NUTS AND BOLTS OF APPELLATE ADVOCACY

Judge Joy Kramer, Kentucky Court of Appeals
Judge Glenn Acree, Kentucky Court of Appeals

I. OVERVIEW – THE KENTUCKY COURT OF APPEALS

A. Created in 1976, the Court of Appeals is an intermediate appellate court of 14 judges, with two judges elected from each of the seven Supreme Court Districts. KRS 22A.010(1). The judges' biographies can be found at http://courts.ky.gov/courts/coa/Pages/coa.aspx.

B. The Court of Appeals may appoint secretaries and staff attorneys for each judge and for the Court. SCR 1.030(5).

C. The judges of the Court of Appeals each have chambers in their respective districts, with a Central Office in Frankfort, Kentucky. SCR 1.030(1). Central Office consists of a clerk staff responsible for maintaining the record of the Court, an assignment section which coordinates the assignment of judges to panels and the delivery of cases to those panels, and a staff attorney's office which supplements the research work of the judges' personal staffs and assists in coordinating the Court's substantive legal work and procedural practice. This includes the coordination of the Court's criminal and civil motions docket.

D. The current Chief Clerk of the Kentucky Court of Appeals is Samuel P. Givens, Jr. The current Chief Staff Attorney for the Kentucky Court of Appeals is Becky Lyon.

E. The judges of the Court of Appeals elect one of their number to serve as chief judge for a four-year term. SCR 1.030(6). The current chief judge is Denise Clayton.

F. For the purpose of deciding cases on the merits, the Court of Appeals sits in panels of three judges. The assignment of judges to panels, the times and places for holding hearings and the assignment of cases shall be determined by the chief judge. SCR 1.030(7)(a).

G. The combination of judges sitting on these three-judge merits panels is determined in such a way that each judge sits and works with each of the other members of the Court. SCR 1.030(7)(b).

H. Each merits panel decides, using a variety of factors, whether to conduct oral argument in the case. Oral arguments may be held anywhere in the state but are most frequently held at the Court's main offices on Democrat Drive in Frankfort, or at the Justice Center in Jefferson County.

I. Less commonly understood is how the Court dispenses with motions. There are two kinds of motions that come before the Court: non-dispositive motions and dispositive motions

1. Non-dispositive motions: Non-dispositive motions most frequently seek time extensions or extensions of page limits in briefs. However, there are many other kinds of non-dispositive motions including, but not limited to: expediting cases; sealing confidential cases and matter; abating cases; seeking referral to the Supreme Court; amending briefs or other filings with the Court. These motions are addressed weekly by the Chief Judge or, in his or her absence, by the Chief Judge Pro Tem.

2. Dispositive motions: These motions are addressed by a three-judge panel that meets once each month at a time agreed upon by the panel. Like merits panels, motions panels are determined in such a way that each judge sits and works with each of the other members of the Court. SCR 1.030(7)(b).

II. THE NUTS AND BOLTS OF MOTION PRACTICE

A. The original and five copies of all motions must be filed in the Office of the Clerk of the Court of Appeals in Frankfort and comply with CR 7.02, CR 11, and CR 76.34(1).

B. The motion must be signed pursuant to CR 11 and served on all parties to the appeal pursuant to CR 5.01 and CR 5.02. A certificate of service must be made in accordance with CR 5.03 on the original motion filed with the Clerk of the Court of Appeals. The date of service as stated in the certificate of service governs the running of response time. CR 76.40 provides that a motion is timely filed when received by the Clerk of the Court of Appeals within the time frame for filing, except that any motion shall be considered timely filed if transmitted within the time allowed for filing by United States registered or express mail (NOT CERTIFIED MAIL), or by other recognized mail carriers with the date the transmitting agency received the document from the sender noted by the transmitting agency on the outside container used for transmitting. CR 5.02(2) has been recently amended to permit service by electronic process.

C. Pursuant to CR 76.34(2), any party to an appeal may file a response to a motion within 10 days of the date on which the motion was served. If the motion was served upon a party by mail, that party mad add 3 days to the allowed response time pursuant to CR 6.05. Five (5) copies of a response to any motion must be filed.

D. A motion to dismiss an appeal suspends the running time for any further procedural steps in the appeal. CR 76.34(6)(b). The remaining time for the

performance of the next procedural step will begin to run again from the date of entry of an order denying the motion to dismiss or passing the motion to dismiss to the panel that will hear the appeal on the merits.

E. Motions in the Court of Appeals are considered on the basis of the papers submitted. Oral argument for a motion is rare.

F. Upon the expiration of response time or when all responses are filed, the clerk's office marks the motion as ready for ruling. The motion is then reviewed by a staff attorney who categorizes the action as procedural or substantive and assigns the motion to a docket. Any motion that does not result in a final disposition of an action, such as a motion for an extension of time or for a waiver of the limitations of briefing, is assigned to the one-judge motions docket pursuant to CR 76.34(4). Any motion that could result in the final disposition of an action is assigned to a criminal, civil, or family motions staff attorney for review and assignment to the monthly three-judge motions docket.

G. If a motion is assigned to the one-judge docket, the docket is normally presented to the Chief Judge or a member of the Court designated by the Chief Judge once every week to ten (10) days, but often more frequently. The frequency of the one-judge dockets depends upon the amount of material to be presented and the availability of a member of the Court to hear the docket.

H. The three-judge motions panel of the Court of Appeals meets monthly in Frankfort. At least 7 days prior to the scheduled motion panel date, the materials placed upon the three-judge motions docket are distributed to the panel. The distribution permits the judges to review the material prior to arrival in Frankfort. Normally, the panel considers more than 100 docketed cases per month. After the meeting of the motions panel, Court staff prepares and submits orders to the judges for review, editing, and signature. Upon receipt of the signed orders from the motions panel, staff attorneys ensure that all motions are delivered to the clerk's office for entry. Pursuant to CR 76.38(1), orders are effective immediately upon entry unless the Court specifically directs otherwise.

III. The following is excerpted from a previous seminar entitled HOW TO SUCCEED AT APPELLATE ADVOCACY! (WITHOUT REALLY TRYING?). It focuses on the pitfalls that can trip up the advocate in civil appeals. The "Nuts & Bolts" of criminal practice in the Court of Appeals picks up below, under section IV.

A. INTRODUCTION

When it comes to nearly any endeavor, we can learn as much (or more) from our mistakes than from our successes. This is true with appellate advocacy.

This part of the outline is not intended to be a comprehensive analysis of civil appellate practice and procedure. It is simply a summary of some practical pointers to use and some pitfalls to avoid as you practice appellate advocacy before the Court of Appeals. While this material focuses on civil appeals in cases that are videotaped in the trial court and in which CR 76.03 (Prehearing Statement) applies, its principles can be applied generally.

B. FIRST OPPORTUNITY TO MAKE MISTAKES

The first chance to make a mistake presents itself long before the appellate phase of your case.

1. ***Potential pitfall #1***: Litigating like you can't lose.

   A lawyer always litigates to win, but he should also always be mindful of the possibility that he will lose.

   MAKE CONCERN FOR PRESERVATION OF ERROR A PRIORITY.

   a. Proper parties.

   b. Proper pleading.

   c. Discovery compliance.

   d. Preservation of error.

      (1) Pre- and post-trial dispositive motions.
      (2) Motions *in limine*.
      (3) Evidentiary objections.
      (4) Jury instructions.
      (5) Additional findings (CR 52.02).

