PROPOSED RULES OF APPELLATE PROCEDURE
2022

Written comments to these proposed Rules of Appellate Procedure must be submitted by June 30, 2022 to rulesamendments@kycourts.net.

These rules incorporate various provisions of current Rules of Civil Procedure and Rules of Criminal Procedure to consolidate all rules regarding appeals into a single location. Where appropriate, these rules draw upon developments in case law and federal rules. Commentary is included for select rules to explain the proposals, but this commentary will not be included as part of the final rules if adopted. Citations to existing rules are also provided for reference. Upon codification, these rules will be eliminated as necessary.

PROPOSED NEW RULES AND AMENDMENTS	
Rule Number	**Title**
ARTICLE I	TITLE AND SCOPE OF RULES
RAP 1	Applicability, Title, and Amendment of These Rules
ARTICLE II	COMMENCEMENT OF APPEAL
RAP 2	Appeal as of Right – How Taken
RAP 3	Appeal as of Right – When Taken
RAP 4	Cross-Appeals
ARTICLE III	GENERAL PROVISIONS APPLICABLE TO APPEALS
RAP 5	Service, Form, and Filing
RAP 6	Computing and Extending Time
RAP 7	Motions
RAP 8	Death, Substitution, and Amendment of Parties
RAP 9	Intervention on Appeal
RAP 10	Failure to Timely Appeal or Comply with Other Rules
RAP 11	Obligation of Counsel and Self-Represented Party; Frivolous Filings
RAP 12	Appearance, Substitution, or Withdrawal of Attorneys
RAP 13	Costs and Filing Fees

PROPOSED RULES OF APPELLATE PROCEDURE

ARTICLE I. TITLE AND SCOPE OF RULES

RAP 1 Applicability, Title, and Amendment of These Rules

(A) Applicability of These Rules.

These rules govern appellate procedure in all Kentucky courts, except for special statutory proceedings in the Court of Appeals. Unless otherwise indicated in specific rules, these rules apply to appeals in both civil and criminal matters. In special statutory proceedings, the procedural requirements of the governing statutes prevail over any inconsistent procedures prescribed by these rules.

These rules also govern original actions in the Supreme Court and the Court of Appeals authorized by Constitution Section 110(2)(a) and Supreme Court Rule 1.030(3).

(B) Title.

These rules are to be known as the Kentucky Rules of Appellate Procedure and may be cited as such or by the abbreviation "RAP."

(C) Amendment.

(1) Suggestions for amendment of these rules may be submitted directly to the Supreme Court of Kentucky for its consideration by letter to the Clerk of the Supreme Court of Kentucky.

(2) Unless otherwise ordered by the Supreme Court, all substantial amendments will be published in an official publication of the Kentucky Bar Association at least 60 days before they become effective. Publication or mail may be accomplished electronically.

{This proposed rule is based upon current CR 1, CR 87.}

ARTICLE II. COMMENCEMENT OF APPEAL

RAP 2 Appeal as of Right—How Taken

(A) Filing the Notice of Appeal.

(1) All appeals shall be taken by filing a notice of appeal in the court from which the appeal is taken within the time allowed by RAP 3. Appeals in civil proceedings shall be taken to the next higher court. Appeals in criminal proceedings shall be taken to the next higher court, except that an appeal from a judgment imposing a sentence of death, life imprisonment, or imprisonment for 20 years or more shall be taken directly to the Supreme Court. Appeals from family courts that are established pursuant to Ky. Const. § 110(5)(b) or Ky. Const. § 112(6) shall be taken to the Court of Appeals. After the filing of the notice of appeal, an appellee or cross-appellee may file a notice of cross-appeal as allowed by RAP 4. If the appeal is from a circuit court, any party may file a motion for transfer of the case to the Supreme Court as provided in RAP 17. A motion for discretionary review by the Supreme Court of a decision of the Court of Appeals, or by the Court of Appeals of an appellate decision of the circuit court, shall be made as provided in RAP 44.

(2) Upon timely filing of the notice of appeal from a final and appealable order on all claims in an action, all parties to the proceedings from which the appeal is taken, except those who have been dismissed in an earlier final and appealable order, shall be parties before the appellate court. Upon timely filing of the notice of appeal from a final judgment or order on less than all claims or parties as permitted by CR 54.02(1), all parties against whom that judgment or order has been made final and appealable shall be parties before the appellate court. The timely filing of a notice of appeal is jurisdictional. The failure to comply with any other rules of appellate procedure, or any order of court, does not affect the validity of the appeal, but is ground for such action as the appellate court deems appropriate as set forth in RAP 10.

(3) The failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial.

(4) Where a statute or another court rule grants a right of appeal to the Court of Appeals, the Kentucky Rules of Appellate Procedure shall govern the taking of the appeal, unless in conflict with the statute or other court rule.

(B) Contents of the Notice of Appeal.

(1) The notice of appeal shall: (a) specify the party or parties taking the appeal; (b) identify, including specifying the date of, the judgment, order, or part thereof appealed from; and (c) contain a certificate that a copy of the notice has been served 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.

(2) The notice of appeal should also: (a) attach a copy of the judgment or order appealed from to the notice of appeal; (b) identify the court to which the appeal is taken; (c) specify all parties to the proceedings from which the appeal is taken, other than the appellant, and counsel representing them; and (d) specify the date of entry of and attach a copy of any orders on post-trial motions under CR 50.02, CR 52.02, or CR 59 that tolled the running of time for filing the appeal.

(C) Clerk's Service of the Notice of Appeal.

(1) When the notice of appeal is filed, the clerk shall serve notice of its filing by delivering a copy showing the date filed, a copy of the official docket sheet, and a copy of the check receipt for the filing fee or order granting in forma pauperis status to the clerk of the appellate court and to the counsel of record of each party to the proceedings from which the appeal is taken or to the party, if unrepresented.

(2) The clerk shall note in the docket the names of the parties served, the date of service, and the means of service. The clerk's failure to serve notice does not affect the validity of the appeal.

(D) Criminal Appeals. An appeal from a judgment imposing a sentence of death, life imprisonment, or imprisonment for 20 years or more shall be taken directly to the Supreme Court.

(E) Certain Appeals Shall Not Constitute an Entry of Appearance. The taking of an appeal from a final order or judgment in any action in which the trial court has denied a defense asserted under Civil Rule 12.02 based upon (1) lack of jurisdiction over the person, (2) improper venue, (3) insufficiency of process, or (4) insufficiency of service of process, shall not constitute an entry of appearance by the appellant in any court.

(F) Joint or Consolidated Appeals.

(1) **Joinder.** Two or more persons entitled to appeal may file a joint notice of appeal and they shall thereafter proceed on appeal as a single appellant. Upon motion of parties that have filed separate timely notices of appeal, the appellate court may join the appeals, and the joined parties shall thereafter proceed on appeal as a single appellant. All parties to the joint notice of appeal, or the party's attorney, must sign the notice of appeal pursuant to RAP 11.

(2) **Consolidation.** Upon motion of a party or upon the court's own motion, separate appeals may be consolidated by the appellate court for

purposes of briefing, oral argument, and rendering an opinion. Consolidation is within the discretion of the appellate court and will generally be granted only if the separate appeals are taken from the same circuit court action or if the appeals involve substantially identical issues. The appellate clerk shall relate the consolidated appeals, and all documents filed in the appellate court shall be noted on the docket as if filed in each of the consolidated appeals. Parties to consolidated appeals shall be treated as separate parties but may, upon motion, be permitted to file a consolidated brief or to adopt a brief filed by another party.

(G) Appeals to Be Heard Together. Two or more appeals involving the same parties or similar issues may, upon notice, be designated to be heard together by the appellate court. If the appellate court designates the appeals to be heard together, the appellate clerk shall relate the appeals on the docket. The appellate court may in its discretion issue a single opinion or order or multiple opinions or orders in appeals designated to be heard together. If the appellate court issues a single opinion or order, the parties may proceed as if the several appeals are a single appeal or may proceed as if they are several appeals.

(H) Payment of Fees. At the time the notice of appeal is tendered, the appellant shall pay all required fees to the clerk of the court from which appeal is taken, and the notice shall not be docketed or noted as filed until such payment is made. If the appellant is a pauper and unable to pay the filing fee, a motion to proceed *in forma pauperis* shall be tendered with the notice of appeal as provided in RAP 54, which governs motions to proceed *in forma pauperis*. In criminal cases, no filing fee is required from the Commonwealth or from a public defender representing a person as set forth in RAP 54(B).

COMMENT

The major change in this rule is to no longer require the naming of appellees or other parties in the notice of appeal. That change has resulted in the new RAP 2(A)(2) and revised requirements for a notice of appeal in 2(B).

Since the Supreme Court rendered City of Devondale v. Stallings, 785 S.W.2d 954 (Ky. 1990), the indispensable party rule has resulted in the dismissal of countless appeals. Experienced appellate practitioners advise parties and less-experienced counsel that every single party named in the trial court, regardless of whether they have any interest in the appeal, should be included in the notice of appeal because whether a party is "indispensable" is not always easy to determine and because courts frequently have a far different view than practitioners on whether a party is indispensable to the appeal.

As stated in Stallings, "policy considerations mandate strict compliance with the time limit on filing of the notice of appeal," which the Court held gave "[p]otential parties to an appeal . . . the right to know within the time specified in the rule that they are parties." Id. at 957. In practice, however, because experienced practitioners name every party remaining in the case below in the notice of appeal, receiving a notice of appeal with a particular party's name in it does not really give that party notice of whether the appeal will or will not concern it; the filing attorney may have no intention of raising any issues regarding which that party is interested, but the filing attorney feels obligated to name that party to prevent dismissal for failure to name an indispensable party. In contrast, when a pro se party or less-experienced attorney files a notice of appeal without naming a particular party, so long as that party receives a copy of the notice of appeal, it may well know that the appeal concerns it, regardless of whether it was named in the notice of appeal.

This Court has, on a number of occasions, overlooked a party's failure to name an indispensable party on appeal, most recently in Cates v. Kroger, 627 S.W.3d 864 (Ky. 2021). The key in those cases is whether the party received notice of the appeal and whether the party was prejudiced. Because both the appellant and the trial court clerk are required to serve the notice of appeal on all parties remaining in the trial court at the time of the final order or judgment being appealed, lack of notice should not be an issue; when it is, courts can determine whether the party was prejudiced by the lack of notice.

This Court has repeatedly held that the doctrine of substantial compliance with rules of appellate procedure is meant to: (1) achieve an orderly appellate process, (2) decide cases on the merits, and (3) prevent the needless loss of the constitutional right to appeal. Thus, sanctions for rule violations should not be automatic dismissal, but should be commensurate with the harm caused and the severity of the defect. Under this Court's "substantial compliance" line of cases, along with its line of cases like Cates, failure to name a party as an "appellee" or "other party" somewhere in a notice of appeal should not result in the dismissal of an appeal, particularly when the unnamed party is aware of the notice of appeal or is not prejudiced by the failure to name it in the notice.

Accordingly, the Committee has proposed a rule (RAP 2(B)(1)) that does not require the naming of appellees or other parties in the notice of appeal. To fix the jurisdictional issue raised in Stallings and address the concerns raised in the Cates dissent, RAP 2(A)(2) makes every party that was in the case at the time of a final order on all claims (or every party subject to an order made final under CR 54.02) a party to the appeal.

In addition to the above change, some minor changes have been made. For example, the appellate clerks would like more information in the notices of appeal to aid in the processing of cases. The Committee understands that desire, but does not wish to provide any additional grounds for dismissal of an appeal. Thus, the notice of appeal now has a two-part rule, one part with what

"shall" and the other part with what "should" be contained in or attached to the notice of appeal.

In addition, sections (F) and (G) clarify and explain existing practice re appeals that are joint, consolidated, or simply heard together. Paragraph (F)(1) makes clear that a joint notice of appeal needs to be signed by all unrepresented parties appealing or by attorney(s) representing all appellants.

{This proposed rule is based upon current CR 73.01, 73.02(1), 73.02(2), (3), and (4), 73.03, RCr 12.02, 12.04.}

RAP 3 Appeal as of Right—When Taken

(A) Time for Filing Notice of Appeal.

(1) **30 days to appeal, unless another time applies.** Unless a statute or court rule provides a different time, the notice of appeal required by RAP 2 shall be filed with the clerk of the court from which the appeal is taken no later than 30 days from the date of notation of service of the judgment or order appealed from.

(2) **Date from which time to appeal begins to run.** The date of notation of service of the judgment or order under CR 77.04(2) or RCr 12.06 shall be the date for the purpose of fixing the running of the time for appeal under this rule.

(3) **Effect of motion to proceed *in forma pauperis*.** If the notice of appeal is timely tendered and accompanied by a motion to proceed *in forma pauperis* as provided in RAP 54, the notice of appeal or cross-appeal shall be considered timely, but shall not be filed until the motion is granted or, if denied, the filing fee is paid. If the motion is denied, the party shall have 30 days within which to pay the filing fee or to appeal the denial to the appropriate appellate court.

(B) Pro se Inmate Appeals. If a pro se inmate files a notice of appeal in a criminal case, the notice shall be considered filed if its envelope is officially marked as having been deposited in the institution's internal mail system on or before the last day for filing with sufficient first class postage prepaid.

(C) Failure to Serve or Receive Notice of Judgment. Failure of the trial court to require service of notice of entry of any judgment or order under this rule, failure of the clerk to serve such notice, or failure of a party to receive notice shall not affect the validity of the judgment or order, and does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in section (E) of this rule.

(D) Extension of Time for Appeal and Other Remedies. Upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment or an order which affects the running of the time for taking an appeal, the trial court may extend the time for appeal, not exceeding 10 days from the expiration of the original time. This is in addition to any other remedies that may be available, including but not limited to, relief available pursuant to CR 60.02, and any relief recognized by case law or other rule.

(E) Effect of a Motion on a Notice of Appeal.

(1) In a criminal case, if a timely motion has been made for a new trial, an appeal from a judgment of conviction may be taken within 30 days after the date of entry of the order denying the motion. If, however, a motion for new trial was made more than 5 days after return of the verdict, the appeal must be from the order overruling or denying the motion, and the review on appeal shall be limited to the grounds timely raised by the motion as provided by RCr 10.06.

(2) If a party timely files in the trial court any of the following motions under the Kentucky Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: CR 50.02; CR 52.02; or CR 59, except when a new trial is granted under CR 59. No motions filed under any other civil rule will toll the time to file a notice of appeal.

(3) If a party files a notice of appeal after the date of the docket notation of service of judgment in paragraph (A)(2) above, but before disposition of any timely motions under CR 50.02, CR 52.02, or CR 59, the trial court retains jurisdiction to rule on the motion. The appellant shall promptly move the appellate court to hold the appeal in abeyance pending a decision on such motion. When the trial court has entered an order disposing of the motion, the appellant shall promptly file a copy with the clerk of the appellate court.

(4) A party intending to challenge an order disposing of any motion listed in paragraphs (E)(1) or (2) of this rule, or a judgment altered or amended upon such a motion, shall file a notice of appeal, or an amended notice of appeal, in compliance with RAP 2, within the time prescribed by this rule measured from the date of the RAP 3(A)(2) docket notation regarding service of the order disposing of the last such remaining motion.

(5) No additional fee is required to file an amended notice of appeal.

{This proposed rule is based upon current CR 73.02(1), 77.04(2) and (4), RCr 12.04, FRAP 4(a)(2).}

RAP 4 Cross-Appeals

(A) Who may take. Any party properly named as an appellee or cross-appellee in a civil case may take a cross-appeal from a judgment of the trial court. A cross-appeal shall be denominated as such. The failure of a party taking an appeal to prosecute the appeal, or that party's dismissal of it shall not prevent any party taking a cross-appeal from prosecuting the cross-appeal.

(B) Timing. The notice of cross-appeal shall be filed no later than 10 days from the last day allowed for the filing of a notice of appeal.

(C) Parties. A cross-appellant may name as cross-appellee any party to the circuit court action against whom relief is sought on the cross-appeal.

(D) Contents of the Notice of Cross-Appeal. The notice of cross-appeal shall conform to RAP 5, shall contain the information identified in RAP 2(B)(1), and should contain the information identified in RAP 2(B)(2).

(E) Additional Cross-Appeal. Any cross-appellee who has not previously filed a notice of appeal or cross-appeal from the judgment to be reviewed may file an additional cross-appeal no later than 10 days from the filing of the notice of cross-appeal which first names that cross-appellee as a party to the appellate action seeking review.

(F) Payment of Fees. At the time a cross-appeal is tendered, the cross-appellant shall pay all required fees to the clerk of the court from which the cross-appeal is taken, and the cross-appeal shall not be docketed or noted as filed until such payment is made. If the party cross-appealing is a pauper and unable to pay the filing fee, a motion to proceed *in forma pauperis* as provided in RAP 54 shall be tendered with the notice of cross-appeal.

(G) Clerk's duty. When the notice of cross-appeal is filed, the clerk shall serve notice of its filing in accordance with RAP 2(C).

{This proposed rule is based upon current CR 74.01.}

ARTICLE III. GENERAL PROVISIONS APPLICABLE TO APPEALS

RAP 5 Service, Form, and Filing

(A) Service. All documents filed pursuant to these rules shall be served as set forth in CR 5.01 and 5.02 and shall contain a certificate indicating the date and manner of service signed by a party or its counsel as set forth in CR 5.03.

(B) Form.

(1) **Caption.** All documents filed pursuant to these rules shall have a caption setting forth the name of the court, the style of the action, the case number, and a title. The style of the action may include the names and designations of all the parties or may state the name and designation of the first party on each side with an appropriate indication of other parties.

(2) **Redactions.** CR 7.03 applies to all actions prosecuted under these rules. Initials or a descriptive term must be used instead of a name in cases involving juveniles, allegations of abuse and neglect, termination of parental rights, mental health, and expungements.

(3) **Signature**. All documents filed pursuant to these rules shall be signed by a party or its counsel as set forth in RAP 11.

(4) **Format**. Except for exhibits, or as otherwise provided in these rules or other orders of the appellate courts, all documents filed in the appellate courts shall be clearly readable, in black type no smaller than 12 point, single sided, and on unglazed white paper 8 ½ by 11 inches in dimension with at least a double space between lines and 1-inch margins.

(C) Filing with the Clerk. All notices of appeal or cross-appeal, designations of the record, *in forma pauperis* motions, motions for supersedeas bonds, and motions for bond on appeal in criminal proceedings shall be filed in the court from which the appeal is taken. All other documents required or permitted by these rules shall be timely filed with the clerk of the court in which the appeal is pending.

(D) Clerk's Duties Regarding Filing and Service. The clerk shall endorse upon every document filed in an action the date of its filing. Such endorsement shall constitute the filing of the document and no order of court shall be required.

(E) Filing Timeliness. To be timely filed, a document shall be received by the clerk of the court in which the appeal is pending within the time specified for filing. Any document filed with the Clerk of the Supreme Court of Kentucky or Kentucky Court of Appeals shall be deemed timely filed if it has been transmitted by United States registered (not certified) or express mail, or by

other recognized mail carriers, with the date the transmitting agency received said document from the sender noted by the transmitting agency on the outside of the container used for transmitting, within the time allowed for filing, or by any other method allowed by court rule or order.

(F) Deficiency. If the Supreme Court of Kentucky or the Kentucky Court of Appeals issues a deficiency notice regarding any document filed in that court, a party receiving such a notice shall file a corrected document within 10 days of the date of the notice.

{This proposed rule is based upon current CR 5.01, 5.02, 5.03, 5.05, 7.02, 10.01, 76.40(2).}

RAP 6 Computing and Extending Time

(A) Computing Time. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

(B) Leave of Court Required for Extension or Enlargement. Parties may not by agreement extend time without leave of court.

(C) Extensions Sought Before a Due Date. The court for cause shown may, at any time in its discretion, with or without motion or notice, extend the time for an act that is required or allowed to be done within a specified time if the request is made before the expiration of the period originally prescribed or as extended by a previous order, but it may not extend the time for taking any action under RAP 3, 4, or 17.

