APPENDIX IV.

OVERVIEW OF ALABAMA RULES OF APPELLATE PROCEDURE

Scope of review. This overview does not contain a comprehensive discussion of the new rules of appellate procedure. Rather, its purpose is to highlight those features of the rules which represent a departure from former practice.

The need for change. Professor Paul Carrington of the University of Michigan School of Law, who served as consultant to the Advisory Committee, observed that a significant percentage of recent Supreme Court decisions turned on questions of appellate procedure and not on the merits. Dissatisfaction with the technical requirements of the old system became virtually universal among members of the bench and bar alike.

Other than the Judicial Article of the State Constitution and its anticipated legislative implementation, perhaps no facet of judicial reform within our State has been more anxiously awaited than the reform represented by these rules of appellate procedure. Coupled with this sense of urgency, however, was the determination of the Court to move deliberately and act responsibly in effecting this long overdue reform in our judicial system.

The philosophy of the rules. The philosophical tone is set in Rule 1 which states, "[The rules] shall be construed so as to assure the just, speedy, and inexpensive determination of every appellate proceeding on its merits."

This principle echoes throughout the rules: Procedural traps will not deprive a litigant of his right to have a determination on the relative merits of the appeal. Such a polestar does not diminish or compromise the professional standards to which counsel should ascribe; indeed, any substandard performance may require second effort on counsel's part at additional expense and delay.

General considerations. The basic concepts embraced in the Advisory Committee's recommendations—in format and in overall purpose—have been retained. The Committee's plan for following the Federal Rules of Appellate Procedure (FRAP), as to rule number and subject matter insofar as applicable, is a good one; the numerical parallel, where applicable, has been preserved except in two instances: (1) old Rule 45, and (2) old Rule 39. Because of the body of precedents which have evolved around the "harmless error rule" (45) and the "review by certiorari rule" (39), these rules have been retained under their old numbers. Although Rule 39 has been broadened substantially, the concept of review by certiorari rather than by direct appeal has been preserved, thus the case law interpreting this rule is likewise preserved, where pertinent.

A concerted effort was made to preserve the objectives sought by the Advisory Committee in the proposed rules and to keep changes to a minimum. As adopted by the Court, the final product—subject to further changes from time to time as experience dictates—is a giant step toward the desired goal: to strike a reasonable balance between those procedures that will most efficiently serve the appellate courts in the task of reviewing and determining issues on the merits and those procedures which provide a reasonably simple method for the preparation and presentation of those issues.

The time table. To Judge Aubrey Cates, Presiding Judge of the Court of Criminal Appeals, goes the credit for suggesting the timetable system similar to the English practice which provides time frames in multiples of seven days. The initial reaction to the oddity of time periods running in weeks soon diminishes when the obvious advantages are considered. Any given step in the appellate process which is accomplished on a given day commences the running of the next succeeding period which will end on that same day of the week. For example, if the judgment or order ruling on the post-judgment motion is entered on a Wednesday, the notice of appeal must be filed within 42 days (6 weeks), the last day of which also falls on a Wednesday. No longer will the last day for any action required by these rules fall on a weekend. The timetable scheme is consistent throughout the rules and all actions regarding preparation and filing of various documents are within the same time frame (multiples of seven), including the granting of extensions of time.

The notice of appeal. The only requirement which is jurisdictional under the rules is the timely filing of the notice of appeal. Rules 3(a)(1) and 4(a)(1). No provision is made for any extension of time for the filing of the notice of appeal, and the time for filing has been shortened considerably from six months to 42 days (6 weeks). Form 1, Appendix 1, provides a simple statement of the notice of appeal. *Failure to file a notice of appeal within the prescribed time will result in an automatic dismissal*.

A notice of appeal is required in appeals from those interlocutory orders enumerated in Rule 4(a)(1)(A), (B) and (C) and must be filed within 14 days (2 weeks) as provided in such rule.

Appeal by permission. In civil cases, appealable to the Supreme Court, and under limited circumstances, a party may request permission to appeal an interlocutory order not otherwise appealable under Rule 4(a)(1)(A), (B) and (C). Rule 5. In such cases, a notice of appeal is not required but the petition for permission to appeal must be filed within 14 days (2 weeks) after the entry of the order.

Costs—Security for costs, supersedeas bonds, and docket fee. Form 1 is provided for appellant's convenience in filing the appropriate security for costs

bond. Rule 7 effects only one change from former practice by permitting a cash bond in lieu of a security for costs bond with the amount of the cash bond to be set by the trial court. Rule 8(a) combines Sections 793, 794 and 795 of Title 7, with certain changes. The amount of the supersedeas bond required is reduced from 200% of the judgment and costs to 150% of judgments not exceeding $10,000 and 125% of judgments exceeding $10,000. Execution of judgments for the payment of money only is superseded automatically upon approval of the supersedeas bond by the trial clerk. Other judgments still require the court's approval and setting of amount of bond for stay of execution. Rule 8(a) prescribes the procedure for appellate review of motions for stay. Rule 12(a) requires appellant to post a $25 docket fee, which is in lieu of other appellate court costs, except when otherwise ordered by the Court.