   If you lose: Your strategy after a loss at trial must simultaneously pursue alternatives that are necessarily related. While you consider post-trial motions, you must keep in mind their effect on any appeal.

2. ***Potential pitfall #2***: Continuing during the post-trial motion phase to only look back in time at the trial. Don't forget the impact post-trial motions can have on appellate procedure and preservation of error.

   a. CR 52.01: "Requests for findings are not necessary for purposes of review except as provided in Rule 52.04."

   b. CR 52.02: You have "10 days after entry of judgment" to have the trial court "make additional findings."

   c. CR 52.04: "A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the

attention of the trial court ...." *See* Anderson v. Johnson, 350 S.W.3d 453 (Ky. 2011) for a detailed discussion of the interplay between CR 52.01 and CR 52.04.

d. CR 54.01: Interlocutory or Final? *See* Embry v. Turner, 185 S.W.3d 209 (Ky. App. 2006); Brooks v. Lexington-Fayette Urban County Housing Authority, 244 S.W.3d 747, 750 (Ky. App. 2007).

e. CR 50.02, 52.02, 59: "The running of the time for appeal is terminated by a timely motion pursuant to any of the Rules hereinafter enumerated, and the full time for appeal fixed in this Rule commences to run upon entry and service under Rule 77.04(2) of an order granting or denying a motion under Rules 50.02, 52.02 or 59, except when a new trial is granted under Rule 59." CR 73.02(1)(e).

CR 59.05 is perhaps the most commonly invoked post-judgment rule. Be ever mindful that a timely and properly filed CR 59.05 motion converts a final judgment to an interlocutory judgment, and tolls the running of time to file an appeal until the trial court rules on the motion.

f. CR 60.02: "A motion under this rule does not affect the finality of a judgment or suspend its operation." CR 60.02.

Finality marks the loss of the circuit court's jurisdiction, sets the appellate process in motion, and starts the appellate clock running.

C. THE NOTICE OF APPEAL

1. ***Potential pitfall #3***: Filing Notice of Appeal too soon.

This will start the clock running for your Prehearing Statement. You have thirty (30) days to file the Notice of Appeal, and twenty (20) after that to file the Prehearing Statement – use the time to your advantage.

2. ***Potential pitfall #4***: Filing Notice of Appeal too late.

Need I say more? Well, maybe just one thing. You cannot use CR 6.02 to enlarge the time for filing your Notice of Appeal.

But ... the trial court may extend the time for appeal for a maximum of ten (10) days (that is, for a total of forty days) but only "[u]pon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment or an order...." CR 73.02(1)(d).

3. ***Potential pitfall #5***: Not naming the right parties.

"The notice of appeal shall specify by name all appellants and all appellees ('et al.' and 'etc.' are not proper designation of parties)...." CR 73.03(1).

If the notice of appeal fails to name all indispensable parties, the appeal must be dismissed. Nelson County Bd. of Educ. v. Forte, 337 S.W.3d 617, 626 (Ky. 2011); Theisen v. Wilson, No. 2010-CA-000076-MR, 2012 WL 95421 (Ky. App. Jan. 13, 2012).

But ... "where the conduct of the parties leaves no doubt that this objective has been met, this Court has upheld the intent of the 'notice' nature of the Civil Rules." Blackburn v. Blackburn, 810 S.W.2d 55, 56 (Ky. 1991); *see also* Ready v. Jamison, 705 S.W.2d 479, 481-82 (Ky. 1986) (There is no "defect so long as the judgment appealed from can be ascertained within reasonable certainty from a complete review of the record on appeal and no substantial harm or prejudice has resulted to the opponent.").

D. THE PREHEARING STATEMENT

This is due twenty (20) days after the Notice of Appeal is filed. CR 76.03(4). (No Prehearing Statement is required in criminal and certain domestic-relations appeals.)

1. ***Potential pitfall #6***: Filing the Prehearing Statement late.

   But ... if yours is late, the COA clerks will send you a friendly reminder.

   You then have ten (10) days to file a motion, either

   a. To dismiss the case, or

   b. For additional time pursuant to CR 6.02(b).

2. ***Potential pitfall #7***: Failing to do either will mean that the case SHALL be dismissed and "the attorney(s) may be reported to the Kentucky Bar Association or other sanctions may be imposed."

3. ***Potential pitfall #8***: Failing to identify all potential issues on appeal. "A party shall be limited on appeal to issues in the prehearing statement" CR 76.03(8).

   But ... "when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." CR 76.03(8).

4. ***Potential pitfall #9***: Failing to send a copy of the Prehearing Statement to the Attorney General if you have an issue challenging the constitutionality of a statute. CR 76.03(5).

   Question: May the constitutionality of a statute be raised for the first time in the appellate court?

   "The Commonwealth responds that this Court has on prior occasions condemned the practice of raising an issue for the first time on appeal, as the trial court is denied the opportunity to rule

on the issue. Nonetheless, as Appellant has raised a *constitutional* question, we will review the merits of the issue." Brown v. Commonwealth, 975 S.W.2d 922, 923 (Ky. 1998) (emphasis supplied, citations omitted).

E. THE PREHEARING CONFERENCE

Records show that these "mediations" have a 35-percent success rate. Two experienced prehearing conference attorneys conduct them and there is absolute confidentiality.

1. ***Potential pitfall #10***: Not taking advantage of the conference. (If you check the box that declines the conference, one still may be scheduled. CR 76.03(7)).

   Once the Court determines that there will be no prehearing conference, or if after a conference there is no settlement, the Court will issue an order to that effect and the time will begin running for certification of the record and then briefing.

F. DESIGNATION OF RECORD

Much of this is now automatic but there are some exceptions.

1. ***Potential pitfall #11***: Thinking that the circuit clerk is responsible for getting the record together. "It is the responsibility of the appellant to see that the record is prepared and certified by the clerk within the time prescribed by CR 73.08." Ventors v. Watts, 686 S.W.2d 833, 834 (Ky. App. 1985); *see also* CR 75.07(5). (The appellee is responsible for seeing that the record includes what the appellee needs. Fanelli v. Commonwealth, 423 S.W.2d 255 (Ky. 1968)).

   But ... you can generally count on the clerk to automatically put together a lot of the record, *i.e.*, "all parts of the written record," such as pleadings, motions, orders, etc., plus juror strike sheets; and videotape of trial if one occurred.

   On the other hand ... it is a good idea to check with the clerk to see what IS being included.

2. ***Potential pitfall #12***: Not designating: (1) untranscribed portions of the record that were stenographically recorded; (2) exhibits that would not fit in an envelope; (3) videotapes of hearings other than the trial.

   But ... motions to supplement the record will typically be permitted if timely.

3. ***Potential pitfall #13***: Designating too much of the record.

   "No party shall designate any matter not essential to the decision of the questions presented by the appeal." CR 75.05

"It is refreshing to consider this appeal on a minimum record, which CR 75.05 is designed to encourage." Gunn v. Robinson, 330 S.W.2d 399, 400 (Ky. 1959).

G. PRE-BRIEFING MOTION PRACTICE

When we think of appellate advocacy, the first things that come to mind are brief writing and oral argument. But motion practice is a good opportunity to fine tune the issues. CR 76.34.

