A WALK THROUGH THE COURT OF APPEALS: AN IN-DEPTH LOOK AT PRACTICE AND PROCEDURE AT THE KENTUCKY COURT OF APPEALS

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JUDGE GLENN E. ACREE is the chief judge of the Court of Appeals. He began serving as chief judge July 1, 2012, after being elected to the position by his fellow Court of Appeals judges. Judge Acree spent more than twenty years in private practice, largely in litigation and appellate advocacy, before his appointment, and then election to the Court of Appeals in 2006. After taking the bench, Judge Acree founded the Kentucky Bar Association Appellate Advocacy Section. In 2013, he founded and was elected the first President of the Central Kentucky American Inn of Court. He is one of only 214 state and federal judges nationwide designated as a Fellow of the Advanced Science & Technology Adjudication Resource Center. Judge Acree served as chair of the Kentucky Access to Justice Commission’s Faith and Justice Alliance Subcommittee and the Veterans Task Force, Pro Bono Outreach Subcommittee. Most recently, he was appointed to the Executive Committee of the Council of Chief Judges of State Courts of Appeal at the National Center for State Courts where he also served as Chair of the Membership Committee and currently serves on the Program Planning Committee.

Judge Acree has a bachelor’s degree and J.D. from the University of Kentucky. He earned a master’s degree from the University of Maryland in American History. Before earning his bachelor's degree, Judge Acree served three years in the United States Army Security Agency. Judge Acree is the 2014 recipient of the Justice Thomas B. Spain Award for Outstanding Service to Continuing Legal Education.
I. OVERVIEW – THE KENTUCKY COURT OF APPEALS

A. Establishment of the Intermediate Appellate Court

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

An excellent read can be found in Kurt X. Metzmeier, Michael Whiteman and Jason Nemes, United at Last; The Judicial Article and the Struggle to Reform Kentucky's Courts (Frankfort 2006). It is a comprehensive history of the battle to reform our justice system, part of which was the creation for the first time in Kentucky of our intermediate appellate court.

B. COA Central – The Clerk's Office at the Court of Appeals

The "headquarters" of the Kentucky Court of Appeals is 360 Democrat Drive, Frankfort, KY 40601.

Central Office is the locus of four key administrative functionaries of the Court:

1. The Clerks' Section is responsible for receiving all filings with the Court, and for maintaining the record of the Court and receiving and maintaining the record of the lower court from which the appeal is taken.

2. The Prehearing Conference Section serves the Court and appellate advocates by streamlining issues and, when possible, resolving the appeal through mediation prior to the brief drafting stage.

3. The Chief Staff Attorney's Section coordinates the Court's procedural practice, and processes original actions brought in the form of petitions for writs. This office also works on all of the Court's dispositive and procedural criminal and civil motions docket, and assists and supplements the research of the judges' "elbow" clerks, as needed and when requested by a Judge. Finally, this office is responsible for final proofing and review of opinions to be rendered.
4. The **Case Assignment Section** coordinates the assignment of judges, the distribution of cases to Three-Judge Merits Panels, and the scheduling of oral arguments.

C. "Field Offices" of the Fourteen Judges

The judges of the Court of Appeals each have chambers in their respective districts. SCR 1.030(1). The Court of Appeals may appoint secretaries and staff attorneys for each judge and for the Court. SCR 1.030(5).

D. Key Players

1. The current Chief Clerk of the Court of Appeals is Sam Givens; Counsel to the Clerk is Wes Deskins.

2. The current Chief Staff Attorney for the Kentucky Court of Appeals is Jeanne Anderson; Deputy Chief Staff Attorney is Becky Lyon.

3. The two Prehearing Conference Attorneys are Leona Power (eastern half of Kentucky) and Scott Coburn (western half of Kentucky); the Prehearing Conference Administrator is Donna Wecker.

4. The current Chief Judge of the Court is Glenn Acree of Lexington; the Chief Judge Pro Tem is Joy Kramer of Burlington.

E. The "Walk" through the Court of Appeals – Breaking Down the Process

It is not uncommon for lawyers to think of appellate advocacy in the Court of Appeals as involving just a few steps: (1) filing of the notice of appeal; (2) drafting briefs; (3) attending oral argument (if one is granted); and (4) waiting for the opinion.

There is so much more.

This seminar is intended to take you on the full journey of an appeal, checking out all the side-roads along the way.

II. BEGINNING A "WALK" THROUGH THE COURT OF APPEALS

A. The Court of Appeals Is Always Just a "Leg" of a Longer Journey that Actually Starts Somewhere Else.

1. Most frequently, that longer journey begins in the circuit court. A final judgment in that court may be reviewed by the Court of Appeals for error. This is a matter-of-right appeal.

   a. "In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court . . . ." Ky. Const. 115.
b. "Except as provided in Section 110 of the Constitution, an appeal may be taken as a matter of right to the Court of Appeals from any conviction, final judgment, order, or decree in any case in Circuit Court, including a family court division of Circuit Court . . . ." KRS 22A.020(1).

c. The procedure for seeking review of final judgments in cases originally filed in the circuit court is by rule.

CR 73.02(1)(a), (b) ("The notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2). . . . If an appeal or cross-appeal is from an order or judgment of the circuit court, the filing fee required by Rule 76.42(2)(a)(i) or (ii) shall be paid to the clerk of the circuit court at the time the notice of appeal or cross-appeal is tendered, and the notice shall not be docketed or noted as filed until such payment is made."). CR 73.02.

d. So, the "ticket" to get into the Court of Appeals from an original action in the circuit court is a Notice of Appeal filed in the circuit court.

2. Some cases come to the Court of Appeals following a circuit court's review of an administrative agency's decision. The appeal to this Court is also a matter-of-right appeal.

a. Technically speaking, these are original actions in the circuit court even though we call them "administrative appeals."

