these concerns. This conversation almost always results in my delving even deeper into the research conducted thus far, or in directing a staff attorney to conduct additional research to determine whether my concerns are valid. In rare instances, these discussions and additional work result in a revised judgment line. But in most cases, I conclude that the proposed judgment line is correct, and my attention then turns to the readability, structure, and reasoning of the draft opinion.

My goal is to issue opinions that any person of reasonable intelligence (with no legal background) can understand. I firmly believe that the law should be accessible to the people, not just to a small group of specialists who “speak the language.”<sup>65</sup> That said, I am well aware that my opinions are primarily read by judges and lawyers, and therefore need to be written in a way that provides the bench and bar with as much clarity and stability in our jurisprudence as possible. Thankfully, there are very few cases in which the readability of an opinion must suffer to clearly and precisely analyze the legal issues presented by the appeal.

In addition to the time dedicated to addressing readability and clarity concerns, I also spend a great deal of time immersed in the relevant and applicable case, statutory, and constitutional law cited by the parties in their briefs and those citations included in the draft opinion. It is imperative that I fully understand the legal landscape at issue in the appeal before I can have complete confidence that the reasoning contained in the draft opinion, and for that matter the proposed judgment line, is correct. And to do that, I frequently spend a considerable amount of time analyzing the relevant statutory frameworks (far beyond the specific subsections being relied upon by the parties), re-examining our state and federal constitutions, and tracing jurisprudential lines back to their origin.

My approach to opinion writing is a bit organic. At the risk of sounding like a child of the 1960s, I try to get the “feel” of a case before delving into the merits. This means that in some cases I may follow a

---

65. One of the methods I use to ensure that my opinions “sound” more conversational in nature is to read them aloud. I find that doing this helps me to remove the more formal or stilted language in a draft opinion, as well as identifying areas of the opinion in need of better transition sentences.

more traditional method of review by reading the trial court's order, the parties' briefs in the order they were filed, any relevant record excerpts, and the accompanying case law and statutes, and in other cases I may start the process by reading the appellant's reply brief. It all depends on the particulars or nature of the case before me. I believe there is great value in "mixing things up," as it were, and that using the same analytical approach in every case runs the risk of squelching creative and outside-the-box thinking.

One important decision to be made for each case is whether the opinion will be designated for publication. Indeed, I almost always have a discussion with a staff attorney about the pros and cons of publishing the opinion in question. And the overarching question I ask before recommending that any opinion be published is whether it clarifies, changes, or adds to, in any respect, the existing body of case law. This is because whenever an opinion is published there is always a danger that it will make the law less clear. And for this reason, among others, I strongly believe that appellate judges should be very deliberate and cautious before deciding to publish an opinion.

At the end of the day, each opinion bears my name as author for time immemorial, and, accordingly, I take my duty to provide clarity and stability in our case law very seriously. This is also why I am selective in the opinions I choose to publish.<sup>66</sup> And while I understand that some of my colleagues believe that publishing the overwhelming majority of the court's opinions ensures the greatest amount of transparency, I am convinced that the manner in which the court currently operates—with a considerable case load and the two-term rule—makes it virtually impossible to do so while maintaining a desirable level of quality control. And thus, in my view, the court of appeals publishes far too many cases.<sup>67</sup>

Thankfully, the court of appeals has a means for disposing of more routine appeals without the need to draft a published or unpublished opinion. Court of Appeals Rule 36<sup>68</sup> provides for an "affirmance without opinion" in cases in which:

---

66. An unpublished or "unreported" opinion is "neither a physical nor binding precedent but establishes the law of the case as provided by O.C.G.A. § 9-11-60(h) [(2006)]." CT. APPEALS R. 33(b); *see also* CT. APPEALS R. 34 ("Opinions are reported except as otherwise designated by the Court. The official reports shall list the cases in which opinions were written but not officially reported and shall indicate the authors and participants in the opinions.")

67. *See* RUGGERO J. ALDISERT, *OPINION WRITING* 7 (3d ed. 2012) ("No one, not even the most fervent supporter of publication in every case, can seriously suggest that every one of these cases . . . has precedential or institutional value.")