Designation of the trial court's record. Invariably every record contains materials irrelevant to the appeal. Rule 10(a) sets out certain of these matters which are not to be included in any record on appeal unless specifically designated. Almost as surely, each record will contain other pleadings, orders, docket entries, etc., unrelated to the issues presented for appellate determination.

This is the appellant's first opportunity, by written designation to the trial clerk, to "cull" the court file and have included in the record on appeal only those documents and orders relevant to the appeal. The appellee is also expected to exercise considered discretion in making additional designations. While the rules allow 7 days (1 week) from the filing of the notice of appeal within which the appellant may designate the record (with an additional 7 days for the appellee), ordinarily this should be done by the appellant at the time of the filing of the notice of appeal, and the suggested forms so provide. The 28-day (4-week) period allowed for the preparation of the clerk's record and the 56-day (8-week) period for the preparation of the reporter's transcript run from the filing of the notice of appeal. Thus, each day taken by counsel in making their designations is subtracted from the clerk's and reporter's "working" time.

With the exception of those items set out in Rule 10(a), the entire court record will ordinarily be included in the record on appeal in criminal cases, as there is usually no designation in criminal appeals. However, the appellant and his attorney, the district attorney and the trial judge may agree that less than the entire record and transcript will constitute the record on appeal. Rule 10(c). If the appellant designates less than the entire clerk's record or reporter's transcript, he must inform the appellee of the issues the appellant intends to present for review.

Designation of the reporter's transcript. The 7-day time frame within which the appellant is due to designate the clerk's record is the same one-week period allowed for the appellant's designation of the reporter's transcript. But, here again, ordinarily this designation should be done simultaneously with the filing of the notice of appeal. Also, the value of this step in the appellate process can be

measured in direct proportion to the degree of thoughtful planning on the part of counsel. For example, if the issue presented on appeal is the refusal by the trial judge to give a requested written jury instruction on the law of agency in a personal injury suit, and four hours of medical testimony was taken during the trial, considerable expense and reporter's time can be saved by omitting this testimony by means of designating only that portion of the evidence relevant to the agency issue. Admittedly, the ultimate refinement of this concept occurs in a subsequent step—the deferred appendix—but immaterial matters of the more obvious nature should be eliminated at this early step.

Trial Clerk's Preparation of Clerk's Record. In civil appeals, upon receipt of the designations of the clerk's record from the parties (or after 7 days from the date of the appellant's designation if no designation is received from the appellee), the clerk will prepare the clerk's record by:

1) withdrawing from the court file the originals of the papers, documents, exhibits, etc., as designated;

2) removing or covering any original page numbers that may appear thereon;

3) photocopying the original of each designated item, one each in civil cases unless additional copies are ordered by the parties;

4) assembling the photocopied pages, prefaced by appropriate indices, and numbering the pages serially, centered at the bottom of the page.

The 28-day (4-week) time frame within which the trial clerk is to complete the clerk's record runs from the date of filing the notice of appeal. The completed clerk's record is retained by the trial clerk and a certificate of completion is served on the appellate clerk, with copies sent to each counsel (plus copies of the indices) and to the court reporter with an indication of the last page number for the reporter's reference in preparing the transcript.

If no designation is received by the trial clerk from the appellant in a civil appeal within the time allowed (7 days from the filing of the notice of appeal), and in criminal appeals the trial clerk will prepare the entire clerk's record minus those items listed in Rule 10(a).

Court reporter's preparation of the transcript. Upon receipt of the designation of the reporter's transcript from the parties in civil appeals (or after 7 days from the date of the appellant's designation if no designation is received from the appellee), the reporter will transcribe the testimony, oral charge, etc., designated by the parties, numbering the pages serially, beginning with the next succeeding numeral which appears on the trial clerk's certificate of completion of the clerk's record, a copy of which is sent to the court reporter. The assembled

reporter's transcript will be prefaced by an appropriate index and filed with the trial clerk. A reporter's certificate of completion, including thereon the last page number of the reporter's transcript, will be served on the appellate clerk and copies mailed to each counsel. The 56 day (8-week) period allowed for the completion of the designated transcript runs from the date of filing the notice of appeal.

In criminal appeals, the reporter prepares a transcript of the entire proceeding within 56 days (8 weeks) and forwards a copy of it to the trail clerk for preparation of the record on appeal.

