

Kentucky Court of Appeals

Basic Appellate Practice Handbook



A Guide to the Rules of Appellate Procedure
for the Kentucky Court of Appeals



Basic Appellate Practice Handbook, Fifth Edition



Chief Judge Larry E. Thompson
Kentucky Court of Appeals

The Kentucky Court of Appeals is pleased to present a revision of the *Basic Appellate Practice Handbook*.

The Handbook is designed to explain basic procedures and concepts for the lay litigant, as well as to succinctly summarize the numerous rules governing appellate practice for attorneys embarking into what may be a new area of expertise. It is our hope that this will continue to assist many in facilitating their access to the Court of Appeals.

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Introduction & Cautionary Notes

The Court of Appeals Basic Appellate Practice Handbook is an introductory guide to completing the steps in the appellate process as it pertains to the Kentucky Court of Appeals. The Handbook provides citations to the rules and explains how to use the rules. It is not designed to be a complete practice manual and is not a substitute for carefully reviewing the current Kentucky Rules of Appellate Procedure (RAP) regarding appeals.

Note: It is the responsibility of a person practicing an appeal to have access to a current set of the rules and to follow those rules. In any apparent conflict between the rules and this Handbook, the rules will control.

The 2023 revision of this Handbook includes references to rules current as of January 1, 2023.

Copies of the current version of the rules are available in most county law libraries and in some larger public libraries. To access West’s Compilation of Court Rules & Procedures online, visit the Kentucky Court of Justice website at www.kycourts.gov and click on “Rules & Procedures” in the “Resources” section of the Supreme Court or Court of Appeals page.

This Handbook deals only with the procedures for practicing an appeal to the Court of Appeals from a judgment in a case originally filed in circuit court. Various types of cases have special procedures for appellate review that will preempt the general procedures set out in this guide. A partial list of such special procedures is detailed in the section titled, “What May Be Appealed.” It is the responsibility of the person practicing the appeal to be knowledgeable about any special procedures that might govern the type of action involved in that appeal.

While the staff of the Court of Appeals will always attempt to be helpful and to assist all parties to the extent possible, members of the staff are not allowed to give legal advice or to make decisions

for a party concerning how an appeal should be practiced. Members of the staff should not be asked for legal advice or for advice about what a party should do in a given situation. Parties practicing an appeal should research questions in the statutes and the court rules.

This Handbook is available on the Kentucky Court of Justice website at www.kycourts.gov. Click on “Court of Appeals,” then on “Basic Appellate Practice Handbook” in the “Resources” section of the page.

Any comments concerning the contents, clarity, or usefulness of this Handbook should be addressed by letter to:

Chief Staff Attorney
Kentucky Court of Appeals
669 Chamberlin Ave., Suite B
Frankfort, Kentucky 40601

The Kentucky Court of Appeals

In 1975, a group of amendments to the Kentucky Constitution (commonly known as the Judicial Article, Sections 109 through 124) created a new intermediate appellate court called the Kentucky Court of Appeals. Prior to that time, the Court of Appeals designation applied to Kentucky's highest court. When the Judicial Article went into effect on January 1, 1976, Kentucky's highest court became known as the Supreme Court of Kentucky and the Court of Appeals commenced operations.

Creation of an intermediate appellate court was necessitated by increased litigation, which had imposed a heavy workload on the Commonwealth's highest court, resulting in long delays for litigants. Section 115 of the Kentucky Constitution affords litigants a constitutional right to one appeal in each action. The new intermediate appellate court not only helped effectuate this right of appeal, but also decreased the time in which appellate review could be obtained.

The intermediate Court of Appeals consists of 14 judges elected by the citizens of the seven Supreme Court districts defined by Kentucky Revised Statute (KRS) 21A.010. The two judges from each district maintain offices within the district from which they were elected. The judges are elected for eight-year terms. The current members of the Court can be found at www.kycourts.gov under Court of Appeals.

The members of the Court of Appeals exercise statewide authority and sit in panels of three in various locations across the Commonwealth. The chief judge is elected by his or her fellow judges and is responsible for assigning judges to hear appeals.

The central office of the Court, including the office of the Clerk of the Court, is located in Frankfort. You can contact the Clerk of Court at the following address and phone number:

Kentucky Court of Appeals
669 Chamberlin Ave., Suite B
Frankfort, Kentucky 40601
502-573-7920

Motion Practice & Formatting and Filing Documents

Parties present their arguments on the merits of an appeal through formal briefs. However, during an appeal it may be necessary to request rulings from the Court on procedural or substantive issues. These may include simple requests for additional time to file a document required by the rules, complex requests for a stay of enforcement of the judgment, or even dismissal of the appeal. These requests are handled through the Court's motion practice.

Motion Practice

Motion practice before the Court of Appeals is different from similar practice before the circuit court in that the parties do not appear at a set motion hour. It is therefore extremely important that the written motion and objections be carefully prepared to present the parties' positions.

Any party is permitted to file a response to a motion within 10 days of the date of service of the motion. RAP 7(C). The motion is held in the Clerk's office for the running of the response time. If the motion was served on a party by mail or electronic service, three additional days are added to the response time for that party. Kentucky Rules of Civil Procedure (CR) 6.05.

Note: Motions are the only documents filed in the Court of Appeals for which the response time runs from the date of service. Therefore, this is the only instance in appellate practice where CR 6.05 applies.

After the response time has run or after all responses have been filed, the motion is screened to determine proper handling. Motions requesting any type of substantive relief are assigned to three-judge panels of the Court. Procedural motions requiring any application of judicial discretion are assigned to the Chief Judge or a member of the Court chosen by the Chief Judge. Purely procedural motions requesting a type of relief that the Court has already determined should be granted as a matter of course are

assigned to the administrative ruling docket.

Procedural motions that do not completely meet the criteria for administrative rulings are submitted to the Chief Judge or a judge designated by the Chief Judge on a weekly basis. Orders signed by the Chief Judge are entered by the Clerk's office as quickly as possible after signing. Such orders are generally entered within two to three weeks following the running of the response time.

All substantive motions are assigned to three-judge panels for ruling. Such panels meet monthly in Frankfort and may consider up to 100 items at a sitting. Orders are signed by the presiding judge. Rulings can be expected five to eight weeks after the response time has run. In appropriate cases, a party can move for oral argument before the panel on a substantive motion, although such requests are rarely granted. RAP 7(F).

Formatting Documents

Special rules govern the form and content of briefs filed in the Court of Appeals. All other documents are formatted in accordance with the general rules governing documents to be filed in court.

All documents filed in the Court of Appeals must be properly captioned to the Court of Appeals. RAP 5. The caption includes the Court of Appeals case number, the parties in the case, and basic circuit court information. The document's title should reflect what is being asked in the motion. For example: "Motion to Dismiss"; "Motion for Additional Time to File a Brief"; or "Response to Appellee's Motion to Dismiss and Motion for Additional Time to File Appellant's Brief."

Documents should be typed. If typing is not possible and handwritten documents must be submitted, the documents must be clearly readable and conform to the formatting requirements in RAP 5(B)(4). Documents must be on 8.5 x 11-inch paper. The type must be at least 12-point and must be double-spaced. A margin of 1.5 inches must appear on the left side of the page. The text

of the document should clearly state the relief requested and the reasons justifying the relief.

The document must be signed by the attorney or party submitting the document and state the signing attorney or party's address.
RAP 11.

If ruling on a motion requires the examination of any documents from the record, copies of those documents (or the relevant portions if the documents are very long) should be attached to each copy of the motion.

