

Alabama Rules of Appellate Procedure

Rule 33A.

Appointment and use of appellate expert.

(a) *Introduction.* This rule shall apply only to appeals taken to the supreme court in cases involving controversies respecting rates and charges of telephone companies or public utilities. The chief justice of the supreme court, with the advice and consent of the supreme court, is hereby authorized to appoint such appellate expert(s) as the chief justice deems necessary to aid the supreme court in its appellate proceedings. Party(ies) may move for or object to the appointment of an appellate expert in accordance with the provisions of Rule 27 of the Alabama Rules of Appellate Procedure.

(b) Selection of appellate expert.

(1) When the chief justice of the supreme court, with the advice and consent of the supreme court, decides to appoint an appellate expert, the clerk of the supreme court shall serve notice on the parties to a case on appeal. If all the parties can agree upon one person to serve as an appellate expert in the case on appeal, the parties may file a joint motion with the clerk within fourteen days of service of notice that an appellate expert will be appointed indicating such agreement and the name and biographical data of the one expert. If the parties do not agree upon an expert, each party to the case under appeal may submit within fourteen days of service of notice that an appellate expert will be appointed the names and biographical data of one or more persons who may qualify as an appellate expert in that case. The clerk shall also request the names and biographical data of potential appellate experts that have expertise in the issue(s) under appeal. There shall be no oral or written communication between potential appellate experts and members of the supreme court.

(2) When the clerk has compiled a list of names and biographical data of potential appellate experts, the clerk shall serve the list on the parties to the case on appeal. Within seven days after service the parties may submit any additional information relevant to the criteria for selection of an appellate expert concerning the persons named on the list. The clerk shall submit the list and additional information to the supreme court. The parties may communicate with appellate experts named on the list only in writing and by filing any written communication with the clerk and by sending copies of any written communication to the other parties.

(3) The chief justice of the supreme court, with the advice and consent of the supreme court, shall use the following criteria to select the names of three potential appellate experts from the list submitted by the clerk:

- (A) Lack of bias in the case under appeal;
- (B) Expertise in the issue(s) under appeal; and
- (C) Ability to present complex, scientific and technological information in a judicial setting.

(4) The clerk shall serve the parties with the names of the three potential appellate experts selected by the supreme court. The party(ies)—appellant(s) and the party(ies)—appellee(s) may strike the name of one potential appellate expert each by filing the name to be stricken with the clerk of the supreme court within seven days of service of the list of three potential appellate experts. The one name not stricken shall be the appellate expert. In the event that the party(ies)—appellant(s) or party(ies)—appellee(s) cannot agree by majority vote upon a strike or otherwise fail to file a strike, the chief justice of the supreme court, with the advice and consent of the supreme court, shall select the appellate expert from the names not stricken from the list of potential appellate experts.

(c) *Instructions to the appellate expert.* Once the chief justice of the supreme court, with the advice and consent of the supreme court, has selected an appellate expert, the clerk of the supreme court shall prepare and deliver to the appellate expert instructions that contain the following provisions:

- (1) The appellate expert shall be compensated by the supreme court at a reasonable rate;
- (2) The appellate expert's conduct shall be governed by the Alabama Canons of Judicial Ethics as they apply to judges pro tempore;
- (3) The appellate expert shall communicate with the supreme court by written documents in response to written inquiries submitted by the clerk of the supreme court;
- (4) The inquiries submitted to the appellate expert shall be limited to the issues on appeal;
- (5) The appellate expert shall not decide issues of law or fact, shall not offer expert opinion on the ultimate issues in the case on appeal, but shall render assistance as requested by the supreme court; and
- (6) The appellate expert's written response shall respond to the inquiries submitted by the clerk of the supreme court based solely upon the record on appeal and shall not provide any new or additional evidence, either factual or opinion, in a case on appeal.

If the appellate expert has any questions concerning these instructions or any other aspect of this procedure, the appellate expert may submit questions in writing to the clerk of the supreme court. The clerk shall reply in accordance with the provisions of Ala.Code (1975) § 12-2-19(d) and send copies of that reply to the parties to the case on appeal.

