



BENCH AND BAR

JUDGE PAMELA R. GOODWINE

JUNE 25, 2024

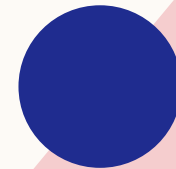
WHAT YOU'LL SEE

RULES OF APPELLATE PROCEDURE

(RAPS)

COA STATISTICS

COA CASE SUMMARIES



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KENTUCKY RULES OF APPELLATE PROCEDURE

MAJOR CHANGES

Contents of the NOA

Indispensable Parties Rule

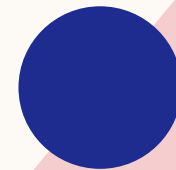
Briefing

Writs, Injunctions, and Emergency Relief

Post-Opinion Remedies

Criminal Rules

Miscellaneous



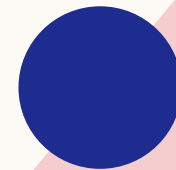
CONTENTS OF NOA

Formerly CR 73.01 -.02 -- NOW RAP 2, 3, and 4

- ❖ RAP 2(A)(2) “Upon timely filing of the notice of appeal . . . 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.**”
 - ❖ If CR 54.02 applies – “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[,]” but other defects with the NOA are evaluated for substantial compliance.

SERVICE OF NOA

RAP 2(2)(C) requires the circuit clerk to serve the NOA on the parties, as did CR 77.04. “The clerk’s failure to serve notice does not affect the validity of the appeal.”





PARTIES TO THE APPEAL

APPELLANTS

RAP 2(B)(1) states that the NOA shall identify the Appellants, the order appealed from, and contain a certificate of service.

APPELLEES

RAP 2(B)(2) states the NOA should identify all parties other than the Appellant; however, there is no requirement that the Appellees be named in the NOA.

MOTIONS TO INTERVENE

There previously was no appellate rule on intervention. RAP 9 states that the standard of CR 24 applies to motions to intervene before our Court.

AMICUS ON REHEARING/DR

RAP 43/45 provide that third parties may move to file an amicus memorandum after a PFR or motion for DR is filed.

SUBSTITUTION OF PARTIES

RAP 8 combines CR 76.24 and CR 25. RAP 8(A)(4) states that any statutorily required motion to revive shall be filed in the trial court. Does this conflict with *Benton v. Estate of Currin*?



INDISPENSABLE PARTY ISSUE

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). Torres was one of 16 plaintiffs who intervened in an employment discrimination case. The case was dismissed prior to class certification. The NOA to the Ninth Circuit did not name Torres but used “et al.” The Court held the use of et al. was insufficient to identify Torres and his exclusion from the NOA constituted a jurisdictional bar.

FEDERAL RULE OF CIVIL PROCEDURE 3

As a result of *Torres*, Rule 3 was amended in 1993. The Committee Note states that the amended rule is intended to sustain an appeal whenever “it is **objectively clear** that a party intended to appeal.” The rule now states that an attorney representing multiple parties can use “et al.”

MEES V. ERETH, 462 N.W.2D 161 (N.D. 1990)

“[W]e deem it appropriate, while retaining our jurisdiction of this appeal, to remand the case to the clerk of the trial court with directions to serve a copy of the NOA on the [omitted party]. [W]e direct that counsel for the [appellants] shall serve . . . copies of the appellants’ brief and of this opinion The [omitted party] shall have 30 days after service . . . to file a brief in response thereto [and to request oral argument]” Jurisdiction of this appeal is retained by the SC and the case is remanded . . . with directions accordingly.”

TOOLS FOR COA ON INDISPENSABLE PARTIES

**NOTICE OF
DEFICIENCY – RAP
10(B) (CLERK'S
OFFICE)**

**SCREENING
ATTORNEY –
MODIFIED SHOW
CAUSE ORDER**

**MOTION PANEL OR
MERITS PANEL – SUA
SPONTE HOLD IN
ABEYANCE AND/OR
DIRECT SERVICE OR
BRIEFING**

BRIEFING – RAP 30, 31, AND 32

FORMERLY CR 76.12

STATEMENT
CONCERNING
ORAL ARGUMENT
AND
INTRODUCTION
NOW A COMBINED
ONE PAGE (DO
NOT COUNT
TOWARD WORD
LIMIT)