(D) Enlargement of Time Sought After a Due Date. Upon the filing of a motion for enlargement made after the expiration of a due date, the court may in its discretion grant an enlargement of time where the failure to act was the result of excusable neglect. No enlargement of time will be granted for taking any action under RAP 3, 4, 17, or 44.

{This proposed rule is based upon current CR 6.01, 6.02, 76.34(1).}

RAP 7 Motions

(A) In General. An application to the court for an order or other relief shall be by motion which shall be made in writing, comply with RAP 5, state with particularity the grounds therefor, and set forth the relief or order sought.

(B) Redactions. CR 7.03 applies to all actions prosecuted under these rules. Initials or a descriptive term must be used instead of a name in cases involving juveniles, allegations of abuse and neglect, termination of parental rights, mental health, and expungements.

(C) Response. An opposing party may file a response no later than 10 days from the date a motion was filed or within the time otherwise designated by the court.

(D) Number of Copies. Five copies (1 unbound and 4 bound) of motions and responses shall be filed in the Court of Appeals. Except as otherwise directed by RAP 43 through 46, 5 copies (1 unbound and 4 bound) of motions and responses shall be filed in the Supreme Court, unless the Court directs otherwise.

(E) Hearing and Disposition. Except for motions that call for final disposition of an appeal or original action in the appellate court, any member of the court designated by the Chief Justice or Chief Judge may hear and dispose of any motion.

(F) Oral Arguments. No motion will be heard on oral argument except by order of the court.

(G) Motion to Dismiss Appeal or Cross-Appeal.

(1) In addition to any other relief provided by these rules, an adversary party may move to dismiss an appeal or cross-appeal because it is not within the jurisdiction of the appellate court or because it has not been prosecuted in conformity with these rules.

(2) The filing of a motion to dismiss shall suspend the running of time for procedural steps otherwise required with regard to the appeal and any cross-appeal in the same proceeding. The time will continue to run as otherwise provided by these rules after the date an order is entered denying the motion or passing it to the merits.

COMMENT

Throughout these rules, the parties are asked to provide 1 unbound copy in addition to the bound copies for use by and ease of the clerks.

{This proposed rule is based upon current CR 7.02, 7.03, 76.34.}

RAP 8 Death, Substitution, and Amendment of Parties

(A) Death of a Party in a Civil Case.

(1) If a party in a civil case dies after a notice of appeal is filed or while a proceeding is otherwise pending in the appellate court, the personal representative of the deceased party may be substituted as a party on motion filed with the clerk of the appellate court by the representative or by any party. If the deceased party has no representative, any party may suggest the death on the record and proceedings shall be had as the appellate court may direct.

(2) If a party against whom an appeal may be taken dies after entry of a judgment or order in the trial court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed, substitution shall be effected in the appellate court in accordance with this paragraph.

(3) If a party entitled to appeal shall die before filing a notice of appeal, the notice of appeal may be filed by the party's personal representative, or, if the party has no personal representative, by the party's attorney of record within the time prescribed by these rules. After the notice of appeal is filed, substitution shall be effected in the appellate court in accordance with this rule.

(4) Any statutorily required application to revive an action shall be filed in the trial court.

(B) Death of Defendant in a Criminal Appeal. No notice of appeal may be filed if the defendant in a criminal case has died. Upon notice of the defendant's death, the appeal shall be dismissed.

(C) Duty to Notify of Death of a Party. All parties, and counsel for parties, to an appeal have a duty to notify the court when a party to the appeal has died.

(D) Public Officer as Party. When a public officer is a party to an appeal or other proceeding in the officer's official capacity, the officer may be described as a party by official title rather than by name. The appellate court may, however, require the officer's name to be added.

(E) Public Officer's Death or Separation from Office. When a public officer is a party in the officer's official capacity to an appeal or other proceeding in the appellate court and dies, resigns, or otherwise ceases to hold office, the action does not abate, and the successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be

entered at any time, but the failure to enter such an order shall not affect the substitution.

(F) Substitution for Other Causes. If substitution of a party in the appellate court is necessary for any reason other than as set forth above, substitution shall be effected by motion filed in the appellate court in which the matter is then pending.

{This proposed rule is based upon current CR 76.24.}

RAP 9 Intervention on Appeal

(A) Upon motion or recommendation by the court anyone may be permitted to intervene on appeal for the reasons in CR 24.01(1) and CR 24.02, except that intervention on appeal is discretionary with the court.

(B) A motion to intervene shall state the proposed intervenor's interest in the appeal; state whether the proposed intervenor seeks to file a separate brief, to join in the brief of a party to the appeal, or to file a joint brief with another proposed intervenor; and set forth the reasons intervention would assist the court. When the constitutionality of an act of the General Assembly was raised in the trial court and is drawn into question by the proposed intervenor, the proposed intervenor shall serve a copy of the motion upon the Attorney General. The motion shall otherwise conform to RAP 7 with service on all parties to the appeal.

(C) Any party objecting to the proposed intervention may file a response within 10 days. The response shall otherwise conform to RAP 7 with service on all parties and the proposed intervenor. The court shall determine, in its discretion, whether intervention shall be granted and, if so, whether the proposed intervenor shall be aligned as appellant or appellee and whether the proposed intervenor shall be permitted to file a separate brief.

{This rule is based upon current CR 24.01–24.03.}

RAP 10 Failure to Timely Appeal or Comply with Other Rules

(A) Dismissal of appeal. The failure of a party to timely file a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial.

(B) Consequences for failing to comply with rules. A party's failure to take any step other than the timely filing of a notice of appeal, cross-appeal, or motion for discretionary review does not affect the validity of the appeal or other proceeding in an appellate court. Although failure to comply with rules other than timely filing of a notice of appeal, cross-appeal, or motion for discretionary review does not affect the validity of an appeal or other proceeding, the failure of a party to substantially comply with the rules is ground for such action as the appellate court deems appropriate, which may include:

(1) A deficiency notice or order directing a party to take specific action,

(2) A show cause order,

(3) Striking of filings, briefs, record or portions thereof,

(4) Imposition of fines on counsel for failing to comply with these rules of not more than $1,000,

(5) A dismissal of the appeal or denial of the motion for discretionary review, and

(6) Such further remedies as are specified in any applicable rule.

COMMENT

This rule substantially mirrors CR 73.02(2), with the addition of deficiency notices and show cause orders, which are frequently used by the appellate courts but not specifically mentioned in the rules. The order of the actions starts low and builds, rather than beginning with dismissal of an appeal or denial of a motion as is currently the case in CR 73.02(2)(a), and the potential fine for sanctions has increased from $500 to $1000.

RAP 11 Obligation of Counsel and Self-Represented Party; Frivolous Filings

(A) Obligation of Counsel and Self-Represented Parties.

(1) Every filing of a party represented by an attorney shall be signed by at least one attorney of record in that attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's filing and state the party's address. The signature of an attorney or party constitutes a certification that the signatory has read the filing, that to the best of the signatory's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the filer. If a filing is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the unsigned document.

(B) Frivolous filings. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith. If an appellate court determines that an appeal or appellate filing is frivolous, it may impose an appropriate sanction, including but not limited to:

(1) Striking of filings or briefs or portions thereof;

(2) A dismissal of the appeal or denial of the motion;

(3) Awarding just monetary sanctions and single or double costs to the opposing party;

(4) Imposition of fines on counsel of not more than $1,000; and

(5) Such further remedies as are specified in any applicable rule.

{This proposed rule is based upon current CR 11, 73.02(4).}

RAP 12 Appearance, Substitution, or Withdrawal of Attorneys

(A) Notice of Appearance or Substitution. Any attorney appearing on behalf of a party after the initiating document has been filed shall file a notice of entry of appearance. Any attorney substituting for another attorney shall file a notice of substitution, which will act as a withdrawal for the previous attorney.

(B) Motion to Withdraw. Without substitution of another attorney, an attorney shall not withdraw from representation except upon motion to withdraw granted by the court. In addition to the service required under RAP 5(A), service of a motion to withdraw shall also be made on the client at the client's last known address.

COMMENT

This is a new rule to advise when counsel is required to enter an appearance. Currently, it is not obvious to many attorneys when or why they need to let an appellate court know of their presence, other than by filing a brief or other document in court.

Also, notices of appearance are currently treated by the appellate clerks as motions to appear and require a ruling from the court. Unless an attorney is withdrawing without the substitution of another attorney, the choice of attorney representing a party on appeal should be between the attorney and the represented party without involving the court other than through the provision of notice.

RAP 13 Costs and Filing Fees

(A) Costs Taxable. Except for a filing fee, no costs shall be taxed in proceedings in the Supreme Court and Court of Appeals unless otherwise ordered by the Court.

(B) Filing Fees.

(1) Filing fees for docketing the following in the Court of Appeals or in the Supreme Court shall be:

(a)	Appeal, cross-appeal or certification of law	$150
(b)	Appeals or cross-appeals from Circuit Court, Family Division, to the Court of Appeals, from orders determining: (1) Paternity (2) Dependency, neglect or abuse (3) Domestic violence (4) Juvenile status offense	$75
(c)	Motion for transfer	$150
(d)	Motion or cross-motion for discretionary review	$150
(e)	Petition for rehearing, modification or extension of opinion	$150
(f)	Motion for leave to file amicus curiae brief	$150
(g)	Motion for intermediate relief (if filing fee has not been paid)	$150
(h)	Motion for relief under RAP 20	$150
(i)	Original proceeding under RAP 60	$150
(j)	Motion for reconsideration of a final order or "Opinion and Order"	$150
(k)	Petition or cross-petition for review of a decision by the Workers' Compensation Board	$150

(2) In appeals from District Court, the filing fee is $60, plus any additional fees set by statute, local rule, or ordinance.

(3) No filing fee shall be payable in a criminal proceeding in which the appellant or appellants are represented by a public defender. No filing fee shall be payable by the Commonwealth in criminal proceedings, but in civil actions it shall be liable for reimbursement of costs as provided by paragraph (C) of this rule to the same extent as any other unsuccessful party. Judicial officers of the Court of Justice who are litigants in their official capacities shall not be liable for reimbursement or for the payment of filing fees except as may be required by the Supreme Court in actions arising under Supreme Court Rule 4 (Judicial Retirement and Removal Commission).

(C) Collection. The costs of each appeal or original action shall be borne by the unsuccessful party or parties. Liability for reimbursement of costs may be enforced on motion without necessity of an independent proceeding.

{This proposed rule is based on current CR 3.03, CR 76.42.}

RAP 14 Number of Documents Required

(A) Number of Documents Required for Docketing. The required number of documents for docketing in the Court of Appeals and Supreme Court shall be:

		Supreme Court	Court of Appeals	Rule References
(1)	Motion to transfer	10	N/A	RAP 17
(2)	Certification of Law	10	N/A	RAP 50
(3)	Motion for relief from order regarding injunction	10	5	RAP 20
(4)	Prehearing Conference Statement	N/A	1	RAP 22
(5)	Briefs	10	5	RAP 31
(6)	Petition for rehearing	10	5	RAP 43
(7)	Motion for reconsideration	10	5	RAP 43
(8)	Motion for discretionary review	10	5	RAP 44
(9)	Cross-motion for discretionary review	10	5	RAP 46
(10)	Petition for review workers' compensation proceedings	N/A	5	RAP 49
(11)	Motion for amicus (and substantive filing)	10	5	RAP 34, 43(C), 45
(12)	Original proceedings	10	5	RAP 60

(B) Untabbed Original. One copy shall replace the tabs with blank pages and be left unbound and considered the original.

{This proposed rule is based on current CR 76.43.}

RAP 15 Word-Count Certificate

(A) Purpose. To achieve more readable briefs and other documents (by, for example, using easily readable fonts and reasonable font sizes in footnotes, keeping footnotes together on the same page), the number of words in a document filed in the Kentucky appellate courts is intended to be the primary method of determining whether a document fits within any relevant length limits. Thus, computer-generated documents that are likely to approach the word limits in these rules require a word-count certificate.

(B) Page limits.

(1) **Handwritten or typewritten documents**. Because some parties do not have access to computers, these rules also contain page limits for handwritten and typewritten documents. These page limits apply only to typewritten and handwritten documents and do not apply to computer-generated documents.

(2) **Computer-generated documents**. These rules also contain page limits for computer-generated documents. These page limits are lower than the page limits for handwritten or typewritten documents. If a computer-generated document fits within the page limits for computer-generated documents, then a word-count certificate is not necessary.

(C) Word limits. A computer-generated document that exceeds the page limits for a computer-generated document, but that 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 certificate must also state the number or words in the portion of the brief subject to the word limit. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the document.

(D) Exclusions from word and page limits. Covers, captions, signature blocks, certificates of service, word-count certificates, exhibits, and appendices are excluded from any page or word-count limits in these rules. In addition, other rules may exclude certain required portions of documents from the page or word limits.

(E) Acceptable form. A word-count certificate is acceptable if is in the following form or contains the following information:

> This document complies with the word limit of RAP [*insert RAP citation, e.g., 31(G)(1)*] because, excluding the parts of the document exempted by RAP 15(E) [*and additional RAP citation, if any, such as RAP 31(G)(1)*], this document contains [*state the number of words*].

COMMENT

This is a new rule, based on the word-count certificates required in federal court. This is a necessary part of the transition from page to word counts to allow better presentation of briefs.

Because members of the Committee were concerned that self-represented persons without computer access be treated fairly, all rules with page or word limits give documents that handwritten or typewritten the same number of pages as the rules currently provide.

The page limits for computer-generated documents are 1–10 pages less (depending on the length of the document) than the current page limits for briefs and other filings. If a party does not want to do a word count (which is very easy on a computer), then the party needs to make sure that the brief is sufficiently short that it cannot hit the word-count limit. For example, in federal court the page-limit for principal briefs is 30 pages (double spaced and 14-point font, including footnotes). The word-count limit is 13,000 words, which allows a great many more pages than 30. (Thirty double-spaced pages with a 14-point font equals about 7,500 words, meaning a brief utilizing the word count limit can be slightly less than twice as long as a briefing using the page limit.)

Here, principal briefs in the Court of Appeals are limited to 8,750 words or 20 pages if computer generated and 25 pages if handwritten or typewritten while principal brief in the Supreme Court are limited to 40 pages or 17,500 words if computer generated and shall not exceed 50 pages if handwritten or typewritten. This encourages parties to use the lower page limits (where a word-count certificate is not required), while allowing them to use more pages if they include a word-count certificate.

The word-count limits in the various rules were derived from the current page limits multiplied by 350 words per page.

RAP 16 Reserved

ARTICLE IV. PRELIMINARY PROCEDURE AND INTERLOCUTORY RELIEF

RAP 17 Transfer of Appeal from Court of Appeals to Supreme Court

(A) General. No later than 10 days from the date on which a notice of appeal to the Court of Appeals has been filed, any party may serve and file a motion in the Supreme Court for transfer of the case to that Court. A copy of the notice of appeal shall accompany a motion for transfer filed in the Supreme Court. The requirements of RAP 44(C)–(I) shall apply to such motions, except that other parties to the appeal may file a response in the Supreme Court within 10 days of the filing of the motion for transfer.

(B) Death Penalty. The filing of a notice of appeal in a case in which a death penalty has been imposed will automatically serve to transfer the appeal to the Supreme Court. The filing of a notice of interlocutory appeal in a case in which a death penalty is sought will automatically serve to transfer the appeal to the Supreme Court.

(C) Considerations Governing Transfer. Transfer is within the discretion of the Supreme Court and will be granted only upon a showing that the case is of great and immediate public importance, except that if separate appeals in a criminal case to the Supreme Court and to the Court of Appeals arise from the same trial, the Supreme Court in its discretion, on motion of the appellant whose appeal lies to the Court of Appeals, may transfer that appeal to the Supreme Court.

(D) Running of Time. Filing of the motion shall suspend the running of time for further steps in the appeal, and the full time for such steps shall be computed from the date of the order granting or denying the transfer.

(E) Granting of Motion. If the motion is granted, the appeal shall be perfected and prosecuted as in appeals taken as a matter of right unless otherwise directed by the Supreme Court.

(F) Recommendation by Court of Appeals. The Supreme Court may at any time, upon recommendation of the Court of Appeals, transfer to the Supreme Court any case pending before the Court of Appeals that falls within the criteria set forth in paragraph (C) above. The entry of a recommendation for transfer by the Court of Appeals shall suspend the running of time for any further steps in the appeal, and the full time for such steps shall be computed from the date of the order of the Supreme Court granting or denying the transfer.

(G) Transfer to Appropriate Court. If the Supreme Court Clerk or Court of Appeals Clerk receives a notice of appeal within the exclusive appellate jurisdiction of the other appellate court, the clerks may consult and transfer the appeal to the appropriate court. Upon docketing of the appeal in the

appropriate court, the appeal shall proceed as if it had been originally filed in the court with jurisdiction.

(H) Costs. Payment of the filing fee specified in RAP 13 shall be required with the motion.

{This proposed rule is based on current CR 74.02.}

RAP 18 Reserved.

RAP 19 Reserved.

RAP 20 Motion for Relief from an Order Granting or Denying an Injunction

(A) No Appellate Review of Restraining Order. There is no appellate review of a temporary restraining order entered by a circuit court under CR 65.03.

(B) Relief Regarding Temporary Injunction. When a circuit court by interlocutory order has granted, denied, modified, or dissolved a temporary injunction, a party adversely affected may, no later than 20 days from the entry thereof, move the Court of Appeals for relief from such order. If the order dissolves a temporary injunction previously granted, the circuit court may in its discretion suspend the operation of the order for a period not exceeding 20 days to permit such party to proceed under this rule.

(1) **Filing Requirements.** One unbound and four bound copies of the motion for relief shall be filed in the office of the Clerk of the Court of Appeals. The movant shall pay the filing fee required by RAP 13. The format of the motion shall be the same as for other motions filed in the appellate court under RAP 7. The motion shall state clearly the procedural history of the case, the factual history of the dispute, and the grounds on which movant's claim for relief is based.

(2) **Record.** The movant shall file with the motion copies of such portions of the record as may be necessary to a proper consideration and disposition of the motion.

(3) **Response.** Any respondent may file five copies (1 unbound and 4 bound) of a response no later than 10 days from the date on which the motion is filed.

(4) **Service.** In addition to service on all other parties as required by RAP 5, the motion and all attachments, as well as any response, shall be served on the judge whose decision is under review. The date and method of service shall be certified on the motion.

(5) **Submission.** Upon the running of response time provided in paragraph (B)(3), the motion and any responses shall be submitted to a panel for decision. Oral argument will not be held unless ordered by the Court on its own motion or on the motion of a party.

(6) **Basis for Affirmative Relief Regarding Temporary Injunction.** The basis of affirmative relief from an order denying, modifying, or dissolving a temporary injunction shall be the grounds specified in CR 65.04(1), and if such relief is granted, a bond may be required to be executed in the circuit court as provided by CR 65.05.

(7) **Order.** A signed copy of the order entered on a motion made pursuant to section (B) of this rule shall be sent forthwith to the clerk of the circuit court where the action is pending and when filed in the circuit clerk's office shall have the same effect as an order entered by such circuit court.

(C) Relief Regarding Permanent Injunction.

(1) **Relief in circuit court.** After an appeal is taken from a final judgment granting or denying an injunction, any party may move the circuit court to grant, suspend or modify injunctive relief during the pendency of the appeal. The circuit court, in its discretion, may provide in the order ruling on the motion that the status existing immediately before the entry of the final judgment shall be maintained for a specified limited time to protect a party wishing to proceed promptly under section (C)(2) of this rule.

(2) **Relief in Court of Appeals.** A party adversely affected by a ruling by the circuit court under paragraph (C)(1) of this rule may move the Court of Appeals for relief.

(a) **Filing Requirements.** Relief shall be sought in the Court of Appeals by filing five copies (1 unbound and 4 bound) of a motion complying in all respects with other motions filed in the appellate court under RAP 7. The motion shall state clearly the procedural history of the case, the factual history of the dispute, and the grounds on which movant's claim for relief is based. If no request was made to the trial court under paragraph (C)(1) of this rule, the motion shall state why such request was impractical.