Because the Court of Appeals prepares its own orders, draft orders should not be submitted with a motion.

Service & Certification of Service

Any document submitted to the Court of Appeals must be served on all other parties to the appeal. RAP 5. If a party is represented by counsel, service is completed by delivery to the party's counsel. For all documents filed in the Court of Appeals, service may be done by hand delivery or by mail.

An attorney (or unrepresented party) may also elect to use electronic service. Electronic service includes email and fax. Sending electronic documents between the attorneys significantly reduces the amount of paper being mailed. Attorneys may elect electronic service by filing a notice of election with the Clerk of the Court of Appeals and serving the notice of election on opposing attorneys by hand delivery or mail. The attorneys will then exchange preferences for where the electronic documents should be sent. Unrepresented parties may continue to serve attorneys by hand delivery or mail, even though an attorney has elected electronic service. See CR 5.02(2) for the specifics on how to accomplish electronic service.

Note: Even though you may send copies of documents to a party or attorney by email or fax as outlined above, paper copies must be sent to the Clerk of the Court of Appeals unless the attorney

has elected to submit the document through the Court of Justice e-filing system The Clerk of the Court of Appeals does not accept filings through email or fax.

Each document must contain a certificate stating how service was done and listing the individuals served. The certificate must be signed by the person responsible for the service. RAP 5(A); CR 5.03. An example of a certificate of service is included in the Appendix.

Numbers of Copies

In general, five copies – four bound and 1 unbound - are required for documents filed in the Court of Appeals. The major exception is that only one copy of the prehearing statement is required. The number of copies required is set out in the rule governing the particular document and is in the list found at RAP 7(D).

Filing Documents

The notice of appeal, any supersedeas bond under RAP 63, and the designation of record are filed with the circuit court clerk. All other documents must be filed in person, by mail, or through e-filing if available, in the office of the Clerk of the Court of Appeals at the following address:

Office of the Clerk
Kentucky Court of Appeals
669 Chamberlin Ave., Suite B
Frankfort, Kentucky 40601

Timely Filing Documents

Documents that are subject to a deadline must be received in the office of the Clerk of the Court of Appeals on or before the due date. Documents that arrive after the deadline will be returned late

If a person is running short on time, RAP 5(E) provides a method that relies on the date the mail carrier received the document to determine if the document was timely filed. For example, if

a document is due on Thursday, a party may mail a document by U.S. Express Mail on Wednesday. The Clerk's office will use Wednesday to determine if the document is late, even if the document does not arrive until Friday. Under RAP 5(E), the document may be sent by U.S. Registered Mail, U.S. Express Mail, or by a recognized carrier – such as UPS or FedEx - where the carrier marks the outside of the envelope or box with the date the carrier received the mailing from the customer. **Certified Mail does not qualify under the rule.**

A party attempting to use this method of transmittal must carefully comply with the rule and make sure that the date the mail carrier received the document is prominent on the outside of the envelope or box. Documents properly mailed under the rule are deemed timely based on the date that the mail carrier received the document.

What May Be Appealed

Finality Rule

In general, a party may only appeal from a judgment that is final. A judgment is considered final and appealable if that judgment disposes of all the claims presented in a circuit court lawsuit. A judgment or an order that does not dispose of all claims and that leaves some claims pending is considered interlocutory and may not be immediately appealed. CR 54.01. Any claims disposed of in an interlocutory order may be raised in the Court of Appeals when a final judgment has been entered.

However, a circuit judge may make an interlocutory judgment that disposes of at least one claim final and immediately appealable by including certain findings under CR 54.02. The circuit judge must find that the decision is the judge's final decision on that claim, meaning that the judge has heard evidence and arguments needed to resolve the claim and the judge will not change the ruling on the claim.

The circuit judge must also find that there is no just reason to delay enforcement of the judgment. This means that the successful party is entitled to enforcement of the judgment and that enforcement will not affect the resolution of the remaining claims.

Both findings, (1) that the decision is final, and (2) that there is no just cause for delay, are required to make the judgment final. The failure to adequately recite both findings will prevent the Court of Appeals from acquiring jurisdiction. *Peters v. Board of Education of Hardin County*, 378 S.W.2d 638 (Ky. 1964).

The Court of Appeals must review appeals to determine whether the judgment is final and properly appealable. The Court must dismiss an interlocutory appeal even if neither party raises the issue. Attorneys and parties should also be aware that where an order is by its very nature interlocutory, even the inclusion of the recitals set forth in CR 54.02 will not necessarily make it appealable. *Hook v. Hook*, 563 S.W.2d 716 (Ky. 1978).

Exceptions to the Finality Rule

There are some exceptions to the finality rule that allow immediate appeals of judgments that would otherwise be considered interlocutory. Some of these exceptions have been established by statute and some by court decision. The common factor in the exceptions is that delaying the appeal of the judgment would permit events to proceed that would prevent the Court of Appeals from granting meaningful relief.

The following list is not exhaustive of the exceptions to the finality rule that may be available:

1. An interlocutory appeal may be taken by the Commonwealth in a criminal case under certain circumstances. KRS 22A.020(4).
2. An order appointing or refusing to appoint a receiver is immediately appealable. KRS 425.600(1).

3. An order upholding a condemnor's right to take property in an eminent domain case is appealable. *Ratliff v. Fiscal Court of Caldwell County*, 617 S.W.2d 36 (Ky. 1981).
4. An order denying a party's motion to intervene as a matter of right is appealable. *Ashland Public Library Board of Trustees v. Scott*, 610 S.W.2d 895 (Ky. 1981).
5. An order directing property to be sold in satisfaction of a judgment is appealable. *Security Federal Savings & Loan Association of Mayfield v. Nesler*, 697 S.W.2d 136 (Ky. 1985); *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754 (Ky. App. 2005).
6. An order confirming a judicial sale is appealable. *Elam v. Acme Well Drilling Co.*, 411 S.W.2d 468 (Ky. 1967).
7. Certain types of orders in arbitration cases are immediately appealable. KRS 417.220; *JPMorgan Chase Bank, N.A. v. Bluegrass Powerboats*, 424 S.W.3d 902 (Ky. 2014); *Valley Construction Co., Inc. v. Perry Host Management Co., Inc.*, 796 S.W.2d 365 (Ky. App. 1990).
8. An order granting a CR 60.02(f) motion more than one year after the judgment. *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329 (Ky. 2007).
9. An order granting or denying class action certification is appealable within ten days of entry. CR 23.06.
10. An order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment. *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883 (Ky. 2009).

Special Procedures

This Handbook deals only with the procedures for appealing a final judgment of a civil or criminal case originating in the circuit court to the Court of Appeals. The following is a list of cases in

which specialized procedures may apply. The list is not exhaustive:

1. Appeals from district court to circuit court. RAP 48.
2. Appeals from small claims court to circuit court. KRS 24A.340.
3. Appeals of habeas corpus cases. KRS 419.130; RAP 52
4. Appeals from a judgment in an election contest. KRS 120.075.
5. Review of pretrial bail. RAP 51(A).
6. Review of bail pending appeal. RAP 51(B).
7. Review of an appellate decision of the circuit court. RAP 44.
8. Review of an appellate decision of the Court of Appeals. RAP 44.
9. An original action in the nature of mandamus or prohibition against a circuit judge. RAP 60.
10. Appeals of a Court of Appeals' decision in an original action. CR 60(I).
11. Appeals from an order denying *in forma pauperis* status on appeal. RAP 55(D); *Gabbard v. Lair*, 528 S.W.2d 675 (Ky. 1975); *Bush by Bush v. O'Daniel*, 700 S.W.2d 402 (Ky. 1985).
12. Review of circuit court action on a temporary injunction. RAP 20(B).
13. Review of circuit court action on a request for stay pending appeal of a permanent injunction. RAP 20(C).
14. Review of a decision of the Workers' Compensation Board. RAP 49.