1. ***Potential pitfall #14***: Failing to file a dispositive motion before starting to write the brief. We often see arguments in briefs that, had they been brought by motion, might have resulted in dismissal, but certainly would have narrowed issues and shortened briefs. Some examples are:

   a. Failure to name appellee in notice of appeal.

   b. Appeal is from an interlocutory order.

   c. Failure to file timely notice of appeal/notice of cross-appeal.

   d. Any jurisdictional issue.

2. ***Potential pitfall #15***: Failing to ask for oral argument on a strong dispositive motion.

   But ... these are very rarely granted. However, if the grounds for dismissal are strong and oral argument is not a waste of time, asking for an oral argument cannot hurt.

3. ***Potential pitfall #16***: Failing to move for the advancement of an appeal.

   CR 76.22 provides that an appeal may be advanced for good cause shown.

H. BRIEF WRITING

This, of course, is the most important part of an appeal. Surprisingly, not every lawyer is good at this. A successful brief shows that the lawyer has spent time preparing it so that it exhibits thoughtfulness, thoroughness, intellectual and jurisprudential honesty, clarity, and conviction. A successful brief complies with all rules.

1. ***Potential pitfall #17***: Procrastination.

   Start an outline of your brief before you prepare your Notice of Appeal. This will result in a better Notice of Appeal, a better Prehearing Statement, and a better brief.

2. ***Potential pitfall #18***: Filing brief late. (*See* above). Come on, folks. You've got sixty (60) days – thirty (30) for special cases involving vulnerable parties (paternity, abuse, neglect, dependency, domestic violence, juvenile status, termination of parental rights).

   But ... if your appellant brief is late, the COA clerks will send you a friendly reminder. Be aware that such a reminder will not be sent for an appellee or reply brief, though.

   You then have ten (10) days to **file a motion**, either

   a. To dismiss the case, or

   b. For additional time pursuant to CR 6.02(b).

   OR, if you do neither, you encounter ...

3. ***Potential pitfall #19***: Failing to do either will mean that the case SHALL be dismissed and "the attorney(s) may be reported to the Kentucky Bar Association or other sanctions may be imposed."

4. ***Potential pitfall #20***: Technical non-compliance with rules. Familiarize yourself with CR 76.12. The clerks will kick the brief back to you for correction and refiling if the brief:

   a. Exceeds page limits.

   b. Is not signed.

   c. Does not have a proper certificate of service.

   d. Does not have a proper certificate of return of record.

   e. Has the wrong color cover.

   f. Does not have the order or judgment appealed from as the first exhibit in the brief's appendix.

   g. And other technical reasons.

   But ... when it is sent back, you will have ten (10) days to make the corrections and refile.

5. ***Potential pitfall #21***: Failing to include a statement regarding oral argument. There is no real penalty; however, you likely will not get an oral argument unless the other party requests it and the presiding judge deems it helpful. Your statement regarding oral argument should be clear, concise, and direct. If you desire oral argument, ask for it; if you do not, declare so without qualification. There is no need to hedge.

Note: Oral arguments are granted based on a variety of factors. Each particular judge varies with regard to the weight given to those factors. But it is practically certain that if neither party requests it, there will be no oral argument.

6. ***Potential pitfall #22***: Including exhibits that are not part of the record. This typically results in striking of the exhibits but MAY justify striking the brief. Baker v. Jones, 199 S.W.3d 749 (Ky. App. 2006).

   Failure to comply with "a substantial requirement": The following Pitfalls highlight what the Court generally views as "substantial requirements" of a brief. Sanctions can include striking the brief and more. CR 76.12(8)(a); Hallis v. Hallis, 328 S.W.3d 694 (Ky. App. 2010). Again, familiarize yourself with CR 76.12.

7. ***Potential pitfall #23***: The first of the "biggies" is the failure to include "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."

   Note: Judges will catch this even when it is not raised by the other party.

   The Court generally considers the argument unpreserved or waived. Monroe v. Cloar, 439 S.W.2d 73, 73 (Ky. 1969).

   At most, the Court will only review the briefs for manifest injustice. Hallis v. Hallis, 328 S.W.3d 694 (Ky. App. 2010); Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990).

8. ***Potential pitfall #24***: Failure to cite to the record in the statement of facts or where a fact is stated for the first time in the argument.

   The Court will not search the record to find substantiation for a bald statement of fact in the brief. Dennis v. Fulkerson, 343 S.W.3d 633 (Ky. App. 2011); Horn v. Horn, 430 S.W.2d 342, 343 (Ky. 1968).

   If the argument hinges on that fact, you likely will lose that argument.

   Also, if you cite to the record, and it is an important fact, be sure the citation is correct AND that it says what you say it says. If it doesn't, your credibility will take a hit.

9. ***Potential pitfall #25***: Failure to support a legal argument with citation to authority.

   The problem here is usually subtler. Lawyers sometimes cite legal authority which, when carefully read, or read in context, does not support the legal conclusion for which it is cited.

   Failure to cite any legal authority in support of the argument(s) advanced on appeal is a grievous error that will likely result in waiver of the

argument(s). Bailey v. Bailey, 399 S.W.3d 797 (Ky. App. 2013); Hadley v. Citizen Deposit Bank, 186 S.W.3d 754, 759 (Ky. App. 2005).

10. ***Potential pitfall #26***: A brief so bad it gets the attention of the KBA.

    Attorney's filing of appellate brief that did not comply with rule governing form and content for briefs amounted to failure to provide competent representation to his client, warranting suspension for sixty (60) days. Kentucky Bar Ass'n v. Brown, 14 S.W.3d 916 (Ky. 2000).

I. POST-BRIEF MOTION PRACTICE

After a brief is filed, and before your response or reply brief is filed, you can file a motion challenging errors in the previous brief, such as those outlined above.

Potential pitfall #27: Failing to move to dismiss, or alternatively to strike a brief, for failure to satisfy a "substantial requirement" of CR 76.12. CR 76.34(6)(a).

"Timely filing of a motion to ***dismiss*** [but not a motion merely to strike a brief] shall suspend the running of time for procedural steps otherwise required with regard to the appeal and any cross-appeal in the same proceeding, and the time will continue to run as provided by Rule 76.12(2) after the date an order is entered denying the motion or passing it to the merits." CR 76.34(6)(b) (emphasis supplied).

J. ORAL ARGUMENT

The Civil Rules presume that there will be an oral argument. CR 76.16. If you want oral argument but the scheduling order says you won't get it, you have an option.

1. ***Potential pitfall #28***: Failing to file a motion for oral argument when you really want one.

   You have ten (10) days to move to reconsider the Court's denial of oral argument. CR 76.16(1).

2. ***Potential pitfall #29***: Failure to use, or failure to *properly use*, "visual aids" during oral argument.

"Visual aids" are allowed at oral argument with leave of Court. CR 76.16(2).

Simply blowing up a copy of a "controlling" legal authority does not give it greater weight.

Plates and silverware from a restaurant forced into bankruptcy will not inspire compassion.

Helpful visual aids include:

- Plats demonstrating boundary disputes

- Enlarged demonstrative exhibits previously used at trial that show the intersection where an accident occurred

Run them by opposing counsel first and be sure to obtain Court approval as early as possible.

K. POST-OPINION MOTIONS

After the opinion is rendered, you have a few options that should be considered. But they can be a little confusing.

If the case is dispensed by OPINION, CR 76.32 controls (twenty (20) days to file a petition for rehearing).