"An original action that is limited to a review of the record contemplates a review for an abuse of discretion, which is in fact an administrative appeal. Merely calling a proceeding an 'original action' does not make it so." Louisville Metro Health Dept. v. Highview Manor Ass'n, LLC, 319 S.W.3d 380, 383 (Ky. 2010).

b. Still, the fact that the first court to hear the case is the circuit court sets up the constitutional requirement that there be a matter-of-right appeal to the Court of Appeals.

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1 "Appeals from a judgment of the Circuit Court imposing a sentence of death or life imprisonment or imprisonment for twenty years or more shall be taken directly to the Supreme Court." Ky. Const. 110(2)(b).
c. "In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court . . . ." Ky. Const. 115.

d. Therefore, the same procedure is followed as in any direct appeal from the circuit court. CR 73.02(1)(a), (b) ("The notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2) . . . . If an appeal or cross-appeal is from an order or judgment of the circuit court, the filing fee required by Rule 76.42(2)(a)(i) or (ii) shall be paid to the clerk of the circuit court at the time the notice of appeal or cross-appeal is tendered, and the notice shall not be docketed or noted as filed until such payment is made."). CR 73.02.

e. Again, the "ticket" to get into the Court of Appeals is a Notice of Appeal filed in the circuit court.

3. The administrative appeal of a decision by the Workers' Compensation Board is appealed directly to the Court of Appeals

a. "The decision of the board shall be subject to review by the Court of Appeals pursuant to Section 111 of the Kentucky Constitution and rules adopted by the Supreme Court. The scope of review by the Court of Appeals shall include all matters subject to review by the board and also errors of law arising before the board and made reviewable by the rules of the Supreme Court for review of decisions of an administrative agency." KRS 342.290

b. This is a unique statutory proceeding for appeal and is governed, as noted above, by KRS 342.290. However, procedurally, it is governed by CR 76.25, which says, in pertinent part:

"Within 30 days of the date upon which the [Workers' Compensation] Board enters its final decision . . . . any party aggrieved by that decision may file a petition for review by the Court of Appeals and pay the filing fee . . . . An original and four (4) copies of the petition shall be filed with the Clerk of the Court of Appeals." CR 76.25

c. The "ticket" to the Court of Appeals from an adverse decision by the Workers' Comp Board is a Petition for Review filed with the Court of Appeals.

4. If the judgment you wish the Court of Appeals to review began as an action originally filed in district court, it will have to go through the circuit court first. That appeal to circuit court is the "matter-of-right" appeal.
a. Ky. Const. 112(5) ("The Circuit Court . . . shall have such appellate jurisdiction as may be provided by law."); KRS 23A.080(1) ("A direct appeal may be taken from District Court to Circuit Court from any final action of the District Court.").

b. A circuit court judgment based on appellate jurisdiction is not appealed to the Court of Appeals as a matter-of-right.

CR 76.20(1) ("A motion for discretionary review . . . by the Court of Appeals of a judgment of the circuit court in a case appealed to it from the district court, shall be prosecuted as provided by this Rule 76.20 and in accordance with the Rules generally applicable to other motions. Such review is a matter of judicial discretion and will be granted only when there are special reasons for it.").

c. The "ticket" to the Court of Appeals then is a Motion\(^2\) for Discretionary Review filed in the Court of Appeals.

5. If it is an election contest, the case will only come to the Court of Appeals after the proper circuit court hears the case on an expedited basis. KRS 120.055.

a. As with any case originating in the circuit court decision, appeal is a matter-of-right, but there are some very special rules in election cases. "The appeal shall be in accordance with the Rules of Civil Procedure, except that the notice of appeal shall be filed and a supersedeas bond executed in the Circuit Court and the record shall be filed in the Court of Appeals, [ALL] within ten (10) days after the entry of the judgment, or within such other time as the Court of Appeals may, for cause shown, permit." KRS 120.075(1).

b. Having said this much, take heed! **WARNING:** UNLESS YOU CONSIDER YOURSELF AN EXPERT AT ELECTION APPEALS, THEN STAY AWAY.\(^3\)

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\(^2\) Some have filed "petitions for discretionary review" and even "petitions for a writ of certiorari" because they were confused by the language of KRS 22A.020(5) which states: "Any party aggrieved by the judgment of the Circuit Court in a case appealed from a court inferior thereto may petition the Court of Appeals for a writ of certiorari." This is technically incorrect. While the legislature may set the bounds of jurisdiction of the various courts, only the Supreme Court has authority to prescribe procedural rules to be followed by a party seeking to avail himself of that jurisdiction. Lawyers are wise to ignore the legislature’s meddling in matters solely reserved to the judiciary. However, it is the practice of the Clerk of the Court of Appeals to ignore this incorrect form suggested by the legislature in favor of the substance of the document filed.

\(^3\) "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Ky. Supreme Court Rules 3.130, Rule of Professional Conduct 3.130(1.1).
6. Or the trip may begin, technically speaking, with an original action in the Court of Appeals.

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 [i.e., a circuit judge or an agency whose decision was the subject of an original action/administrative appeal in circuit court]. All other actions [against other parties] must be prosecuted in accordance with applicable law. Original proceedings in an appellate court may be prosecuted upon the payment of the [proper] filing fee and the filing of a petition setting forth [certain specific matters and a] memorandum of authorities in support of the petition." CR 76.36.

b. In a practical sense, an original action in the Court of Appeals is filed relative and subsequent to a separate original action in circuit court or an act (or failure to act) by an administrative agency.

c. The Court of Appeals may exercise its original jurisdiction in cases seeking relief in the nature of mandamus or prohibition. The successful petition will merit the Court of Appeals' writ of mandamus or writ of prohibition.

d. The ticket to the Court of Appeals in an original action, then, is a Petition for Relief filed in the Court of Appeals.