Notice of Appeal

The notice of appeal is the document used to begin an appeal taken as a matter of right. The requirements for filing the notice of an appeal to the Kentucky Court of Appeals are generally contained in RAP 2 and RAP 3.

The notice of appeal notifies other parties, the circuit court, and the Court of Appeals that the appellant wishes to exercise their constitutional right to review the circuit court's judgment. Care must be taken in the preparation and filing of the notice because it will define the appeal. Some mistakes may not be correctable later and may limit the relief the appellant can obtain.

Time

The notice of appeal must be filed on time. If the notice is not timely filed, the only sanction provided for in the procedural rules is dismissal of the appeal. RAP 2(A)(2).

Following final judgment, the circuit court clerk is required to send out copies of the judgment when entered. The time for filing the notice of appeal begins from the date on which the circuit court clerk notes on the circuit court docket sheet that he or she served the judgment on counsel or the litigant if *pro se*. RAP 3(A)(1); CR 77.04(2); Kentucky Rules of Criminal Procedure (RCr) 12.06.

The time for filing the notice of appeal is delayed if certain post-judgment motions are filed in the circuit court. This delay permits all circuit court decisions to be completed before an appeal is initiated. The full 30-day period runs from the date that the circuit court clerk notes on the docket that he or she has sent out notice of ruling on the post-judgment motions. RAP 3(E).

A party may file a notice of appeal before disposition of a post-judgment motion. RAP 3(E). The appellant shall promptly move the appellate court to hold the appeal in abeyance pending a decision on such motion. The notice of appeal becomes effective when the trial court enters an order disposing of the last

remaining post-judgment motion. RAP 3(E)(3). A party intending to file a challenge to the post-judgment order must file a notice of appeal or an amended notice of appeal to include that order. RAP 3(E)(4).

There is one narrow situation in which an extension of time can be obtained for the filing of the notice of appeal. If a party does not learn of the entry of the judgment or order through excusable neglect, that party can obtain an extension of 10 days by filing a motion in the **circuit court**. RAP 3(D). The rule has been interpreted to require that the motion, and the notice of appeal, be filed with the circuit court within 10 days of the running of time as originally calculated. If the motion for a 10-day extension is granted, the notice of appeal becomes effective as of the date it was filed. *James v. James*, 313 S.W.3d 17 (Ky. 2010).

Where to File

The notice of appeal must be timely filed in the office of the circuit court clerk. The filing fee must also be paid. While there is no prohibition against filing by mail, the notice and the fee must be actually received in the circuit court clerk's office on or before the date due. The rule that allows for filing by mail in the office of the Clerk of the Court of Appeals (RAP 5(E)) does not apply to the notice of appeal and other documents specifically required to be filed in the circuit court. Hand delivery to the circuit court clerk's office is the most certain way to ensure that the notice is timely received and that the full amount of the filing fee is paid.

Payment of the Filing Fee

The required filing fee for the appeal must be paid to the circuit court clerk at the time the notice of appeal is tendered (given) to the circuit court clerk. The notice of appeal cannot be filed until the fee is paid. RAP 2(H).

If a litigant has insufficient resources to pay the required fees, a motion to proceed *in forma pauperis* must be filed in the circuit court when the notice of appeal is tendered to the circuit court clerk. The motion must be supported by an affidavit indicating

that the person's poverty requires the waiver of the filing fee. The issue of whether filing fees should be waived is initially addressed to the circuit court. If the circuit court denies relief, a separate appeal on that issue alone may be taken to the Court of Appeals. If the circuit court denies *in forma pauperis* status, the party has 30 days to pay the filing fee or to file a notice of appeal to the Court of Appeals on that issue alone. RAP 3(A)(3); RAP 54; RAP 55.

Designation of Parties

All parties to the appeal should be identified by name. This should be done in the body of the notice of appeal in separate paragraphs that list the appellants and appellees. After the filing of the complaint, many circuit court documents will not list all parties but instead will list only a lead party followed by the phrase "*et al*" (which means "and others") to avoid long lists of people. The term "etc." also is sometimes used to shorten the description of a party to an appeal. The notice of appeal should identify all parties by name. If a person or entity is involved in the litigation in a limited capacity (as executor or guardian, for example), that capacity should be included with the name.

Appellants. The notice of appeal must list all appellants responsible for the filing of that particular notice. It must contain a certificate of service demonstrating service of the notice upon counsel for all parties to the proceedings from which the appeal is taken, or, if a party is unrepresented, upon the party at the party's last known address. RAP 3(B)(1). It is important to remember that only one appellant brief may be filed in each appeal. RAP 2(F). If appellants or groups of appellants have separate interests that will make it desirable to file separate briefs, separate notices of appeal must be filed.

Appellees. In preparing a listing of appellees, the appellant must include all parties who would be affected by the reversal of the judgment. All such parties should be named and served. RAP 3(B)(1)(c); RAP 3(B)(2).

Designation of Judgment

The notice of appeal must identify the circuit court judgment the appellant wishes to have reviewed. RAP 3(B)(1)(b). This will normally be the final judgment in the case. Because the Supreme Court of Kentucky has adopted the standard of substantial compliance, a mistake in designating the judgment will not result in dismissal of the appeal if the judgment to be reviewed can be determined with reasonable certainty from a review of the record as a whole. *Ready v. Jamison*, 705 S.W.2d 479 (Ky. 1986). However, careful and precise identification of the judgment will make it easier for the clerks of the circuit court and Court of Appeals to set up the records and assist the appellant in going forward with the appeal. A copy of the judgment should be attached to the notice of appeal. RAP 3(B)(2)(a).

Stay of the Judgment Pending Appeal

In the absence of a specific statute or rule, the filing of a notice of appeal does not stay the enforcement of a judgment. *Taustine v. Fleig*, 374 S.W.2d 508 (Ky. 1964); *Hale v. Cundari Gas Transmission Company*, 454 S.W.2d 679 (Ky. 1969). Stay of the grant or denial of a permanent injunction must be sought under the provisions of RAP 20(C). Stay of a money judgment or of a judgment determining the ownership of property must be obtained through the filing of a supersedeas bond under RAP 63. In all other cases, a stay must be sought by the filing of a motion for intermediate relief under RAP 21.

Family Court Appeals Expedited by Rule

The Courts have established special time deadlines for cases involving the most vulnerable. These types of cases include appeals arising from actions concerning paternity, dependency, abuse, neglect, domestic violence, juvenile status offense, or involuntary termination of parental rights. Please note that the rules impose time deadlines that are strictly enforced and requests for additional time should be made only for extraordinary reasons.

1. Prehearing conference procedure does not apply pursuant to RAP 22(A)(2).
2. Reduced time for the circuit court clerk to certify the record pursuant to RAP 26(B)(4).
3. Reduced briefing time pursuant to RAP 30(E)(1):

Unless otherwise directed by court order, an appellant shall file a brief with the clerk of the appellate court no later than 30 days after the date of the notation on the docket of the notification required by RAP 26(B)(5). The appellee's response brief shall be filed within 30 days after the date of filing of the appellant's brief. An appellant may file a reply brief within 10 days after the date of filing of the appellee's brief.