If by ORDER or OPINION AND ORDER, CR 76.38(2) controls (only ten (10) days to file a motion for reconsideration).

1. ***Potential pitfall #30***: Failing to file a PETITION FOR REHEARING under CR 76.32(1)(a)(i) or failing to argue proper grounds to change the outcome of the case.

   A Petition for Rehearing *seeks a different outcome*.

   Yes, they are rare but some are granted.

   You must:

   - Limit your argument "to a consideration of the issues argued on the appeal," CR 76.32(1)(b) (except in "extraordinary cases when justice demands it"),

   AND

   - Point out where "the court has overlooked a material fact in the record," CR 76.32(1)(b),

   OR

   - Point out where "the court has overlooked ... a controlling statute or decision," CR 76.32(1)(b),

   OR

   - Convince the Court that it "has misconceived the issues presented on the appeal or the law applicable thereto." CR 76.32(1)(b).

2. ***Potential pitfall #31***: Failing to file a PETITION TO MODIFY the opinion. CR 76.32(1)(a)(ii).

A Petition for Modification *does NOT seek a different outcome*.

These are more common, and more often granted, probably because there is a lower threshold.

Use CR 76.32(1)(a)(ii) "to point out and have corrected any inaccuracies in statements of law or fact contained in an opinion [when] the result reached in the opinion is not questioned...." CR 76.32(1)(c).

3. ***Potential pitfall #32***: Failure to file a PETITION FOR EXTENSION of the opinion. CR 76.32(1)(a)(ii)

   Like a petition to modify, a petition for extension of the opinion *does not seek a different outcome*.

   Use CR 76.32(1)(a)(ii) when you are trying "to extend the opinion to cover matters in issue not discussed therein." CR 76.32(1)(c).

4. ***Potential pitfall #33***: Failure to file a motion to reconsider publication.

   If you believe an opinion designated "NOT TO BE PUBLISHED" should nevertheless be published, you can, within "the time for filing a timely petition for rehearing or modification under CR 76.32 ... move[ ] the Court of Appeals to publish its opinion[.]" Commonwealth v. Crider and Rogers, Inc., 929 S.W.2d 179, 180 (Ky. 1996).

5. ***Potential pitfall #34***: Failing to file a MOTION TO RECONSIDER AN OPINION AND ORDER.

   "A decision or ruling styled an 'Opinion and Order' is an order." CR 76.38(1).

   "[A]ll orders of an appellate court . . . are effective upon entry and filing with the clerk." CR 76.38(1).

   Treat it like any court's order that you would like reconsidered.

   "On *ex parte* motion the court may suspend the effectiveness of such order pending disposition of the motion to reconsider." CR 76.38(2).

   Present whatever grounds you believe satisfy CR 11.

L. SOME ADDITIONAL GENERAL COMMENTS

If you should receive a SHOW CAUSE order, PLEASE RESPOND TO IT.

If the Court ORDERS you to do something, PLEASE DO IT.

If you have any DEADLINE, either MEET IT or SEEK AN EXTENSION of time so that you can meet the Court's expectations.

IV. GETTING TO THE COURT OF APPEALS – CRIMINAL CASES: FILING A NOTICE OF APPEAL FROM A FINAL JUDGMENT OF CONVICTION

A. RCr 12.04(3) requires a notice of appeal from a final judgment of conviction to be filed within 30 days from the date of entry of the judgment or from the date of entry of an order denying a timely motion for a new trial. The notice of appeal must be filed in the office of the circuit court clerk of the circuit court where the judgment was entered. RCr 12.04(1).

B. The notice of appeal must be accompanied by the payment of the filing fee required by CR 76.42(2)(a)(i). The notice of appeal cannot be filed by the clerk of the circuit court without payment of the filing fee under CR 73.02(1)(b) unless a motion to proceed *in forma pauperis* has been granted by the circuit court. The Commonwealth of Kentucky and the public defender are not required to pay a filing fee.

C. A criminal defendant may appeal ONLY from a final judgment of conviction. A criminal defendant does not have any right to an interlocutory appeal. KRS 22A.020(4); Evans v. Commonwealth, 645 SW.2d 346 (Ky. 1982). Denial of a motion to suppress evidence is not a final judgment.

D. If an appeal is taken from a judgment of conviction imposing a sentence of death or imprisonment for twenty years or more, the appeal must be taken to the Supreme Court of Kentucky. Ky. Const. § 110(2)(b).

E. The Commonwealth of Kentucky may appeal an adverse interlocutory order of the circuit court as provided by KRS 22A.020(4). The Commonwealth's interlocutory appeal, however, does not suspend the proceedings in the case.

F. The Commonwealth of Kentucky cannot file an appeal from a judgment of acquittal.

G. Failure to timely file a notice of appeal may result in the Court of Appeals issuing an order directing the appellant to show cause why the appeal should not be dismissed for the failure to timely file a notice of appeal. Upon the expiration of the response time indicated in the show cause order, the matter will be placed on the three-judge criminal motions panel docket for consideration. Failure to respond to the show cause order will most likely result in dismissal of the appeal.

H. Please keep in mind that the time for filing a Notice of Appeal is not triggered by service, but by the date of the circuit clerk's notation on the docket of service of notice of entry, with that date fixing the running of time for the appeal. Fox v. House, 912 S.W.2d 450 (Ky. App. 1995). The filing of a Notice of Appeal within the prescribed time frame is mandatory and failure to do so is fatal to an appeal. CR 73.02(2). CR 6.05 DOES NOT APPLY

because that rule adds an additional three days only if the time is triggered by service. A NOTICE OF APPEAL IS NEVER TRIGGERED BY SERVICE!

I. Kentucky does, however, have a "mailbox rule" for the *pro se* inmate. RCr 12.04(5) provides that if an 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.

J. THERE IS NOT A MAILBOX RULE FOR CIVIL APPEALS!!!

V. PRE-TRIAL BAIL

A. RCr 4.43

B. Any criminal defendant aggrieved by a decision of the circuit court on a motion to change the conditions of bail may appeal that decision to the Court of Appeals under the following conditions as established by RCr 4.43(1):

1. The notice of appeal must be filed within ten (10) days.

2. Upon filing of the notice of appeal, the clerk of the circuit court shall prepare and certify the record on appeal, usually that portion of the record as relates to the question of bail. This abbreviated record shall be filed with the Clerk of the Court of Appeals within fourteen (14) days after the filing of the notice of appeal.

3. Appellant SHALL FILE a brief within ten (10) days from the date the record is filed in the office of the Clerk of the Court of Appeals. The appellant's brief must conform to CR 76.12 in all aspects except that the brief shall only be five (5) double-spaced, typewritten pages in length. The appellant's brief must be served on both the local Commonwealth's Attorney and the Attorney General.

4. The Commonwealth of Kentucky is not required to file a brief. If the Commonwealth chooses to file a brief, the brief must conform to CR 76.12 in all aspects except that the appellee's brief shall only be five (5) double-spaced, typewritten pages and must be filed no later than ten (10) days from the date the appellant's brief is filed.

5. The appeal shall stand submitted for final disposition ten (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. Upon submission, the appeal is immediately assigned to the first available three-judge criminal motions panel of the Court of Appeals.