(b) **Record.** The movant shall file with the motion copies of such portions of the record as may be necessary to a proper consideration and disposition of the motion.

(c) **Response**. Any party may file five copies of a response (1 unbound and 4 bound) not later than ten days from the date on which the motion was filed.

(d) **Service.** In addition to service on all other parties as required by RAP 5, the motion and all attachments, as well as any response, shall be served on the judge whose decision is under review. The date and method of service shall be certified on the motion.

(e) **Submission**. The motion and any responses shall be submitted to a panel of the Court for decision. No oral argument will be heard unless ordered by the court on its own motion or on motion of a party.

(f) **Order**. Any order entered under this rule may fix such terms as are proper to secure the rights of the parties, including the execution of an injunction bond subject to the provisions of CR 65.05.

(D) Emergency Relief in Court of Appeals. If a movant will suffer irreparable injury before a motion under sections (B) or (C) of this rule will be considered by a panel of the Court of Appeals, the movant may request emergency relief by filing five copies (1 unbound and 4 bound) of a separate motion for emergency relief in the office of the Clerk of the Court of Appeals. The motion for emergency relief shall clearly set out the nature of the irreparable injury that will occur unless emergency relief is granted. The emergency request shall be assigned to a judge of the Court of Appeals in accordance with the normal practice of the Court. The judge may deny the request without response or may provide for a written response or oral response by telephone if necessary. Emergency relief shall not be granted *ex parte* except under the most extraordinary circumstances as shown in the motion.

(E) No Reconsideration. A ruling granting or denying interlocutory or emergency relief under sections (B), (C), or (D) of this rule will not be reconsidered.

(F) Review by Supreme Court

(1) **When Authorized.** Any party adversely affected by an order of the Court of Appeals in a proceeding under sections (B) or (C) of this rule may, no later than 10 days from the date on which such order was entered, move the Supreme Court to vacate or modify it. The decision whether to review such order shall be discretionary with the Supreme Court. Such a motion will be entertained only for extraordinary cause shown in the motion.

(2) **Requirements.** Ten copies (1 unbound and 9 bound) of the motion shall be filed with the Clerk of the Supreme Court. The movant shall pay the filing fee required by RAP 13. The format of the motion shall be the same as for other motions filed in the appellate court under RAP 7. The motion shall state clearly the procedural history of the case, the factual history of the dispute, and the grounds on which movant's claim for relief is based. The motion and all attachments shall be served on all other parties, the circuit court, and the Court of Appeals. The date and method of service shall be certified on the motion.

(3) **Record.** The movant shall attach to each copy of the motion copies of the order or orders of the Court of Appeals and all other portions of the record submitted to the Court of Appeals pursuant to paragraphs (B)(2) and (C)(2)(b) of this rule.

(4) **Response**. Any party may file a response to the motion within 10 days of the date on which the motion was filed, or such earlier time as directed by the Supreme Court. The response shall be filed and formatted in accordance with paragraph (F)(2) of this rule.

(5) **Emergency Relief in Supreme Court**. If a Court of Appeals judge has granted or denied emergency relief under paragraph (D) of this rule, any party adversely affected by that order may move the Supreme Court for relief in the same manner as provided in paragraphs (F)(1)–(3) of this rule.

(a) If the Supreme Court declines to exercise its discretion to immediately review the ruling, the motion for relief in the Court of Appeals will be assigned to a panel of that Court for decision.

(b) Unless the Supreme Court directs otherwise, any party may file a response within 10 days of the date on which a motion for emergency relief was filed.

(c) If the Supreme Court decides to exercise its discretion to immediately review the ruling, the Supreme Court review shall encompass both the emergency motion and the motion for relief under paragraph (F)(1) of this rule.

(d) Failure of a party to seek Supreme Court emergency review under section (F)(5) shall not affect the party's right to seek review under paragraph (F)(1) of a decision of a Court of Appeals panel disposing of the motion for relief under sections (B) or (C) of this rule.

COMMENT

CR 65.07, 65.08, and 65.09 are combined into one rule and revised to better clarify how they work together and to add provisions that were previously implicit. Practitioners have a hard time following the current rules as written.

Requirements to serve the trial court with motions under this rule, and to serve the Court of Appeals with motions relating to review by the Supreme Court, have also been added.

{This proposed rule is based on current CR 65.07, 65.08 and 65.09.}

RAP 21 Motion for Intermediate Relief During Pendency of Appeal

(A) When Authorized.

(1) **Time.** At any time after a notice of appeal under RAP 2 or a motion for discretionary review under RAP 44 has been filed, a party to the appeal or motion may move the appellate court for intermediate relief upon a satisfactory showing that otherwise the movant will suffer immediate and irreparable injury before final disposition of the appeal.

(2) **Requirements.** Five copies (1 unbound and 4 bound) of the motion shall be filed in the appellate court. The format of the motion shall be the same as for other motions filed in the appellate court under RAP 7. The motion shall state with specificity the procedural and factual history of the dispute and the grounds on which the movant's claim for relief is based.

(3) **Record Required.** Unless the record has previously been certified to the appellate court, the movant shall attach to each copy of the motion copies of the final judgment, any motion for stay filed in the circuit court, any circuit court order disposing of the motion for stay, and copies of any other portions of the record necessary for disposition of the motion.

(4) **Response.** Any opposing party may file a response to the motion for intermediate relief no later than 10 days from the date on which the motion is filed. Five copies (1 unbound and 4 bound) of the response shall be filed in appellate court and the format shall be the same as motions filed in the appellate courts.

(5) **Hearing and Disposition.** Upon the filing of the response or the expiration of the time for a response, the motion shall be submitted for decision. No replies are allowed.

(a) Except for motions that call for final disposition of an appeal or original action in the appellate court, any member of the court designated by the Chief Justice or Chief Judge may hear and dispose of any motion; and

(b) Any intermediate order of a procedural nature pending final disposition of a proceeding pending in an appellate court may be issued on the signature of any judge of that court.

(B) Review. Any party adversely affected by a decision of the Court of Appeals under this rule may seek review in the Supreme Court under the procedure provided for review of injunctions under RAP 20(F).

{This rule is based upon current CR 76.33.}

RAP 22 Prehearing Procedure in the Court of Appeals

(A) Application.

(1) In all civil cases appealed to the Court of Appeals, except those specified in paragraph (A)(2), each appellant and cross-appellant shall file a prehearing statement no later than 20 days from the filing of its respective notice of appeal or cross-appeal. The prehearing statement shall be filed with the Court of Appeals.

(2) This rule does not apply to criminal cases, to orders granting or denying class action certification under CR 23.06, or to civil cases involving prisoner applications seeking relief relating to confinement or conditions of confinement, appeals of findings of contempt, appeals relating to extraordinary writs, and appeals from circuit court orders determining paternity, dependency, abuse, neglect, domestic violence, or juvenile status offense. This rule also does not apply to cases appealed to or transferred to the Supreme Court.

(B) Running of Time.

(1) The running of time for further steps in cases where this rule applies shall not begin until so ordered by the Court of Appeals except for:

(a) The filing of a notice of cross-appeal under RAP 4;

(b) The filing of a motion to transfer under RAP 17; or

(c) The filing of a prehearing statement under section (C) below.

(2) Unless otherwise ordered by the Court of Appeals, the full time for such further steps shall be computed:

(a) From the date of entry of the order stating that no prehearing conference will be held pursuant to paragraph (D)(3) of this rule, or

(b) From the date of the entry of the order reciting the actions taken and the agreements reached by the parties during a conference held pursuant to paragraph (D)(4)(c) of this rule.

(C) Prehearing Statement and Supplemental Prehearing Statement.

(1) A prehearing statement shall be submitted on a form which is available from each circuit court or from the Court of Justice website. The prehearing statement shall include the following information:

(a) The style of the case and circuit court docket number;

(b) The name, mailing address, and telephone number of each attorney whose appearance is entered in the case, together with the name and address of the party represented by the attorney who is filing the prehearing statement;

(c) The name of the judge who presided over the matter being appealed;

(d) The date on which the notice of appeal and any notice of cross-appeal was filed;

(e) A statement as to whether the matter has previously been before the Court of Appeals;

(f) The type of litigation;

(g) A brief description of the claims, defenses, and issues litigated;

(h) A brief statement of the facts, issues, and jurisdictional challenges to be raised on appeal;

(i) A statement, based on counsel's present knowledge, as to whether the appeal involves a question of first impression;

(j) A statement as to whether the determination of the appeal will turn on the interpretation or application of a particular case or statute and, if so, the name of the case or the number of the statute;

(k) A statement, based on counsel's present knowledge, as to whether there is currently pending in the Court of Appeals or the Supreme Court another case arising from substantially the same case or controversy or involving an issue which is substantially the same, similar or related to an issue in the appeal.

(l) A copy of the complaint or other initiating document, the judgment or order sought to be reviewed, and any opinion or findings of the circuit court or administrative agency.

(2) A party shall be limited on appeal to issues identified in the prehearing statement, except that upon a timely motion demonstrating good cause, the Court of Appeals may permit additional issues to be raised.

(3) A copy of each prehearing statement shall be served on all parties to the appeal. If the constitutionality of a statute is challenged by any party as an issue in the appeal, a copy of the prehearing statement or supplemental statement shall be served upon the Attorney General. If the Attorney General does not file an entry of appearance within 10 days of the filing of the

prehearing statement or supplemental statement, then no further filings or briefs shall be served on the Attorney General.

(4) No later than 10 days from the filing of a prehearing statement, each appellee or cross-appellee may file with the Court of Appeals, with copies served on all parties, a supplemental statement containing any other information needed to clarify the issues on appeal and on cross-appeal.

(5) After the filing of a prehearing statement and any supplemental statements, no further steps are required until so ordered by the Court of Appeals, except the following:

(a) The filing of a notice of cross-appeal under RAP 4; or

(b) The filing of a motion to transfer under RAP 17.

(D) Prehearing Conference

(1) In all cases requiring a prehearing statement under paragraph (A)(1), any party may move for a prehearing conference at the time of filing the prehearing statement or supplemental prehearing statement.

(2) In all cases requiring a prehearing statement under paragraph (A)(1), the Court of Appeals will determine whether a prehearing conference would assist the Court or the parties. The determination shall be made by the designee of the Chief Judge of the Court of Appeals. Such designee shall be a judge of the Court of Appeals or a staff attorney of the Court known as a conference attorney.

(3) If it is decided that no prehearing conference will be held, the designee shall issue an order informing the parties. The entry of this order shall commence time running for further steps under these appellate rules.

(4) If a case is selected for a prehearing conference, the designee shall issue an order directing attorneys for all parties to attend a prehearing conference, in person or remotely, and setting the date and location for the conference.

(a) The purpose of the conference shall be to consider the possibility of settlement, the simplification of issues, the contents of the record, the time for filing the record and briefs, and any other matters which may aid in the handling or disposition of the proceedings.

(b) The prehearing conference discussions are confidential, except to the extent disclosed by the prehearing order and shall not be disclosed by the Court's designee or by the parties or counsel in briefs or argument.

(c) 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 course of the proceedings.

(5) In the event of default by any party in any action required by a prehearing conference order, the Clerk of the Court of Appeals shall issue a notice to the party in default providing a 10-day period within which to file an affidavit showing good cause for the default and including when the required action will be taken.

(6) A judge who participates in a prehearing conference or becomes involved in settlement discussions pursuant to this rule shall not sit as a member of the panel assigned to hear the appeal.

(E) Penalties for Failure to Comply. For any failure to comply with the provisions of this rule, the Court of Appeals may assess reasonable expenses caused by the failure, including attorney's fees; assess all or a portion of the appellate costs; or dismiss the appeal.

COMMENT

This rule is substantially the same as the current rule CR 76.03 although it has been revised in places to make it more easily understood, such as adding the 20-day deadline to the beginning of the rule and making clearer when the prehearing procedure does and does not apply.

{This rule is based upon current CR 76.03.}

RAP 23 Reserved.

ARTICLE V. RECORD ON APPEAL

RAP 24 Contents and Designation of Record on Appeal

(A) Composition of the Record on Appeal. The following items constitute the record on appeal:

(1) **Written Record**. The entire original written record on file in the office of the clerk of the trial court, including juror strike sheets made pursuant to RCr 9.36, designations or stipulations of the parties with respect to the record, and a copy of the certification of record on appeal, including a copy of the case history and docket shall be included.

(2) **Exhibits and Physical Evidence**. Exhibits, such as documents, maps and photographs, and other papers or electronic records that are reasonably capable of being enclosed in legal-sized envelopes, shall be included in the record on appeal. Weapons, contraband, and other physical evidence shall not be transmitted to the appellate court unless specifically directed by the appellate court upon a timely motion of a party or upon its own motion.

(3) **Official Recordings.** The official electronic recording of court proceedings is the official record for appeal. Official recordings of the trial that results in the order or judgment being appealed from shall be certified as a part of the record on appeal. In addition, official recordings of other proceedings that have been designated by the parties or agreed upon by stipulation shall be certified as a part of the record on appeal.

(4) **Transcripts of Court Proceedings are Not the Official Record.** Parties to an appeal may attach an evidentiary appendix, consisting of a limited number of pages of a transcript of an official proceeding, as an evidentiary appendix to their brief as set forth in RAP 32(E)(2). A transcript included in an evidentiary appendix does not take the place of an official video record.

(B) Designation of Record on Appeal

(1) **Appellant's Duty.**

(a) **Contents of Record Designation.** Appellant or counsel for appellant, if any, shall provide the clerk of the trial court with a designation listing with specificity the dates on which official recordings were made for all pre-trial and post-trial proceedings necessary for inclusion in the record on appeal. While trial recordings are part of the record on appeal regardless of designation, to facilitate the timely preparation and certification of the record, the parties should list the date(s) of any trial proceedings.

(b) **Timing of Record Designation.** If RAP 22 (prehearing procedure) is applicable, the designation shall be filed with the clerk of the trial

court no later than 10 days from the order ending the prehearing procedure under RAP 22(B)(2). In all other appeals, the designation shall be filed with the clerk of the trial court no later than 10 days from the filing of the notice of appeal.

(2) **Other Party's Duty.** No later than 10 days from the service and filing of appellant's designation, or no later than 10 days from the time for filing of such designation has expired, any other party to the appeal may file a designation of additional dates of pre-trial or post-trial recordings as that party wishes to be included.

(3) **Recordings Designated but not Sent.** If pre-trial or post-trial recordings that were timely designated for inclusion in the record on appeal are omitted from the record on appeal, the party may notify the circuit clerk pursuant to RAP 25(C).

(4) **Recordings not Timely Designated for Inclusion.** Pre-trial or post-trial recordings that are not timely designated for inclusion will not be included in the record on appeal other than as set forth in RAP 25(D).

COMMENT

The various rules (CR 75.01, 75.11, and CR 98(2), (3) and (5)) regarding the contents and the designation of the record are gathered together in one place to make the process easier to follow. A number of rules have been eliminated. CR 75.02 (Transcript of evidence and proceedings) and 75.03 (Form of testimony) are obsolete. CR 75.05 (Record to be abbreviated) and 75.06 (Stipulation as to record) are infrequently used, if at all, and they should not be used given that, if any portion of the record is left out that the appellate court thinks should not have been, the omission will be held against the appellant.

The requirement under CR 75.07(5) that it is "the responsibility of the appellant . . . to see that the record is [timely] prepared and certified" has been eliminated as the preparation of the record is largely beyond the control of the parties.

The rule no longer excludes depositions not read into evidence at trial. That practice can create problems for cases decided on summary judgment, or after trial when certain issues (e.g. Daubert, failure to grant summary judgment) are raised after trial.

Paragraph (A)(4) is new to make clear that hearing transcripts are not the official record, but that the video recordings are the official record.

Paragraph (B)(1) now suggests (but does not require) advising the circuit court clerk of the dates of all video recordings that should be included in the record to better enable the clerks to find the trial videos.

Paragraph (B)(2) makes clearer the impact of the prehearing procedure on the timing of the record designation.

Paragraph (B)(3) along with RAP 25(C) provide a mechanism to easily fix mistakes regarding the record.

{This proposed rule is based on current CR 75.01, 75.11, and CR 98.}

RAP 25 Unavailable or Omitted Proceedings

(A) Narrative statement.

(1) In the event no official record of the evidence or proceedings at a hearing or trial was made or, if made, is not clearly understandable from the recording, the appellant may prepare a narrative statement of the evidence or proceedings from the best available means, including appellant's recollection, for use as a supplement to or in lieu of an insufficient official record. This statement shall be served on all opposing counsel who participated below who may serve objections or proposed amendments to the trial court within 10 days after service. Both parties may attach affidavits or other documents to support their statements, objections, or proposed amendment.

(2) The proposed narrative statements, with the objections or proposed amendments, shall be submitted to the trial court for settlement and approval and, as settled and approved, shall be included in the record on appeal.

(3) The adequacy of the narrative statement to allow for a full and fair review may be raised in the appellate court.

(4) By agreement of the parties and approval by the trial court, a narrative statement of all or any part of the evidence or other proceedings at a hearing or trial may be substituted for or used in lieu of an official recording.

(5) Any statement approved by the trial court, or any order refusing to approve a narrative statement, shall be included in the record on appeal. Once a narrative statement has been approved, or an order entered refusing to do so, it shall be certified as part of the original record on appeal or as a supplemental record on appeal and immediately transmitted by the clerk of the trial court to the clerk of the appellate court.

(B) Effect of Omitted Record. The appellate court shall not consider any claim or contention which is based upon a portion of the record below that has not been made part of the record before the appellate court. The record may, however, be corrected or modified as set forth in the following sections (C), (D), and (E)

(C) Circuit Clerk May Correct Record. If material properly designated by a party is omitted from the record by error or accident, the party may notify the circuit clerk who shall file a supplemental certification and transmit that omitted portion of the record to the appellate court without further order of that court.

(D) Power of the Court to Correct or Modify the Record.

(1) If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by the trial court.

(2) If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by agreement, or the trial court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the trial court.

(3) All other questions as to the content and form of the record shall be presented to the appellate court.

(E) Deadlines Run from Original Certification. All appellate deadlines determined by the date of certification of the record on appeal run from the original notice of certification under RAP 26(B)(5), not any supplemental certification, correction, or modification of the record under this rule, unless otherwise ordered by the appellate court, except in criminal cases in which RAP 30(D)(2) applies.

COMMENT

Section (A) makes clearer how to create a narrative statement and otherwise correct the record. CR 75.14 (Bystander's bill) is omitted, except to the extent that affidavits from bystanders are used to create the narrative statement.

Section (C) is new. It is intended to speed up correction of the record on appeal when the circuit court clerk makes a mistake in certifying the record.

CR 75.15 (re an agreed statement on appeal) has been deleted from the rules regarding the record on appeal.

{This rule is based on current CR 75.08, 75.13, 75.14.}

RAP 26 Duties of Circuit Court Clerk Regarding Preparing, Certifying, and Forwarding the Record and Review or Withdrawal of Appellate Record

(A) Duties of Clerk Upon Filing of Notice of Appeal

(1) **Transmittal of Documents.** Upon the filing of a notice of appeal to the Court of Appeals or to the Supreme Court, the clerk of the circuit court shall forthwith transmit a copy of the notice of appeal to the appellate clerk and counsel for the parties to the case in the circuit court (or to the parties if they are pro se), together with copies of (a) the docket sheet of the court from which the appeal is taken; (b) the judgment or order sought to be reviewed; (c) any opinion or findings of the circuit court or administrative agency; and (d) the receipt for the notice of appeal filing fee or an order granting a motion to proceed *in forma pauperis*.

(2) **Additional Duties in Criminal Appeal.** In addition, if the case is a criminal case the above documents shall also be provided to the Attorney General's Office. If the notice of appeal in a criminal case is filed by a public advocate, the above documents shall also be provided to the Department of Public Advocacy. If the notice of appeal was mailed by an inmate, the clerk shall provide a copy of the envelope to the appellate clerk with the notice of appeal.

(3) **Record of Trial Court Video**.