Prehearing Conference Procedure

The prehearing conference program was enacted to allow the Court of Appeals to bring parties represented by counsel to a discussion for the purpose of settling appeals.

The prehearing conference process requires the appellant to file a statement of the case on a standard form and gives the appellee the opportunity to file a responsive statement. A party represented by counsel desiring a prehearing conference must also file a motion requesting a conference along with their statement. If no objection to the motion is filed within 10 days, the Court will schedule a prehearing conference with the parties. If the case cannot be settled at conference, the appeal will be restored to the regular docket of the Court. Besides settlement, a prehearing conference may also address certain elements of the case to assist with disposition of the appeal. NOTE: *Pro se* litigants do not qualify for a prehearing conference.

Appeals Covered by the Prehearing Conference Process

RAP 22 sets out the prehearing conference process. RAP 22(A)(1) applies to all civil actions except appeals from prisoner applications for relief relating to confinement or conditions of confinement and appeals from circuit court orders determining class action certification, appeals from findings of contempt, paternity, dependency, abuse, neglect, domestic violence, juvenile status offense, or involuntary termination of parental rights.

The prehearing conference process applies to cross-appeals as well as to direct appeals. RAP 22(A)(1).

If an appellant has questions concerning the application of the rule to a particular case, those questions may be addressed to the Clerk of the Court of Appeals at 502-573-7920.

Timely Filing

In a case to which RAP 22 is applicable, the appellant or cross-appellant must file a prehearing statement within 20 days of the date of the filing of the notice of appeal or cross-appeal. RAP 22(A); RAP 22(C). Appellees and cross-appellees may file a responsive pleading called a supplemental statement within 10 days of the filing of the prehearing statement. RAP 22(C)(4).

The time for other steps in the appeal, **except** the filing of a notice of cross-appeal, the filing of a motion to transfer, and the filing of a prehearing statement, is stayed until the Court removes the case from the prehearing process by an order directing that no conference will be held or by an order reciting the results of the conference and returning the appeal to the regular appellate process. RAP 22(B)(1)-(2).

Prehearing Statement

The prehearing statement must be filed in a form that formats necessary information in a way that can be quickly reviewed by Court staff. The circuit court clerk will provide the appellant or appellant's counsel with the form at the time the notice of appeal is filed. RAP 22(C)(1). The form is also available online so that it

can be completed electronically and then printed for filing. Visit www.kycourts.gov and click on “Resources” at the top of the page. Click on “Legal Self-Help,” then on “Legal Forms.” Click on AOC Form 070, entitled, “Kentucky Court of Appeals Civil Appeal Hearing Statement.” One copy of the statement is filed in the office of the Clerk of the Court of Appeals. The statement also must be served on opposing counsel. RAP 22(C)(3).

The subsections of RAP 22(C)(1)(a)-(l) set out the information required to be submitted on the form. Supplemental pages may be attached if the space provided on the form is insufficient for the information to be stated. Additionally, the form requires that copies of the following documents be attached to the statement: (1) the judgment from which the appeal is taken, (2) the complaint or other pleading that began the current action, and (3) any opinion or findings of the circuit court or administrative agency.

In preparing the statement, the appellant must be aware that under RAP 22(C)(2), the appellant is thereafter limited to the issues raised in the prehearing statement. Therefore, the appellant should carefully list all issues that are expected to be raised. Failure to do so may result in the necessity of requesting special permission from the Court of Appeals to raise additional issues and may prevent the appellant from raising an issue for review. *American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543 (Ky. 2008).

Appellee’s Supplemental Statement

There is no form for the preparation of the appellee’s supplemental statement under RAP 22(C)(4). The appellee should prepare a statement in the form of a regular response, numbering the sections of the appellant’s statement to which the appellee is responding. One copy of the supplemental statement must be filed with the Clerk of the Court of Appeals and the supplemental statement must be served on opposing counsel.

Conferences & Conference Orders

Conference attorneys employed by the Court review the

prehearing statements and supplemental statements to select appeals for which conferences will be held. In preparing their statements, litigants represented by counsel desiring a prehearing conference must file a motion for a prehearing conference to consider settlement, simplification of issues, contents of the record, the time for filing the record and briefs, and/or other matters that may aid in the handling or disposition of the appeal. RAP 22(D). Opposing parties may file an objection or response to the motion within 10 days. If an objection to a conference is filed, then the motion will be denied and the appeal will be restored to the regular docket of the Court. If no objection is filed, then a case manager for the Court will contact counsel for the parties to arrange a conference date. An order formalizing the scheduling will follow. A conference attorney employed by the Court will conduct the conference by telephone, by video, or in person. Conference attorneys invest considerable time to help litigants reach a mutually agreement settlement. All statements made at a prehearing conference are confidential and may not be disclosed by the conference attorney, by counsel, or by the parties. RAP 22(D)(4)(b).

Following the conclusion of the prehearing conference procedure, the Court of Appeals' designee shall issue an order reciting the actions taken and the agreements reached, and that order shall govern the subsequent courts of the proceedings. RAP 22(D)(4)(c). If the case is settled, the parties should file a joint motion to dismiss the appeal. If the case is not settled, it will be returned to the Court's active docket.

Record on Appeal

Introduction

The record on appeal collects the pleadings and other papers filed in circuit court, together with the evidence introduced at trial, for presentation to the Court of Appeals.

The Circuit Court Clerk's Record

Kentucky appellate rules require the circuit court clerk to prepare

the record using the original papers filed in the circuit court clerk's case file. RAP 24(A)(1) and RAP 26(B)(1). This spans the filing of the complaint to the certification of the record. The circuit court clerk orders the documents, adds page numbers, binds the documents, and prepares an index. The circuit court clerk must certify the record within 30 days after the date of filing the first notice of appeal; however, if RAP 22 applies to the appeal, the circuit court clerk shall prepare and certify the record within 30 days of the order ending the prehearing procedure. RAP 26(B)(4).

Designation of the Record

The appellant must file a designation of record complying with RAP 24(B)(1) if there is any material, such as transcripts of proceedings recorded by a court reporter or electronic recordings other than a trial (*see* RAP 98)), that needs to be added to the materials that the circuit court clerk automatically includes in the record. The designation of record must be filed within 10 days of either: (a) the filing of the notice of appeal if RAP 22, the prehearing conference rule, does not apply, or (b) the entry of the order of the Court of Appeals removing the case from prehearing under RAP 22(B)(2). RAP 24(B)(1)(b). The designation must be filed in the circuit court clerk's office and must be served on all other parties, the court reporter (if any), and the Clerk of the Court of Appeals. The designation must specifically list those portions of any recorded proceedings that are to be included in the record on appeal. RAP 24(B)(1) and (2).

If an appellant fails to designate material that the appellee believes is necessary to present the appellee's position on appeal, the appellee may file a counter-designation within 10 days of the date of service and filing of appellant's designation, or no later than 10 days from the time on which the appellant's designation was due to be filed. RAP 24(B)(2).

Electronic Recordings

Most Kentucky circuit courts are equipped to record proceedings electronically. When such a recording system has been installed in a circuit court, the electronic recording is used as the official

record of the proceedings for purposes of appeal. RAP 24(A)(3). No transcript of the proceedings is prepared. The circuit court clerk is required to include the electronic recording of any trial. However, if any pre-trial or post-trial hearings are needed, the appellant must file a designation listing the dates of any such hearings to be added to the record on appeal. Failure to designate necessary hearings limits the Court's ability to review appeals on their merits and may result in affirmation of the circuit court's decision. *Gambrel v. Gambrel*, 501 S.W.3d 900 (Ky. App. 2016).