7. Finally,⁴ we have appeals of certain interlocutory orders of the circuit court.

a. "When a circuit court by interlocutory order has granted, denied, modified, or dissolved a temporary injunction, a party adversely affected may within twenty days after the entry thereof move the Court of Appeals for relief from such order." CR 65.07(1).

b. "After an appeal is taken from a final judgment granting or denying an injunction any party may move the circuit court to grant, suspend or modify injunctive relief during the pendency of the appeal. . . . A party adversely affected by [such] a ruling . . . may move the Court of Appeals for relief . . . by filing . . . a motion complying in all respects with

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⁴ Even this is not a comprehensive list. There are also appeals to review bail setting, in accordance with RCr 4.43. 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 pursuant to RCr 4.43(1).
other motions filed in the appellate court under CR 76.34."
CR 65.08(1)-(3).

c. Also, "CR 65.07 [is] the proper procedural vehicle[] for
appellate review of trial court orders denying motions to
compel arbitration [when] only the FAA applies."
Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306,
338 (Ky. 2015), as corrected (Oct. 9, 2015), reh’g denied
(Feb. 18, 2016) (Abramson, J. dissenting; also implied by
ruling of majority opinion which was based on CR 65.09).

d. Therefore, a party may get entry into the Court of Appeals
after adverse rulings under CR 65.07 and CR 65.08, and
orders denying motions to compel arbitration under the
FAA\(^5\) by filing a Motion pursuant to CR 76.34 with the
Court of Appeals.

B. Summarizing Then, Your Ticket into the Court of Appeals Can Be by:

1. **Notice of Appeal** filed in the circuit court: for matter-of-right
appeals including appeals of circuit court review of all decisions of
an administrative agency except from the Workers’ Comp Board.

2. **Petition for Review** filed in the Court of Appeals: for appeals from
decisions of the Workers’ Compensation Board.

3. **Motion for Discretionary Review** filed in the Court of Appeals:
for discretionary consideration by the Court of Appeals of district
court judgments that have received appellate review at the circuit
court.

4. **Notice of Appeal** filed and supersedeas bond executed in the
circuit court and the record filed in the Court of Appeals: for
election contests.

5. **Petition for Relief** filed in the Court of Appeals: for original
actions seeking a writ of *mandamus* or writ of prohibition against a
circuit judge or administrative agency.

6. **Motion** pursuant to CR 76.34 with the Court of Appeals: for
appeals of injunctions.

III. THE PATH MOST TRAVELED; THE PATH LEAST TRAVELED

A. Once you are "in the door" of the Court of Appeals, the nature of your
entry will determine what could happen next.

\(^5\) Appeals of such denials when the Kentucky Arbitration Act applies are matter-of-right appeals
governed by KRS 417.220.
B. But there is one thing common to all – the clerk of the Court of Appeals must create a case file and give it a number. Precisely how this occurs still depends on the initiating document, no matter where that initiating document is filed.

1. Every case is assigned a number beginning with the year this Court opens the file, followed by the designation of this Court ("CA"). That is followed by a number given to every file opened in the order of filing regardless of its nature. Lastly, there is a suffix that identifies the kind of case it is. The following are the suffixes we use to tell us the appeal type:
   a. -MR matter of right appeal (including appeals from circuit court of administrative appeals other than from the Workers Comp Board).
   b. -ME matter of right appeal that is expedited.
   c. -WC Workers' Compensation Board appeal.
   d. -DR discretionary review motion that is pending.
   e. -DG discretionary review motion that has been granted.
   f. -DD discretionary review motion that has been denied.
   g. -EL election contest.
   h. -OA original action (petition for a writ).
   i. -I injunction appeals brought pursuant to CR 65.07 (including appeals from orders denying arbitration under the FAA).

2. If you file a Notice of Appeal from circuit court in a matter of right case, the circuit clerk will send the notice and attached judgment from which the appeal is taken to the clerk's office in the Court of Appeals. A typical case number would look like this:
   a. 2016-CA-000123-MR; or
   b. 2016-CA-000234-ME (if the issue, such as child custody, is expedited).

3. A workers' compensation case file will be created by the clerks of the Court of Appeals when you file the Petition for Review. A typical case number would look like this:
   2016-CA-000345-WC
4. In discretionary review cases, the Court of Appeals clerks create a record based on the filing in the Court of Appeals' clerk's office of a Motion for Discretionary Review. A typical case number would look like this:
   a. 2016-CA-000456-DR (before Court either grants or denies the motion).
   b. 2016-CA-000567-DD (if Court denies motion).
   c. 2016-CA-000678-DG (if Court grants motion).

5. In an election contest appeal, the Court of Appeals file is created if the Notice of Appeal is filed and supersedeas bond executed in the Circuit Court and the record filed in the Court of Appeals. Then the election appeal case number looks like this:
   2016-CA-000789-EL

6. In an original action, the clerk of the Court of Appeals creates a new file when the Petition for Relief is filed in the Court of Appeals. A typical case number for such a case would look like this:
   2016-CA-000890-OA

7. Lastly, the clerk will create a new case folder upon the filing of a Motion pursuant to CR 76.34 with the Court of Appeals seeking review of the circuit court's ruling on an injunction. The typical case number would look like this:
   2016-CA-000901-I

IV. THE FIRST EYES ON YOUR CASE

A. Although most attorneys working at Central Office of the Court of Appeals work in the Chief Staff Attorney's Section or Prehearing Conference Attorneys' Section, there are three attorneys currently working in the Clerks' Section – The Clerk of the Court of Appeals (Sam Givens), Counsel to the Clerk (Wes Deskins), and a Senior Staff Attorney (John Poole).

B. With the assistance of non-attorney clerks, one or more of these three attorneys review each of the initiating filings for compliance with the applicable rule.

C. If the attorney has a concern that perhaps you failed to comply with the proper rule (or even if he is sure you did not comply), he will prepare for
the Chief Judge a "Show Cause" order identifying the concern\(^6\) and giving you an opportunity to explain why your case should not be dismissed. The Show Cause Order itself is non-dispositive and, as with any non-dispositive order, can be issued upon the signature of the Chief Judge, his/her designee, or any other judge as provided in the rules. These we call "One-Judge Orders" (further discussed below).