(a) Upon the filing of a notice of appeal, a certified copy of video recordings required by CR 98(2), or a court-certified copy of that portion recording the court proceeding being appealed, shall be filed with the clerk and certified by the clerk as part of the record on appeal. A second copy of the video recording, or a court-certified copy of that portion recording the court proceeding being appealed, also shall be retained by the clerk.

(b) The clerk shall arrange for the recording of duplicate copies of video recordings for use by counsel in preparing an appeal. The clerk shall charge the person requesting a duplicate video recording a reasonable fee, which shall be set by the Administrative Office of the Courts, for each duplicate video tape, disk or other media requested.

(B) Duties of Clerk Regarding Preparing and Certifying Record.

(1) **Written Record**. The circuit court clerk shall prepare and certify the entire original written record on file in the clerk's office. All parts of the written record on appeal shall be arranged in the order in which they were filed or entered, including juror strike sheets made pursuant to RCr 9.36. If the record comprises more than 150 pages, it shall be divided into two or more volumes not exceeding 150 pages each. Each volume shall be securely bound.

Logs of any official recordings designated must be included in the record. In addition, there shall be a general index at the beginning of the record and an index to each volume in the front thereof which shall show, in the order in which they appear, the pages on which all pleadings, orders, judgments, instructions, and papers may be found.

(2) **Official Recordings**. The clerk shall prepare and certify official recordings of the trial resulting in the order or judgment being appealed and shall further certify other official recordings that have been designated by a party. The clerk may certify a recording of the entire docket of proceedings on a designated date if a log of that docket is included in the record.

(3) **Exhibits and Physical Evidence**. All exhibits such as documents, maps, photographs, and other papers reasonably capable of being enclosed in legal-sized envelopes, shall be transmitted to the appellate court. Weapons, contraband, and other physical evidence shall not be transmitted to the appellate court unless specifically directed by the appellate court upon a timely motion of a party or upon its own motion. All exhibits filed with the record shall be sufficiently identified.

(4) **Time for Certification.**

(a) If RAP 22 does not apply to the appeal, the record on appeal shall be certified by the clerk within 30 days after the date of filing the first notice of appeal.

(b) If RAP 22 applies to the appeal, the clerk shall prepare and certify the record within 30 days of the order ending the prehearing procedure under RAP 22(B)(2).

(c) In *in forma pauperis* cases, the time for certifying the record on appeal shall run from the date a motion to proceed *in forma pauperis* is granted.

(d) The appellate court, in its discretion, may extend the time for certification of the record upon motion and a showing of good cause.

(5) **Notice of Certification**. The clerk of the court from which the appeal is taken shall immediately notify the clerk of the appellate court when the record has been completed and certified as required by this rule, and shall simultaneously serve copies of such notification and the index of the record on appeal upon all parties to the appeal. The clerk shall enter the fact and date of such notification in the case history of the case.

(C) Several appeals. When more than one appeal is taken to an appellate court from the same judgment, a single record on appeal shall be prepared containing all the matter designated or agreed upon by the parties, without

duplication. If there are separate appeals to the Supreme Court and the Court of Appeals in a criminal case, a copy of the original record shall be made up and certified as the record on appeal in the Court of Appeals.

(D) Transmitting and Retaining the Record.

(1) **Retention of Record Until Requested.** Until the record on appeal is requested by the clerk of the appellate court, the record on appeal shall be retained under the responsibility and control of the clerk of the circuit court.

(2) **Withdrawal of Record.**

(a) Counsel for the parties may withdraw the record on appeal from the trial court or the circuit court clerk.

(b) The record on appeal shall not be withdrawn by pro se parties, but it may be viewed in the trial court or circuit clerk's office during regular business hours.

(c) The record on appeal will be made available first to counsel for the appellant and then to the counsel for the appellee and then to counsel for appellant. If the record on appeal is removed from the clerk's office, counsel for the party withdrawing the record shall return it before submitting the party's brief to the appellate court. A record on appeal shall not be retained by counsel beyond the filing date on which the brief for the party represented by that counsel is due.

(d) The original evidentiary exhibits and the official electronic records shall be retained in the clerk's office until the record is transmitted to the appellate court, and they may not be withdrawn by any party or by counsel for any party.

(e) Withdrawals and returns of the record on appeal shall be noted by the clerk.

(3) **Transmission of Record.** The circuit court clerk shall transmit the record on appeal to the appellate court when so requested by the clerk of the appellate court. When transmitting the record on appeal, the clerk shall send one certified copy of the recorded proceedings prepared pursuant to RAP 24.

(E) Duties of Clerk on Appeal of Order Granting or Denying a Writ of Habeas Corpus. As set forth in RAP 52(B), a record on appeal consisting of all documents on file with the circuit court and all video record of any hearings held, unless the party appealing specifies otherwise, shall be transmitted to the

Court of Appeals as soon as possible, but no later than 10 days from the filing of a notice of appeal from an order granting or denying a writ of habeas corpus.

(F) Duties of Clerk on Appeal of In Forma Pauperis. As set forth in RAP 55(D), the appeal of certain orders relating to motions to proceed *in forma pauperis* are expedited proceedings. In such appeals, a certified copy of the abbreviated record shall be bound and page numbered according to the normal procedure for a record on appeal. The original record shall be retained by the lower court clerk. The certified copy of the abbreviated record shall be transmitted to the appellate court clerk as soon as possible, but no later than 10 days from the notice of appeal.

COMMENT

The various rules regarding the duties of the circuit court clerk are combined into one place. The requirement under CR 75.07(5) that it is "the responsibility of the appellant . . . to see that the record is [timely] prepared and certified" has been eliminated because the parties cannot control the clerks.

Section (B)(5) is changed to require clerks to send the index, which is necessary to properly cite to the appellate record, with the record certification.

Paragraphs (E) and (F) are new and delineate the duties of the circuit court clerks regarding habeas and pauper appeals.

{This proposed rule is based on current rules CR 73.08, 75.07, 76.03, 98(3); RCr 12.04(5.}

RAP 27 Appellate Clerk's Duties

(A) Scope of Rule. RAP 27 applies only to the clerks of the Court of Appeals and Supreme Court.

(B) General Docket. The clerk of each appellate court shall keep a general docket in which shall be recorded all appeals and original proceedings in that court. It shall show the number and style of each case and the dates it is docketed, submitted, or sent to the court, and decided. In appealed cases it shall show also the county from which appealed, whether it is civil or criminal, and if advanced; the dates briefs are filed; the dates a petition for rehearing, modification or extension is filed and ruled on and the nature of the ruling; and the date the order or opinion became final.

(C) Docketing of Appeals. No action in or appeal to the Court of Appeals or Supreme Court will be docketed until the filing fee required by RAP 13 is paid, except as set forth in RAP 2(H). Subject to that requirement, an appeal shall be docketed when the appellate court clerk receives copies of the notice of appeal, official docket sheet, judgment, and receipt for the filing fee or an order granting a motion to proceed *in forma pauperis* from the appropriate court clerk. A motion for relief under RAP 20(B), (C), or (F) shall also be treated as an appeal and shall be docketed when it is filed and the filing fee is paid. A motion for relief under RAP 20(D) shall be treated as an interlocutory motion in the pending appeal from the final judgment and shall not receive a separate docketing number in the Court of Appeals.

(D) Docket Sheets. The clerk shall attach to each case record a docket sheet which shall bear the style and file number of the case, a brief indication of the subject-matter, the names and addresses of the attorneys, and in appealed cases the county and appellate district from which appealed and the name and address of the trial judge. Every step taken in the case shall be entered by the clerk on the docket sheet.

(E) Filing of Papers. Nothing lodged with the clerk in connection with an original proceeding or an appealed case, or on which action of any kind by the court is sought, shall be docketed or noted as a step in a proceeding unless it is tendered within the time allowed for its filing and otherwise conforms to these rules and any filing fee required by RAP 13 has been paid.

(F) Unauthorized or Nonconforming Paper. A late, unauthorized, or otherwise nonconforming paper shall be considered only by leave of the court.

(G) Request for Transmittal of Record on Appeal. Transmittal of the record on appeal from the clerk of the trial court shall be requested by the clerk of the appellate court when the appellant's reply brief is filed or at the expiration of the time allowed for its filing, whichever is sooner, with the following exceptions in criminal cases (including proceedings under RCr 11.42):

(1) If the notice of certification required by RAP 26(B)(5) indicates that counsel for the appellant is the Public Advocate of the Commonwealth or the Attorney General of the Commonwealth, the clerk of the appellate court shall request transmittal of the record forthwith; or

(2) If the notice of certification required by RAP 26(B)(5) indicates that counsel for the appellant is someone other than the Public Advocate of the Commonwealth or the Attorney General of the Commonwealth or that the appellant is acting pro-se, the clerk of the appellate court shall request transmittal of the record when the appellant's brief is filed. Should the appellant fail to file a brief, the clerk need not request the record unless so directed by the court.

(H) Preservation and Disposition of Records.

(1) **Withdrawal from Custody of Clerk.** Records or parts thereof shall be taken from the custody of the clerk of the appellate court only under extraordinary circumstances and upon order of the court, except that, unless otherwise directed by the Supreme Court, the Public Advocate of the Commonwealth or the Attorney General of the Commonwealth may be permitted by the clerk of an appellate court to have temporary custody of records in criminal and quasi-criminal cases for the purpose of preparing briefs.

(2) **Transmittal from Court of Appeals to Supreme Court.** Upon the granting of a motion for discretionary review by the Supreme Court, the clerk of the Court of Appeals shall forward the record on appeal to the clerk of the Supreme Court, together with the briefs and all other relevant papers on file in the Court of Appeals.

(3) **Return to Trial Court.** Upon final disposition of an appeal the clerk shall return the original record to the clerk of the trial court. All other records shall be retained or archived. Physical exhibits may be disposed of at any time as the court directs unless otherwise directed by statute.

{This proposed rule is based on current CR 79.06, 76.46.}

RAP 28 Access to Record on Appeal

(A) General Rule. In all actions prosecuted under these rules, the complete or partial record on appeal, or the record submitted with original actions, is available for public inspection unless access is prohibited by: (1) a federal statute or regulation or a Kentucky statute; (2) this rule or another court rule; (3) a published opinion of the Supreme Court of Kentucky or the Kentucky Court of Appeals; or (4) an order entered by the court from which the action arises or the appellate court in which the appeal or original action is filed.

(B) Access to Items Sealed by Court Order

(1) Counsel for parties to the appeal or original action may access the record, including items sealed by order of court, except those submitted exclusively for in camera review. To view in camera matters, counsel must file a motion in the trial or appellate court demonstrating why access is necessary to a fair outcome of the appeal or original action.

(2) A party proceeding without counsel may not access matters sealed by order of court without first obtaining an order of court permitting access. The party may file a motion in the trial or appellate court showing why access is necessary to a fair outcome of the appeal or original action.

(3) Any person or legal entity with standing to seek access to sealed matters in a record may file a motion in the court in which the record is located, stating specific reasons why access should be granted and why the interest in access substantially outweighs the interest in maintaining the seal.

COMMENT

This is a new rule to explain current practice and to have rules to provide guidance when necessary.

RAP 29 Reserved.

ARTICLE VI. BRIEFS

RAP 30 Time for Filing and Serving Briefs

(A) When Required. Unless otherwise directed by the appellate court or these rules, before any appeal is taken under submission for final disposition on the merits, briefs shall be filed by the respective parties. No briefs other than those listed below or amicus curiae briefs pursuant to RAP 34 will be considered except on order of the court. Should the appellant or appellants fail to file a brief, no brief shall be required of the appellees unless so ordered by the court.

(B) Service. Before or concurrent with filing any brief in the appellate court, a party shall serve a copy on each party to the appeal and on the judge whose decision is under review. The brief may be served electronically on the trial judge and on any party who consents to electronic service. In criminal cases, both the defendant and the attorney general also shall serve copies of their briefs on the Commonwealth's attorney of the district in which the case was tried. Service shall comply with RAP 5.

(C) Civil Cases.

(1) **Non-expedited Civil Case with No Cross-Appeal**

(a) An appellant shall file an initial brief with the clerk of the appellate court no later than 60 days after the date of the notation on the docket of the notice of certification required by RAP 26(B)(5). When the Supreme Court has granted a motion for discretionary review, the movant becomes an appellant whose brief shall be filed no later than 60 days from the date of entry of the order granting review.

(b) Appellee's response brief shall be filed no later than 60 days after the date on which the appellant's initial brief is filed.

(c) Appellant's reply brief may be filed no later than 15 days after the date on which the last appellee's response brief is filed. If the appellant's reply brief is responsive to more than one appellee's response brief, the reply brief must be filed no later than 15 days after the date on which the last appellee's response brief was due.

(2) **Cross-Appeals.**

(a) If a cross-appeal has been filed in a civil case, then the appellant's initial brief shall be filed within the time set forth in paragraph (C)(1)(a) above.

(b) The appellee's response brief shall be combined with its initial brief as a cross-appellant, and the combined brief shall be filed no later than 60 days after the date on which the appellant's brief is filed.

(c) The appellant's reply brief shall be combined with its response brief as cross-appellee, and the combined brief may be filed no later than 60 days after the last appellee's brief is filed or due to be filed.

(d) The cross-appellant's reply brief may be filed no later than 15 days after the date on which the cross-appellee's response brief is filed or due to be filed.

(D) Criminal Cases.

(1) If counsel for the appellant is someone other than the Public Advocate or the Attorney General, the time in which the briefs shall be filed is the same as in section (C)(1) above.

(2) If counsel for the appellant is the Public Advocate, the Attorney General, or a designee of either, the appellant's brief must be filed no later than 60 days from the date on which the record on appeal was made available by the clerk of the appellate court (notice of which shall be sent). The time in which response and reply briefs shall be filed is the same as in non-expedited civil cases, section (C)(1) above.

(3) When the Supreme Court has granted a motion for discretionary review in a criminal case, the movant becomes an appellant, and briefs are due as set forth in section (C)(1) above.

(E) Expedited Appeals. Civil appeals from circuit court orders determining adoption, termination of parental rights, paternity, dependency, abuse, neglect, domestic violence, or juvenile status offense and from orders granting or denying class action certification under CR 23.06 are expedited. In addition, certain criminal appeals are or may be expedited.

(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.

(2) If a cross-appeal has been filed in an expedited appeal, unless otherwise directed by court order, the 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 notice of certification required by RAP 26(B)(5). The appellee's response brief shall be combined with its initial brief as a cross-appellant, and

the combined brief shall be filed no later than 30 days after the date on which the appellant's brief is filed. The appellant's reply brief shall be combined with its response brief as cross-appellee, and the combined brief may be filed no later than 30 days after the last appellee's brief is filed or due to be filed. The cross-appellant's reply brief may be filed no later than 10 days after the date on which the cross-appellee's response brief is filed or due to be filed.

(3) Motions for extension of time will not be considered except under extraordinary circumstances.

{This proposed rule is based on current CR 76.12, 98(4).}

RAP 31 Format and Number of Briefs

(A) Text.

(1) **Requirements.** All briefs shall be typewritten or typeset and meet the following requirements:

(a) Unglazed white paper, 8½ by 11 inches in dimension

(b) Single sided, double spaced, and clearly readable.

(c) Text, black type no smaller than 12 point set at standard width.

(d) Footnotes no smaller than 12 point set at standard width.

(e) 1½ inch margin on left side with 1 inch margins on all other sides.

(f) Briefs must be securely bound at left side.

(g) An appendix that conforms to RAP 32(E).

(2) **Recommendation.** It is recommended that easily readable fonts be used. Examples of easily readable fonts are Century Schoolbook, Century, Times New Roman, and similar fonts. Examples of fonts that are difficult to read are fonts with "narrow" in the title, Comic Sans, Papyrus, and similar fonts.

(B) Redactions. CR 7.03 applies to all actions prosecuted under these rules. Initials or a descriptive term must be used instead of a name in cases involving juveniles, allegations of abuse and neglect, termination of parental rights, mental health, and expungements.

(C) Cover. All briefs shall be enclosed, front and back, in covers.

(1) **Contents.**

(a) **Caption.** The front cover shall include the case number of the appeal, the case number of the action from which the appeal was taken, a caption identifying the lead appellant and appellee, and the name of the party on whose behalf the brief is submitted.

(b) **Certificate of Service.** The front cover must also contain a signed statement, in accordance with RAP 30(B), that service has been made and that identifies by name the persons served.

(c) **Certificate Regarding Record.** Except for briefs on appeal from the Court of Appeals to the Supreme Court, the certificate shall further certify that the record on appeal has been returned to the clerk of the court from which it was withdrawn or that it was not withdrawn by the party filing the brief.

(2) **Color.** The front covers of briefs shall be colored as follows: Appellant—red; Appellee—blue; Appellant's reply brief—yellow; combined Appellee response brief/initial brief as Cross-Appellant—blue; combined Appellant reply brief/response brief as Cross-Appellee—yellow; Cross-Appellant's reply brief—yellow.

(D) References to Parties. In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, it is recommended that briefs use the parties' actual names, or the designations used in the lower court or agency proceedings, or descriptive terms, such as "the employee" or "the driver."

(E) Citation Form.

(1) **Authorities**. Parties shall cite Kentucky statutes from the official edition of the Kentucky Revised Statutes, which may be abbreviated "KRS." Parties shall cite Kentucky cases reported after June 1886 from the Supreme Court and its predecessor court: *Doe v. Roe*, ___ S.W.2d ____ (Ky. [date]); or from the present Court of Appeals (beginning in 1976), *Doe v. Roe*, ___ S.W.3d ___ (Ky. App. [date]). Case names should be italicized.

(2) **Unpublished opinions.** Citation to unpublished opinions is governed by RAP 41.

(3) **Certified Written Record.** Parties shall cite the certified record by referring to pages as numbered by the clerk, such as "TR __" or, if not possible, to any other point of reference that will readily enable the material to be found.

(4) **Official Recording.** Each reference in a brief to a segment of the designated official recording shall set forth the letters "VR" and the month, day, year, hour, and minute (or second if necessary) at which the reference begins as recorded. For example: VR 10/27/20 at 10:24:05 or VR 10/27/20 at 4:10–16.

(F) Number of Copies of Briefs.

(1) **Court of Appeals** – 1 unbound and 4 bound copies. The unbound copy shall replace extruding tabs with separator pages.

(2) **Supreme Court** – 1 unbound and 9 bound copies. If the case in the Supreme Court involves a cross-appeal, then one additional copy for each

cross-appeal is required. The unbound copy shall replace extruding tabs with separator pages.

(G) Length.

(1) **Word-count certificate.** Any computer-generated briefs exceeding the below page limits for computer generated briefs must include a word-count certificate in conformity with RAP 15.

(2) **Court of Appeals.**

(a) An appellant's initial brief and an appellee's response brief shall not exceed 8,750 words or 20 pages if computer generated and shall not exceed 25 pages if handwritten or typewritten.

(b) An appellant's reply brief shall not exceed 1,750 words or 4 pages if computer-generated and shall not exceed 5 pages if handwritten or typewritten, except that when an 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.

(c) A brief combining appellee's response brief with its initial brief as a cross-appellant shall not exceed 14,000 words or 30 pages if computer generated and shall not exceed 40 pages if handwritten or typewritten. A brief combining appellant's reply brief with its response brief as cross-appellee shall not exceed 10,500 words or 25 pages if computer generated and shall not exceed 30 pages if handwritten or typewritten.

(3) **Supreme Court.**

(a) An appellant's initial brief and an appellee's response brief shall not exceed 40 pages or 17,500 words if computer generated and shall not exceed 50 pages if handwritten or typewritten.

(b) An appellant's reply brief shall not exceed 7 pages or 3,500 words if computer generated and shall not exceed 10 pages if handwritten or typewritten, except that when an appellant is called upon to respond to more than one appellee brief, then appellant is permitted up to 4 additional pages or 1,750 additional words per each additional appellee brief if computer generated or up to 5 additional pages per each additional appellee brief if handwritten or typewritten.