Depositions

The parties may designate as part of the record on appeal depositions that were filed in the circuit court.

Missing Record of Proceedings

If the transcript or electronic recording of a portion of the proceedings is missing or cannot be made a part of the record on appeal for any reason, the appellant may prepare a narrative statement to replace the missing material. RAP 25(A); *Cardine v. Commonwealth*, 623 S.W.2d 895 (Ky. 1981). Failure to replace the missing material may inhibit the appellate court's ability to review the issue that the appellant wishes to raise. *Porter v. Harper*, 477 S.W.2d 778 (Ky. 1972).

Certification of the Record

When the record has been properly assembled, the circuit court clerk certifies the record and sends out a notice of certification to the litigants and to the Clerk of the Court of Appeals. RAP 26(B)(5).

Custody of the Record

After certification, the record on appeal is retained in the custody of the circuit court clerk so that it is available to the parties for the preparation of their briefs. If counsel is allowed to check out the record, the record must be returned to the circuit court clerk before the filing of counsel's brief. RAP 26(D)(2)(a)-(e). The parties' briefs must certify that the record has been returned to the circuit court clerk or that it was not checked out from the circuit court clerk. RAP 31(C)(1)(c).

The Brief: Written Argument

The brief contains a party's written argument on the merits of the appeal. It is the principal way to present the party's position on appeal. Because the Court of Appeals hears oral argument in only about 10 percent of the appeals submitted on the merits, the brief may be a party's only opportunity to persuade the Court.

The technical requirements for preparing the brief are designed to expedite the handling of the brief in the appellate clerk's office and in the judges' chambers.

Beyond the technical requirements, careful presentation of the arguments and thoughtful assembly of an appendix will assist the judges in evaluating the parties' positions on the issues presented in the appeal.

Time for Filing Briefs

Special Cases Involving Protection of Vulnerable Victims. RAP 30(E) establishes shortened briefing times in appeals from circuit court orders determining paternity, dependency, abuse, neglect, domestic violence, juvenile status offense, or involuntary termination of parental rights. In such cases, the standard deadlines for filing briefs are shortened to allow the appellant 30 days, the appellee 30 days, and the appellant 10 days for a reply brief. Counsel practicing such cases need to be aware of the shortened deadlines and that extensions of time may be requested only under extraordinary changes.

Civil Cases. RAP 30(C) requires that the appellant's brief be filed within 60 days of the date that the circuit court clerk notes on the docket that the certification of the record has been sent out. The appellee's brief is due 60 days from the date of the filing of the appellant's brief. The appellant's reply brief is due 15 days from the date of the filing of the appellee's brief. If there is more than one appellee, the appellant may file a reply brief to each within 15 days of the filing of the brief or may file a single reply brief to all

appellee's briefs within 15 days of the date the last appellee's brief was filed.

If there are multiple appellees and one or more of the appellees chooses not to file a brief, then the appellant would only know with hindsight when the last appellee's brief was filed. In that situation, the rule allows the reply brief to be filed 15 days from the date the appellee's brief was due to be filed. If the appellant is also a cross-appellee, the appellee's brief **shall** combine the appellee's initial brief as a cross-appellant and its response to appellant's brief and shall be filed no later than 60 days after the date on which the appellant's brief is filed. RAP 30(C)(2)(b). Then, the appellant **shall** file a single brief that combines its response brief as cross-appellee and appellant's reply arguments within 60 days of the date of the appellee's brief. RAP 30(C)(2)(c).

Criminal Cases. RAP 30(D). The appellant's brief is due within 60 days of the certification of the record (subject to the entry of service of notice) unless the appellant is represented by the Department of Public Advocacy, the Office of the Attorney General, or a designee of either. In the latter cases, the brief is due 60 days from the date the appellate clerk makes the record available to the public advocate, the attorney general, or the designee. The appellee's brief is due 60 days from the date of the filing of the appellant's brief. An appellant's reply brief may be filed within 15 days of the date of the filing of the appellee's brief.

Filing of Briefs

To be timely filed, a brief must be received in the office of the Clerk of the Court of Appeals within the time allowed for filing. RAP 5(E). In computing deadlines, the rules provide that the time for filing briefs runs from either the date of the circuit court clerk's notice of certification or the filing of another brief. The additional time allowed if the deadline runs from service by mail set forth in CR 6.05 does not apply to the filing of briefs. If a party requires additional time, a motion should be filed as soon as the need becomes apparent.

If filing the brief by mail, RAP 5(E) permits a brief to be filed by mail on the due date if a party uses U.S. Registered Mail, U.S. Express Mail, or some other recognized carrier, such as UPS or FedEx **Certified Mail does not qualify under the rule.** The rule requires the carrier to place the date it receives the package from its customer on the outside of the envelope or box. A party must carefully comply with this rule when using the mail or a messenger service to file briefs in the Court of Appeals. See “Timely Filing Documents” earlier in this handbook for a full discussion of RAP 5(E).

The Court of Appeals also has a “drop box” inside the main entrance of its central office in Frankfort. Briefs that are due on a specific day may be deposited in the box after the office has closed for that day. The briefs are considered timely filed if deposited before the office reopens the following morning.

Format of the Brief

The rules for formatting a brief are contained in RAP 31.

Paper: 8.5 x 11-inch unglazed white paper.

Type: Black type, no smaller than 12-point (standard width), text double spaced, and clearly readable.

Margins: 1.5-inch on the left margin; 1-inch on all other margins.

Binding: Briefs are to be securely bound on the left side. If staples are used, the party should ensure that all sharp edges are tucked in.

Covers: Briefs must be enclosed (front and back) with colored covers indicating the nature of the brief:

- Appellant – Red
- Appellee – Blue
- Appellant reply – Yellow

- Combined Appellee response brief/initial brief as Cross-Appellant – blue
- Combined Appellant reply brief/response brief as Cross-Appellee – Yellow
- Amicus Curiae – Brown
- Other – White
- Petition for Rehearing – Green
- Response to Petition for Rehearing – Gray

Length: RAP 30(G) sets strict limits for the length of briefs. RAP 31(G)(1). Unless a party’s motion to exceed the page limit is granted, the page limits are:

Appellant – 8,750 words or 20 pages if computer generated (a brief printed on a computer printer is computer generated); or 25 pages if handwritten or typewritten

Appellee – 8,750 words or 20 pages if computer generated (a brief printed on a computer printer is computer generated); or 25 pages if handwritten or typewritten

Appellee/Cross-Appellant Combined – 14,000 words or 30 pages if computer generated; or 40 pages if handwritten or typewritten

Cross-Appellee/Appellant Reply Combined – 10,500 words or 25 pages if computer generated; or 30 pages if handwritten or typewritten

Appellant Reply – 1,750 words or 4 pages if computer-generated; if handwritten or typewritten, 5 pages; except that if appellant is called upon to respond to more than one appellee brief, then appellant is permitted up to 1,750 additional words or 4 additional pages per each additional appellee brief if computer generated or up to 5 additional pages per each additional appellee brief if handwritten or typewritten

Word-Count Certificate: The brief may need to contain a word-count certificate in conformity with RAP 15. If a computer-generated document fits within the page limits for computer-generated documents, then a word-count certificate is not necessary. A computer-generated document that exceeds the page limits for a computer-generated document, but is within the relevant word limit, must include a certificate by the attorney or an unrepresented party that the brief falls within the relevant word limit. The brief’s cover, caption, introduction, statement concerning oral argument, statement of points and authorities, signature block, certificate of service, word-count certificate, exhibits, and appendices are excluded from any page or word-count limits in these rules. A word-count certificate is not required if the brief is handwritten or typewritten.