68. CT. APPEALS R. 36.

1. The evidence supports the judgment;
2. No reversible error of law appears and an opinion would have no precedential value;
3. The judgment of the court below adequately explains the decision; and/or
4. The issues are controlled adversely to the appellant for the reasons and authority given in the appellee's brief.<sup>69</sup>

Rule 36 cases “have no precedential value,” and typically involve a one-page order relying on one or more of the criteria noted above.<sup>70</sup>

In Rule 36 cases, I speak with a staff attorney at the outset of the review, and before any written work is done, about disposing of the appeal in this manner. And if I decide that a Rule 36 “opinion” is appropriate, the staff attorney will then prepare two documents for my—and, ultimately, the other panel members’—consideration: (1) a memorandum explaining why the case is one in which a written opinion is unnecessary and how the designated Rule 36 criteria have been satisfied,<sup>71</sup> and (2) a one-page order outlining the grounds for disposing of the case by way of Rule 36.

After the foregoing documents are prepared, I then read the memorandum, proposed order, and parties’ briefs to ensure that I still agree with this method of handling the case. If so, I reread the proposed memorandum to determine if any revisions are necessary, and I carefully examine the controlling legal authorities. I do not, however, spend significant time worrying about whether the memorandum conveys my “voice” or whether certain passages are particularly eloquent. It is, after all, an internal memorandum that the parties will never see. To put it plainly, a Rule 36 memorandum needs to be substantively accurate, not Shakespearean verse.

With all of that said, parties receiving a Rule 36 opinion should understand that there has, nevertheless, been a great deal of work and consideration by the judges and staff attorneys leading up to that order. And while I certainly understand the frustration many lawyers feel

---

69. *Id.*

70. *See id.*

71. This does not mean that a case disposed of by way of Rule 36 never results in a published opinion. *See, e.g.,* *City of St. Marys v. Brinko*, 324 Ga. App. 417, 422, 750 S.E.2d 726, 729 (2013) (affirming the trial court’s grant of summary judgment to the defendants on certain tort claims in a consolidated appeal pursuant to Ct. APPEALS R. 36); *Lexington Ins. Co. v. Rowland*, 323 Ga. App. 191, 746 S.E.2d 924 (2013) (a published Rule 36 opinion with a dissenting opinion); *Jones v. Forest Lake Vill. Homeowners Ass’n*, 312 Ga. App. 775, 720 S.E.2d 174 (2011) (a published Rule 36 opinion sanctioning the appellant for bringing a frivolous appeal).

when they receive a one-page order, rather than a written opinion, the unfortunate reality is that Rule 36 is a crucial time-management tool for judges in addressing the court of appeals considerable caseload<sup>72</sup> and the always-looming deadlines imposed by the two-term rule.

#### V. CONCURRENCES AND DISSENTS

In addition to the approximately 150 opinions I am assigned to author or dispose of every year, I am also required to carefully examine and consider the merits of approximately 300 opinions or orders drafted by my colleagues on the panel, as well as those that “roll over” to my division as a result of a dissent or are considered en banc. To be sure, most of the opinions issued by our court are not particularly controversial and result in unanimous decisions with full concurrences from the other judges.<sup>73</sup> But occasionally, we do disagree with one another. And when that happens, a judge who takes issue with the proposed opinion has numerous options.

If a judge agrees with the judgment line in a proposed opinion, but not all of the reasoning contained therein, he or she can (1) draft a memorandum to the authoring judge outlining the problems or concerns with the opinion, and identifying any language that needs to be added or omitted in order to obtain the full concurrence of that judge;<sup>74</sup> (2) draft a special concurrence that includes a full concurrence, but which provides additional reasoning for or commentary concerning the court’s decision; (3) draft a special concurrence that does not include a full concurrence (thus making the opinion or any disputed division of the opinion of no precedential value), but outlines entirely separate reasoning for concurring in the judgment line; (4) draft a concurrence dubitante, which is a full concurrence, but one that is done so doubtfully; or (5) simply concur in judgment only with or without a separate opinion, which also renders the opinion of no precedential value.<sup>75</sup> If

---

72. See ALDISERT, *supra* note 67, at 4 (“As courts have gotten busier . . . the pace of opinion publishing has not been able to keep up with the rate of incoming cases.”).