6. This appeal does not stay any further proceedings in the circuit court.

C. Oral argument is rarely granted in appeals filed pursuant to RCr 4.43.

D. Pursuant to RCr 4.43(2), the writ of habeas corpus is the proper vehicle for seeking circuit court review of the action of a district court concerning pre-trial bail.

E. Release of a criminal defendant on bail during the pendency of an appeal filed in the Court of Appeals pursuant to RCr 4.43 may result in the dismissal of the appeal as moot.

F. RCr 4.43 only applies to appellate review of bail conditions prior to entry of a judgment of conviction. After entry of a judgment of conviction, appellate review of bail on appeal shall be by intermediate motion filed pursuant to RCr 12.82 in the appeal of the conviction. RCr 4.43(3).

G. Notable legal authority concerning pretrial bail:

1. Kentucky Constitution Section 16.

2. Abraham v. Commonwealth, 565 S.W.2d 152 (Ky. App. 1997).

3. RCr 4.00 through 4.58.

4. KRS 431.066.

VI. BAIL PENDING APPEAL

A. RCr 12.82

B. A motion for bail pending appeal MUST BE FILED IN THE CIRCUIT COURT FIRST unless some reason exists that filing the motion in circuit court is not practicable or that the motion for bail pending appeal was filed and denied by the circuit court.

C. Failure to file the motion for bail pending appeal in the circuit court first will result in the motion for bail pending appeal filed in the Court of Appeals to be passed pending adjudication of the motion for bail pending appeal in the circuit court.

D. The motion for bail pending appeal is filed as a motion in the underlying appeal. A notice of appeal from a circuit court order denying bond on appeal is improper procedure pursuant to RCr 12.82.

E. Best practice requires attaching a copy of the circuit court's written order denying the motion for bail pending appeal as an exhibit to the motion for bail pending appeal that is filed in the Court of Appeals. The written order denying the motion for bail pending appeal may not always have been certified and/or included by the circuit court clerk as part of the record on appeal.

F. Upon the expiration of the response time for the motion for bail pending appeal, the motion is assigned to the three-judge criminal motions panel of the Court of Appeals for a ruling.

G. Things to remember about bail pending appeal:

1. There is no absolute right to bail on appeal. The presumption of innocence which is the basis of all legitimate guaranties of bail no longer applies to a convicted defendant. Braden v. Lady, 276 S.W.2d 664 (Ky. 1955).

2. The decision of the trial court regarding bail should not be disturbed by an appellate court unless it is clearly demonstrated that the trial judge failed to exercise sound discretion. RCr 12.82; Commonwealth v. Peacock, 701 S.W.2d 397 (Ky. 1985).

3. When considering a motion for bond on appeal, the trial court is required to consider the defendant's past criminal acts, reasonably anticipated conduct if released and financial ability to give bail. Peacock, supra; RCr 4.16; RCr 12.82.

VII. MOTIONS FOR DISCRETIONARY REVIEW

A. CR 76.20.

B. The Kentucky Court of Appeals exercises discretionary jurisdiction in cases originating in district court and heard on appeal by the circuit court. Commonwealth v. Hurd, 612 S.W.2d 766 (Ky. App. 1981). To request the Court of Appeals to exercise its discretionary jurisdiction, the movant must file a motion pursuant to CR 76.20.

C. The motion for discretionary review by the Court of Appeals must be filed with the Clerk of the Court of Appeals within thirty (30) days from the date of entry of the circuit court judgment. CR 76.20(2)(a). The motion for discretionary review must be accompanied by a filing fee or a properly filed motion to proceed in forma pauperis.

D. If the circuit court was sitting on an appeal from district court, review by the Court of Appeals MUST be sought by a motion for discretionary review. A notice of appeal may not serve to transfer jurisdiction to an appellate court, when a motion for discretionary review is called for by the rules. The purpose and function of these two different pleadings are significantly different. A notice of appeal serves to provide notice that an appeal is being pursued as a matter of right, while a motion for discretionary review is a *request* to an appellate court for it to exercise jurisdiction as a matter of election. Beard v. Commonwealth ex rel Shaw, 891 S.W.2d 382 (Ky. 1994).

E. With respect to filing a motion for additional time to file a motion for discretionary review, Kentucky law clearly provides that the time for invoking the appellate court's jurisdiction by filing a motion for discretionary review may be extended before it expires, but the time may not be enlarged after it

expires. CR 6.02, CR 76.20(2)(c) and AK Steel Corporation v. Carico, 122 S.W.3d 585 (Ky. 2003).

F. CR 76.20(3) mandates the requirements of a motion for discretionary review:

1. Designate the parties as movant and respondent;
2. Maximum length of the motion is fifteen (15) pages;
3. The motion shall contain the name of each movant, each respondent, and the names and addresses of counsel. CR 76.20(3)(a);
4. The motion shall contain the date of entry of the judgment sought to be reviewed. CR 76.20(3)(b);
5. The motion shall contain a statement of whether bail on appeal has been executed. CR 76.20(3)(c); and
6. The motion shall contain a clear and concise statement of the material facts, the questions of law involved, and the specific reason or reasons why the judgment should be reviewed. CR 76.20(3)(d).

G. Record on motion:

1. Photocopies 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 to reconsider, shall be filed with each motion for discretionary review. CR 76.20(4).
2. Supplying this limited record is the movant's responsibility!

H. Response to the motion for discretionary review:

1. CR 76.20(5) permits each respondent to file a response to the motion for discretionary review within thirty (30) days after the date the motion is filed.
2. The response cannot exceed fifteen (15) pages in length. CR 76.20(5).
3. No reply to a response shall be filed unless directed by the Court. CR 76.20(5).

I. Other important aspects:

1. The motion and the response shall be either printed or reproduced by an acceptable printing process. CR 76.20(6);
2. The motion and the response shall be signed by each party or counsel. CR 76.20(6);
3. Five (5) copies of the motion and the response are to be filed in the Court of Appeals. CR 76.20(6);

4. The motion and the response must be served on the other parties and the clerk of the circuit court whose decision is sought to be reviewed, with such service shown as required by CR 5.02 and CR 5.03. CR 76.20(7);

5. The matter 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 earlier. CR 76.20(8); and

6. The three-judge criminal motions panel of the Court of Appeals considers the motion for discretionary review upon submission.

J. Disposition:

1. If the motion for discretionary review is denied, the circuit court's decision stands affirmed. The denial of the motion does not indicate approval of the opinion or order sought to be reviewed and shall not be cited as connoting such approval. CR 76.20(9)(a).

2. If the motion is granted, the appeal shall be perfected in the same time and manner as if it were an appeal taken as a matter of right, unless otherwise directed by the Court. Evidence designated under CR 75.01 must be transcribed. The time prescribed by CR 73.08 for preparation and certification of the record and by CR 75.01 for designation of the evidence or other proceedings requiring transcription shall be computed from the date of the order granting the motion. CR 76.20(9)(c).

3. An order by the Court of Appeals granting or denying a motion for discretionary review will not be reconsidered. CR 76.20(9)(e).

K. Things to keep in mind about motions for discretionary review:

1. The purpose of a motion for discretionary review is not to win the case, but to convince the Court of Appeals to take the case!

2. The grant of review is purely discretionary with the Court and will be granted only when there are "special reasons" for such review. CR 76.20(1).

VIII. HABEAS CORPUS APPEALS

A. Pursuant to KRS 419.020, petitions for the issuance of a writ of habeas corpus must be filed in the circuit court. Habeas corpus actions cannot be initiated in the Kentucky Court of Appeals.