(d) Inquiries, responses, briefs, objections, and enlargement of time.

(1) Each written inquiry from the clerk of the supreme court to the appellate expert shall be served upon the parties and remain on file with the clerk for seven days before being submitted to the appellate expert. The parties may file briefs in response to the inquiry and these briefs shall be submitted to the appellate expert along with the inquiry.

(2) The appellate expert shall file with the clerk of the supreme court a written response to the inquiry submitted by the clerk of the supreme court within fourteen days from receipt of the inquiry. The clerk shall serve a copy of the appellate expert's written response on the parties and the written response shall remain on file for seven days before being submitted to the supreme court. The parties may file briefs concerning the appellate expert's response and these briefs shall be submitted to the supreme court along with the response.

(3) Parties may object to the form or substance of the written inquiry submitted by the clerk of the supreme court and to the appellate expert's written response. Objections shall be made within seven days after the inquiry or response is served upon the party making the objection.

(4) Enlargements of time for filing may be granted in accordance with the provisions of Rule 26(b) of the Alabama Rules of Appellate Procedure.

[Adopted 3-4-81, eff. 3-6-81; Amended 11-19-96, eff. 1-1-97.]

Committee Comments

Rule 33A derives from Alabama Code (Supp.1980) § 37-1-143. This statute was passed by the Alabama Legislature in 1978 to allow a direct appeal from the Public Service Commission to the Alabama Supreme Court in utility rate-making cases. In an effort to assist the supreme court to handle the size and complexity of these cases without the benefit of a trial record, the Alabama Legislature passed the following provisions: "... the chief justice of the supreme court, with the advice and consent of the supreme court, is hereby authorized to appoint such special masters, accountants, utility rate-making consultants and such other personnel as he deems necessary to aid and assist the court in these appellate procedures. Such personnel may be appointed and employed on a part-time or full-time basis without regard to the merit system." The legislature did not, however, provide any funds for the court to hire experts.

This rule contains a procedure for the supreme court to appoint an “appellate expert” to assist the court in assimilating and digesting complex scientific and technological information within the adversary process in utility rate-making cases.

Rule 33A is not designed to allow the introduction of new factual or opinion evidence nor is it designed to allow an expert to decide complex cases. Its purpose is to provide the supreme court with the assistance the court desires in its analysis of the record on appeal. The parties to the appeal have full access to all communication between the clerk of the supreme court and the appellate expert at each stage in the use of an appellate expert.

This rule contains numerous provisions to insure the neutrality of the appellate expert and to maintain the adversary nature of the litigation: (1) the parties have an opportunity to inform the supreme court of any relevant bias shown by potential appellate experts; (2) the party(ies)—appellant(s) and party(ies)—appellee(s) each have one strike in the selection of an appellate expert; (3) the appellate expert shall be compensated as directed by the supreme court but at no expense to the parties; (4) the Alabama Canons of Judicial Ethics apply to the appellate expert; (5) instructions and answers to questions concerning procedure are given to the expert in writing by the clerk of the supreme court; (6) all communication between the clerk of the supreme court and the appellate expert is in writing and available to the parties; and (7) the parties have an opportunity to file briefs and objections concerning the inquiries submitted by the clerk to the supreme court and written responses from the appellate expert.

There are no restrictions on the length of the appellate expert’s written responses or of the parties’ briefs. It is anticipated that the relatively short time period allowed for the preparation of these documents will encourage succinctness and brevity.

The Clerk of the Alabama Supreme Court will prepare a standard form to obtain biographical data concerning potential appellate experts. The form will contain requests for a minimum of the following information: complete educational, professional, consulting and employment history; identification of any testimony given by the expert concerning utility rates or rate-making and a brief summary of the substance of that testimony; identification and substance of activity as a master, arbitrator, or mediator; a list of all publications; a list of all speeches delivered with summaries of content in speeches relating to utility rates or rate-making; and a list of three references.

**Court Comment to Amendments to Rules 33A(a) and 33A(b)(2)
Effective January 1, 1997**

The amendments to Rules 33A(a) and 33A(b)(2) remove gender specific pronouns.