73. ALSTON & BIRD, LLP, *supra* note 8, at 142-43 (“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 . . . The Court of Appeals decides cases with panels of more than three judges only in limited circumstances.”).

74. Occasionally, a judge will simply pen a brief handwritten note to the authoring judge, outlining any areas of concern. These notes are treated no differently than a more formal memorandum and they are circulated along with the file for the other judge or judges’ consideration.

75. There is even one extraordinary occasion in which I published an opinion “concurring dubitante in judgment only,” which means that I had serious doubts in that case about not only the reasoning of the majority opinion but also the judgment line. See

a judge on the original panel joins the special concurrence of another judge, the case is then reassigned to the author of the special concurrence and that concurrence becomes the majority opinion.

If a judge disagrees with the judgment line, he or she may author a dissenting opinion, which will then cause the case to transition to a seven-judge “whole court,” consisting of the original panel members, a backup panel of judges, and the presiding judge of the next division.<sup>76</sup> For example, if a judge on the First Division dissents from an opinion authored by one of the other panel members, the case will then be voted on by all three judges of the First Division, all three judges of the Second Division, and the presiding judge of the Third Division.<sup>77</sup> A majority opinion or dissent will only trigger the consideration of the entire (twelve-judge) court when it seeks to overrule a prior precedent, or when the majority of the original panel of judges or those of a seven-judge “whole court” conclude that the case is of such importance that it warrants en banc consideration (something that rarely happens).<sup>78</sup> If

---

Nalley v. Langdale, 319 Ga. App. 354, 372-73, 734 S.E.2d 908, 922 (2012) (Dillard, J., concurring dubitante in judgment only). This type of concurrence has only been used once in the history of the court of appeals and is affectionately referred to by one of my colleagues as “concurring Dillardtante.” See Alyson M. Palmer, *Judges, Lawyers Mull Possible Changes to State Appeals Court*, FULTON COUNTY DAILY REP., Feb. 13, 2014 (“Dillard said in his concurrence that the two-term rule precluded him ‘from engaging in the type of extended study necessary to achieve a high degree of confidence that my experienced, able colleagues are right.’ McFadden quipped that it was a ‘concurrence Dillardtante,’ adding, ‘if he didn’t pull an all-nighter before he did that, it was pretty darn close.’”).

76. See O.C.G.A. § 15-3-1(c)(1) (“Each division shall hear and determine, independently of the others, the cases assigned to it, except that the division next in line in rotation and a seventh Judge shall participate in the determination of each case in which there is a dissent in the division to which the case was originally assigned.”).

77. The chief judge of the court of appeals, currently the Honorable Herbert E. Phipps, appoints the presiding judges and assigns the remaining judges to serve on one of the court’s four divisions. See O.C.G.A. § 15-3-1(b) (“The court shall sit in divisions composed of three Judges in each division. Two Judges shall constitute a quorum of a division. The assignment of Judges to each division shall be made by the Chief Judge, and the personnel of the divisions shall from time to time be changed in accordance with rules prescribed by the court. The Chief Judge shall designate the Presiding Judges of the divisions and shall, under rules prescribed by the court, distribute the cases among the divisions in such manner as to equalize their work as far as practicable.”).

78. See O.C.G.A. § 15-3-1(c)(2) (“In all cases which involve one or more questions which, in the opinion of the majority of the Judges of the division or of the two divisions plus a seventh Judge to which a case is assigned, should be passed upon by all the members of the court, the questions may be presented to all the members of the court; and if a majority of all the members of the court decide that the question or questions involved should, in their judgment and discretion, be decided by all the members of the court, the case shall be passed upon by all the members of the court, provided that a majority of the Judges

the court sitting en banc considers a case and is “evenly divided” at six-six, the case is then transferred to the Georgia Supreme Court (without the opinion being published).<sup>79</sup>

Unlike the majority opinions I author, I typically draft concurrences and dissents with very little assistance from my staff attorneys. To be sure, I have asked my staff attorneys for their assistance in drafting concurrences and dissents on occasion, and I always confer with one or more of them before any opinion leaves my chambers, but I generally do not confer with my staff attorneys about other judges’ opinions. My intent is to handle as much of the “other judge” work as possible, which allows my staff attorneys to primarily focus on assisting me with the opinions I author.