"Except for motions that call for final disposition of an appeal or original action in the appellate court, any member of the court designated by the Chief Justice or Chief Judge may hear and dispose of any motion; and ... Any intermediate order of a procedural nature pending final disposition of a proceeding pending in an appellate court may be issued on the signature of any judge of that court." CR 76.34(4)(a)-(b).

D. Responses to Show Cause Orders are presented to the Three-Judge Motion Panel (further discussed below) for consideration and for the issuance of an order that is potentially dispositive.

1. If your response to the Show Cause Order satisfies our concerns, your appeal will proceed to the next step.

2. If you fail to "show cause," the Three-Judge Motion Panel will issue an order dismissing your case.
   - If that happens, you have ten days to ask that we reconsider our decision. CR 76.38(2).

E. But let's be positive and say your initiating document is in perfect order. So, what's next?

F. This section of this outline applies to all cases before the Court of Appeals. The next procedure common to all cases in this Court has to do with the RECORD below.

G. However, two kinds of cases have steps to complete before proceeding to the record, motion, briefing, case assignment, oral argument, deliberation/judicial conferencing, and rendition stages.

1. Advocates bringing civil matter-of-right appeals must comply with rules regarding the prehearing conference – an opportunity to mediate.

2. Advocates who have filed a motion for discretionary review of their case from a judgment of the circuit court exercising its appellate jurisdiction must have a panel of the Court of Appeals review the motion for discretionary review to see if should be considered on

\(^6\) This could be any non-compliance including, but not limited to, filing the wrong initiating document (for example, a notice of appeal when a discretionary review petition was required), or failing to name an indispensable party, or appealing from a non-appealable interlocutory order, or any other failure to follow the rules.
the merits. As described in greater detail below, certain necessary parts of both the trial court and appellate court record must be attached to the motion.

H. Therefore, we must consider these two "special" steps in the context of the respective proceeding. We begin with the civil matter-of-right appeal and the procedure known as PREHEARING.

V. PREHEARING

A. This section, dealing with the Prehearing Statement and Prehearing Conference, applies to a limited number of appeals. The governing rule is CR 76.03. For that rule to apply, the appeal must fit the following criteria:

1. Matter-of-right appeal (from a decision by the circuit court);
2. Civil, not criminal, but not:
   a. Prisoner applications seeking relief relating to confinement or conditions of confinement;
   b. Appeals from Circuit Court orders determining paternity, dependency, abuse, neglect, domestic violence, or juvenile status offense. CR 76.03(1).

B. If your appeal fits these criteria, you must file a Prehearing Statement with the Clerk of the Court of Appeals within twenty (20) days of filing the Notice of Appeal. CR 76.03(4).

1. If you are late filing the Prehearing Statement, the Clerk of the Court will send you a friendly reminder. COA Admin Order 2007-7.
2. You will 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) to file the Prehearing Statement.

C. The cue is the Notice of Appeal. Think of the Notice of Appeal and the Prehearing Statement as linked by a twenty-day-long chain.

D. The Prehearing Statement is a form supplied by the Clerk of the Court of Appeals to be completed by the Appellant. CR 76.03(4). He will send that form to you as soon as he receives a copy of your Notice of Appeal from the circuit clerk.

E. An Appellee may file a Supplemental Prehearing Statement but must do so within ten (10) days after the Appellant files the Prehearing Statement. CR 76.03(6).
F. The first purpose of the Prehearing Statement is to provide enough information for the Prehearing Conference Attorneys to determine whether the "walk" through the Court of Appeals can be expedited (making it a "run" through the Court of Appeals?) by the advocates' and their parties' participation in a prehearing conference. CR 76.03(7).

G. There are important consequences to completing and filing the Prehearing Statement. Among them are these:

1. First, the time for all further steps in the appeal is suspended. It won't resume until there is an order that no prehearing conference will be held or, following a prehearing conference, entry of an order reciting the actions taken and the agreements reached by the parties during a prehearing conference. CR 76.03(3).

2. Second, the Prehearing Statement has the effect of limiting the issues that will be argued in the briefs. THIS IS VERY IMPORTANT!

   "A party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." CR 76.03(8).

   A motion to strike from your brief any argument on an issue not raised in the prehearing statement will almost surely be granted. Furthermore, the Court may, sua sponte, strike the argument if it becomes aware of this violation of CR 76.03(8).

3. Third, if you challenge the constitutionality of a statute, you must involve the Attorney General of Kentucky.

   "In any civil case to which this rule applies in which the constitutionality of a statute is challenged by any party as an issue in the appeal, a copy of the prehearing statement shall be served upon the Attorney General. The Attorney General may file within 10 days of the filing of the prehearing statement an entry of appearance. If no entry of appearance is filed in such a case by the Attorney General, then no further filings or briefs shall be served on the Attorney General." CR 76.03(5). See also KRS 418.075(2) ("In any appeal to the Kentucky Court of Appeals or Supreme Court or the federal appellate courts in any forum which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum. This notice shall specify the challenged statute and the nature of the alleged constitutional defect.").
H. The Prehearing Conference is a valuable tool if properly utilized.

1. There is a box to check on the Prehearing Conference Statement to indicate whether you believe a prehearing conference could be helpful, and why – either way. Your decision to check or not check that box is not determinative of whether you will be ordered to a prehearing conference, but your response here has substantial weight in that decision.

2. We encourage participating. About one-third of the prehearing conferences conducted result in a settlement agreement and dismissal of the appeal.

3. Our two Prehearing Conference Attorneys handle all prehearing conferences, dividing the state roughly in half. They will travel to you, or at least close to you, to conduct the Prehearing Conference. Leona Power handles everything from Frankfort east and Scott Coburn handles everything west of Frankfort.