B. An appeal may be taken to the Court of Appeals upon entry of a final order in circuit court granting or denying a petition for a writ of habeas corpus. KRS 419.130.

C. The notice of appeal must be filed within 30 days from the date of entry of the judgment in circuit court. A filing fee or a motion to proceed in forma pauperis on appeal must be filed contemporaneously with the notice of appeal. Davenport v. Ashley, 981 S.W.2d 121 (Ky. App. 1998).

D. Appeals from an order granting or denying a petition for a writ of habeas corpus are not briefed by the parties to the appeal. The appeal is placed upon the docket of the next sitting three-judge criminal motions panel. Habeas corpus appeals are predominately decided from a review of the record. Oral argument and briefing are ordered only if the criminal motions panel determines that such would be helpful in the decision on appeal.

IX. REVIEW OF DENIAL OF IN FORMA PAUPERIS STATUS

A. If an individual seeks to proceed in forma pauperis on appeal pursuant to KRS 453.190, the party seeking pauper status must first file a motion to be permitted to proceed in forma pauperis in the circuit court.

B. If the motion is made in good faith, supported by an affidavit of indigency, and a notice of appeal is tendered within the 30-day time period for filing a notice of appeal under RCr 12.04, the notice of appeal is considered to be timely filed.

C. If the motion to proceed in forma pauperis is granted by the circuit court, the notice of appeal will be filed as of the date it was tendered pursuant to CR 5.05(4).

D. If the motion to proceed in forma pauperis is denied by the circuit court, the aggrieved party may seek appellate review in the Kentucky Court of Appeals. To seek review, the aggrieved party must file a notice of appeal from the order denying the motion to proceed in forma pauperis with the clerk of the circuit court within 30 days of the date of entry of the order. CR 5.05(4).

E. In criminal cases, all proceedings are governed by the procedure established in Gabbard v. Lair, 528 S.W.2d 675 (Ky. 1975). The clerk of the circuit court prepares and certifies a record of all motions and orders and any transcript and/or video of hearings on motions concerning the appellant's indigency status. Upon receipt of the record on appeal from the circuit court, the appeal is immediately submitted to the first available three-judge motions panel for a decision.

F. No briefs are filed and no oral arguments are heard unless expressly ordered by the three-judge motions panel.

G. If the Court of Appeals reverses a circuit court's decision and directs an appellant to be permitted to proceed in forma pauperis, the underlying notice of appeal would be filed as of the date tendered. CR 5.05(4).

H. Gabbard requires all other proceedings in the underlying appeal to be stayed. Therefore, the time for designating the record and for certifying the record would begin to run in full from the date the Court of Appeals disposed of the appeal.

I. A party aggrieved by the decision of the Court of Appeals may seek review in the Supreme Court of Kentucky pursuant to CR 76.20.

X. MOTIONS FOR BELATED APPEALS

A. A defendant who claims to have lost the right of appeal from a criminal conviction for reason of the lack of effective assistance of counsel to prosecute the appeal must seek relief by requesting reinstatement of the appeal from the appellate court that has jurisdiction to hear the appeal. Commonwealth v. Wine, 694 S.W.2d 689 (Ky. 1985).

B. A defendant who claims to have lost the right of appeal from an order denying a post-conviction motion for reason of lack of effective assistance of counsel to prosecute the appeal must seek relief by requesting reinstatement of the appeal from the appellate court that has jurisdiction to hear the appeal. Moore v. Commonwealth, 199 S.W.3d 132 (Ky. 2006).

C. The motion for belated appeal must be filed in the appellate court with jurisdiction to hear the appeal.

D. The belated appeal procedure exists for criminal defendants only. There is no legal authority for a belated appeal in a civil case.

XI. OTHER MOTIONS ROUTINELY ASSIGNED TO THE THREE-JUDGE CRIMINAL MOTIONS PANEL

A. Motions to dismiss an appeal.

1. Court policy requires an affidavit from the appellant (criminal defendant) in support of the motion to dismiss any criminal appeal filed in the Court of Appeals.

B. Motions to reconsider pursuant to CR 76.38.

1. Three-judge motions panels usually issue orders or opinions and orders, which become effective immediately upon entry by the Clerk. CR 76.38(1).

2. A motion to reconsider any order must be filed within 10 days from the date of entry of the order. CR 76.38(2).

3. Motions to reconsider are returned to the same panel that issued the original order.

C. Responses to Show Cause Orders.

D. Motions to Withdraw as Counsel.

1. ALWAYS serve your former client with a motion to withdraw as counsel!

2. If you are withdrawing from an appeal, but requesting appointment of counsel for your former client, file a motion for appointment of counsel, a motion to proceed in forma pauperis, and an affidavit of indigency from your former client.

XII. QUESTIONS

The contact information for the Central Office of the Kentucky Court of Appeals is 360 Democrat Drive, Frankfort, KY 40601. The telephone number is 502-573-7920.

ORIGINAL ACTIONS, INTERMEDIATE RELIEF, AND INTERLOCUTORY RELIEF

I. Original Actions

1. *Subject Matter Jurisdiction and Supervisory Authority of the Kentucky Court of Appeals*

A. "The Court of Appeals shall have appellate jurisdiction only, except that ... it may issue all writs necessary in aid of its appellate jurisdiction." Ky. Const. §111(2); *Francis v. Taylor*, 593 S.W.2d 514 (Ky. 1980).

B. CR 81 provides that "[r]elief heretofore available by the remedies of mandamus, prohibition, scire facias [revival of dormant judgment; enforcement of payment on a municipal lien], quo warranto [inquiry into whether a public official properly exercised governmental authority], or of an information in the nature of a quo warranto, may be obtained by original action in the appropriate court."

C. "The Court of Appeals may administer oaths, punish contempts, and issue necessary orders to give control over lower courts. Proceedings in the nature of mandamus or prohibition against a circuit judge shall originate in the Court of Appeals." SCR 1.030(3).

2. *Nature of Mandamus and Prohibition – Extraordinary Relief*

A. Writs of mandamus and prohibition are of ancient origin in English common law. 55 C.J.S. Mandamus §9 (2016); 63C Am. Jur. 2d Prohibition §2 (2016). Mandamus and prohibition evolved among the six "prerogative" writs including habeas corpus and certiorari. Black's Law Dictionary Revised Fourth Ed. (1968). These writs were "issued by the courts only upon proper cause shown, never as a mere matter of right, the theory being that they involve a direct interference by the government with the liberty and property of the subject, and therefore are justified only as an exercise of the extraordinary power (prerogative) of the crown." *Id.*

B. Mandamus – Latin for "We command." A higher court issues a writ of mandamus to compel a lower court to act upon a matter within the lower court's jurisdiction when the lower court has neglected or refused to act. *Mahoney v. McDonald-Burkman*, 320 S.W.3d 75, 79 (Ky. 2010).

C. Prohibition – A higher court issues a writ of prohibition to prevent a lower court from acting outside of its jurisdiction or to prevent a lower court from acting erroneously within its jurisdiction. *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004).

D. Writs of mandamus and prohibition are reserved for truly extraordinary cases and are discouraged because of their interference with the orderly judicial process. *Cox v. Braden*, 266 S.W.3d 792, 797 (Ky. 2008). The decision to issue an extraordinary writ is always discretionary. *Id.* Extraordinary writs are further disfavored because of their expedited nature and abbreviated record, which magnify the potential for incorrect and unjust rulings. *Id.* at 795.