(c) A brief combining appellee's response brief with its initial brief as a cross-appellant shall not exceed 22,750 words or 50 pages if computer generated and shall not exceed 65 pages if handwritten or

typewritten. A brief combining appellant's reply brief with its response brief as cross-appellee shall not exceed 8,750 words or 20 pages if computer generated and shall not exceed 25 pages if handwritten or typewritten.

(4) **Death Penalty Cases.** In cases where the death penalty has been imposed, upon motion made at least 20 days prior to the filing deadline, and upon good cause shown, the appellant's brief and the appellee's brief may be extended to no more than 120 pages or 52,500 words. Upon similar motion, for good cause shown, made at least 5 days prior to the filing deadline, a reply brief may be extended to no more than 20 pages or 8,750 words.

(5) **Exclusions from word and page limits.** The cover, introduction, statement concerning oral argument, statement of points and authorities, signature block, exhibits, and appendices are excluded from the page and word limits set forth above.

(H) Penalties.

(1) A brief may be stricken for failure to substantially comply with the requirements of these rules.

(2) If the appellant's brief has not been filed within the time allowed, the Court may dismiss the appeal.

(3) If the appellee's brief has not been filed within the time allowed, the court may: (a) accept the appellant's statement of the facts and issues as correct; (b) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (c) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

COMMENT

Footnotes are now required to be a 12-point font. Recommendations regarding fonts have been added. Video record citations may now be cited to the second or the minute; before it appeared (but was not clear) that citation to the second was required. Copies here, and elsewhere in the rules, require 1 unbound and the rest to be bound, with separator pages replacing the extruding tabs in the unbound copy.

{This proposed rule is based on current CR 76.12, 98(4), FRAP 28(d).}

RAP 32 Organization and Content of Briefs

(A) Appellant's Opening Brief. An appellant's opening brief must contain the following sections, in the following order.

(1) An **introduction** indicating the nature of the case and a **statement concerning oral argument** indicating whether the appellant desires oral argument and why appellant believes that oral argument would or would not be helpful to the court in deciding the issues presented. The combination of the introduction and statement concerning oral argument shall not exceed one page.

(2) A **statement of points and authorities**, which shall set forth, succinctly and in the order in which they are discussed in the body of the argument, the appellant's contentions with respect to each issue of law relied upon for a reversal, listing under each the authorities cited on that point and the respective pages of the brief on which the argument appears and on which the authorities are cited.

(3) A **statement of the case** consisting of a summary of the facts and procedural events relevant and necessary to an understanding of the issues presented by the appeal, with ample references to the specific location in the record supporting each of the statements contained in the summary.

(4) An **argument** conforming to the statement of points and authorities, with ample references to the specific location in the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

(5) A **conclusion** setting forth the specific relief sought from the appellate court.

(6) A **signature** by an attorney of record for the party submitting the brief or, for a party proceeding pro se, by the party.

(7) An **appendix** that conforms with section (E) of this rule.

(B) Appellee's Response Brief. An appellee's response brief must contain the following sections:

(1) A **statement concerning oral argument** responsive to appellant's statement indicating why appellee believes that oral argument would or would not assist the Court in deciding the issues presented. The response brief may also contain an **introduction** indicating the nature of the case. The

combination of the introduction and statement concerning oral argument shall not exceed one page.

(2) A **counterstatement of points and authorities** in the same format required for appellant's statement of authorities.

(3) A **counterstatement of the case** stating whether the appellee accepts the appellant's statement of the case and, if not, setting forth the matters the appellee considers essential to a fair and adequate statement of the case in accordance with the requirements for appellant's statement of the case.

(4) An **argument** conforming to appellee's counterstatement of points and authorities and to the requirements for appellant's argument.

(5) A **signature** by an attorney of record for the party submitting the brief or, for a party proceeding pro se, by the party.

(6) An **appendix** that conforms with section (E) of this rule may be attached.

(C) Other briefs.

(1) Other briefs permitted by these rules shall have a statement of authorities conforming to paragraph (A)(2) of this rule, shall state the purpose of the brief and the particular issues to which it is directed, and shall contain an argument consistent with paragraph (A)(4) of this rule. The brief shall conclude with a statement of the relief sought, if pertinent, and may contain an appendix conforming to section (E) of this rule.

(2) Reply briefs must be confined to points raised in the briefs to which they are addressed and must not reiterate arguments already presented.

(3) A cross-appellant's reply brief may respond only to the portion of the cross-appellee's response brief(s) regarding issues raised in the cross-appeal.

(D) Briefs of five pages or less. A statement of points and authorities is not required for a brief of 5 pages or less, but is required for briefs of more than 5 pages.

(E) Requirements for the Appendix to a Brief.

(1) **Record Appendix.**

(a) **Documents required in appendix to appellant's and cross-appellant's initial brief.** An appellant and a cross-appellant must attach an appendix to the party's initial brief. The first item of the appendix shall be a listing or index of all documents included in the appendix. The

appellant shall place the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court. The appendix shall contain copies of the findings of fact, conclusions of law, and judgment of the trial court, any written opinions filed by the trial court in support of the judgment, and the opinion or opinions of the court from which the appeal is taken. In workers' compensation cases the appendix shall include the opinions of the Administrative Law Judge, the Workers' Compensation Board, and the Court of Appeals.

(b) **Permissible documents to include in brief appendix.** Additional items may be included in an appendix to appellant's initial brief, and an appendix may be attached to briefs following the appellant's initial brief. The appendix may contain papers or exhibits in the appellate record to which ready reference may be considered by the appellant as helpful to the appellate court. Parties should not include documents in an appendix that have been attached to a previously filed brief in the same appeal, unless it is a required document under paragraph (E)(1)(a) above

(c) **Items not included in the record**. Except for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs.

(d) **Required index and tabs for appendix.** The first item of the appendix shall be a listing or index of all documents included in the appendix. The index shall set forth where each document may be found in the record. The items in the appendix shall be separated by appropriate extruding tabs.

(e) **Unpublished Opinions**. Like other items in the appendix, unpublished opinions that are required to be attached to briefs as set forth in RAP 41(C) shall be listed in the index to the appendix and separated by extruding tabs.

(2) **Evidentiary Appendix**. Appellants and appellees may attach to their briefs an appendix of the evidence that consists of a transcription of video recorded evidence or other court proceeding. The purpose of an evidentiary appendix is to facilitate the efforts of each appellate judge in studying the briefs in a meaningful way.

(a) **Content.** An evidentiary appendix shall contain transcriptions of only those parts of the video recording that support the specific issues or contentions raised in a brief on appeal, or that relate to a question of whether an alleged error was properly preserved for appellate review.

(b) **Length.** The filing of an evidentiary appendix and index attached to a brief shall not exceed 50 pages if filed in the Supreme Court, nor 25 pages if filed in the Court of Appeals, except that an evidentiary appendix and index attached to a reply brief shall not exceed 15 pages.

(c) **References to the Record.** Either at the top of each page of an evidentiary appendix or in an index at the beginning of an evidentiary appendix, there shall be references to any witnesses whose testimony is transcribed along with video recording references to the beginning and ending of any transcribed testimony.

COMMENT

Under the current rules, introductions to briefs (that do not count toward the page limits) are currently limited to 2 simple sentences. The "simple" nature of the sentences is long gone; parties (at least in civil cases) now frequently include an introduction of more than 2 sentences. The rule has been changed so that the introduction and statement regarding oral argument may now not exceed 1 page total, which does not count toward the word or page limit.

Section (C)(3) is new and makes explicit what was implicit—a cross-appellant's reply brief is not a "combined" brief, and may only address the cross-appeal issues.

Section (E) has combined and revised the rules regarding required and permissible appendices (including evidentiary appendices) to make them clearer. Paragraph (E)(1)(c) has been added to make clear that items may not be included in an appendix unless they are part of the record or are items as to which the court may take judicial notice. Paragraph (E)(1)(e) has been added to make clear that unpublished opinions need to be listed in the index and have their own tabs.

{This proposed rule is based on current CR 76.12(4), 76.28(4)(c), and 98(4)(b).}

RAP 33 Reserved.

RAP 34 Amicus Curiae

(A) Participation in appeals. Amicus curiae may participate in appeals only as set forth in this rule and in RAP 43(C) and RAP 45.

(B) Amicus Curiae Briefs.

(1) **Motion Required.** A brief for an amicus curiae shall not be filed except upon order of the appellate court, pursuant to motion filed simultaneously with the tendered brief that specifies with particularity the nature of the movant's interest, the points to be presented, and their relevance to the disposition of the case.

(2) **Time for Filing.** A motion to file an amicus curiae brief must be filed no later than 15 days from the date on which the appellant's brief is filed, regardless of whether the amicus curiae advocates the position of the appellant or appellee.

(3) **Payment**. Payment of the filing fee specified in RAP 13 shall be required with a motion for leave to file an amicus curiae brief.

(4) **Form.** An amicus curiae brief shall conform to RAP 30, 31, and 32(C)(1), but with a tan cover, shall not exceed 5,250 words, shall include a word-count certificate in conformity with RAP 15, and shall not contain appendices, other than copies of final unpublished opinions as required by RAP 41(C).

(C) Oral Argument. Counsel representing an amicus curiae shall not participate in oral argument.

{This proposed rule is based on current CR 76.12(7); 76.16(3).}

RAP 35 Supplemental Authority

(A) Recent Supplemental Authority. A party may file a motion for leave to cite recent supplemental authority if such authority was decided after that party's final brief was filed. Such a motion shall attach the supplemental authority and, in 250 words or less (excluding caption, signature block, and certificate of service), describe how the supplemental authority pertains to the appeal at hand. Other parties to the appeal may file a response with the same word limit.

(B) Other Supplemental Authority. A party may file a motion for leave to cite supplemental authority decided before its final brief was filed only for good cause shown. Such a motion shall attach the supplemental authority and, in 400 words or less (excluding caption, signature block, and certificate of service) describe how the supplemental authority pertains to the appeal at hand and why it was not cited in the party's brief. Other parties to the appeal may file a response with the same word limit.

(C) Certificate of Compliance. A motion filed pursuant to this rule must include a word-count certificate in conformity with RAP 15.

COMMENT

This is a new rule. Parties now file motions to cite supplemental authority for a variety of reasons. This rule makes clear when parties may file supplemental authority and the different standard for cases decided after briefing has been completed. It also places a limit on the word count, which is sufficient to say why the case was cited, but not to reargue an issue in a brief. The word count is higher for non-recent supplemental authority because the party has to explain why it's being cited rather late in the process.

This is the only length limit in the rules that requires a word-count regardless of whether it is handwritten or typewritten. Given that 400 words is only a bit more than a page, a person without a computer can count the words if making such a motion.

RAP 36 Reserved.

ARTICLE VII. DISPOSITION OF APPEAL

RAP 37 Submission

Appeals will be submitted for consideration on the merits by the appellate court when all briefs have been filed or when the time for such filing has expired, whichever is sooner. No document filed or tendered after submission will be considered unless filed pursuant to these rules or with leave of court.

{This proposed rule is based on current CR 76.26.}

RAP 38 Oral Argument

(A) When Heard. Oral arguments on the merits will be heard in cases designated by the appellate court. RAP 32 provides for the parties to include in their brief statements concerning the need for oral argument in the appeal.

(B) Procedure. In an oral argument, the appellant shall open and close. Unless otherwise directed, each side will be allowed 15 minutes. Visual aids based on the record may be used at oral argument with leave of the court.

(C) Non-Attorneys. A person who is not an attorney will be permitted to make an oral argument only with special leave of the court.

(D) Death Penalty Cases - Notice of Issues. In cases where the death penalty was imposed, appellant shall file and serve upon appellee not later than 14 days before oral argument a notice of issues that appellant intends to argue orally, with specific reference to the argument number and page numbers of each issue in appellant's brief. If appellant fails to do so without good cause, appellant's oral argument may be limited to answering questions from the Court.

(E) Supplemental Authority. In cases set for oral argument, a party shall file any motion under RAP 35 for leave to cite supplemental authority for oral argument not later than 10 days before oral argument, unless good cause is shown for a later filing.

COMMENT

The current requirement in CR 76.16(1) that an opinion not be rendered until 10 days after the court orders that no oral argument will be held has been removed.

The notice of issues from CR 76.16(5)(b) has been removed for non-death penalty cases.

{This proposed rule is based on current CR 76.16}

RAP 39 Reserved.

RAP 40 Opinions and Orders—Issuance and Effective Date

(A) Written Opinions and Orders.

(1) Appellate court opinions and orders shall be reduced to writing and, except for unanimous actions of the Supreme Court, shall list the names of the members concurring or dissenting and indicate the name of any member who did not participate in the decision.

(2) Opinions and orders finally deciding a case on the merits shall include an explanation of the legal reasoning underlying the decision.

(B) Time of Announcement. Unless otherwise determined by the Supreme Court, opinions of the Supreme Court will be released for publication on Thursdays. Unless otherwise determined by the Court of Appeals, opinions of the Court of Appeals shall be released on Fridays.

(C) Distribution of Copies. Promptly after an opinion is handed down, the clerk shall send a copy to the trial judge, to any intermediate court which made a decision in the case, and to each attorney in the case.

(D) Publication.

(1) Each opinion rendered by the Supreme Court and the Court of Appeals must show on its face whether it is "To Be Published" or "Not To Be Published." The decision as to publication will be made by the court rendering the opinion. Opinions designated "Not To Be Published" are not binding precedent. These opinions may, however, be cited as non-binding authority as permitted by RAP 41.

(2) If a motion for discretionary review of an opinion of the Court of Appeals is filed under RAP 44, the opinion may not be published until the Supreme Court has entered an order making a final disposition of that matter. If the motion for discretionary review is denied or withdrawn, whether the opinion shall be published is determined by how the Court of Appeals designated the opinion, unless the Supreme Court directs otherwise. If the motion for discretionary review is granted, the opinion of the Court of Appeals shall not be published unless expressly ordered to be published by the Supreme Court.

(E) Withdrawal of Opinions. Parties to an appeal may not by agreement dismiss an appeal and have an opinion withdrawn after it has been issued.

(F) Effective Date of Opinions, Orders, and "Opinions and Orders."

(1) **Effective Date of Opinions and "Opinion and Orders."** An opinion or an "opinion and order" is effective upon finality as set forth in section (G) of this rule.

(2) **Effective Date of Orders.** Unless otherwise directed, all orders of an appellate court, including those in original proceedings under RAP 60, are effective upon entry and filing with the clerk. As set forth in RAP 43(D), the court may suspend the effectiveness of certain orders.

(G) Finality of Opinions and "Opinion and Orders." This paragraph, RAP 40(G), applies to any decision of an appellate court styled as an "Opinion" or "Opinion and Order."

(1) An opinion of the Supreme Court becomes final on the 21st day after the date of its rendition unless a petition under RAP 43 has been timely filed or an extension of time has been granted for that purpose. An opinion of the Court of Appeals becomes final on the 31st day after the date of its rendition unless a petition under RAP 43 or a motion for discretionary review under RAP 44 has been timely filed or an extension of time has been granted for one of those purposes.

(2) The filing of a timely motion for discretionary review under RAP 44 suspends finality of the opinion for which review is sought. An order denying the motion or permitting its withdrawal reinstates the opinion of the lower court. If the motion for review is granted, the opinion of the court finally disposing of the matter supersedes all lower court opinions arising from the appeal.

(3) In the event of a timely petition for rehearing under RAP 43,

(a) if it is in the Supreme Court and is denied, the opinion becomes final immediately upon such denial;

(b) if it is in the Supreme Court and is granted and a new or revised opinion is rendered, the new or revised opinion becomes final on the 21st day after the date of its rendition unless otherwise ordered, or unless a further petition under RAP 43 has been timely filed or an extension of time has been granted for that purpose;

(c) if it is in the Court of Appeals and is denied, the opinion becomes final on the 31st day after the date the petition was denied unless a motion for discretionary review under RAP 44 has been timely filed; or

(d) if it is in the Court of Appeals and is granted, and a new or revised opinion is rendered, the new or revised opinion becomes final on the 31st day after the date of its rendition unless otherwise ordered, or unless a further petition under RAP 43 or a motion for discretionary review under RAP 44 has been timely filed or an extension of time has been granted for one of those purposes.

(4) Unless otherwise ordered, in no event shall an opinion become final pending final disposition of a timely petition under RAP 43 or a timely motion for discretionary review under RAP 44; and in every case it shall become final when no such motion or petition has been filed within the time allowed for that purpose.

(5) When an opinion has become final or when a dispositive order has been issued, the clerk of the appellate court that rendered it shall forthwith send it to the clerk of the trial court and, if the opinion results from a review of the decision of another appellate court, to the clerk of that court also, a copy of the opinion with an endorsement stamped thereon showing the date upon which it became final, whereupon the clerk of the trial court shall forthwith file the opinion as enclosed in the original record and note the filing on the proper docket. In the event a final opinion directs that an administrative agency, board, or commission conduct further proceedings with respect to such action, the clerk of the trial court shall forthwith remand the action to the administrative agency, board, or commission before which said action originated without further order of the trial court.

(6) No mandate shall be required to effectuate the final decision of an appellate court, whether entered by order, opinion, or opinion and order.

(H) Non-Final Opinions May Not Be Cited. Non-final opinions, orders, or opinions and orders may not be cited or used as binding or persuasive precedent in any court of this state and may not be cited without indicating the non-final status.

(I) Clerical Corrections. The Supreme Court may, on the court's own motion, make clerical corrections to an opinion or opinion and order that do not change its substance until the opinion or opinion and order becomes final. The Court of Appeals may, on the court's own motion, make clerical corrections to an opinion, opinion and order, or order that do not change its substance until the 31st day after the opinion, opinion and order, or order is rendered, unless a petition for rehearing or motion for reconsideration has been filed. Clerical corrections under this rule do not affect the finality of the opinion, order, or opinion and order, and do not affect the deadlines for filing a petition for rehearing or reconsideration under RAP 43 or a motion for discretionary review under RAP 44.

COMMENT

The effective date and finality of opinions, orders, and opinions and orders are now contained in one rule and expanded upon and clarified.

A change to the rules is that "opinions and orders" are now equated with opinions rather than with orders. Both opinions and "opinions and orders" are effective on finality, while orders are effective upon entry and filing. This

eliminates the need for differing deadlines (20 v. 10 days) for petitions for rehearing of opinions v. motions for reconsideration of opinions and orders or orders.

Sections (D)(2) and (G)(2) explain the impact of a motion for discretionary review on finality, including that an opinion rendered after discretionary review is granted supersedes any opinions in the appeal chain. Practitioners, particularly those from out of state or with limited appellate experience, do not intuitively understand the impact of discretionary review on the previous opinions in the chain. This also helps solve the issue of practitioners relying on a portion of a Court of Appeals opinion when the Supreme Court has granted review and rendered its own opinion. Regardless of whether the Supreme Court is affirming or reversing the Court of Appeals, it is only the Supreme Court opinion that has any precedential value.

New section (H) makes clear that non-final opinions may not be used as any sort of precedent.

Section (I) explains when clerical corrections can be made to opinions and that such corrections do not delay finality or any further appellate deadlines.

{This rule is based on current CR 76.28, 76.30, 76.38(1).}

RAP 41 Citation to Unpublished Opinions

(A) Kentucky Opinions. "Not To Be Published" opinions of the Supreme Court and the Court of Appeals are not binding precedent and citation of these opinions is disfavored. A party may cite to and rely on a "Not To Be Published" opinion for consideration if:

(1) it was rendered after January 1, 2003,

(2) it is final under RAP 40(G),

(3) there is no published opinion of the Supreme Court or the Court of Appeals that would adequately address the point of law argued by the party, and

(4) the party clearly states that the opinion is not binding authority.

(B) Unpublished Opinions from Other Jurisdictions. Unpublished opinions from other jurisdictions are not binding precedent and citation of these opinions is disfavored. A party may cite to and rely on a final unpublished opinion from a jurisdiction other than Kentucky only if citation of the opinion is permitted by the law of that jurisdiction.

(C) Citation and Copies.