Number of Copies: 1 unbound and 4 bound copies of each brief must be filed with the Clerk of the Court of Appeals. RAP 31(F).

Organization of the Appellant’s Brief

RAP 32(A) provides guidelines for the organization and contents of the appellant’s brief. The organizational rules allow the appellate judges to efficiently review the brief.

The **Introduction** lets the judges know what area of law is involved in the appeal. The introduction should be very short.

The **Statement Concerning Oral Argument** should be one brief paragraph indicating whether the appellant desires oral argument on the appeal and supplying any reason to support the value of an oral argument in resolving the appeal.

The **Introduction and Statement Concerning Oral Argument together** shall not exceed one page.

The **Statement of Points and Authorities** lists the issues the party will discuss in the “Argument” section of the brief. The statement of each issue should be simple and direct. Under each issue the appellant must list the legal authorities cited in the argument

together with the page of the brief on which the authority is cited. This gives the appellate judge a quick listing of material that may need to be read in conjunction with the brief.

The **Statement of the Case** is the “story” of the case. It sets out the facts of the case and the procedural events the judges need to know to understand the case. The statement should be sufficiently complete for a comprehensive understanding of the case but should not contain unnecessary material. The statement should be as objective as possible and without personal attacks. Each statement narrated should be supported by a reference to the specific page number or recording reference number to show where the fact appears in the record. CR 98 provides a form for citing to electronic recordings.

The **Argument** tracks the “Statement of Points and Authorities” and presents the issues that the appellant believes require a different result than that reached by the circuit court. All facts stated must be supported by references to the record, and statements concerning the law must be supported by citations of authority, either statute or published appellate decision. RAP 32(A)(4). RAP 31(E) provides a specific format for citing to Kentucky statutes and opinions.

At the beginning of the discussion of each issue, the appellant must include a statement (with a reference to the record) showing how and when the issue was **preserved for appeal**. It is helpful to also set out the standard of review the appellate court must use in reviewing the issue.

The **Conclusion** states the relief the appellant seeks in the Court of Appeals. The request should be as specific as possible.

The brief must include a **Signature** by an attorney of record for the party submitting the brief or, for a party proceeding pro se, by the party. RAP 32(A)(7). The signature may appear on the front cover or after the conclusion.

The **Record Appendix** contains material from the record that the appellant wishes to make easily available to the reading judges. RAP 32(E)(1). The appellant must include a copy of the judgment appealed and any opinion of the circuit court as the first item in the appendix. In deciding what other documents to include in the appendix, the appellant should consider that only the presiding judge of the panel will have the record on appeal immediately available in the judge's office. The associate judges will each have a set of the briefs, including the appendix. If there are essential documents from the record that the judges should closely examine, copies should be included in the appendix. A list of the items included in the appendix must be placed at the beginning of the appendix. The items in the appendix must be separated by tabs. Material not in the record on appeal may not be included in the appendix.

An **Evidentiary Appendix** consisting of a transcription of video recorded evidence or other court proceeding may be attached after the **Record Appendix**. RAP 32(E)(2).

If the appendices are large, they may be bound separately from the brief in red covers that are appropriately labeled.

Organization of the Appellee's Brief

RAP 32(B) provides guidelines for the organization and contents of the brief for the appellee. The requirements are the same as for the appellant (see previous paragraphs) except that the rules do not require an introduction or any specific appendix material. The remarks above concerning the appendix shall be followed by the appellee as well if the appellee chooses to include a **Record Appendix** and/or **Evidentiary Appendix**. The appellee should not duplicate documents included in the appellant's appendix but may refer to documents included by the appellant.

Organization of the Appellant's Reply Brief

The appellant's reply brief is responsive to points raised in the appellee's brief and may not repeat arguments already made in the appellant's initial brief. If the reply brief is five pages or less, a

“Statement of Points and Authorities” is not required. RAP 32(C)-(D).

Service of the Brief

Copies of each brief must be served on all adverse parties (by service on their counsel if a party is represented by counsel) and on the circuit court judge whose decision is under review. In a criminal case, both the defendant and the attorney general must serve the Commonwealth’s attorney of the district from which the appeal comes. RAP 30(B).

Certifications Required

The cover of each brief must contain a signed statement identifying by name the individuals served with copies of the brief. The certification must also contain a statement that the record on appeal has been returned to the circuit court clerk or that the record was not withdrawn. RAP 21(C)(1)(b)-(c).

Sanctions for Failure to File a Brief

If an appellant fails to file a brief within the time allowed by the rules or by an order of the Court, the appeal may be dismissed. RAP 31(H).

If no appellee files a brief, the Court may either:

1. Accept the appellant’s statement of the facts and issues as correct;
2. Reverse the judgment if the appellant’s brief reasonably appears to sustain such action; or
3. Treat the failure to file a brief as a confession of error and reverse the judgment without consideration of the merits. RAP 31(H)(2)-(3).

Further, any brief may be stricken for failure to substantially comply with the requirements of the Rules of Appellate Procedure. RAP 31(H)(1).

Submission & Consideration of Appeals

Transmittal of the Record to the Appellate Court

The circuit court clerk sends the record on appeal to the Court of Appeals when transmittal is requested by the appellate court clerk. RAP 26(D)(3). In a civil case, this will occur after an appellant's reply brief is filed or the time for filing such a brief has run. RAP 27(G). In a criminal case, the time for transmittal of the record will occur:

1. After the certification of the record if a criminal defendant is represented by the Department of Public Advocacy;
2. After filing of the appellant's brief if a criminal defendant is represented by someone other than the Department of Public Advocacy; or
3. After certification if the Commonwealth is the appellant.

Ready to Be Assigned on the Merits

After the record is received and all briefs are filed, the appeal is ready to be assigned to the Court for consideration and decision. Once the appeal has been submitted, no additional materials related to the merits of the case may be filed unless permission to do so is requested by motion.

Assignment to a Panel

The 14 judges of the Court of Appeals sit in panels of three judges. The Chief Judge of the Court assigns judges to sit on panels and those panel assignments are changed monthly. Rules of the Supreme Court of Kentucky (SCR) 1.030(7). The Chief Judge is also responsible for assigning cases to the panels and designating the presiding judge on each case. The presiding judge will ordinarily author the opinion of the panel and is responsible for ensuring that the appeal moves without unnecessary delay.

Cases are assigned to panels after submission. While any delay will be dependent upon the Court's workload, such assignment will

usually occur within two to six weeks after submission. Normally, the panel will be scheduled to meet about four months after the assignment. For example, cases delivered to the judges in early September will be for their December panels. The early delivery of cases to the judges allows them to screen cases and schedule oral arguments.

Once a panel has been assigned, the membership of the panel becomes a matter of public record. The Clerk of the Court of Appeals sends a notice to counsel and any unrepresented parties identifying the members of the panel. However, counsel and litigants must be aware that judges cannot receive any contact about a case from the parties except through a proper filing in the office of the Clerk of the Court of Appeals. Any attempt to make such contact may require the judge to disqualify himself from the case and may subject the offending party to sanctions.

Oral Argument and Non-oral Cases

The Court of Appeals traditionally has scheduled oral argument in less than 10 percent of the appeals assigned to panels for decision on the merits.

