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# THE NEW RULES OF APPELLATE PROCEDURE ARE HERE

## WHAT KENTUCKY APPELLATE PRACTITIONERS NEED TO KNOW

BY BETH BREETZ AND ZACHARY VANVACTOR

**T**he Supreme Court of Kentucky has approved new Rules of Appellate Procedure (“RAP”), which became effective on January 1, 2023. Except for special statutory proceedings or where otherwise specifically exempted, these new rules apply in both civil and criminal appellate matters.<sup>1</sup> RAP incorporates various provisions previously contained in the Rules of Civil Procedure and effectively consolidates all rules regarding appeals into a single source and in the general order that they would occur in an appeal. RAP contains many more headings and subheadings than the previous rules and is easier to understand and follow. In addition, RAP makes a variety of changes to the former rules governing appeals. Appellate practitioners in Kentucky would thus be well served to familiarize themselves with these new rules and, in particular, how they change appellate practice in the Court of Appeals and Supreme Court. This article provides a brief overview of some of the most significant rule changes.

RAP 2 substantially revises the rule regarding notices of appeal. The old requirement to name all appellants, appellees, and any other parties to the appeal in the notice of appeal has been removed entirely. 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, because whether a party is “indispensable” is not always easy to determine and because courts and practitioners frequently differed regarding whether a particular party was indispensable to the appeal.<sup>2</sup> RAP 2 fixes the jurisdictional “indispensable party” pitfall by automatically making every party that was in the case at the time of a final order a party to the appeal. In addition to spelling out the requirements for a notice of appeal, RAP 2(B) also includes specific information that should be included in or attached to the notice of appeal, which will significantly help the clerks of the appellate courts. RAP 2(F) & (G) clarify existing

practice regarding appeals that are joint, consolidated, or simply heard together.

RAP 7(D) requires parties to provide one unbound copy in addition to the bound copies. This new requirement appears throughout the rules, including in RAP 31, which governs the formatting and number of briefs required.

RAP 10 substantially mirrors the prior CR 73.02(2) but adds deficiency notices and show cause orders to the appellate courts’ list of available actions when a party fails to comply with the rules. These actions have long been used by the appellate courts but were not specifically provided for in the prior rules. The order of available actions now builds in severity, whereas CR 73 began with dismissal of an appeal or denial of a motion.

RAP 12 is a new rule clarifying when counsel must enter an appearance or notice of substitution and makes such notices self-effectuating. The new rule clearly distinguishes between notices of appearance or substitution (which were previously treated as motions to appear, but now do not require an order) and motions to withdraw without substituting another attorney (which do require the court’s approval). An attorney who was not counsel of record before the document initiating the appeal was filed should file a notice of appearance before, or simultaneous with, filing any brief, motion, or other document in the appellate courts with the new attorney’s name.

RAP 15 is a new rule similar to the word-count certificates used in federal appellate courts. This rule operates in conjunction with RAP 31(G), which establishes limits of 8,750 words or, if no word-count certificate is used, 20 pages if computer generated and 25

pages if handwritten or typewritten for principal briefs in the Court of Appeals, and 17,500 words (or 40 pages if computer generated and 50 pages if handwritten or typewritten) for principal briefs in the Supreme Court. This rule encourages parties to use the lower page limits (where a word-count certificate is not required), while still allowing them to use more pages if they include a word-count certificate. This will allow practitioners to make briefs easier to read by, for example, allowing attorneys to choose more readable fonts.

RAP 20, which governs motions for relief from orders granting or denying an injunction, effectively consolidates the prior CR 65.07, 65.08, and 65.09. The new rule better explains how those provisions work together and codifies provisions in those rules that were previously merely implicit.<sup>3</sup>

RAP 22 is substantially similar to the prior rule on prehearing conferences in the Court of Appeals, but is revised to put the 20-day deadline at the beginning of the rule and make clearer when the prehearing procedure does or does not apply.

RAP 24, 25, and 26 consolidate the old rules regarding the contents and designation of the record, and they eliminate several now-obsolete provisions from the prior rules. The prior requirement under CR 75.07(5) that the appellant was responsible to see that the record was timely prepared and certified is eliminated. RAP 24 makes clear that the video recordings of hearings, as opposed to their transcripts, are the official record. As in the old rules, parties are required to designate the dates of all pre-trial and post-trial recordings that they

want to be included in the appellate record and are encouraged (but not required) to list the trial dates as well, to better enable the trial court clerks to locate those recordings, which are supposed to be automatically included in the appellate record.<sup>4</sup> RAP 25 clarifies how to correct or add omitted items to the record on appeal, including clarifying how to create a narrative statement if an official recording was not made or is not understandable. Relatedly, the rules regarding the duties of the circuit court clerk have been combined and consolidated into new RAP 26, which also now requires the circuit clerk to send the index (which is necessary to properly cite to the appellate record) along with the record certification.

RAP 28 is a new rule governing access to, and the viewing of, the record on appeal, including access to sealed items.

RAP 31, which governs the formatting of briefs, now requires that all footnotes be in 12-point font. The new rule also clarifies that citations to the video record may be to either the second or the minute.<sup>5</sup> And, as noted above, RAP now requires parties to provide one unbound copy in addition to the bound copies of all briefs.

RAP 32 revises the prior rule on the contents and organization of briefs. Introductions and statements regarding oral argument now may not exceed one page total (which does not apply toward the word or page limit).<sup>6</sup> RAP 32 also revises the prior rules on required and permissible appendices to clarify what items must or may not be included.



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RAP 35 is a new rule covering when parties may file supplemental authority and the different standards for cases decided before or after briefing has been completed.