(1) When citing a "Not To Be Published" opinion of the Kentucky appellate courts, the party must provide the style, date, and case number of the opinion: e.g. *Doe v. Roe*, 2019-SC-1234 (Ky. Feb. 20, 2020), or *Smith v. Jones*, 2019-CA-1999 (Ky. App. Dec. 4, 2020).

(2) When citing an unpublished opinion from another jurisdiction that can be accessed on a free publicly available electronic database, the party must provide a URL or other identifier that will permit easy access to the opinion.

(3) If a cited unpublished opinion is not available on a free publicly available electronic database, the party relying on the opinion must include a copy of the entire opinion in the appendix to the party's brief.

COMMENT

Since CR 76.28(4) was amended in 2009 to permit limited use of unpublished opinions, many free and paid internet services have made access to appellate opinions from every jurisdiction relatively easy for lawyers and the general public. Widespread access requires acknowledgement of the changed circumstances and guidance on the use of the information now available.

To prevent unnecessary citation of unpublished opinions, section (A) includes the language from CR 76.28(4) that unpublished opinions are not "binding precedent," adds that their use is "disfavored," and also lists the requirements for use. The requirements in (A)(1) and (3) are adapted from the existing rule; (A)(2) adds the requirement that the opinion be final; and (A)(4) requires a clear statement that the unpublished opinion is not binding authority.

Section (B) is new. The phrase, "only if citation of the opinion is permitted by the law" of the jurisdiction rendering the opinion, is copied from Washington General Rule 14.1(b). A party who wants to use an opinion from federal court or another state's court must first find out if the opinion could be used in the rendering jurisdiction.

Subsection (C) addresses and changes when unpublished opinions must be attached to briefs. (C)(1) anticipates use of the Kentucky Court of Justice website and eliminates the requirement to file copies of unpublished opinions with the brief so long as the SC or CA case numbers and the date of the opinion are provided. This new requirement also makes sense because people should be checking the KCOJ website to determine the subsequent history of the case, including whether it is final. While attorneys may continue to provide a Lexis or Westlaw cite for the court and adverse counsel, such a cite should be in addition to the rule requirements of date and case number. The same approach is taken to foreign opinions in (C)(2) and (3). It is reasonable to anticipate that unpublished opinions of the federal appellate courts and those of state appellate courts are readily available on free sites. Where they are not, (C)(3) requires submission of the whole opinion as part of the appendix.

Paragraph (A)(2) includes an explicit reference to RAP 40(G), regarding finality of opinions. The combination RAP 40(G)(2) and 41(A)(2) should now make it clear that a motion for discretionary review suspends finality of the opinion for which review is sought and that, whether or not the opinion is designated for publication, it cannot be used until the last court in the discretionary review chain has made a final disposition or the time for filing has expired.

RAP 42 Stay Pending Review by United States Supreme Court

(A) Filing Petition in U.S. Supreme Court Does Not Affect Finality. The filing in the Supreme Court of the United States of a petition for review on a writ of certiorari does not affect the finality of an opinion or final order.

(B) Procedure for Seeking and Granting Stay. An order staying execution or enforcement of an opinion or final order may be entered upon motion made pursuant to RAP 7 to the appellate court that rendered the opinion or final order for which review is sought. A stay may be granted from the date of opinion or order until the time to file certiorari expires with no petition being filed, or if a petition is timely filed, until the case before the United States Supreme Court is finally resolved, and the appellate court retains jurisdiction to render such a stay during this time period. If the stay is to act as a supersedeas, a supersedeas bond shall be required in accordance with the Rules of the Supreme Court of the United States.

COMMENT

References to specific U.S. Supreme Court rules have been eliminated.

The rule is also revised to make clear that the appellate court that entered the opinion for which certiorari is sought retains jurisdiction until the time to file a petition for certiorari has passed without a petition or until the case before the U.S. Supreme Court is final. This is in conformity with Rule 23 of the U.S. Supreme Court, which expects an application for stay, except in the most extraordinary circumstance, to be first sought in courts below.

{This proposed rule is based on current 76.44.}

ARTICLE VIII. REHEARING OR DISCRETIONARY REVIEW

RAP 43 Petition for Rehearing or Other Relief as to Opinion or Opinion and Order or Motion for Reconsideration of Order

(A) Scope of Rule. Any decision of an appellate court styled an "Opinion" or "Opinion and Order" is governed by Section (B) of this rule. Any decision or ruling styled as an "Order' is an order governed by section (D) of this rule.

(B) Petition Regarding Opinion or Opinion and Order

(1) **When Petition for Rehearing Authorized.** A party affected by an Opinion or Opinion and Order of the Supreme Court or Court of Appeals in an appealed case may petition the Court for the following relief:

(a) **Rehearing.** Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on the appeal and will be granted only when it appears 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.

(b) **Modification.** When it is desired to point out and have corrected any inaccuracies in statements of law or fact contained in an opinion or opinion and order of the court, and the result reached is not questioned, a party may request a modification.

(c) **Extension.** When it is desired to extend the opinion or opinion and order to cover matters in issue not discussed therein, and the result is not questioned, a party may request an extension.

(d) **Publication.** When an opinion or opinion and order was originally designated not to be published and it is desired to cite the opinion or opinion and order as binding or persuasive precedent in any court of this state, a party may request publication.

(2) **Style.** A party may petition for a combination of the above (rehearing, modification, extension, and publication), if appropriate, but must style the petition to specifically include all forms of relief sought.

(3) **Time for Filing.** A petition for rehearing, modification, extension, or publication shall be filed not later than 20 days from the date on which the opinion or opinion and order was issued, and any response thereto shall be filed no later than 20 days from the date on which the petition was filed. Unless a timely motion for discretionary review of an opinion or opinion and order of the Court of the Appeals is filed pursuant to RAP 44, the failure of a party to timely file a petition shall result in the appeal becoming final.

(4) **Form.** All petitions regarding opinions or opinion and orders and responses under this rule shall be in the form prescribed by RAP 31, but with covers colored as follows: Petition—Green; Response—Gray. All petitions shall attach a copy of the opinion at issue.

(5) **Length.** Petitions for rehearing, modification, extension, or publication, and any responses shall be limited to 3,500 words or 8 pages if computer generated and limited to 10 pages if handwritten or typewritten. If a computer-generated document exceeds the page limit but is within the word limit, a word-count certificate in conformity with RAP 15 is required. Covers, signatures, and appendices are not included in the word or page limit.

(6) **Disposition.** In the Supreme Court, a petition for rehearing will be assigned to a justice other than the one who prepared the opinion. In the Court of Appeals, a petition for rehearing will be assigned to a member of the panel that decided the case, other than the member who prepared the opinion.

(7) **Procedure if rehearing or reconsideration is granted.** In the event a petition for rehearing is granted, a party adversely affected by the new opinion may petition for a rehearing, modification or extension under the same rules governing the original petition for rehearing, modification, or extension.

(C) Amicus Curiae in Support of or Opposition to Petition for Rehearing of Opinion or Opinion and Order.

(1) **Motion Required.** An amicus curiae memorandum in support of or in opposition to a petition filed pursuant to RAP 43(B) shall not be filed except in extraordinary circumstances upon order of the appellate court, pursuant to a motion for leave filed simultaneously with the tendered memorandum that specifies with particularity the nature of the movant's interest, the points to be presented, and their relevance to the disposition of the petition for rehearing.

(a) **Time for Filing.** A motion for leave to file an amicus curiae memorandum and accompanying memorandum must be filed within 10 days of the filing of the petition.

(b) **Payment.** Payment of the filing fee specified in RAP 13 for a motion to file an amicus curiae brief shall be required with a motion for leave to file an amicus curiae memorandum in support of or in opposition to the petition.

(2) **Amicus Curiae Memorandum.**

(a) **Content.** An amicus curiae memorandum should provide reasons for or against rehearing, modification, or extension that are unlikely to be brought to the attention of the court by the parties. An amicus curiae

memorandum that does not serve this purpose burdens the Court, and its filing is not favored.

(b) **Form.** An amicus curiae memorandum shall have a white cover containing the information required by RAP 5(A)(1) and (2) and the name of the party on whose behalf the motion is submitted and it shall include a word count certificate in conformity with RAP 15. An amicus curiae memorandum shall not exceed 1,750 words, excluding the cover, signature block, and word count certificate. The memorandum shall not contain appendices, other than copies of unpublished opinions as required by RAP 41.

(D) Motion for Reconsideration of Order.

(1) **Time for Filing.** Unless otherwise provided by these rules or ordered by the court, a party adversely affected by a decision rendered by order may no later than 20 days from the date of its entry move the court to reconsider it. On ex parte motion, the court may suspend the effectiveness of such order pending disposition of the motion to reconsider and any response thereto shall be filed no later than 20 days from the date on which the petition was filed.

(2) **Form.** All motions for reconsideration of orders shall be in the form prescribed by RAP 7, with responses as allowed by that rule.

(3) **Length.** The length of motions for reconsideration or orders and any responses are limited as set forth for petitions in paragraph (B)(5) above.

(4) **Motion to Reconsider Order on Motion to Dismiss.** The timely filing of a motion to reconsider an order granting or denying a motion to dismiss shall suspend the running of time to the same extent as provided by RAP 7(G) with respect to the filing of a motion to dismiss.

(5) **No Reconsideration of Certain Orders.** Paragraph (D)(1) of this rule shall not apply to orders granting or denying transfer under RAP 17, to orders granting or denying relief under RAP 20 or 21, or to orders granting or denying discretionary review under RAP 44. Orders granting or denying a petition for rehearing or a motion for reconsideration under this rule will not be reconsidered.

(E) Number of Copies. In the Supreme Court 10 copies (1 unbound and 9 bound) shall be filed. In the Court of Appeals 5 copies (1 original and 4 bound) shall be filed.

(F) Costs. Payment of the filing fee specified in RAP 13 shall be required with a petition or motion made pursuant to this rule.

(G) Interplay with Motion for Discretionary Review. A motion for discretionary review will not be ruled on during the pendency of a petition for rehearing or motion for reconsideration. A party who has moved for discretionary review under RAP 44 may not file a petition for rehearing or motion for reconsideration of the same case in the court that rendered the opinion or order for which review is sought, unless the opinion or order sought to be reviewed is revised or set aside pursuant to another party's petition for rehearing or motion for reconsideration. If the order or opinion sought to be reviewed is set aside, the pending motion for discretionary review shall be dismissed without prejudice, and any party may file a subsequent motion for discretionary review of the order or opinion finally disposing of the case. The filing of a subsequent motion for discretionary review following a dismissal without prejudice under this paragraph shall not require payment of another filing fee.

COMMENT

Currently CR 76.32 provides 20 days for a petition for rehearing of an opinion and CR 76.38(2) provides 10 days for a motion for reconsideration of an order or of an opinion and order. This difference creates a trap for the unwary. The new rule provides 20 days for opinions, opinions and orders, and orders, and treats opinions and orders like opinions for purposes of rehearing.

Because the Court of Appeals (primarily) frequently receives motions to publish, paragraph (B)(1)(d) specifically adds publication to rehearing, extension, or modification and makes clear that such a motion must be filed within 20 days of the opinion's rendition and may only be filed by a party.

Section (C), allowing amicus motions in support or opposition to a petition for rehearing, has been added. Amicus memos are limited to the equivalent of 5 pages.

Section (G), regarding the interplay between petitions for rehearing and motions for discretionary review, has been added for explanation.

{This proposed rule is based on current 76.32.}

RAP 44 Motion for Discretionary Review

(A) General. A motion for discretionary review by the Supreme Court of a decision of the Court of Appeals, and a motion for such review by the Court of Appeals of a judgment of the circuit court in a case appealed to it from the district court, shall be prosecuted as provided by this rule and in accordance with the rules generally applicable to other motions. Such review is a matter of judicial discretion and will be granted only when there are special reasons for it.

(B) Time for Motion.

(1) A motion for discretionary review by the Court of Appeals of a circuit court judgment in a case appealed from the district court shall be filed within 30 days after the date on which the judgment of the circuit court was entered, subject to the provisions of CR 77.04(2) and Criminal Rule 12.06(2).

(2) A motion for discretionary review by the Supreme Court of a Court of Appeals decision shall be filed within 30 days after the date of the order or opinion sought to be reviewed unless a timely petition or motion under RAP 43 has been filed or an extension of time has been granted for that purpose, in which event a motion for discretionary review shall be filed within 30 days after the date of the order denying the petition or motion for reconsideration or, if it was granted, within 30 days after the date of the opinion or order finally disposing of the case in the Court of Appeals.

(3) The failure of a party to file a motion for discretionary review within the time specified in this rule, or as extended by a previous order, shall result in a dismissal of the motion for discretionary review.

(C) Contents. The motion shall conform to RAP 5 and shall contain the name of the party on whose behalf the motion is submitted. The motion shall also contain:

(1) The name of each movant and each respondent and the names and addresses of their counsel;

(2) The date of entry of the judgment sought to be reviewed, or the date of final disposition by the Court of Appeals, as the case may be;

(3) A statement of whether a supersedeas bond, or bail bond on appeal, has been executed;

(4) If the motion is addressed to the Supreme Court, a statement that the movant does not have a petition for rehearing or motion for reconsideration pending in the Court of Appeals and a statement showing whether any other

party to the proceeding has a petition for rehearing or motion for reconsideration pending in the Court of Appeals; and

(5) A clear and concise statement of (a) the material facts, (b) the questions of law involved, and (c) the specific reason or reasons why the judgment should be reviewed.

(D) Length. The motion shall not exceed 5,250 words or 13 pages in length if computer-generated and shall not exceed 15 pages in length if handwritten or typewritten. The caption, certificate of service, and the items listed in section (C)(1) through (C)(4) above are excluded from the word and page limits. A motion that exceeds the page limit but falls within the word limit must include a word-count certificate in conformity with RAP 15.

(E) Response to Motion. Each respondent may file a response to the motion within 30 days after the motion is filed. Paragraph (D) of this rule applies to the response. No reply to a response shall be filed.

(F) Record on Motion. The movant shall file with each motion copies of the final order or judgment, any findings of fact, conclusions of law and opinion of the trial court, and any opinion or final order of the appellate court, including any decision on any petition for rehearing or motion for reconsideration. In administrative agency cases, copies of the findings of fact, conclusions of law and award or order of the administrative agency shall be filed. While no other record on the motion shall be required unless the court to which the motion is addressed so orders, the parties may attach copies of portions of the record that will assist the court in considering the motion or response.

(G) Form, Signing, and Number of Copies Required. The motion and the response shall be clearly readable, in black type no smaller than 12 point (including footnotes), single sided, and on unglazed white paper 8 ½ by 11 inches in dimension with at least a double space between lines and 1-inch margins. The motion and response shall be signed by each party or its counsel in that person's individual name, which signature shall constitute a certification that the statements of fact therein are true. Ten copies (1 unbound and 9 bound) shall be filed for a motion in the Supreme Court and 5 (1 unbound and 4 bound) in the Court of Appeals.

(H) Service of Motion and Response. Upon filing, the motion and the response shall be served on the other parties and on the clerk of the court whose decision is sought to be reviewed, and such service shall be shown as provided in RAP 5.

(I) Submission. The motion shall be submitted to the court for consideration when the response is filed or when the time for filing such response has expired, whichever is sooner.

(J) Disposition of Motion. The denial of a motion for discretionary review does not indicate approval of the opinion or order sought to be reviewed and shall not be cited as connoting such approval.

(1) If the motion is in the Supreme Court and is granted, the times prescribed in RAP 30 for the filing of briefs shall be computed from the date of the entry of the order granting the motion. In further proceedings in the Supreme Court, the movant shall be the appellant and the respondent shall be the appellee.

(2) If the motion is in the Court of Appeals and is granted, the appeal shall be perfected in the same time and manner as if it were an appeal as a matter of right, unless otherwise directed by the court.

(3) A motion for discretionary review in the Supreme Court will not be ruled upon during the pendency of a petition for rehearing or motion for reconsideration in the Court of Appeals. If a party files a timely petition for rehearing or motion for reconsideration in the Court of Appeals after another party has filed a motion for discretionary review in the Supreme Court, the clerk shall withhold submission of the latter pending final disposition of the case in the Court of Appeals.

(4) A ruling by the Court of Appeals granting or denying a motion for discretionary review will not be reconsidered by the Court of Appeals. A ruling by the Supreme Court granting or denying a motion for discretionary review will not be reconsidered by the Supreme Court. A motion for reconsideration, however styled, shall not be accepted for filing by the clerk of the Supreme Court or Court of Appeals.

(5) Copies of the order shall be sent forthwith by the clerk of the appellate court to counsel for each party and to the clerk of the court whose decision is sought to be reviewed.

(K) Costs. Payment of the filing fee specified in RAP 13 shall be required with the motion.

{This rule is based on current CR 76.20.}

RAP 45 Amicus Curiae in Support of or Opposition to Motion for Discretionary Review

(A) Motion Required. An amicus curiae memorandum in support of or in opposition to a motion for discretionary review shall not be filed except in extraordinary circumstances upon order of the appellate court, pursuant to a motion for leave filed simultaneously with the tendered memorandum that specifies with particularity the nature of the movant's interest, the points to be presented, and their relevance to the disposition of the motion for discretionary review. The motion shall conform to RAP 7 with service on all parties to the appeal.

(1) **Time for Filing**. A motion for leave to file an amicus curiae memorandum and accompanying memorandum must be filed within 15 days of the filing of the motion for discretionary review.

(2) **Payment**. Payment of the filing fee specified in RAP 13 for a motion to file an amicus curiae brief shall be required with a motion for leave to file an amicus curiae memorandum in support of or in opposition to a motion for discretionary review.

(B) Amicus Curiae Memorandum.

(1) **Content.** An amicus curiae memorandum should provide reasons for or against discretionary review that are unlikely to be brought to the attention of the court by the parties. An amicus curiae memorandum that does not serve this purpose burdens the Court, and its filing is not favored.

(2) **Form.** An amicus curiae memorandum shall conform to RAP 5, have a white cover containing the information required by RAP 5(1)(A) and the name of the party on whose behalf the motion is submitted, and include a word-count certificate in conformity with RAP 15. An amicus curiae memorandum shall not exceed 1,750 words, excluding the cover and signature block. The memorandum shall not contain appendices, other than copies of unpublished opinions as required by RAP 41.

COMMENT

This is a new rule. At times, an opinion or issue may be critically important to an industry or certain group in ways that are not obvious to the court from which review is sought. During CLE and other discussions about the creation of the appellate rules, a number of attorneys expressed interest in the ability to file an amicus in support of a motion for discretionary review.

RAP 46 Cross Motion for Discretionary Review

(A) Time for Motion. If a motion for discretionary review is granted, the respondent shall then be permitted 10 days thereafter in which to file a cross motion for discretionary review designating issues raised in the original appeal that are not included in the motion for discretionary review but that should be considered in reviewing the appeal in order to properly dispose of the case.

(B) Form and Response. A cross motion for discretionary review will be practiced in conformity with RAP 7, motion practice in appellate courts. Each cross respondent may file a response to the cross motion within 10 days after the cross motion is filed. No reply to a cross response shall be filed. Ten copies (1 unbound and 9 bound) of any cross motion or cross response shall be filed in the Supreme Court and 5 (1 unbound and 4 bound) in the Court of Appeals.

(C) Record on Motion. The cross-movant shall file with each motion copies of the final order or judgment, any findings of fact, conclusions of law and opinion of the trial court, and any opinion or final order of the appellate court, including any decision on any petition for rehearing or motion for reconsideration. In administrative agency cases, copies of the findings of fact, conclusions of law and award or order of the administrative agency shall be filed. While no other record on the motion shall be required unless the court to which the motion is addressed so orders, the parties may attach copies of portions of the record that will assist the Court in considering the motion or response.

(D) Suspension of Time. The filing of a cross motion for discretionary review shall suspend the running of time for briefing discretionary review as heretofore granted, and the full time for briefing shall be computed from the date of the order granting or denying the cross motion for discretionary review.

(E) Briefing if Cross Motion Granted. If the cross motion for discretionary review is granted, the cross-movant shall brief the issues raised in the cross motion in the brief responding to the brief on behalf of the original movant. The original movant shall then be permitted to reply to the issues raised in the cross-motion in the reply brief permitted by RAP 30.