Record on appeal. Upon receipt of the reporter's transcript, the trial clerk within 7 days will combine the clerk's record and reporter's transcript into volumes of not more than 200 pages each, verify the correctness of the pagination to insure that the page numbers appear in the center of the page at the bottom and run in an uninterrupted numerical sequence, and bind by fastening at the top. This will constitute the record on appeal.

In civil cases, the trial clerk shall mail a certificate of completion to the appellate clerk and shall retain the record on appeal for the use of the parties in preparing their briefs and deferred appendices.

In criminal appeals, the court reporter has 56 days (8 weeks) from the filing of the notice of appeal to prepare the entire transcript and forward it to the trial clerk. The trial clerk has 7 days from the day of receipt of the transcript to assemble the transcript, exhibits, and documents in his possession along with the trial record. He then makes three photocopies of the completed record on appeal. He retains one and forwards one copy each to the Attorney General and the attorney for the appellant. The original of the record on appeal is forwarded to the clerk of the appellate court. Rule 11(b).

Pleading error on appeal. The troublesome "assignment of error" is no longer required. Rule 20. In its stead is substituted "Issues Presented." This procedural change in no way modifies the substantive rules of review, such as preserving of record the error below and the issues presented should concisely point to adverse ruling, etc. Rule 28.

In criminal appeals, the appellant should also apprise the appellate court of error below by including a list of adverse rulings with the pages on which they appear.

*Briefs***.** While the requirement that counsel argue "assignments of error" has been eliminated, cases in support of the issues presented must still be included under such headings. As above, briefs in criminal appeals should also contain a list of adverse rulings. Rule 28(a)(7). See Form 23.

Oral argument requests shall appear on the last page of the brief, and the words "ORAL ARGUMENT REQUESTED" shall also appear on the cover of the brief. The color scheme provided for the appellant's brief (blue), appellee's brief (red), and appellant's reply brief (gray), and amicus curiae or intervenor's brief (green), should impose no undue burden on counsel, and will aid materially in the administrative handling of briefs at the appellate level. The number of briefs to be submitted to the court is determined by the number of judges on the appellate court where the appeal is pending (9, 5, or 3).

*Appendix***.** The rules provide for a delayed or deferred appendix at the option of counsel. See Rule 30. One copy of the record on appeal has its obvious disadvantage. A mandatory appendix would in certain cases work an undue hardship on the parties. The Advisory Committee recommended an expensive alternative which would have required one copy of the record on appeal for each appellate judge. The optional deferred appendix is a reasonable compromise.

If the appellant "opts out" of the appendix system, he must order from the trial clerk, or otherwise provide for, an additional copy of the designated record on appeal for filing with the appellate clerk, at his own expense. This means that the appellate court will have either an appendix for each brief filed (one for each judge), or two copies of the record on appeal. Non-election of the deferred appendix by the appellant will not prevent its use by the appellee. The "opting out" party, however, will not be allowed to make additions to the appendix.

This is counsel's second and final opportunity to shape the record on appeal to fit the "Issues Presented." Counsel's preparation of the appellant's brief has caused him by this time to examine with fine scrutiny the entire record on appeal. He knows, for example, whether the motion to dismiss, the trial court's overruling of the motion for summary judgment, the testimony of an expert witness, etc., are matters material to his "Issues Presented." Can he now further reduce the designated record so that each judge will have before him an abbreviated record as part of his brief? If so, he can to this extent aid each judge in his effort to understand the brief, particularly in its relationship to the record. Not all cases on appeal will lend themselves to the appendix system, but experience indicates that a vast majority of cases will. The easy way out (ordering an extra copy of the record on appeal) will more frequently than not amount to substandard appellate advocacy.

Two methods for compilation of the appendix are provided. Rule 30(e). The single uninterrupted set of page numbers of the record on appeal allows counsel to compile the appendix by photocopying and assembling the designated pages from the record on appeal in numerical sequence without renumbering. Rule 30(e)(2). This means that this type appendix will not contain its own set of page numbers serially affixed, but will bear the same number borne by that page in the record on appeal. Counsel will refer in briefs to this single set of numbers

without the necessity of any prefix. In other words, the former method of, for example, (TR. 52), or (R. 8), is eliminated in favor of (52), (8), etc. The fact that gaps will occur in the page numbers that appear in the appendix will be of no consequence since references in the briefs will be to those page numbers that appear in the appendix. For example, if counsel uses in the appendix pages 4 through 12, 22 through 60, and 81 through 96, from the record on appeal, these pages will appear in this order, omitting the pages between these numbers.

If the cross-reference to the record on appeal method is used in the preparation of the appendix (Rule 30(e)(1)), the pagination of the appendix only will be affected. An appropriate index or cross-reference table will be included in the appendix. This in no way will affect the pagination of the record on appeal or the respective duties of the trial clerk and court reporter in the preparation and assemblage of the record.