With all of that said, practitioners should understand that even when the court issues a unanimous decision, the other judges on the panel are always fully engaged in the opinion-writing process. Indeed, there is often a great deal of informal conferencing, exchanging of back-and-forth memoranda, and substantial revisions to the proposed opinion, all of which the parties never see. There are even cases in which the proposed opinion triggers a dissent, is circulated as a seven or twelve-judge decision, and then, after numerous concurrences and dissents are drafted, returns to the original three-judge panel and is issued as a unanimous decision. Those who regularly practice before our court should not assume that the only time the other panel members are fully engaged in another judge’s case (that is, one they are not assigned to author) is when they publish either a concurrence or dissent. I spend a considerable amount of time each term working on opinions authored by my colleagues, and they do likewise.

## VI. INTERLOCUTORY AND DISCRETIONARY APPLICATIONS

As with direct appeals, an application for a discretionary or interlocutory appeal is randomly assigned to a judge by the court’s computer-generated “wheel.” The application is then immediately and randomly assigned to an attorney in central staff to carefully review the application and accompanying materials, conduct any additional and necessary research (time permitting), and draft a memorandum on behalf of the assigned judge recommending the grant or denial of the application. All of this work must be done within a very condensed period of time.

---

passing upon the case concur in the judgment.”).

79. See GA. CONST. art. VI, § 5, para. 5; see also GA. CONST. art. VI, § 5, para. 4 (authorizing the court of appeals to certify questions to the Georgia Supreme Court to aid its decisional process).

Indeed, O.C.G.A. § 5-6-35(f)<sup>80</sup> provides that our court must either grant or deny an application for discretionary appeal within thirty days,<sup>81</sup> and O.C.G.A. § 5-6-34(b)<sup>82</sup> requires that we must either grant or deny an application for interlocutory appeal within 45 days.<sup>83</sup> Suffice it to say, this does not give the central-staff attorneys or judges a significant amount of time to consider the merits of these applications.

A lawyer hoping to have a discretionary or interlocutory application granted, then, needs to understand just how important it is to present a concise and self-contained application to the court. Indeed, regardless of whether you are filing a discretionary or interlocutory application, there are steps you can take to increase your client's chances of receiving the highly sought-after "grant" from our court.

First and foremost, you need to make sure that your application is narrowly tailored to meet the criteria established by our court in its rules. Court of Appeals Rule 30(a)<sup>84</sup> provides that an application for an interlocutory appeal will be granted only when it appears from the documents submitted that:

1. The issue to be decided appears to be dispositive of the case; or
2. 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
3. The establishment of precedent is desirable.<sup>85</sup>

Put another way, is there some compelling reason to stop the proceedings below and have the court of appeals intervene? It is not enough to demonstrate that the trial court erred. An application for interlocutory appeal must show that the trial court erred *and* that there will be unjust consequences resulting from that error unless the court of appeals immediately steps in and corrects it, or, conversely, that judicial-economy concerns warrant granting the application.<sup>86</sup>

Court of Appeals Rule 31(a)<sup>87</sup> provides that an application for discretionary appeal will be granted only when "[r]eversible error appears to exist"<sup>88</sup> or "[t]he establishment of a precedent is desir-

---

80. O.C.G.A. § 5-6-35(f) (2013).

81. *Id.*

82. O.C.G.A. § 5-6-34(b) (2013).

83. *Id.*

84. CT. APPEALS R. 30(a).

85. *Id.*

86. *See generally* O.C.G.A. § 5-6-35.