{This rule is based on current CR 76.21.}

RAP 47 Neither Petition for Rehearing nor Motion Discretionary Review Required for Exhaustion in Criminal Appeals

In all appeals from criminal convictions or post-conviction relief matters a litigant shall not be required to petition for rehearing or to file a motion for discretionary review to either the Kentucky Court of Appeals or Kentucky Supreme Court following an adverse decision of either the circuit court or Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the appellate court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. If rehearing or discretionary review is sought on less than all of the claims of error presented on appeal, the litigant, nevertheless, shall be deemed to have exhausted all available state remedies respecting the claim(s) of error for which rehearing or discretionary review is not sought. Finality of the opinion for all claims of error is governed by RAP 40(G).

{This rule is based on current RCr 12.05.}

ARTICLE IX. APPEALS FROM DISTRICT COURT

RAP 48 Appeals From District Court

(A) Applicability of This Rule, Other Rules, and Statutes

(1) This rule, RAP 48 applies only to appeals from the district court. Appeals from district court to circuit court must be prosecuted under the procedures set out in this rule and other RAP provisions as set forth in this rule, with the following exception.

(2) If the appeal is from a final order or judgment entered in a district court proceeding based on a statute providing a special remedy, the procedural requirements of the statute will prevail over any inconsistent procedures set out in this rule or any other RAP.

(B) Starting the Appeal

(1) All appeals from a final judgment or order of a district court must be taken to the circuit court.

(2) The party appealing must file a notice of appeal in the district court within the time allowed by RAP 3 or by a special remedy statute that authorizes an appeal. Some examples of special remedy time limits are:

Small Claims	KRS 24A.340	10 days;
Paternity	KRS 406.051	60 days;
Forcible Entry and Detainer	KRS 383.255	7 days.

(3) The notice of appeal must contain the information required by RAP 2 and must be served on all parties to the district court action in the manner required by RAP 5(A).

(4) The appellant must also pay the required filing fee of $60, plus any additional fees set by statute, local rule, or ordinance. The district court clerk will not docket the appeal or mark the notice of appeal as filed unless the filing fee is paid or the appellant has complied with the procedures established by RAP 2(H), RAP 54, or RAP 55 to excuse payment of the filing fee.

(5) As allowed by RAP 2(F) and (G), two or more persons entitled to appeal may file a joint notice of appeal, or may later seek consolidation of separate appeals or seek to have separate appeals heard together.

(C) When Notice of Appeal in a Criminal Case Acts as a Stay. The timely filing of a notice of appeal from a judgment of the district court in a criminal

case shall stay proceedings on the judgment as long as the case remains on appeal, except for the requirement of a bail bond. Stays in juvenile dispositions shall be discretionary with the court.

(D) Cross-Appeals

(1) Any party named as an appellee or cross-appellee in a civil case may file a notice of cross-appeal in the district court.

(2) The notice of cross-appeal must contain the information required by RAP 4(D), must conform to RAP 5, and must be served on all parties to the district court action in the manner required by RAP 5(A).

(3) The notice of cross-appeal must be filed no later than ten days after the last day allowed for the filing of the original notice of appeal.

(4) A party who is named as a cross-appellee and who has not previously filed a notice of appeal or cross-appeal, may file a cross-appeal no later than ten days from the filing of the notice of cross-appeal that first names that cross-appellee as a party to the appeal.

(E) Record on Appeal

(1) Appeals are limited to the record created in the district court. Except for matters of which a court may take judicial notice under Kentucky Rule of Evidence 201, no party to an appeal may refer to matters that were not made a part of the record in the district court.

(2) The record on appeal consists of two parts, the paper or digital record of pleadings, motions, and papers that were filed in the district court action and the digital recordings of the proceedings, hearings and trials that were conducted in the district court action.

(3) While a designation of the record is not necessary, to facilitate the timely preparation of the record, within 10 days of the filing of the notice of appeal, the parties should provide the clerk of the district court with a designation listing with specificity the dates on which official recordings were made for all proceedings necessary for inclusion in the record on appeal.

(4) The record on appeal will remain in the custody of the district court clerk until the circuit court requests its production in that court. The record need not be certified unless and until either the Court of Appeals or Supreme Court grants discretionary review.

(F) Time for Filing Statement and Counterstatement of Appeal

(1) Within 30 days after filing a notice of appeal, to perfect the appeal, the appellant must file with the circuit court clerk the statement of appeal that

is required by paragraph (G) of this rule. If more than one notice of appeal has been filed in a case, all statements of appeal must be filed within 30 days of the day on which the first notice of appeal was filed.

(2) Within 30 days after the filing of a statement of appeal, an appellee or an appellee/cross-appellant may file with the circuit court clerk the counterstatement of appeal authorized by paragraph (H) of this rule. The circuit court may treat an appellee's failure to file a counterstatement of appeal as an admission that the district court made an error. If an appellee is also a cross-appellant, a counterstatement of appeal is required to perfect the cross-appeal.

(G) Contents of Statement of Appeal

(1) A party or parties appealing from the judgment or a final order of the district court shall file with the clerk of the circuit court a statement of appeal that conforms to the requirements of RAP 5 and includes the district court case number.

(2) In appeals from criminal judgments or orders, a copy of the statement of appeal must also be served on the Commonwealth's Attorney.

(3) The statement of appeal must also contain:

(a) A "Statement of the Case" consisting of a concise summary of the facts, and procedural events in the district court that are necessary to an understanding of the issues presented by the appeal, with ample references to the specific location in the record supporting each of the statements contained in the summary;

(b) An "Argument" consisting of a concise statement of the legal claims on which the appellant relies for relief and citations to the legal authorities that support the claims;

(c) A specific statement of the relief that the Appellant seeks; and

(d) A statement as to whether oral argument is desired; and

(e) A statement as to whether the matter has been before the circuit court on any previous occasion and whether reference to the record of the prior appeal is necessary.

(4) Unless the circuit court, by order, permits a greater length, the statement of appeal shall be limited to 8,750 words or 20 pages if computer generated or 25 pages if handwritten or typewritten. A computer-generated petition that exceeds the page limit but falls within the word limit must include a word-count certificate in conformity with RAP 15.

(H) Contents of Counterstatement of Appeal by Appellees or by Appellees/Cross-Appellants

(1) The counterstatement of appeal must be filed with the clerk of the circuit court and must conform to the requirements of RAP 5.

(2) In appeals from criminal judgments or orders, a copy of the counterstatement of appeal must also be served on the Commonwealth's Attorney.

(3) The counterstatement of appeal must contain the following:

(a) A "Counterstatement of the Case" consisting of a concise summary of any additional facts and procedural events in the district court that are necessary to an understanding of the issues presented on appeal, with ample references to the specific location in the record supporting each of the statements contained in the summary, or a statement that no further information is needed;

(b) An "Argument" consisting of a concise response to the legal claims on which the appellant relies and citations to the legal authorities that support the claims;

(c) If there is a cross-appeal, an argument consisting of a concise statement of the legal claims on which the cross-appellant relies for relief and citations to the legal authorities that support these claims;

(d) A specific statement of the relief that the appellee or appellee/cross-appellant seeks; and

(e) A statement as to whether oral argument is desired.

(4) Unless the circuit court, by order, permits a greater length, the counterstatement of appeal shall be limited to 8,750 words or 20 pages if computer generated or 25 pages if handwritten or typewritten. A computer-generated petition that exceeds the page limit but falls within the word limit must include a word-count certificate in conformity with RAP 15.

(I) Submission and Oral Argument

(1) When the counterstatement of appeal is filed or when the time for filing a counterstatement of appeal has expired, whichever is sooner, the appeal is submitted for decision.

(2) The circuit court may schedule oral argument on its own motion or upon motion filed by a party to the appeal. With the exception of a motion for oral argument, nothing further may be filed in the appeal unless the circuit court, by order, permits it.

(J) Disposition. Opinions or orders that finally decide an appeal must be reduced to writing and entered of record pursuant to CR 58(1). Opinions or orders that dispose of an appeal on the merits must include an explanation of the legal reasons for the decision.

(K) Reconsideration

(1) A party who seeks reconsideration, correction or modification by the circuit court of an opinion or order finally disposing of an appeal may seek relief pursuant to CR 59.05.

(2) A party who seeks further review of an opinion or order finally disposing of an appeal may file a motion for discretionary review in the Court of Appeals pursuant to RAP 44.

(L) Costs

(1) Costs on appeal shall be borne by the unsuccessful party or parties, except, however, that in criminal cases no reimbursement shall be required of the Commonwealth or a municipality.

(2) Liability for reimbursement of costs may be enforced on motion without the necessity of an independent action.

{This rule is based on current CR 72.02, 72.04, 72.06, 72.08, 72.10, 72.12, 72.13, 73.02(1)(c), RCr 12.02, 12.04.}

ARTICLE X. OTHER APPEALS

RAP 49 Appeals from Workers' Compensation Board

(A) General. Pursuant to Section 111(2) of the Kentucky Constitution and SCR 1.030(3), decisions of the Workers' Compensation Board shall be subject to direct review by the Court of Appeals in accordance with the procedures set out in this rule.

(B) Time for Petition. No later than 30 days from the date upon which the Board enters its final decision pursuant to KRS 342.285(3), any party aggrieved by that decision may file a petition for review with the Clerk of the Court of Appeals and pay the filing fee required by RAP 13. Failure to file the petition and pay the filing fee within the time allowed shall require dismissal of the petition.

(C) Format. Five copies (1 unbound and 4 bound) of the petition shall be filed with the Clerk of the Court of Appeals. All petitions and responses shall be in the form prescribed by RAP 31, but with covers colored as follows: Petition—Red; Response—Blue.

(D) Contents of Petition. The petition shall designate the parties as appellant(s) and appellee(s) and shall contain the following:

(1) The name and address of each appellant and each appellee and the names and addresses of their respective counsel. The appellant shall specifically designate as appellees all adverse parties and the Workers' Compensation Board.

(2) The petition shall state the date of the entry of the decision by the administrative law judge and the date of entry of the final decision of the Workers' Compensation Board.

(3) Each petition shall begin with a table of points and authorities stating the issues to be raised. The petition shall contain a clear and concise statement of (a) the material facts, (b) the questions of law involved, and (c) the specific reason(s) why relief from the Board's decision should be granted by the Court of Appeals. The petition shall be prepared with the expectation that it will be the only document filed by the petitioner in the appeal and shall be limited to 8,750 words or 20 pages if computer generated or to 25 pages if handwritten or typewritten. The cover, table of points and authorities, signatures, and attachments are excluded from the page and word limits. A computer-generated petition that exceeds the page limit but falls within the word limit must include a word-count certificate in conformity with RAP 15.

(4) Copies of the following documents shall be attached to each copy of the petition filed in the Court of Appeals: (a) the decision of the

administrative law judge, (b) the final decision of the Workers' Compensation Board, and (c) a set of the briefs filed with the Board by the appellant and each appellee. If review is sought of a decision on a motion to reopen, copies of the motion, any responses thereto, and decisions on that motion by the administrative law judge and the Board shall be attached. The petition shall clearly state whether there is or is not any other action concerning the injury pending before any other state or federal court or administrative body.

(E) Record. Upon receipt of the petition, the Clerk of the Court of Appeals will request that the original record of the Workers' Compensation Board be prepared by the board in conformity with RAP 24, 25, and 26, certified no later than 30 days from the date of the request, and transported forthwith to the office of the Clerk of the Court of Appeals. This certification and transmission may occur by electronic means.

(F) Response to Petition. Each appellee may file 5 copies (1 unbound and 4 bound) of a response to the petition no later than 30 days from the date on which the petition was filed with the Court of Appeals. A response shall be limited to 8,750 words or 20 pages if computer generated or to 25 pages if handwritten or typewritten. The cover, table of points and authorities, signatures, and attachments are excluded from the page and word limits. A computer-generated petition that exceeds the page limit but falls within the word limit must include a word-count certificate in conformity with RAP 15. No reply to the response shall be filed.

(G) Certification and Service.

(1) The petition and the response shall be signed by each party or his counsel and that signature shall constitute a certification that the statements therein are true and made in good faith.

(2) Upon filing, a copy of the petition and any response shall be served on counsel of record, or on any party not represented by counsel, and on the Workers' Compensation Board. Such service shall be certified on the petition or response pursuant to RAP 5.

(3) In any case in which the constitutionality of a statute is questioned, a copy of the petition and response shall be served on the Attorney General by the party challenging the validity of the statute. The Attorney General may file an entry of appearance no later than 10 days from the date of such service. If no entry of appearance is filed, no further filings need be served on the Attorney General.

(H) Cross-Petition and Response.

(1) Any party designated as an appellee may file a cross-petition no later than 30 days from filing of the petition. The cross-petition shall state the

name of each cross-appellant and each cross-appellee and the names and addresses of their respective counsel. The cross-petition shall contain a clear and concise statement of the issues that the cross-appellant seeks to raise and any material facts relevant to those issues not presented in the petition.

(2) Any cross-appellee may file a response to the cross-petition no later than 30 days from the filing of the cross-petition.

(3) Five copies (1 unbound and 4 bound) of the cross-petition and response shall be filed with the Clerk of the Court of Appeals. A combined cross-petition and response shall be limited to 14,000 words or 30 pages if computer generated and limited to 40 pages if handwritten or typewritten. The cover, table of points and authorities, signatures, and attachments are excluded from the page and word limits. A computer-generated petition that exceeds the page limit but falls within the word limit must include a word-count certificate in conformity with RAP 15.

(4) Cross-petitions and responses shall be signed and served in accordance with paragraph (G) of this rule, with colored covers and binding in accordance with paragraph (C) of this rule.

(I) Submission. The petition, any responses, cross-petitions, and the record shall be submitted to the Court of Appeals for review, and the matter shall proceed further as directed by order of the Court of Appeals. The court may order the filing of briefs compliant with RAP 30–32 or direct that the appeal be submitted for decision based only upon the petition and response.

(J) Disposition. After the Court of Appeals issues a decision, the Clerk shall send a copy of the decision to counsel for each party and to the Workers' Compensation Board.

(K) Procedure for Further Review. Further review may be sought in the Supreme Court of a final decision or final order of the Court of Appeals in a Workers' Compensation matter, and shall be prosecuted in accordance with the rules generally applicable to other appeals pursuant to RAP 30, 31, 32 and 60.

{This rule is based on current CR 76.25.}

RAP 50 Certification of Question of Law to or from the Supreme Court

(A) Power to Answer Federal Court or Sister State Highest Court. If in any proceeding before any federal court or the highest appellate court of any other state or the District of Columbia, questions of law of this state may be determinative of the cause then pending before that originating court, and it appears to that court or a party that there is no controlling precedent in the decisions of the Supreme Court and the Court of Appeals of this state, a request that the Kentucky Supreme Court certify the law may be made by the originating court.

(B) Procedure for Request. Certification of the law may be requested by any of the courts referred to in paragraph (A) of this rule either upon the requesting court's own motion or upon motion to the requesting court by any party to the cause before it. Other than the Commonwealth of Kentucky, as set forth in paragraph (J) below, no party may directly request certification from the Kentucky Supreme Court.

(C) Contents of Certification Request. The request for certification shall set forth:

(1) the questions of law to be answered;

(2) a statement of all facts relevant to the questions certified showing fully the nature of the controversy in which the questions arose;

(3) the names of each appellant and appellee; and

(4) the names and addresses of counsel for each appellant and appellee.

(D) Preparation of Request for Certification. A request from any of the courts referred to in paragraph (A) of this rule shall be prepared by the originating court, signed by the judge presiding at the hearing, and 10 copies shall be forwarded to the Supreme Court by the clerk of the originating court under its official seal. The Supreme Court may require the original or copies of all or such portion of the record before the originating court as it deems necessary.

(E) Disposition by Supreme Court of Kentucky.

(1) An order denying the request for certification of the law will not be reconsidered.

(2) Upon entry of an order granting the request for certification, the matter shall be docketed in the same manner as in a civil appeal. The filing fee in the Supreme Court shall be equally divided between the parties unless otherwise ordered by the originating court, and each party shall pay its share

of the filing fee within 30 days of the date of the entry of the order granting certification.

(F) Briefs and Argument. Within 30 days of the date of the order granting certification, each of the parties desiring to be heard shall file with the clerk of the Supreme Court 10 copies of a brief setting forth the party's arguments. Oral arguments will not be required or permitted unless so ordered by the Supreme Court.

(G) Opinion. The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.

(H) Procedure on Certifying. The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state or district.

(I) Power to Certify. The Supreme Court, on its own motion or on the motion of any party, may order certification of questions of law to the highest court of any state or the District of Columbia when it appears to the Supreme Court that there are involved in any proceedings before the Supreme Court questions of law of the receiving state or district which may be determinative of the cause then pending in the Supreme Court and it appears to the Supreme Court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

(J) Request for Certification of Law by the Commonwealth. A request by the Commonwealth of Kentucky pursuant to Section 115 of the Constitution of Kentucky for a certification of law shall be initiated in the Supreme Court. The request shall be initiated within 30 days of a final order adverse to the Commonwealth. The Commonwealth shall initiate the certification procedure by motion requesting the Supreme Court to accept review. The motion shall contain the same elements as provided in section (C) of this rule. The motion shall be served and response permitted in conformity with the rules applicable to motion practice in the Supreme Court. Ten copies of the request for certification by the Commonwealth and the response, if any, shall be filed with the Clerk of the Supreme Court. If the motion is granted, thereafter the case shall proceed in the same manner as any other criminal appeal.

COMMENT

This rule has been slightly revised from the current version in CR 76.37 to make clear that parties cannot request certification from the Supreme Court, but that only courts may do so. Parties may, however, request the originating court to seek certification from the Supreme Court.

RAP 51 Review of Decisions Concerning Bail

(A) Appellate Review of Bail Pending Trial.

(1) When a circuit court has granted or denied a motion for a review of a bail bond under RCr 4.38 or 4.40, or has changed a condition of release pursuant to RCr 4.42, a defendant aggrieved by such a decision may appeal that decision to the Court of Appeals under the following procedures.

(a) The notice of appeal from the order of the trial court shall be filed within 10 days after the date of entry, subject to RCr 12.82, and shall otherwise be in the manner fixed by RAP 2 and 3.

(b) Upon the filing of the notice of appeal, the clerk of the circuit court shall prepare and certify a copy of such portion of the record or proceedings as relates to the question of bail and is needed for the purpose of deciding the issue on appeal, including, but not limited to, the order of the trial court, the motion and any responses thereto, and any video recording of the hearing on the motion being appealed. The abbreviated record shall be filed with the clerk of the appellate court within 14 days after filing of the notice of appeal.

(c) The appellant shall, within 10 days after the filing of the record, file a brief with the appellate court. The brief shall state clearly the procedural history of the case, the factual history of the dispute, and the grounds on which movant's claim for relief is based and otherwise comply with the briefing requirements of RAP 30–32. Such brief shall not exceed 1,750 words or 4 pages if computer-generated and shall not exceed 5 pages if handwritten or typewritten. A computer-generated petition that exceeds the page limit but falls within the word limit must include a word-count certificate in conformity with RAP 15.

(d) The brief and record appendix shall be served on both the local Commonwealth's Attorney and on the Attorney General.

(e) No brief shall be required of the appellee, but the appellee may file a brief within 10 days after the date the appellant's brief is filed. Such brief shall not exceed 5 double-spaced typewritten pages and shall otherwise comply with the requirements of RAP 30–32. No other briefs shall be filed unless requested by the appellate court.

(f) The appeal shall stand submitted for final disposition 10 days after the date on which the appeal was perfected by the appellant or upon the filing of the appellee's brief, whichever occurs first. Oral argument will not be held unless ordered by the Court on its own motion or on the grant of a motion of a party.

(g) Neither the filing of the notice of appeal nor the pendency of the appeal shall stay further proceedings in the prosecution.

(h) A final disposition by the Court of Appeals on the appeal shall not be subject to rehearing or modification under RAP 43.