WORD COUNT
OF 8,750
WORDS OR 20
PAGES; 25
PAGES IF
HANDWRITTEN

REPLY – 1,750
WORDS OR
FOUR PAGES;
FIVE PAGES IF
HANDWRITTEN

TWO
APPENDICES:

RECORD
APPENDIX

AND

EVIDENTIARY
APPENDIX
(OPTIONAL)

NO CHANGE TO
TIMING

RAP 30(C)(2) --
CROSS-APPELLANTS
MUST FILE A
COMBINED BRIEF;
THIS WAS OPTIONAL
BEFORE; PAGE LIMIT
FOR
APPELLEE/CROSS-
APPELLANT 14,000
WORDS/30 PAGES,
OR 40 IF
HANDWRITTEN;
COMBINED
APPELLANT'S
REPLY/RESPONSE TO
CROSS-APPELLEE IS
10,500 WORDS OR 25
PAGES; 30 PAGES IF
HANDWRITTEN

PENALTIES – RAP 31(H)

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 the 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.

Manifest injustice: *Ford v. Commonwealth*, 628 S.W.3d 147 (Ky. 2021), states that manifest injustice/palpable error standard may be applied only for briefing defects relating to preservation.

NONCOMPLIANCE

RAP 10(B) – Failure to comply with the appellate rules – possible sanctions:

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 . . . of not more than \$1,000;
5. A dismissal of the appeal or denial of the motion for DR;
6. Such further remedies as are specified in any applicable rule;

Note: Due process requires the attorney be offered a hearing if a monetary fine is imposed by our Court; three-Judge panel is required. *In re Marshall*, 734 S.W.2d 472 (Ky. 1987).

FRIVOLOUS FILINGS

RAP 11(B) – Frivolous Appeals – An appeal or motion is frivolous if so totally lacking in merit that it appears to have been taken in bad faith. Sanctions:

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 course of not more than \$1,000; and
5. Such further remedies as are specified in any applicable rule.

EMERGENCY AND INTERLOCUTORY RELIEF

CR 76.33 – NOW RAP 21

- RAP 21(A)(5)(a) states that one judge may sign a non-dispositive order
- We have previously treated a motion for intermediate relief as two motions
- Under RAP 21, the motion can be treated as a single motion and signed by one Judge

CR 65.07 .08– NOW RAP 20(B), (D), (E), (F)

- Time limit of 20 days from the entry of the injunction; 10 day response time
- A party has 10 days (used to be 5 days) to move the SC for relief if our Court denies relief from a temporary or permanent injunction, or grants or denies emergency relief in such a case. If SC takes the case, they decide the underlying motion as well.

CR 76.36 – NOW RAP 60

- “Emergency relief” instead of “intermediate”
- Either party may move for emergency relief, not just the petitioner.
- Deletes requirement that petitioner would require relief prior to the expiration of 20 days following the filing of the petition – now “prior to a ruling on the petition”

OTHER CHANGES

WRITS/INTERLOCUTORY RELIEF

- ❖ There is now a word/page limit on writ petitions, equal to 30 pages, or 14,000 words. RAP 60(F).
- ❖ RAP 20 specifies that a restraining order cannot be the subject of interlocutory relief.

POST-OPINION AND ORDER

- ❖ The time for filing a motion for reconsideration of an order is now **20 days** instead of 10 days. RAP 43(D)
 - ❖ (does not affect non-oral notices)
- ❖ An opinion and order is treated as an opinion.
- ❖ A motion to publish is now expressly permitted.
- ❖ A PFR may be filed within 20 days and has a word limit equaling 8 pages if computer generated

POST-OPINION

- ❖ Amicus Curiae may file a motion for leave to file a memorandum in support of or opposition to a PFR within 10 days of the filing of the PFR. RAP 43(C). Such a memorandum shall not be filed “except in extraordinary circumstances upon order of the appellate court.” Must state with particularity the movant’s interest. Memorandum is limited to 1,750 words.