4. In practice, the lawyers for the parties are expected to attend the conference in person (unless otherwise ordered by the Court). See CR 76.03(9).

5. Again, in practice, your client must be available during the conference. However, personal attendance is infrequently ordered, but has been so ordered on occasion. CR 76.03(9).

6. As in any mediation, of course, everything said remains confidential.

   "The comments made during the prehearing conference are confidential, except to the extent disclosed by the prehearing order entered pursuant to CR 76.03(10), and shall not be disclosed by the conference judge or conference attorney nor by counsel in briefs or argument." CR 76.03(12).

7. Here is a practice pointer. The greatest prospect for settlement occurs when both parties attend in person. So encourage your client to attend.

8. Here is a corollary practice pointer. If your client will be participating by telephone only, advise the other party of that fact, or at least inform the prehearing conference attorney or Prehearing Conference Administrator Donna Wecker. Nothing seems to be more irritating to a party than attending the conference in person only to learn then that the other party is participating by phone while the attending party took a day off work.
I. Do not presume that all you will do at the conference is discuss settlement. Even if you believe settlement is unlikely, there is still value in participating in the conference.

As stated in CR 76.03(10), "[t]he purpose of the conference shall be to consider [in addition to] the possibility of settlement":

1. "[T]he simplification of issues,"
2. "[T]he contents of the record,"
3. "[T]he time for filing the record and briefs, and"
4. "[A]ny other matters which the judge or conference attorney determines may aid in the handling or disposition of the proceedings."

J. However, settlement certainly is the main goal of the conference. If you settle the case, an order will be issued and you can relax knowing you won't have to file a brief.

K. If the Prehearing Conference does not result in settlement, an administrative order will be issued ending the suspension of running of time in the appeal and the case will ready for the next step – RECORD CERTIFICATION.

Again, we pause before moving on to discussing the RECORD so that we may address the procedure following the filing of a motion for discretionary review that precedes moving the record from the circuit court to the Court of Appeals. A sojourner on the discretionary review path must convince the Court of Appeals to grant his/her motion for discretionary review.

VI. DISCRETIONARY REVIEW

A. The map for the route through the Court of Appeals by discretionary review is found in CR 76.20 (Motion for discretionary review) and CR 76.34 (Motions).

B. The party filing the motion is denominated the Movant and the party responding to the motion is denominated the Respondent. CR 76.20(3).

C. A response is permitted if filed within thirty days, but no reply is allowed by the rule. CR 76.20(5).

D. The motion and any response to the motion are limited to fifteen (15) pages. CR 76.20(3).

E. Of first importance is the deadline for filing the motion for discretionary review.
"[F]ailure of a party to file a Motion for Discretionary Review within [thirty (30) days after the date the judgment of the circuit court was entered], or as extended by a previous order, shall result in a dismissal of the Motion for Discretionary Review." CR 76.20(2)(a), (c).

F. The motion must include certain necessary portions of the trial court record and the appellate court record.

"There shall be filed with each motion [for discretionary review] 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 for reconsideration. . . . No other record on the motion shall be required unless the court to which the motion is addressed so orders." CR 76.20.

G. The Respondent "may file a response to the motion within thirty days after the motion is filed." CR 76.20(5). A response is not required, but it helps the Court decide whether to grant discretionary review.

H. Procedural compliance review by the Clerk's Section may proceed before a response is received. See, supra, IV. FIRST EYES ON YOUR CASE.

I. After procedural compliance review and receipt of a response (or thirty days after the motion is filed if no response is filed), the case will be sent to the Chief Staff Attorney's Section where it will be assigned to a staff attorney in that section to research the merits of the motion.

J. The staff attorney will draft a memorandum (with or without a recommendation for grant/denial of the motion). This memorandum, along with the motion and response, if any, will be sent to the Three-Judge Motion Panel for consideration and decision.

K. If the Three-Judge Motion Panel denies discretionary review, the lower court's decision is deemed affirmed; however, "denial of a motion for discretionary review does not indicate approval of the opinion or order sought to be reviewed and shall not be cited as connoting such approval." CR 76.20(9)(a).

L. If the Three-Judge Motion Panel grants discretionary review, "the appeal shall be perfected in the same time and manner as if it were an appeal as a matter of right, unless otherwise directed by the court." CR 76.20(9)(c).

M. So, grant of a motion for discretionary review puts the case at the beginning of the very same path as a civil matter-of-right appeal. In accordance with CR 76.20(9)(c), the next step after the grant of a motion for discretionary review is to file a Prehearing Statement (see above).

N. After discretionary review is granted, and after compliance with CR 76.03, this type of case (this path through the Court of Appeals) is exactly where we left the matter-of-right appeal – ready for the record.
VII. APPEALS FROM THE WORKERS' COMPENSATION BOARD

A. Again, we'll delay getting to a discussion of the record on appeal so that we can discuss appeals from the Workers' Compensation Board.

B. The procedure for filing Workers' Comp Board appeals under CR 76.25 is comprehensive. It includes:

1. Requiring the petition to identify the parties as "appellant(s)" and "appellee(s)" (CR 76.25(4));

2. A thirty-day deadline for filing a petition for review with the Court of Appeals (CR 76.25(2));

3. That the format be consistent with CR 7.02(4) regarding margins and spacing, etc., and that the cover of the petition be red, while the response be bound in a blue cover (CR 76.25(3)). The petition is required by CR 76.25(4)(c) to contain a "clear and concise statement" of:
   a. The material facts;
   b. The questions of law involved; and
   c. The specific reason(s) why relief from the Board's decision should be granted by the Court of Appeals.

4. We require that the petition include as an appendix significant parts of the Workers' Compensation Board record:
   a. The decision of the administrative law judge;
   b. The final decision of the Workers' Compensation Board; and
   c. A set of the briefs filed with the Board by the appellant and each appellee.
   d. Additionally, if review is sought of a decision on a motion to reopen, copies of the motion to reopen, any responses thereto, and decisions on that motion by the administrative law judge and the Board shall be attached.