(i) Any party adversely affected by the final disposition of the appeal by the Court of Appeals may move the Supreme Court for discretionary review under RAP 44 within 30 days from the date the decision of the Court of Appeals was entered. Such a motion will be entertained only for extraordinary cause show in the motion. A response to the motion for discretionary review, which must conform to RAP 44, may be filed within 30 days after the motion is filed.

(2) The writ of habeas corpus remains the proper method for seeking circuit court review of the action of a district court respecting bail.

(B) Appellate Review of Bail During Pendency of Appeal. An appellant may seek bail on appeal from the trial court pursuant to RCr 12.78. An appellant aggrieved by a decision of the trial court regarding bail on appeal may seek review in the appellate court pursuant to this section.

(a) Such an application shall be made pursuant to RAP 7 and shall show that: (1) application has been made and denied, with reasons given for the denial; (2) application to the trial court is not practicable; or (3) the action on the application did not afford the relief to which the applicant considers himself or herself to be entitled.

(b) The decision of the trial court regarding bail will not be disturbed by an appellate court unless it is demonstrated that the trial judge failed to exercise sound discretion.

{This rule is based on current RCr 4.43, 12.06, 12.82.}

RAP 52 Habeas Corpus Appeals

(A) Procedure. Any party may appeal a ruling granting or denying a writ of habeas corpus by filing a notice of appeal with the clerk of the court where the order was entered pursuant to KRS 419.130. The notice of appeal shall be filed no later than 30 days after the order denying or granting the writ of habeas corpus. The notice shall be served on all parties no later than the date of filing.

(B) Record. The appeal under this section is an expedited proceeding without briefing. A designation of the record is not required. The record on appeal will consist of all documents on file with the circuit clerk and all video record of any hearings held, unless the party appealing directs otherwise. The original record shall be bound and numbered according to the normal procedure for a record on appeal. The record shall be transmitted to the Court of Appeals as soon as possible, but no later than 10 days from the filing of the Notice of Appeal.

(C) Stay on Appeal. If the judgment of the circuit court grants release of the person detained, any party may request the circuit court to stay the judgment or to set bond for release of the person detained. Upon proper motion, the Court of Appeals may continue, modify or set aside the bond or stay pending appeal.

COMMENT

RAP 52 is based upon KRS 419.130. No previous rule existed. The rule conforms to the current practice in the Court of Appeals for review of the denial of a writ of habeas corpus. The rule is necessary to aid the circuit court clerk and the litigant in processing a habeas corpus appeal.

RAP 53 Reserved.

RAP 54 Motions to Proceed in Forma Pauperis and Appoint Counsel

(A) General.

(1) To proceed *in forma pauperis*—meaning without payment of costs and fees, or with payment of partial costs and fees—in an action governed by these rules, a person must file a motion with an affidavit stating the reasons the person applying for relief is unable to pay the costs and fees required to file the action. The motion and affidavit must be filed in the court where the document initiating the action governed by these rules must be filed, at the same time the document initiating the action governed by these rules is filed, unless exempted by another provision of this rule.

(2) Motions and responses filed in the Court of Appeals or in the Supreme Court under this rule must be filed in accordance with RAP 7.

(3) In criminal actions governed by these rules in which a person is represented by a public defender, the payment of a filing fee shall not be required.

(B) Criminal Actions.

(1) Persons Represented by Public Defender.

(a) A person represented by a public defender at the time of sentencing in a criminal case may proceed *in forma pauperis* on appeal without requiring further proof of a person's indigency, and the sentencing court must automatically enter an order permitting a person to proceed in forma pauperis on appeal, unless the sentencing court determines, after conducting a hearing, good cause exists that the represented person is no longer indigent.

(b) The public defender may continue representation of a person on appeal without filing a motion to proceed *in forma pauperis* and without seeking reappointment at each stage of a proceeding governed by these rules, unless a court having jurisdiction over the action determines, after conducting a hearing, that the represented person is no longer indigent.

(2) Persons Not Represented by Public Defender.

(a) A person not represented by a public defender, including an inmate acting pro se, who wants to proceed *in forma pauperis* in a criminal action governed by these rules, must do so by filing a motion in compliance with paragraph (A) of this rule.

(b) If a person is proceeding under paragraph (B)(2) of this rule, a motion in compliance with paragraph (A) must be filed each time a filing fee or cost is required and such a motion must be made at the same time a filing requiring a fee or cost is made.

(C) Civil Actions.

(1) **Non-Inmate.** A person who wants to proceed in forma pauperis in a civil proceeding governed by these rules, must file a motion in compliance with paragraph (A).

(2) **Inmate**

(a) A person, who is currently an inmate in a state or federally-operated facility, a county jail, or other facility of local government, and who wants to proceed *in forma pauperis* in a civil proceeding governed by these rules, must file a motion and affidavit in compliance with paragraph (A) and also include a certified copy of their inmate prison account statement showing the total deposits for the 6 months immediately preceding the filing of the motion to proceed *in forma pauperis*. If an inmate prison account statement for the preceding 6 months is not available, all inmate account records that are available shall be filed with the motion and affidavit.

(b) An inmate who commences, intervenes, or joins an action or an appeal of a judgment in a civil action or proceeding, must pay, at a minimum, a $5.00 partial filing fee unless the court in which the motion is filed determines the inmate is unable to pay a fee or costs.

(3) **Motion required each time a filing fee or cost must be paid.** At the same time a filing is made that requires a filing fee or cost, a person proceeding under paragraphs (C)(1) or (C)(2) of this rule must file a motion in compliance with RAP 54(A).

(D) Appointment of Counsel

(1) If a party seeks appointed counsel on appeal, the party shall file a motion for appointment of counsel on appeal in a court having jurisdiction over the action.

(2) A motion for appointment of counsel on appeal may be filed with the document that initiates an action under these rules. If the trial court denies the motion or if the party later seeks counsel on appeal, the motion may be filed with the appellate court.

(3) If counsel is appointed, the court ruling on the motion may assess an amount to be paid for representation. The amount may be ordered to be paid in lump sum or installment payments. Failure to pay may result in civil collection proceedings, but will not affect the filing of the notice of appeal.

COMMENT

Motions to proceed in forma pauperis are most often filed by persons represented by public defenders in trial courts and persons unrepresented by counsel. In Kentucky's appellate court system, many of the filers that are unrepresented by counsel are incarcerated inmates. Given this, RAP 54 has been written and formatted in a way to make it understandable to the filers that most frequently utilize the rule.

RAP 54(A)(1) & (2) outline the general procedure for filing a motion to proceed in forma pauperis and clarifies if the motion is filed in an appellate court it must be filed in compliance with RAP 7, incorporating service and response rules. A reference to the procedure for filing responses to motions to proceed in forma pauperis is also included. This section of the rule incorporates KRS 453.190. RAP 54(A)(3) incorporates CR 76.42(2)(b).

RAP 54(B) addresses the filing of motions to proceed in forma pauperis in criminal actions and is divided into two subsections. Paragraphs (B)(1)(a) and (b) address proceeding in forma pauperis in cases where a person is represented by a public defender and incorporates KRS 31.120(1)(c). By incorporating the statute into this Rule, the need for a defendant represented by the public defender at sentencing to file a new motion and accompanying affidavit of indigency is obviated, and a court is prevented from denying in forma pauperis status and appointment of counsel unless a change in circumstances has been shown after a hearing. RAP 54(B)(2)(a) and (b) generally outline the procedure for filing an in forma pauperis motion in cases where an individual is not represented by counsel. This section is a reference to KRS 453.190.

RAP 54(C)(1) and (2) outline the procedure for filing a motion to proceed in forma pauperis in civil actions. This section of the Rule incorporates KRS 453.190 and KRS 454.400 – KRS 454.415, which govern civil actions filed by inmates. Paragraph (C)(2)(a) incorporates KRS 454.400, defining those persons that qualify as an "inmate," and KRS 454.410(1), which outlines additional materials that an inmate wishing to file a civil action must file if they wish to proceed in forma pauperis, or pay a reduced filing fee. Paragraph (C)(2)(b) incorporates KRS 454.410(2).

RAP 54(D), regarding motions requesting the appointment of counsel, addresses several statutes regarding appointment of counsel in both criminal and civil cases, including but not limited to KRS 31.110 and 31.120. For example, a needy person is entitled to be represented by a public defender in a host of proceedings although a partial fee can be assessed. KRS 31.120 defines how a court determines who a needy person is. KRS 610.100 covers appointment of counsel in abuse, dependency and neglect cases. KRS 625.080 covers involuntary termination of parental rights. For simplicity (and because the statutes may change), the proposed rules do not reference statutes, but simply sets forth the procedure to seek appointment of counsel on appeal.

RAP 55 Appeal of the Denial of In Forma Pauperis

(A) Scope. A party may appeal the following by filing a notice of appeal with the clerk of the court where the order was entered: (1) the denial of a motion to proceed in forma pauperis in the trial court or on appeal; (2) the assessment of a partial filing fee; or (3) the denial of a motion to waive all fees.

(B) No Filing Fee Required. No filing fee or motion to proceed in forma pauperis is required to file this notice of appeal.

(C) Time to Appeal. The notice of appeal shall be filed no later than 30 days from the entry of the order or no later than 10 days from the expiration of time given to pay the filing fee, whichever is later.

(D) Abbreviated Record. The appeal under this section is an expedited proceeding without briefing. A designation of the record is not required. The abbreviated record shall contain:

(1) The motion to proceed in forma pauperis with supporting documents.

(2) The tendered notice of appeal.

(3) Any subsequent motion with supporting documents relating to in forma pauperis status.

(4) Any response from another party.

(5) The orders of the trial court ruling on the motion(s).

(6) If a hearing was held, a copy of the video record of the hearing.

(7) The notice of appeal of the rulings of the trial court.

A certified copy of the abbreviated record shall be bound and page numbered according to the normal procedure for a record on appeal. The original record shall be retained by the lower court clerk. The certified copy of the abbreviated record shall be transmitted to the appellate court clerk as soon as possible, but no later than 10 days from the notice of appeal.

(E) Time to Pay, if Trial Court Order is Affirmed. If the filing fee or partial filing fee is affirmed, the fee or partial fee must be paid no later than 30 days from the entry of the appellate court decision.

COMMENT

This new rule sets out the procedure for appealing the denial of in forma pauperis set out in Gabbard v. Lair, 528 S.W.2d 675 (Ky. 1975). CR 73.02(1)(b) limited the time to appeal the denial of a motion to proceed in forma pauperis to 10 days. The above rule extends the time to appeal the denial of a motion to proceed in forma pauperis to 30 days.

RAP 56 Reserved.

RAP 57 Reserved.

RAP 58 Reserved.

RAP 59 Reserved.

ARTICLE XI. ORIGINAL ACTIONS

RAP 60 Original Proceedings in Appellate Courts

(A) Applicability. Original proceedings in an appellate court, including a circuit court sitting as an appellate court, may be prosecuted only against a judge or agency whose decisions may be reviewed as a matter of right by that appellate court. All other actions must be prosecuted in accordance with applicable law.

(B) Commencement. Original actions brought under this rule may be prosecuted upon payment of the filing fee required by RAP 13 and the filing of a petition in the format prescribed by this rule, RAP 5, and RAP 7. Five copies (4 bound and 1 unbound) shall be filed.

(C) Content of the Petition. The petition must set forth:

(1) The name of each respondent against whom relief is sought;

(2) The name of each real party in interest and that party's counsel. A real party in interest for purpose of this rule, RAP 60, is any party in the circuit court action from which the original action arises who may be adversely affected by the grant or denial of the relief sought in the petition;

(3) The style and case number of any underlying action pending in a circuit court or in the Court of Appeals;

(4) An explicit statement of the relief sought;

(5) A clear and concise statement of (a) the material facts of the action, with express reference to any order sought to be reviewed and the ground on which jurisdiction is alleged; (b) the questions of law involved with citations to authority pertinent to each question; and (c) the reasons why relief should be granted;

(6) An appendix containing any items permitted by paragraph (E) of this rule, and copies of any orders or other papers relevant to the action; and

(7) Proof of service on all respondents and real parties in interest as required by RAP 5(A).

(D) Response. The party against whom relief is sought and any real party in interest may, within 20 days after the date on which the petition was filed, file a response that conforms to RAP 5 and RAP 7. A responding party may submit evidence as permitted by paragraph (E) of this rule.

(E) Evidence. Parties may submit evidence with the petition or response in the form of exhibits, affidavits, counter-affidavits, depositions, documents filed in the underlying case, and the electronic record of any relevant proceedings.

(F) Length. Except by the court's permission, and excluding the accompanying documents permitted by paragraph (C)(6), petitions and responses filed under sections (C) and (D) shall be limited to 14,000 words or 30 pages if computer generated and limited to 40 pages if handwritten or typewritten. If a computer-generated document exceeds the page limit but is within the word limit, a word-count certificate in conformity with RAP 15 is required.

(G) Submission and Disposition. Original actions will be submitted for decision when the response is filed or the time for filing has expired, whichever is sooner, unless otherwise ordered by the court. Replies are not permitted.

(H) Emergency Relief

(1) If any party requires relief prior to a ruling on the petition, the party may, upon a showing that immediate and irreparable harm will occur, move in conformity with RAP 7 for a temporary order in the court in which the original action is filed.

(2) A party adversely affected by an order of the Court of Appeals disposing of a motion for emergency relief brought under this rule may seek relief in the Supreme Court pursuant to RAP 20(F). The filing of a motion under RAP 20(F) does not stay proceedings in the Court of Appeals.

(3) A party adversely affected by an order of a circuit court acting as an appellate court and disposing of a motion for emergency relief brought under this rule may seek relief in the Court of Appeals utilizing the provisions of RAP 20(C)(2) and RAP 20(D). The filing of a motion under RAP 20 does not stay proceedings in the circuit court.

(I) Appeals to the Supreme Court.

(1) An appeal may be taken to the Supreme Court as a matter of right from a final order disposing of an original action prosecuted in the Court of Appeals. The Rules of Appellate Procedure shall apply except as set forth in this paragraph RAP 40(I).

(2) The notice of appeal and filing fee as set forth in RAP 2 and 13 shall be filed with the Clerk of the Court of Appeals no later than 30 days after the date the judgment or order appealed from was entered. A cross-appeal may be taken in the time and manner specified in RAP 4, except that the notice of cross-appeal and filing fee shall be timely filed with the Clerk of the Court of Appeals.

(3) An appellant's brief shall be filed within 30 days of the date of the notice of certification, and further briefing shall proceed as in expedited appeals, RAP 30(E), except that in workers' compensation cases, briefing shall proceed in accordance with RAP 30(C). An appellant's brief and an appellee's combined response brief/cross-appellant's brief, if any, shall set forth arguments for reversal or modification of the judgment or order from which the appeal and cross-appeal, if any, are taken. Briefing shall comply with RAP 31 and 32.

(4) Briefs in response to an appeal or cross-appeal shall be required. Where an appeal is taken against a judge in the Court of Justice and concerns performance of an official act, the party appealing shall serve notice on the real party in interest, who shall be required to file a brief on behalf of the judge against whom the appeal or cross-appeal is taken. No attorney shall, however, be required or permitted to file such a brief where to do so would conflict with the interest of the attorney's client.

(5) The Clerk of the Court of Appeals shall transmit all or any portion of the original record of the proceedings to the Supreme Court when so requested by the clerk of that court.

(J) Appeals to the Court of Appeals when Circuit Court Sits as Appellate Court in Original Actions.

(1) An appeal may be taken to the Court of Appeals as a matter of right from a final order disposing of an original action prosecuted in the circuit court. The Rules of Appellate Procedure shall apply except as set forth in this paragraph, RAP 40(J).

(2) The notice of appeal and filing fee as set forth in RAP 2 and 13 shall be filed with the circuit court clerk no later than 30 days after the date the judgment or order appealed from was entered. A cross-appeal may be taken in the time and manner specified in RAP 4. Briefing shall proceed as in expedited appeals, RAP 30(E), and shall comply with RAP 31 and 32. Briefs shall be required as set forth in RAP 60(I)(4) above.

(3) The circuit court clerk shall transmit all or any portion of the original record of the original proceedings to the Court of Appeals when so requested by the clerk of that court.

(4) Further relief, if any, from a Court of Appeals judgment or order ruling on a matter of right appeal from an original action prosecuted in the circuit court may be sought in the Supreme Court pursuant to RAP 44, motions for discretionary review.

COMMENT

Paragraph (C)(6) adds an appendix to the list of petition contents to remind them that they will need some documents attached to the petition.

Paragraph (F) adds a length limit of 40 pages (or the equivalent word limit).

Pargraph (H) is a reworked version of CR 76.36(4) to make the process for motion practice with writ petitions clearer. While CR 76.36(4) currently allows a motion for intermediate relief if relief is required within 20 days of the petition, petitioners frequently file a combination of motions for emergency, interlocutory, or intermediate relief because it is not clear what they need to do if they need relief, for example, within 48 hours or within 30 days. The new rule is now titled "Emergency" rather than "Intermediate" relief, to better indicate the nature of what needs to be contained in the motion. The 20-day time limit is removed and such motions are now allowed if the party requires relief before the petition will be ruled on. This should allow one motion with a writ petition setting forth any time constraints rather than a series of motions seeking essentially the same relief, and it should streamline and clarify the process.

{This proposed rule is based on current CR 76.36, 81}

RAP 61 Reserved.

ARTICLE XII. BONDS

RAP 62 Stays and Bail in Criminal Cases

Stays of execution and bail on appeal are governed by RCr 12.80 except a stay pending the outcome of a district court appeal is governed by RAP 48(C) and a stay pending the outcome of a habeas corpus appeal is governed by RAP 52(C).

COMMENT

This is a new rule offered to explain the operation of these rules with these rules with the Rules of Criminal Procedure regarding bail on appeal.

RAP 63 Bonds in Civil Appeals

(A) Stay Pending Appeal of Judgment Other than Injunction Judgment.

(1) When an appeal is taken, the appellant may stay enforcement of the judgment by giving a supersedeas bond as provided in this rule. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court or the clerk, and the clerk shall give prompt notice of such approval to the party or parties in whose favor the judgment was rendered.

(2) If the appellant is a governmental unit exempted from the execution of a bond under the provisions of paragraph (E) of this rule, the filing of a notice of appeal by such party shall stay enforcement of the judgment as to it in all cases where the giving of the supersedeas bond would affect such a stay.

(B) Supersedeas Bond.

(1) Whenever an appellant entitled to a stay desires a stay on appeal, the appellant may present to the trial court clerk or the trial court for approval an executed supersedeas bond with good and sufficient surety. The address of the surety shall be shown on the bond. The bond shall be in a fixed amount and conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, including costs on the appeal and interest as the appellate court may adjudge.

(2) When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the trial court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond.

(3) When the judgment determines the disposition of the property in controversy as in real actions or replevin, or when such property is in the custody of the sheriff, or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. A supersedeas bond may be given to stay proceedings on a part of a judgment, and in such case the bond need only secure the part superseded.

(C) Failure to File or Insufficiency of Supersedeas Bond.

(1) The sufficiency of the bond or the surety may be determined by the trial court upon motion and hearing.

(2) During an appeal, the trial court shall retain original jurisdiction to determine all matters relating to the right to file a supersedeas bond, the amount and sufficiency thereof and the surety thereon.

(D) Judgment Against Surety. By entering into a supersedeas bond, the surety submits to the jurisdiction of the court with which the bond is filed and liability may be enforced on motion without the necessity of an independent action. The motion shall be served on the surety as provided by RAP 5 at least 20 days prior to the date of the hearing.

(E) Exemption of Governmental Units from Giving Bond. Whenever a bond is or may be required by these rules in order to take any proceeding, to indemnify any party, or to stay proceedings under or the enforcement of a judgment, such requirement shall not apply to the United States, the Commonwealth or any of its municipal corporations or political subdivisions, or any of their agencies or officers acting for or on their behalf. Unless otherwise exempted by law, such governmental unit shall be obligated to the same extent as if it had given the bond required.

{This rule is based on CR 62.03, 73.04, 73.06, 73.07, 81A.}