MOTIONS FOR DR

RAP 44

- Time limit of 30 days
- Failure to timely file “shall result in a dismissal of the motion for discretionary review”
- Response time of 30 days
- No reconsideration

RAP 45

- “An amicus curiae memorandum in support of or in opposition to a motion for [DR] shall not be filed except in extraordinary circumstances upon order of the appellate court, pursuant to a motion for leave filed . . . with the tendered memorandum.” The movant must specify with particularity “the nature of [their] interest, the points to be presented, and their relevance . . .” Time limit of 15 days of the date of the filing of the motion for DR. 1,750 words

RECORD ON APPEAL

RAP 24

Previously, CR 75.07(5) stated that it was the appellant's duty to see that the record is timely prepared and certified; RAP 24(A) eliminates that duty. However, a designation of record is still required under RAP 24(B) within 10 days of the NOA or the order ending the prehearing procedure.

RAP 26(A)(3)

Previously, the record of the trial video had to be designated as part of the record on appeal. RAP 26(A)(3) now directs that a certified copy of the video record "recording the court proceeding being appealed" "shall be filed with the clerk and certified by the clerk as part of the record on appeal."

ACCESS TO SEALED DOCUMENTS

RAP 28(B) states that counsel for parties may access the record "including items sealed by order of court, except those submitted exclusively for in camera review." However, a pro se party "may not access matters sealed by order of the 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."

CRIMINAL CASES

- RCr 4.43 pre-trial bail appeals are now RAP 51; *Gabbard v. Lair* appeals are RAP 55 (denial of motion to proceed *in forma pauperis*).
- RAP 13(3) – no filing fee shall be payable when the appellant or the appellants are represented by a public defender. This clarifies a prior ambiguity because the previous rule stated “criminal actions” and left us wondering about writs, confinement actions, Casey’s Law actions, etc.
- RAP 17(B) pertains to transfer from COA to SC in death penalty cases. The filing of the NOA in which a death penalty has been imposed will automatically serve to transfer the appeal to the SC. **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 SC.**
 - Ex. The CW’s interlocutory appeal re: suppression or evidentiary issues.

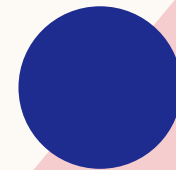
MISCELLANEOUS

- ❖ CR 76.40 is now RAP 5(E). Certified mail still does not qualify.
- ❖ Workers' comp – RAP 49
- ❖ Standalone Rule 11. RAP 11; RAP 5(B)(3)
- ❖ Computing time – RAP 6
 - ❖ Mirrors CR 6.01 concerning holidays, intervening Saturdays and Sundays;
 - ❖ “Cause shown” standard for extensions sought before a due date, but we cannot extend the time for filing NOA, cross-appeal, or motion to transfer;
 - ❖ For enlargement of time after a due date, the “court may in its discretion grant . . . where the failure to act was the result of excusable neglect.” Time for filing NOA, cross-appeal, motion to transfer, and motion for DR cannot be enlarged.

COA STATISTICS

(SEE HANDOUT)

REVIEW CHART OF COA
STATISTICS COMPARING
2024 WITH PRIOR YEARS





**CASE
SUMMARIES**

- PUBLISHED CASES
FROM JANUARY 2024
THROUGH MAY 2024
- SEE HANDOUT
- TEN CASES TO REVIEW

CASES-HANDOUT

2022-CA-0368-MR, Blake P. Walker v. CW

2022-CA-1016-MR, H.M. v. CW

2023-CA-0583-MR, William Travis Boston v. CHC, et al

2022-CA-0686-MR, Christopher Smith v. CW

2023-CA-0748-MR, Deborah Lloyd v. Norton Hospitals, Inc.,

2023-CA-1174-ME, Lankford v. Lankford and E.L., (4/26)

2023-CA-0218-ME, J.P.T. v. CW, CHFSS; J.D.T., a minor child

2023-CA-0941-ME, G.M.A.; and M.A. v. CW

2022-CA-1341-MR, Millers Lane Center, LLC, et al v. Morgan & Pottinger, P.S.C.; et al

2021-CA-1187-MR, Kristina L. Ives, Individually, et al v.

HMB Professional Engineers, Inc., et al

THANK YOU

To the Central Office Staff
Attorneys (COSA) for your
preparation of RAP
Memoranda