5. The rest of the record will come later, when requested by the Clerk of the Court of Appeals, as discussed later in this outline.

6. Interestingly, "[t]he petition shall be prepared with the expectation that it will be the only pleading filed by the appellant in the appeal." CR 76.25(4)(c).
7. There is no provision requiring a prehearing conference or the filing of a prehearing statement as in matter-of-right appeals.

8. Rather, "[t]he petition, any responses, cross-petitions, and the record shall be submitted to the Court of Appeals for review, and the matter shall proceed further as directed by order of the Court of Appeals." CR 76.25(10).

9. That leaves the door open so that "[t]he [C]ourt [of Appeals] may order the filing of briefs under CR 76.12 or direct that the appeal be submitted for decision based only upon the petition and response." CR 76.25(10).

10. We at the Court also believe we have the authority to order the parties to participate in the Prehearing Conference procedure; however, we rarely exercise that authority.

11. Because the review by the Court of Appeals is the first time any court of the Commonwealth has considered the case, the unsuccessful party in the Court of Appeals is entitled to a matter-of-right appeal to the Kentucky Supreme Court. CR 76.25(12).

VIII. THE RECORD – IN THE OTHER CASES

A. At this point, we have discussed cases before the Court of Appeals that arrived (1 and 2) as matter-of-right appeals (whether starting in circuit court or an administrative agency other than the Workers' Comp Board), (3) as appeals starting in the Court of Appeals as motions for discretionary review, and (4) as appeals from decisions of the Workers' Compensation Board.

B. This leaves (5) election contest appeals, (6) original actions, and (7) appeals from a circuit court's order of injunctive relief. With special notice of how the RECORD gets to the Court of Appeals, let's address these last three first.

C. Election contest appeals are governed by a variety of statutes (found primarily in KRS Chapter 120) and procedural rules. We have already warned about the specialty nature of practice area. However, here is what is important to know for the purposes of this seminar:

1. Technically speaking, the appeal of an election contest decision is a matter-of-right appeal under the Kentucky constitution. However, because of the urgency with which they must be addressed, these appeals are subject to special procedural rules.

2. Election contests and appeals are governed primarily by KRS Chapter 120.
a. Election contests are filed in the circuit court; they are expedited; they are tried before the court without a jury. KRS 120.055, .065.

b. The trial court must find facts and apply law in accordance with CR 52.01. Deaton v. Little, 452 S.W.2d 384 (Ky. 1969).

c. Contests of regular elections in the circuit court proceed as equity actions. KRS 120.165(1).

d. Appeals to the Court of Appeals of election contests are also expedited. KRS 120.075, .175.

e. The Notice of Appeal and supersedeas bond must be filed with the circuit court within ten (10) days after the circuit court judgment. KRS 120.075(1).

f. The RECORD "shall be filed in the Court of Appeals, within ten (10) days after the entry of the judgment, or within such other time as the Court of Appeals may, for cause shown, permit." KRS 120.075(1).

g. Otherwise, the procedure for getting the record to the Court of Appeals "shall be in accordance with the Rules of Civil Procedure . . . ." KRS 120.075.

h. "The entire original record shall be filed and no designation of record shall be required." KRS 120.075(1).

i. The Clerk of the Court of Appeals must immediately deliver the file, including the record on appeal, to the Chief Judge. KRS 120.075(2).

j. The Chief Judge immediately establishes a Three-Judge Merits Panel to consider the election contest appeal. However, the Chief Staff Attorney (rather than the presiding judge's law clerks) will work with the panel to draft the opinion.

k. So, that's how – and that's how fast – the circuit court record gets to the Court of Appeals.

D. Original actions in the Court of Appeals are brought pursuant to CR 76.36.

1. In this original action in the Court of Appeals, the petitioner pursues the case against a respondent who will be a judge or an administrative agency. CR 76.36(1).
2. The goal of the petitioner is to obtain a writ of prohibition or a writ of *mandamus*.

3. The respondent has twenty (20) days to respond to the petition. CR 76.36(2).

4. The RECORD: By definition, in an original action, technically speaking, there is no record from the court below – there is no "court below." However, because this category of Court of Appeals case challenges the act of a judge or administrative agency, there is always at least one document to be filed in the original Court of Appeals action created in a prior proceeding. All such documents would be attached to the Petition for Relief. Additionally, affidavits regarding the prior proceeding may be attached to the petition.

"Evidence in support of or against the petition, other than that which may be attached to the petition and response in the form of exhibits, affidavits, and counter-affidavits, will be permitted only by order of the court, and it shall be in the form of affidavits or depositions taken in accordance with the Rules applicable to proceedings in trial courts. Oral testimony will not be heard in the appellate court." CR 76.36(5).

5. "Original actions will be submitted for decision when the response is filed or the time for filing it has expired, whichever is sooner, unless otherwise ordered by the court." CR 76.36(6).

6. The Three-Judge Motion Panel makes the decision in an original action.

7. Under *Hoskins v. Maricle*, 150 S.W.3d 1 (Ky. 2004), a writ may be granted only upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

8. Appeals from this original action in the Court of Appeals are matter-of-right appeals to the Supreme Court. CR 76.36(7).

E. An appeal from an injunction, under CR 65.07 or CR 65.08, comes to this Court as appeals of interlocutory orders.

1. Notably (or at least interestingly), appeals pursuant to CR 65.07 are given a case number with a suffix ".I"; however, appeals pursuant to CR 65.08 are not given that suffix.

   a. Appeals under CR 65.07 occur prior to the final judgment in the circuit court following entry in that court of a
temporary injunction. There is a filing fee associated with an appeal pursuant to CR 65.07. CR 76.42(2)(a)(viii).

b. However, appeals under CR 65.08 occur after there is a judgment in the circuit court and an existing appeal in the Court of Appeals, on the merits of the judgment entered; the circuit court will have entered a post-judgment injunction. There is no separate filing fee for post-judgment relief of a circuit court's injunction, so the appeal under CR 65.08 becomes a part of the appeal of the circuit court's final judgment.