RAP 40, which governs effective dates of opinions and orders, consolidates and expands upon the prior rules. One key change is that “opinions and orders” are now treated the same as “opinions” and both become effective on finality, whereas “orders” are effective upon entry and filing.<sup>7</sup> This change eliminates the need for differing deadlines for petitions for rehearing of “opinions” versus motions for reconsideration of “opinions and orders” or “orders.”<sup>8</sup> The new rule further clarifies the impact of a motion for discretionary review on finality and also makes clear that non-final opinions may not be used as precedent.<sup>9</sup>

RAP 41 includes a number of substantive changes to the prior rules on the citation of unpublished decisions. Aimed at curtailing the citation of unpublished opinions, RAP 41 directs that such decisions are not “binding precedent,” while also adding that their use is “disfavored.” The rule goes on to list requirements for the use of unpublished decisions.<sup>10</sup> One is the requirement to include a clear statement that the unpublished decision is not binding authority.<sup>11</sup> The new rule also eliminates the requirement to attach copies of unpublished Kentucky decisions to the brief, so long as the Supreme Court or Court of Appeals case number and the date of the decision are provided.<sup>12</sup> (Westlaw or Lexis citations still may be included but should be in addition to the SC/CA case number.)

RAP 42 now makes clear that the appellate court that entered the opinion for which certiorari is sought retains jurisdiction to enter a stay until the time for a petition for certiorari has passed or until the case before the U.S. Supreme Court is final.

RAP 43 contains several changes on petitions for rehearing and motions for reconsideration. The new rule has a standard 20-day deadline across opinions, opinions and orders, and orders.<sup>13</sup> It also includes new provisions allowing amicus motions in support of, or opposition to, a petition for rehearing, and clarifying the interplay between petitions for rehearing and motions for discretionary review.<sup>14</sup>

RAP 45 now allows amicus curiae to support or oppose motions for discretionary review.

RAP 50, on the certification of questions of law to or from the Supreme Court, revises slightly the prior version of the rule to make clear that only courts (not parties) may request certification from the Supreme Court (although parties may request that the originating court seek certification from Supreme Court).<sup>15</sup>

For criminal law practitioners and pro se parties, RAP 51 (review of decisions concerning bail), RAP 52 (habeas corpus appeals), RAP 54 (motions to proceed in forma pauperis and appoint counsel), RAP 55 (appeal of the denial of in forma pauperis), and RAP 62 (stays of execution and bail on appeal) are new rules, based on and clarifying existing practice, that govern each of those procedures.

RAP 60, regarding original actions in the appellate courts, adds a length limit<sup>16</sup> and reworks the previous rule regarding motion practice with writ petitions. Parties no longer need to file a combination of motions for emergency, interlocutory, or intermediate relief, but may simply file a motion with the original action setting forth any time constraints and justifications for emergency relief.<sup>17</sup>

A quick note on electronic filing. At the time RAP was drafted and adopted, electronic filing was anticipated in Kentucky’s appellate courts. After a pilot project e-filing is now available in Kentucky appeals. While RAP is consistent with electronic filing in the appellate courts, the rules that specifically govern electronic filing are found in Kentucky Supreme Court Administrative Order 2022-65, available at <https://kycourts.gov/Courts/Supreme-Court/Pages/Administrative-Orders.aspx>. Before e-filing in Kentucky appellate courts, attorneys must complete Appellate eFiling Certification, found under the eLearning tab at the Kentucky Court of Justice website (<https://kcoj.kycourts.net/kycourts/Apps>).

The new Rules of Appellate Procedure add useful clarifications, additions, and guidance that will make appellate practice less burdensome and enigmatic for practitioners. **BB**

## ABOUT THE AUTHORS

**BETH BREETZ** is the chair of the Kentucky Supreme Court’s Appellate Rules Committee, which worked long and hard to draft the Rules of Appellate Procedure for review and approval by the Kentucky Supreme Court. Breetz is the co-chair of Stites & Harbison’s Appellate Advocacy Group.



**ZACHARY VANVACTOR** is a litigator in Stites & Harbison’s Business Litigation Service Group, where he practices a variety of trial court and appellate litigation.



## ENDNOTES

- 1 RAP 1(A).
- 2 See *Comments to proposed RAP 2 at pages 8-9*, available at [https://cdn.ymaws.com/www.kybar.org/resource/resmgr/supremecourt/PROPOSED\\_RULES\\_OF\\_APPELLATE\\_.pdf](https://cdn.ymaws.com/www.kybar.org/resource/resmgr/supremecourt/PROPOSED_RULES_OF_APPELLATE_.pdf).
- 3 *Id.* at page 34.
- 4 RAP 24(B)(1)(a)
- 5 RAP 31E(4).
- 6 RAP 32(A)(1).
- 7 RAP40(F).
- 8 See *Comments to proposed RAP 40 at pages 69-70*, available at [https://cdn.ymaws.com/www.kybar.org/resource/resmgr/supremecourt/PROPOSED\\_RULES\\_OF\\_APPELLATE\\_.pdf](https://cdn.ymaws.com/www.kybar.org/resource/resmgr/supremecourt/PROPOSED_RULES_OF_APPELLATE_.pdf)
- 9 RAP 40 (G) & (H).
- 10 RAP 41(A).
- 11 RAP 41(a)(4).
- 12 See RAP 41(C)(1).
- 13 RAP 43(D)(1).
- 14 RAP 43(C).
- 15 RAP 50(A).
- 16 RAP 60(F).
- 17 RAP 60 (H)