Appeals are initially selected for oral argument by the presiding judge. In general, the Court favors oral argument on questions of law rather than fact. Because a layperson would be at a considerable disadvantage in arguing against trained counsel, oral argument is not scheduled unless both sides are represented by counsel. However, a person without counsel may ask for special leave to orally argue. RAP 28. When all three members of the panel have selected cases for oral argument in any assignment month, arguments are scheduled at a reasonably convenient location. Panels are scheduled across the Commonwealth, taking into account the location of counsel's offices.

Orders are entered informing counsel of the scheduled time and place for oral argument as soon as practical after assignment. Normally, counsel will receive a scheduling order at least two months before the date of oral argument. If counsel has an

irreconcilable conflict with the scheduled date, a motion to reschedule must be promptly filed. Rescheduling of oral argument is granted only for compelling reasons.

The time allowed for oral argument will be set out in the order scheduling oral argument. Normally, 30 minutes will be allowed for each oral argument with the time being equally divided between the appellant and the appellee.

The oral argument schedule of the Court of Appeals is available on the Kentucky Court of Justice website at www.kycourts.gov. Click on “Court of Appeals” and then on “Oral Arguments Calendar.”

Counsel wishing to submit supplemental authority must carefully comply with the provisions of RAP 35. RAP 38(E).

If the Court determines that oral argument will not be heard on an appeal, an order dispensing with oral argument is entered. If counsel can advance good reasons for holding oral argument, a motion to reconsider must be filed within 10 days of the entry of the non-oral notice. In cases in which no oral argument is scheduled, the panel reviewing the appeal may elect to render an opinion prior to the designated assignment month.

Decisions of the Court

Procedural matters may be handled by a single judge whose signature appears on an order disposing of the issue.

All opinions on the substantive merits of an appeal and all dispositional orders must be approved by a panel of three judges. The members of the panel who voted on the opinion or disposition order are listed on the “BEFORE” line of the document. At the end of the document, there is a statement concerning whether all of the panel members concurred (agreed with the decision). If any member of the panel dissents from (disagrees with) the majority decision, that fact is stated at the end of the majority opinion. A concurring or dissenting judge may write a

separate opinion stating that judge’s reasoning. A decision by a majority of the panel is the decision of the Court of Appeals. SCR 1.030(7)(d).

The Court of Appeals may dispose of a case by **affirming** or **reversing** the entirety of the judgment or it may **affirm in part** as to some issues and **reverse in part** as to others. The Court may **vacate** the circuit court decision if the circuit court omitted some essential step in reaching its decision, if it lacked jurisdiction, or if it exceeded its jurisdiction. The Court also may **remand** the case to the circuit court for further proceedings if necessary. If a case is remanded to circuit court, a party adversely affected by the decision of the circuit court on remand is entitled to take a new appeal of that decision. However, the “law of the case” doctrine may prevent the Court of Appeals from reviewing issues conclusively decided in the first appeal.

Decisions of the Court of Appeals are announced in one of three types of documents: an opinion, an order, or an opinion and order.

Opinions: RAP 40

An opinion is titled as such in the caption of the document – for example, “Opinion Affirming.” An opinion lists the panel deciding the case, as well as the authoring judge, but does not have an actual signature. The Court announces most decisions on the merits of appeals in opinions.

Opinions are rendered each Friday at 10:00 a.m. No information can be released about an opinion until the release time. Opinions are mailed to counsel or unrepresented litigants on Friday after the release time. Opinions are available at the release time at www.kycourts.gov through “Searchable Opinions” section of the Court of Appeals page. The “Court of Appeals Minutes” section of the page lists all the decisions for a given week. The file number for each opinion listed in the Minutes is a link that connects to the text of the opinion itself.

The opinion shows on its face the date of release and whether it is

designated for publication. The designation indicates whether the Court intends the opinion to be cited as precedent. Even though the Court may not have designated an opinion for publication, RAP 41(A) allows unpublished opinions rendered after January 1, 2003, to be cited “for consideration” only “if there is no published opinion . . . that would adequately address the point of law argued by the party.” Additionally, a party may request that an unpublished opinion be designated published by filing a motion to publish in conformity with RAP 43(H).

All opinions of the Court of Appeals, “unpublished” and “to be published,” are matters of public record.

If a decision is announced in an opinion, further review in the Court of Appeals must be sought by a petition for rehearing under RAP 43(B).

An opinion is not effective until it becomes final under RAP 40(G).

Orders

The Court of Appeals uses orders to announce all procedural rulings, most dismissals of appeals, and the substantive disposition of original actions and other expedited actions. Orders contain the signature of the judge making the ruling or of the presiding judge of the panel making the ruling. If the order announces a panel decision, the panel is listed on the “BEFORE” line of the order.

Orders show the date of entry near the signature of the judge and are effective immediately upon entry. RAP 40(F). Orders are entered as soon as possible after being received in the office of the Clerk of the Court of Appeals.

Orders are rarely designated for publication.

If a decision is announced by an order, further review in the Court of Appeals must be sought by a motion to reconsider under RAP 43(D) within 20 days from the date of entry of the order.

Opinion and Orders

The opinion and order is generally used when the Court of Appeals wishes to provide a more detailed explanation than usual in an order or when the Court wishes to issue a published decision that must be effective immediately.

An opinion and order lists the panel making the decision, lists the author of the document, and is signed by the author. Opinions and orders are normally rendered on Fridays at 10:00AM EST

A decision announced in an opinion and order is subject to further review in the Court of Appeals by a petition for rehearing under RAP 43(B).

Petitions for Rehearing & Motions to Reconsider

Once a decision is made in the Court of Appeals, either party can request that the Court of Appeals review the decision. However, as previously noted, there are two different methods of requesting such review and the choice of how to proceed depends upon the type of document the Court uses to announce its decision. If the Court decided the case by opinion, or opinion and order, a petition for rehearing under RAP 43(B) is appropriate. If an order is used, a motion to reconsider under RAP 43(D) is appropriate. These filings are not interchangeable.

Note: There is no requirement that a petition for rehearing or motion to reconsider be filed as a prerequisite for seeking review in the Supreme Court of Kentucky.

Petitions for Rehearing

A party adversely affected by an opinion of the Court of Appeals may file a petition for rehearing or a petition for modification or extension of the opinion under RAP 43(B). The relief available in a petition for rehearing is very limited. RAP 43(B)(1)(a) provides that relief will be granted only when a petitioner can show that “the court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues

presented on the appeal or the law applicable thereto.” If a party does not wish to challenge the result of the opinion but wishes to correct factual inaccuracies or to request that the Court address issues not covered in the opinion, the appropriate filing is a petition for modification or extension. RAP 43(B)(1)(b)-(c). A party may request rehearing and modification or extension in a single petition. A party may also move the Court to publish an opinion or opinion and order that was originally designated not to be published. RAP 43(H).

The petition must be filed in the Court of Appeals within 20 days of the date on which the opinion or opinion and order was issued. RAP 43(B)(3). If a party requires more time to prepare the petition, a motion requesting additional time must be filed on or before the date the petition is due. The petition must be accompanied by the \$150 filing fee required by RAP 13(B), except that no filing fee is required for a motion to publish.

In general, the petition must conform to the formatting prescribed for briefs under RAP 31 (excluding an introduction and statement of oral argument and statement of points and authorities) except that the petition has green covers and is limited to 3,500 words or 8 pages if computer generated and limited to 10 pages if handwritten or typewritten. A copy of the opinion must be attached to each copy of the petition. In preparing the petition, a party should be aware that the members of the panel already have copies of the briefs previously filed and that the arguments of the petition should be directed to the opinion as rendered.