2. Under CR 65.07, "[w]hen a circuit court by interlocutory order has granted, denied, modified, or dissolved a temporary injunction, a party adversely affected may within twenty days after the entry thereof move the Court of Appeals for relief from such order." CR 65.07(1).

3. "The format of the motion shall be the same as for other motions filed in the appellate court under CR 76.34. 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).

4. The respondent has ten (10) days to respond. CR 65.07(4).

5. Like election contests, the RECORD, or at least part of it, is filed with the initiating document: "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).

6. "Oral argument will not be held unless ordered by the Court sua sponte or on the motion of a party." CR 65.07(5)(a). This is a vestige of the days when oral argument before the merits panel was the default position of the Court.

7. The motion and response "shall be submitted to a panel for decision." CR 65.07(5)(a).

8. The case will be considered by the regular monthly meeting of the Three-Judge Motion Panel.

9. Emergency relief is available even more quickly. "If a movant will suffer irreparable injury before the motion will be considered by a panel, the movant may request emergency relief from a member of the Court which may be granted ex parte if necessary. If such

7 Before adoption of CR 76.12(c)(ii) and (d)(i), and amendment of CR 76.16(1). Since the Court has allowed the advocates to express their desire for oral argument, or more commonly their lack thereof, decision without oral argument occurs more frequently than with it.
relief is sought *ex parte* the motion shall state why 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." CR 65.07(6).

a. One judge can grant emergency relief pursuant to CR 65.07(6).

b. When the Clerk receives a motion under CR 65.07(6), he sends it to the Chief Staff Attorney (Jeanne Anderson).

c. The Chief Staff Attorney keeps a rotating list of the Judges generally referred to as the Emergency Order List. The next Judge on the list is called to address the emergency motion. If that Judge is not immediately available, the Chief Staff Attorney moves to the next Judge on the list until she finds a Judge to address the emergency motion.

d. Often the Chief Judge decides the emergency motion because he/she is at Central at least once or twice a week.

e. "Any intermediate order of a procedural nature pending final disposition of a proceeding pending in an appellate court [such as a motion pursuant to CR 65.07(6)] may be issued on the signature of any judge of that court." CR 76.34(4)(b).

10. Appeal to the Supreme Court from a Court of Appeals ruling pursuant to CR 65.07 (whether that decision is by the Three-Judge Motion Panel or the Emergency Motion Judge) is by means of CR 65.09 and must be taken within five (5) days of entry of the order. Whether to review the Court of Appeals decision is discretionary with the Supreme Court and "will be entertained only for extraordinary cause shown in the motion." CR 65.09(1).

IX. THE RECORD – IN MATTER-OF-RIGHT CASES AND WHERE DISCRETIONARY REVIEW IS GRANTED

A. In every matter-of-right appeal, the circuit clerk will prepare the record and certify it, retaining it until it is transmitted to the Clerk of the Court of Appeals. CR 75.07(6), (7).

B. "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; CR 75.07(4)." *Ventors v. Watts*, 686 S.W.2d 833, 834 (Ky. App. 1985).

C. "[T]he trial court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement [of the record] shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the trial court." CR 75.08. If the
Court of Appeals has already exercised jurisdiction over the appeal, supplementing the record requires a one-judge order of this Court.

D. It is possible that a party files a motion in the Court of Appeals that cannot be adequately addressed without all or part of the record. For such circumstances, we have CR 75.10.

"If at any time before the record on appeal to the Court of Appeals or Supreme Court has been transmitted to the appellate court a party desires to move that court for a dismissal, for a stay pending appeal, or for any other intermediate order, the clerk of the trial court at his request shall prepare for transmission to the appellate court a photocopy of the judgment or order from which the appeal is taken, the notice of appeal and such other portions of the record as the parties may request or as may be necessary including a copy of the certificate as to transcript under Rule 75.01(2), if applicable." CR 75.10.

X. ONE-JUDGE ORDERS; THREE-JUDGE MOTION PANELS; MERITS PANELS; EN BANC CONSIDERATION OF CASES

A. We have referred to Emergency Motions Judges and Chief Judges and Three-Judge Motion Panels and Merits Panels. We are overdue in explaining what these are, how they are comprised, and what they do.

B. One-Judge Rulings: Non-dispositive orders in the Court of Appeals may be decided by one judge.

"Except for motions that call for final disposition of an appeal or original action in the appellate court, any member of the court designated by the Chief Justice or Chief Judge may hear and dispose of any motion[.]" CR 76.34(4)(a).

1. These "One-Judge Orders" are largely routine and are worked up in draft form by the "One-Judge Order" staff attorney assigned to the Chief Staff Attorney's Section.

2. Most frequently, these one judge procedural orders are signed by the Chief Judge who spends, on average, one to two days per week in Frankfort at the Court of Appeals Central Office.

3. Some such motions are handled administratively.

C. Three-Judge Motions Panels: Three Judges must address dispositive motions. No single Judge may rule on "motions that call for final disposition of an appeal or original action in the appellate court[.]" CR 76.34(4)(a).

1. Instead, the Chief Judge assigns "panels of three judges each to conduct hearings[.]" Supreme Court Rule (SCR) 1.030(7)(a).
2. "The decision of a majority of the judges of a panel shall constitute the decision of the Court of Appeals." SCR 1.030(7)(d).

3. As noted earlier, the Three-Judge Motion Panel also hears and decides original actions brought under CR 76.36 and interlocutory appeals under CR 65.07.8

4. Supreme Court rules require that the Chief Judge assign Three-Judge Motions Panels and Three-Judge Merits Panels.

"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 in conformity with the administrative policies set forth in subsection (b) of this rule. Judges may be assigned to more than one panel at the same time.