E. Writs of mandamus and prohibition serve to prevent potential injury rather than to remedy or correct an injury that has already occurred. *Mahoney*, 320 S.W.3d at 78.

F. The decision to grant or deny a petition for a writ of mandamus or prohibition constitutes a judgment for the purposes of res judicata with respect to a subsequent petition for a writ of mandamus or prohibition involving the same parties and subject-matter. *Stephens v. Goodenough*, 560 S.W.2d 556, 558-59 (Ky. 1977).

3. *Availability of Extraordinary Writs - General Principles*

A. Before an appellate court will consider the merits of a petition for a writ of mandamus or prohibition, the petitioner must first demonstrate that extraordinary relief is available by showing that the lower court is: (1) acting outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) acting or about to act erroneously, within its jurisdiction, and there is no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the writ is not granted. *Hoskins*, 150 S.W.3d at 10.

B. In the context of writ proceedings, jurisdiction means subject-matter jurisdiction (a court's power to hear a general type of case). *Goldstein v. Feeley*, 299 S.W.3d 549, 553-54 (Ky. 2009). Extraordinary relief is not available to remedy a lack of personal jurisdiction (a court's power to hear a case affecting a particular person) or a lack of particular-case jurisdiction (a court's power to hear a specific case, as opposed to a type of case.

Particular-case jurisdiction usually involves a factual determination of compliance with statutory requirements) because these matters may be adequately remedied by appeal. *Id.; see also Nordike v. Nordike*, 231 S.W.3d 733, 737-38 (Ky. 2007).

C. Where a trial court is acting within its subject matter jurisdiction, a showing of "no adequate remedy by appeal or otherwise" is an absolute prerequisite without exception. *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961). The question of whether an adequate remedy by appeal or otherwise exists is determined on a case-by-case basis. *Hoskins*, 150 S.W.3d at 19. An appeal does not provide an adequate remedy when the right or interest at issue – such as the exercise of certain constitutional rights and duties – cannot be vindicated following trial. *See, e.g., Fletcher v. Graham*, 192 S.W.3d 350, 356-57 (Ky. 2006). Courts generally recognize the existence of an adequate remedy by appeal for most procedural and evidentiary errors. *Hoskins*, 150 S.W.3d at 19. However, there is not an adequate remedy by appeal for a discovery violation involving the erroneous disclosure of information. *Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796, 800 (Ky. 2000).

D. Extraordinary relief is not a substitute for appeal. *National Gypsum Co. v. Corn*s, 736 S.W.2d 325, 326 (Ky. 1987). Extraordinary relief also is not available when a petitioner "otherwise" has an avenue of relief apart from appeal, such as a protective order to ensure the confidentiality of discovery or interlocutory relief pursuant to CR 65.07. *Edwards v. Hickman*, 237 S.W.3d 183, 191 (Ky. 2007); *Goldstein*, 299 S.W.3d at 553-54.

E. Irreparable injury describes an injury of a ruinous nature. *Hoskins*, 150 S.W.3d at 19-20. Irreparable injury has been defined as an injury of incalculable damage to liberty or property. *Id.* at 19. The inconvenience, annoyance, and expense associated with litigation do not rise to the level of irreparable injury. *National Gypsum*, 736 S.W.2d at 327-28. Moreover, the mere failure to succeed in litigation and the intangible costs of justice delayed do not rise to the level of irreparable injury. *Lee v. George*, 369 S.W.3d 29, 34 (Ky. 2012). Speculative injuries are also insufficient to establish irreparable injury. *Gilbert v. McDonald-Burkman*, 320 S.W.3d 79, 85-86 (Ky. 2010).

F. Certain special cases. There is an exception to the irreparable injury requirement when a petitioner can demonstrate a substantial miscarriage of justice and that correction of the error is necessary and appropriate in the interest of the orderly administration of justice. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 808 (Ky. 2004). Examples of "certain special cases" include the breach of an absolute privilege or the clear violation of a civil rule. *Id.* However, even in these cases, the petitioner must still demonstrate the lack of an adequate remedy by appeal. *Independent Order of Foresters v. Chauvin*, 175 S.W.3d 610, 617 (Ky. 2005).

4. *Original Actions – Procedure (CR 76.36)*

A. "Original proceedings in 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." CR 76.36(1). If the decisions of a public officer are not subject to direct review by the Court of Appeals, then a petition for a writ of mandamus or prohibition should originate in the appropriate court of general jurisdiction. *Turner v. Department of Parole and Probation*, 394 S.W.2d 889, 890 (Ky. 1965).

B. Parties. The petitioner is the party who is seeking relief. The respondent is the trial judge against whom relief is sought. CR 76.36(1)(a). The real party in interest is "any party in the circuit court action from which the original action arises who may be adversely affected by the relief sought" in the original action. CR 76.36(8). Real parties in interest usually appear in the caption of the order adjudicating the original action; however, CR 76.36(1) requires only that they be served with a copy of the petition for a writ. CR 76.36(1)(e).

C. Time for filing. Like its federal counterpart, Federal Rules of Appellate Procedure 21, CR 76.36 does not prescribe a time for filing an original action. However, a petition for a writ of mandamus or prohibition must be made with reasonable promptness and is subject to the doctrine of laches. *E.E.O.C. v. K-Mart Corp.*, 694 F.2d 1055, 1060 (6th Cir. 1982); *see also Estate of Cline v. Weddle*, 250 S.W.3d 330, 333-34 (Ky. 2008). CR 76.36(2) provides that the respondent and any real party in interest may file a response within 20 days of the filing of the petition.

D. The mere filing of a petition for a writ of mandamus or prohibition does not automatically stay proceedings in the lower court. 72A C.J.S.

Prohibition §87 (2016). If a petitioner requires relief prior to the expiration of 20 days after the date of filing the petition, they should file a motion for intermediate relief on the grounds that they will suffer an immediate and irreparable injury before a hearing may be had on the petition. CR 76.36(4). A petitioner may not obtain extraordinary relief under this provision when intermediate relief under CR 76.33 is otherwise available in a direct appeal or motion for discretionary review.

E. The record on a petition for a writ of mandamus or prohibition consists of evidence that is attached to the petition and response in the form of exhibits, affidavits, and counter-affidavits. All other evidence will only be admitted with leave of the appellate court. CR 76.36(5). No oral testimony will be heard in the appellate court. *Id.*

F. Original actions are submitted for decision by a three-judge motion panel of the Court of Appeals upon the filing of a response or the expiration of 20 days following the filing of the action, whichever is sooner. CR 76.36(6). On rare occasions, a motion panel has scheduled an oral argument on the petition.

G. The decision of the Court of Appeals to grant or deny a petition for a writ of mandamus or prohibition is subject to a matter-of-right appeal to the Supreme Court of Kentucky. CR 76.36(7).

5. *Standard of Review for Mandamus and Prohibition on Direct Appeal*

A. Petitions for writs of mandamus or prohibition against a district judge or are to be filed in the appropriate circuit court. KRS 23A.080(2); SCR 1.040(6).

B. Because petitions for writs of mandamus or prohibition are original actions and not appeals, the grant or denial of a petition by the circuit court is a final and appealable order. *See Grange*, 151 S.W.3d at 810.