Opposing parties may file responses to the petition within 20 days of the date on which the petition was filed. RAP 43(B)(3). The responses must have gray covers and are limited 3,500 words or 8 pages if computer generated and limited to 10 pages if handwritten or typewritten.

A petition under RAP 43 is assigned to the same panel that considered the appeal. However, a different judge is designated as the presiding judge. RAP 43(B)(6). A petition under this rule

is normally ruled on by order. If a petition is granted, a party adversely affected may file its own petition under RAP 43(B)(7). If a petition is denied, no request for reconsideration of that ruling is permitted. RAP 43(D)(5).

Motions to Reconsider

When a ruling of the Court of Appeals is announced by order, a party adversely affected may file a motion to reconsider under RAP 43(D). A decision announced in a document headed as an opinion and order is treated as an opinion for purposes of rehearing. RAP 43(A). The procedure of RAP 43(D) applies to both procedural and substantive orders of the Court of Appeals except for certain rulings specifically listed in RAP 43(D)(5). The rulings that are not subject to reconsideration by the Court of Appeals include:

1. Orders granting or denying interlocutory relief under RAP 20 or 21;
2. Orders granting or denying transfer under RAP 17;
3. Orders granting or denying discretionary review under RAP 44;
4. Orders granting or denying petitions for rehearing under RAP 43; and
5. Orders granting or denying reconsideration.

If the order to be reconsidered was a final order in an appeal, the \$150 filing fee required by RAP 13 must be paid. RAP 43(F).

In general, a motion to reconsider is assigned to the panel that made the initial decision.

Further Review in the Supreme Court

Final decisions of the Court of Appeals may be reviewed by the Supreme Court of Kentucky. In most cases, review must be

sought by a motion for discretionary review. RAP 44. In workers' compensation cases under RAP 49 and in original actions under RAP 60, review in the Supreme Court is by a matter-of-right appeal.

Motions for Discretionary Review

In any case appealed as a matter of right from a circuit or family court to the Court of Appeals and in any case in which discretionary review was granted or denied in the Court of Appeals, a party may seek review in the Supreme Court by the filing of a motion for discretionary review. The motion must be filed in the office of the Clerk of the Supreme Court within 30 days of the rendition of an opinion by the Court of Appeals, the entry of an order disposing of a petition for rehearing, the entry of an order denying discretionary review by the Court of Appeals, or the entry of some other order finally disposing of an appeal. The motion must be in the form provided by RAP 44 and must be accompanied by the \$150 filing fee specified in RAP 13. Questions concerning the motion should be addressed to the office of the Clerk of the Supreme Court.

Notice of Appeal to the Supreme Court

In an appeal of a workers' compensation case under RAP 49 or an original action filed in the Court of Appeals under RAP 60, review in the Supreme Court is by a matter of right appeal.

The notice of appeal must be filed in the office of the Clerk of the Court of Appeals within 30 days of the date of the rendition of the Court of Appeals opinion, or of the entry of the order disposing of the petition for rehearing, or of the entry of any other order making final disposition of the action. The notice must be served on all opposing counsel and the \$150 filing fee required by RAP 13(1)(d) must be paid.

Final Disposition of Appeals

Effective Date of Opinions

If a decision of the Court is announced by an opinion, the opinion

is not effective until it becomes final under RAP 40(G). Such a decision may not be enforced until it is final.

A decision of the Court of Appeals becomes final on the 31st day after the rendition of the opinion unless a petition for rehearing or motion for discretionary review has been timely filed. RAP 40(G). If a petition for rehearing has been filed, the opinion becomes final on the 31st day after the entry of an order disposing of the petition for rehearing unless a motion for discretionary review is timely filed.

If a motion for discretionary review is filed in the Supreme Court of Kentucky, a Court of Appeals' opinion becomes final immediately upon denial of the motion by the Supreme Court. RAP 40(G)(2). If the motion for discretionary review is granted, the Court of Appeals opinion never becomes effective, but is replaced with the decision of the Supreme Court.

When the opinion becomes final, the Clerk of the Court of Appeals stamps an endorsement on the face of the opinion and sends copies of the endorsed opinion to the circuit court clerk. RAP 40(G)(5). At the time that opinion is made final, the Clerk of the Court of Appeals also returns the original record to the circuit court clerk for further action or for storage and eventual archiving. The Clerk of the Court of Appeals retains a permanent record only of the documents filed in the appellate court, as well as any orders and the opinion of the Court of Appeals.

Kentucky no longer uses a mandate (an order from the Clerk of the Court of Appeals) to make appellate opinions effective. RAP 40(G)(4).

Effective Date of Orders

Unless an order states otherwise, an order is effective upon entry in the office of the Clerk of the Court of Appeals and must be obeyed.

If an order disposes of an appeal, the Clerk of the Court of Appeals

closes out the appellate record (including the return of any original circuit court record) on the 31st day after the entry of the order unless a motion to reconsider or a motion for discretionary review has been filed. If a motion to reconsider is denied, closure will occur on the 31st day after the entry of the order denying the motion to reconsider. If a motion for discretionary review is filed in the Supreme Court, the record is not closed until the Supreme Court disposes of the motion.

Decisions Designated for Publication

If a decision has been designated for publication, the Clerk of the Court of Appeals sends a notice to West Publishing Company allowing the opinion to be printed in the Southwestern Reporter. Until the Clerk releases the opinion as final, it may not be relied upon as authority.

Storage of Records

The Clerk of the Court of Appeals stores appellate court records in the Court's central office for approximately four years. The records are eventually removed to the custody of the Kentucky Department for Libraries and Archives.

Abbreviations

RAP	Kentucky Rules of Appellate Procedure
CR	Kentucky Rules of Civil Procedure
FCRPP	Kentucky Family Court Rules of Procedure and Practice
KRS	Kentucky Revised Statutes
RCr	Kentucky Rules of Criminal Procedure
SCR	Rules of the Supreme Court of Kentucky

Glossary

Affirm. To confirm a judgment on appeal; declaration used when the appellate court finds no reversible error.

Appeal. A legal procedure in which a party who is dissatisfied with a judgment of a lower court may seek review of that judgment in a court with higher authority.

Appellant. A party to a legal proceeding who seeks relief in the appellate court from a lower court judgment.

Appellee. A party who opposes an appeal and who usually seeks to have the judgment affirmed.

Concur. To agree with a decision.

Dissent. To disagree with a decision.

In forma pauperis. A procedure allowing a person who cannot pay court fees because of poverty to proceed without payment of those fees.

Litigant. Any party to a lawsuit.

Motion. A document filed with the court seeking some relief short of a decision on the merits of an appeal, such as an extension of time or dismissal of an appeal.

Opinion. A document rendered by a court announcing a decision on the merits of an appeal and setting out the reasons for that decision.

Order. A document from a court granting or denying a motion or directing that some action be taken.

Pro se. A person who is representing himself or herself in litigation and who is proceeding without an attorney.

Remand. To send a case back to a lower court with directions to take some further action.

Response. A document filed with the court by a party opposing a motion; a response may, in some instances, express a lack of opposition to the relief sought or even join in the request for relief.

Reverse. To declare that a judgment is wrong due to some significant error and that the judgment may not be enforced.

Vacate. To set aside a judgment because the circuit court failed to take a required step in deciding a lawsuit.



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