(b) Assignment of judges.

The assignment of judges to panels shall be rotated in such manner that over the course of each year (i) each judge sits with each of the other members of the court, other than the chief judge, with substantially the same frequency and (ii) each judge other than the chief judge sits in each appellate district with substantially the same frequency as each of the other judges." SCR 1.030(7)(a), (b).

5. In practice, this administrative task falls to the Clerk of the Court who uses an algorithm to create a fourteen-month calendar assigning Judges to motions panels and merits panels. The Case Assignment Section (Patty Bruner) implements this calendar and is responsible for assigning every case to the Judges and substituting Judges who recuse. The Case Assignment Section also schedules every oral argument.

6. The Three-Judge Motion Panel meets monthly in Frankfort. There is (1) a criminal motions docket; (2) a civil motions docket; (3) a writ docket; (4) an original action docket; and (5) a discretionary review docket.

7. At least seven days prior to the scheduled motion panel date, the materials placed upon the criminal motions docket are distributed to the Three-Judge Motions Panel. The distribution permits the judges to review the material prior to arrival in Frankfort. Normally, the criminal motions panel considers approximately twenty-five to 100 docketed cases per month. A roughly equal number of civil motions must be addressed. The other dockets are much lighter.

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8 As noted earlier, actions under CR 65.08 are combined with the previously filed appeal of the final judgment in the same case and dealt with by the three-judge merits panel assigned to that case.
8. After the meeting of the motions panel, their conferencing and decision on each item on all dockets, Court staff prepares and submits orders to the judges for review, editing and signature. Upon receipt of the signed orders from the Presiding Judge of the Three-Judge Motions Panel, the respective staff attorney for each docket ensures that all motions are delivered to the clerk’s office for entry into the record.

D. Three-Judge Merits Panels: The merits panel is the most visible face of the Court. This panel drafts opinions that are rendered, some of which are unpublished, some of which are published, and some of which are de-published by the Supreme Court.

1. Every month, each of the Court of Appeals Judges is assigned by the Case Assignment Section to preside over approximately ten cases for which they serve as Presiding Judge. Twenty or so more cases are assigned to the same Judge to serve as an Associate Judge.

2. The Clerk’s Office also ships the record in each case to the Presiding Judge's chambers.

3. In each of the fourteen Judges’ offices around Kentucky, the Judge and his staff screen the thirty or so cases assigned each month.

4. Every case is screened to determine if there is any conflict.

5. Cases over which the Judge presides are reviewed more closely than the cases on which he/she serves as Associate Judge; this is because the Presiding Judge in each case is charged with drafting a brief summary of the case that appears on the Court's website.

6. Also, during the screening the Presiding Judge decides whether to grant oral argument.

7. Cases are assigned to the Judge's law clerk to research and report back to the Judge. That report may take any variety of forms and varies from Judge to Judge, and often from case to case within any particular Judge's chambers.

8. With the assistance of the law clerks, the Judge will prepare a draft opinion for circulation to the Associate Judges assigned to the case.

9. Due to the distances between the fourteen Judges' offices, face-to-face conferencing only takes place in person if the case is assigned for oral argument.

10. Conferencing in non-oral argument cases takes place telephonically or by email.
11. The individual Associate Judges vote on each opinion circulated by the Presiding Judge, deciding whether to concur or dissent and whether to write separately or not.

12. If both Associate Judges dissent, the case is reassigned to one of the dissenter to draft the new majority opinion.

13. Once a majority of the Three-Judge Merits Panel decides on the outcome and language in an opinion, it is finalized in the Presiding Judge's office; it is then sent electronically to the Chief Staff Attorney's Section.

14. The Chief Staff Attorney, or the Deputy Chief Staff Attorney (Becky Lyon) will read every opinion and any noteworthy aspect of any opinion is brought to the attention of the Chief Judge.

15. A "Rendition Secretary" is assigned to every opinion to be rendered; she will go through the opinion for typos, grammar, etc. He or she will also check citations and quotes to assure they are correct.

16. The attorneys and rendition secretaries in the Chief Staff Attorney's Section look particularly for opinions that are inconsistent with one another; if they find two such opinions, they bring that to the attention of the Chief Judge.

E. The Reconsideration/Rehearing Panel: After an opinion is rendered, there is an opportunity to seek reconsideration or even rehearing of the case. There is a very important distinction between the two.

1. Under CR 76.38(2), "a party adversely affected by a decision rendered by order may within ten days after the date of its entry move the court to reconsider it." CR 76.38(2) (emphasis added).

2. Under CR 76.32(2), "[a] petition for rehearing, modification or extension shall be filed within twenty days after the date on which the opinion was issued . . . ." CR 76.32(2) (emphasis added).

3. If one of these motions is filed, the Three-Judge Merits Panel will be reconstituted; the original Presiding Judge will become an Associate Judge on reconsideration/rehearing and the new Presiding Judge will be a Judge who voted in the majority on the original opinion.

F. The Court of Appeals Sitting en banc:

1. "If prior to the time the decision of a panel is announced it appears that the proposed decision is in conflict with the decision of another panel on the same question, the chief judge may reassign the case to the entire court." SCR 1.030(7)(d).
2. There is no provision for an advocate to move the Court of Appeals to hear a case *en banc* as in the federal system.

3. *En banc* consideration is rare.

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. This number can be used to reach any of the following staff members:

Clerk of the Court: Sam Givens  
Counsel to the Clerk: Wes Deskins  
Chief Staff Attorney: Jeanne Anderson  
Deputy Chief Staff Attorney: Becky Lyon  
Prehearing Conference Attorney (East): Leona Power  
Prehearing Conference Attorney (West): Scott Coburn  
Prehearing Conference Administrator: Donna Wecker