C. The decision to grant or deny a petition for a writ of mandamus or prohibition is generally reviewed for abuse of discretion. *Id.*

D. However, if the basis for the grant or denial involves a question of law such as subject-matter jurisdiction, then the legal conclusion is reviewed *de novo*. *Id.*

E. The grant or denial of petitions for writs of mandamus or prohibition that are subject to the "certain special cases" exception is also reviewed *de novo*. *Id.*

F. If the basis for the grant or denial involves findings of fact, such as whether a petitioner has demonstrated irreparable injury and the lack of an adequate remedy by appeal, then such findings are reviewed for clear error. *Id.*

II. Intermediate Relief Pursuant to CR 76.33

1. *Nature and Availability of Intermediate Relief*

A. The Court of Appeals has inherent authority to maintain the status quo of a case under appeal. *Green Valley Environmental Corp. v. Clay*, 798 S.W.2d 141, 143-44 (Ky. 1990).

B. Intermediate relief is only available after the filing of a notice of appeal or motion for discretionary review. CR 76.33(1).

C. The party seeking intermediate relief must demonstrate that immediate and irreparable injury will occur before a hearing may be had on the appeal or motion. CR 76.33(1). A response may be filed within 10 days after the motion for intermediate relief was served or within the time otherwise designated by the Court. CR 76.34(2).

D. While usually used to stay a lower court's judgment, CR 76.33 gives appellate courts very broad authority to grant intermediate relief to "accomplish any appropriate objective." 7 Kurt A. Philipps, Jr., David V. Kramer, & David W. Burleigh, Kentucky Practice, Rules of Civil Procedure Annotated, Rule 76.33 (6^{th} ed. 2005).

E. However, intermediate relief under CR 76.33 is limited to extraordinary circumstances and is not a substitute for the filing of a supersedeas bond to obtain a stay pending appeal. *See Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 419-20 (Ky. 2005); *Green Valley*, 798 S.W.2d at 144.

F. If the record on appeal has not been transmitted to the Court of Appeals at the time of the filing of the motion for intermediate relief, then a partial record pursuant to CR 75.10 should accompany the motion. CR 76.33(2).

G. A party adversely affected by a decision of the Court of Appeals on a motion for intermediate relief may seek further review via an original action in the Supreme Court. *See generally Green Valley, supra*; see *also* KRS 21A.050.

III. Interlocutory Relief Prior to Final Judgment Pursuant to CR 65.07

1. *Nature of Interlocutory Relief from a Temporary Injunction*

A. An injunction is an equitable and extraordinary remedy whereby a court requires a person to do or refrain from doing a particular thing. 42 Am. Jur. 2d Injunction §1 (2016). Injunctive relief emerged from decisions of the English Court of Chancery, which began functioning as an adjudicatory body in the late 14th century. David W. Raack, *A History of Injunctions in England Before 1700*, 61 Ind. L.J. 539, 555 (1986). Injunctive relief is not available when there are adequate damages at law. *Hedgespeth v. Taylor County Fiscal Court*, 503 S.W.3d 141, 144 (Ky. 2016). The purpose of a temporary injunction is to preserve the status quo pending a decision on the merits of the case. *Chesley v. Abbott*, 503 S.W.3d 148, 153 (Ky. 2016), *citing Curry v. Farmers Livestock Market*, 343 S.W.2d 134, 135 (Ky. 1961).

B. Under CR 65.07, a party adversely affected by the grant, denial, modification, or dissolution of a temporary injunction under CR 65.04 may file a motion for interlocutory relief in the Court of Appeals. CR 65.07 incorporates the material provisions of former Civil Code (CC) 296 and CC 297. 7 Kurt A. Philipps, Jr., David V. Kramer, & David W. Burleigh, Kentucky Practice, Rules of Civil Procedure Annotated, Rule 65.07 (6th ed. 2005).

C. Although motions for interlocutory relief do not share all the characteristics of typical appeals, the jurisdictional requirements of timeliness and the naming of indispensable parties under CR 73.02 apply to motions for interlocutory relief under CR 65.07. *Courier-Journal, Inc. v. Lawson*, 307 S.W.3d 617, 622-23 (Ky. 2010).

D. The Court of Appeals reviews a temporary injunction on three levels: (1) whether the plaintiff below demonstrated irreparable injury, which is a mandatory prerequisite to the issuance of a temporary injunction; (2) whether the trial court properly considered the various equities of the case, including possible harm to the public, harm to the defendant, and whether the temporary injunction preserves the status quo; and (3) whether the complaint has presented a substantial question on the merits of the claim. *Maupin v. Stansbury*, 575 S.W.2d 695, 699 (Ky. App. 1978).

E. While a substantial question on the merits is necessary to support the issuance of a temporary injunction, courts should avoid ruling on the actual merits of the case. *Id.*

F. The Court of Appeals reviews temporary injunction orders for abuse of discretion. *Id.*

G. Because the denial of a motion to compel arbitration is injunctive in nature, relief is available under CR 65.07 whether or not an interlocutory appeal is otherwise provided by statute. *Kindred Hospitals Ltd. Partnership v. Lutrell*, 190 S.W.3d 916, 920 (Ky. 2006). In such a case, the Court reviews whether the trial court properly denied the motion to compel arbitration under ordinary principles of contract. *North Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 102 (Ky. 2010).

2. *Procedure on Motions for Interlocutory Relief*

A. Parties. The party seeking relief is the movant. The adverse party against whom relief is sought is the respondent.

B. Time for filing. A motion for interlocutory relief must be filed within 20 days of entry of the temporary injunction order. CR 65.07(1). Any respondent may file a response within 10 days from the date of service of the motion for interlocutory relief. CR 65.07(4).

C. Form of Motion. "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." CR 65.07(2).

D. Record. "There shall be filed with the motion the original or a certified copy or photocopy of such portion of the record or proceedings as may be

necessary to a proper consideration and disposition of the motion." CR 65.07(3).

E. Motions for interlocutory relief are submitted for decision by a three-judge motion panel of the Court of Appeals. CR 65.07(5)(a). Oral argument will not be heard without leave of the Court. *Id.*

F. Emergency relief is available upon a showing that the movant will suffer immediate and irreparable injury before the motion for interlocutory relief can be heard. CR 65.07(6). Such emergency relief may be granted ex parte if necessary upon a showing that "it is impractical to notify opposing counsel so that they may appear, in person or by phone, before the judge to whom the request for emergency relief is presented." *Id.*

G. The Court of Appeals may not reconsider an order granting or denying a motion for interlocutory relief. CR 65.07(8). Instead, such an order may be reviewed in the discretion of the Supreme Court of Kentucky "for extraordinary cause shown." CR 65.09(1).

IV. Interlocutory Relief Pending Appeal from Final Judgment Pursuant to CR 65.08

1. *Availability and Procedure*

A. Under CR 65.08, interlocutory relief is available pending appeal from a final judgment that granted or denied a permanent injunction. CR 65.08(1).

B. The procedure for a motion for interlocutory relief pursuant to CR 65.08 essentially mirrors the procedure set forth in CR 65.07. However, a party adversely affected by the final judgment may seek interlocutory relief in both the circuit court and the Court of Appeals under appropriate circumstances. CR 65.08(1) & (2).

C. If a party fails to first seek relief in the circuit court, the party must demonstrate to the Court of Appeals why relief in that court was impractical. CR 65.08(3).