87. CT. APPEALS R. 31(a).

88. CT. APPEALS R. 31(a)(1).

able.”<sup>89</sup> My colleague, Judge Christopher J. McFadden, takes issue with the nomenclature of applications for “discretionary” appeal, rightly noting in his well-regarded treatise that there is “no discretion to deny an application for ‘discretionary review’ when reversible error appears to exist.”<sup>90</sup>

The other basis for granting an application for discretionary appeal, which is also a ground for granting an application for interlocutory appeal, is when the “establishment of precedent is desirable.”<sup>91</sup> Of course, what is or is not desirable is entirely in the eye of the beholder. As such, lawyers seeking to have an application for discretionary or interlocutory appeal granted need to understand that it will almost certainly be more difficult to receive a grant on this basis, or, at the very least, that there will be greater uncertainty as to the prospect of the application being granted on this ground. Indeed, when I discussed this aspect of the application process with a central-staff attorney, she quipped, “It seems a little cruel to grant an application to establish precedent if you know up front that the outcome is likely to be the same.” To which I responded, “True, but the rule does not say that we will grant an application to establish precedent only when doing so will benefit the appealing party.” An appellate practitioner should be careful, then, not to conflate the “establish precedent” prong with the other, and entirely distinct, prongs of Rules 30(a) and 31(a). It is important to understand that if your application is granted for purposes of establishing precedent, it may not ultimately be to your liking.

That said, I am quite sympathetic to applications for discretionary and interlocutory appeal that declare the need for precedent in a particular area of the law, while candidly acknowledging that the establishment of such precedent may very well result in a loss for the attorney’s client in that particular case. The key question I ask when considering applications requesting the establishment of precedent is whether the case is a good vehicle for addressing the issue. A good practitioner, then, explains

---

89. CT. APPEALS R. 31(a)(2).

90. MCFADDEN, *supra* note 3, at 437-38; *see also* SUP. CT. R. 34 (“An application for leave to appeal a final judgment in cases subject to appeal under O.C.G.A. § 5-6-35 shall be granted when . . . [r]eversible error appears to exist. . . .”); PHF II Buckhead LLC v. Dinku, 315 Ga. App. 76, 79, 726 S.E.2d 569, 572 (2012) (“Thus, in reviewing discretionary applications for appeals, our rules require us to grant the application when the trial court appears to have committed reversible error. Consequently, when this Court examines a request for a discretionary appeal, it acts in an error-correcting mode such that a denial of the application is on the merits, and the order denying the application is res judicata with respect to the substance of the requested review.”).

91. CT. APPEALS R. 31(a)(2).

not only why the establishment of precedent is desirable, but also why that case is a suitable vehicle for clarifying the issue.

As previously mentioned, the other key to filing a successful application is to make absolutely sure that the application is self-contained and includes everything needed for the central-staff attorneys and judges to examine its merits. In this regard, a lawyer must include all necessary documents in the application, while also taking care not to clutter the application with extraneous parts of the trial record. You also need to be precise with your record citations and make it as easy as possible for the court to confirm that your assertions about the proceedings below are accurate. Finally, given the severe time constraints on the court in evaluating these applications, you should not expect the central-staff attorneys or judges to spend any considerable amount of time doing additional research on the issues raised by your application. Indeed, while my staff attorneys and I conduct extensive research in direct appeals, we will not—and cannot—exert anywhere near that amount of effort with regard to discretionary and interlocutory applications. To put it plainly, your application is going to be treated as a “closed memo” of sorts. If you cannot make your case within the confines of your application, you are not likely to receive a grant from our court.<sup>92</sup> If your application is granted, it will, of course, be handled in the same manner as a direct appeal.<sup>93</sup>

## VII. CLOSING THOUGHTS

The Georgia Court of Appeals is one of the busiest intermediate appellate courts in the country and faces unique challenges as a result of its heavy caseload and our state’s constitutional two-term requirement. Practitioners who understand these challenges and craft their briefs, presentations, and applications with these challenges in mind can more effectively represent their clients and ensure that their arguments are given the greatest consideration possible.

---

92. It only takes one judge to grant a discretionary or interlocutory application, and an application is only denied when all three judges on the assigned panel are in agreement as to the denial of that application.

93. Every once in a while, an application for discretionary or interlocutory appeal that is granted is later dismissed on the basis that it was “improvidently granted.” This is referred to internally as a “DIG” (“dismissed as improvidently granted”). And if your case is DIGed, you should not take it personally. It does not mean that your brief was unpersuasive or that you offended the court. A dismissal on this ground simply means that the court, after a thorough review of the briefs and record, has concluded that the application should have never been granted.