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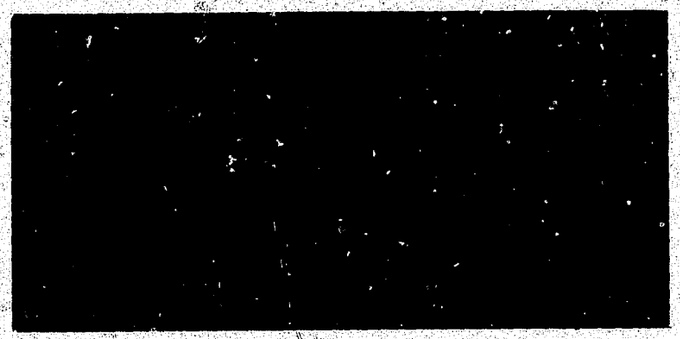

T/A Assignment #265

REVIEW OF RULES OF ORGANIZATION AND PROCEDURE FOR THE NEW COURT OF APPEALS OF KENTUCKY

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I. DESCRIPTION OF NEW KENTUCKY COURT OF APPEALS

A. Background

In November 1975, the Kentucky electorate adopted a new Judicial Article which, in addition to unifying the state's lower courts, established a new intermediate appellate court, the Court of Appeals. Prior to passage of the amendment, Kentucky had been served by a single appellate court. The new Court of Appeals has been empowered to serve as the state's court of first review to which appeals as a matter of right may be taken from the circuit courts (the trial courts of general jurisdiction). The Supreme Court will, in the main, have discretionary jurisdiction over decisions of the Court of Appeals, although this jurisdictional scheme may be altered at any time by the Supreme Court under its new rule-making powers.

Shortly after passage of the Judicial Article, Kentucky's Office of Judicial Planning (OJP) began the development of two sets of proposed rules for the new Court of Appeals: one for procedure and the other for organization. To secure review of these rules, the OJP requested LEAA's Criminal Courts Technical Assistance Project at The American University to provide the services of Hon. Winslow Christian of the California Court of Appeals, who had a broad practical knowledge of appellate court operations, both in California and elsewhere, and Daniel J. Meador of the University of Virginia Law School, whose research on state appellate court operations was deemed of significant value to Kentucky's planning needs.

On April 3, Justice Christian and Prof. Meador visited Frankfort to meet with OJP staff and the Clerk of the new Supreme Court. During this meeting, each rule and its implications were discussed. Out of this process,

a number of suggestions for revisions emerged and were critiqued, and appropriate revisions made in the OJP draft of the rules. The revised versions of both sets of rules are included in Section II of this report.

B. Summary of Planning to Date

The present authorized strength of the new Court of Appeals is fourteen judges. Although none have yet been appointed, a Judicial Nominating Commission was created by statute in the Spring of 1976 and will submit nominations to the Governor who will a int the Court's judges. The Court is slated to commence business by July 1976.

The Office of Judicial Planning has taken advantage of the period between the November passage of the constitutional amendment and its July effective date to plan for the organization and operation of the new appellate court. In addition to development of the proposed rules, the staff of the OJP has explored contemporary literature regarding appellate problems and practices and has reviewed the experiences of other jurisdictions regarding appellate operations.

The Rules developed are designed to serve as rules under which the court can commence operations. Many, indeed, most of them should work well. However, experience will no doubt suggest revisions and the Court should be continually receptive to examining its initially adopted rules to determine if they in fact are functioning so as to afford fair and sound adjudications with maximum efficiency.

C. Specific Comments

The most interesting and innovative aspect of these proposals is embodied in Procedural Rules 12, 13, 14, 17 and 18, which deal with the filing of a statement of appeal and the oral argument. The objective of these Rules is to provide for a simplified, expedited process of bringing an appeal forward for consideration by the Court. These rules require the appellant, shortly after he takes the appeal, to file a "Statement of Appeal" which will include a succinct statement of the material facts, the questions presented on this appeal, and citations of pertinent authorities. This statement replaces the traditional written brief. The appellee is also required to file a statement similar in content and brevity to that filed by the appellant. Here, again, the rules contemplate no briefs. After statements from both sides are filed, the appeal will be set for oral argument unless both parties have waived argument. It is contemplated that these statements will permit the judges to sufficiently explore the issues orally with counsel to make a sound decision. Presumably, the Court has authority to direct the submission of briefs following the argument on any issues on which the judges need that additional assistance.

The elimination of traditional briefs removes one of the most time consuming steps of the appellate process. In most appellate courts, briefing consumes a minimum of 60 days and often much more. If the Kentucky Court of Appeals can manage its burden so as to schedule oral argument shortly after the opposing statements are filed, it should be able to achieve an overall disposition time that is significantly shorter than that which typically prevails in American appellate courts.

Expeditious setting of oral argument may be promoted by the organizational scheme under which the court will sit in three-judge panels in all sections of the state. Thus, oral arguments can be held at points convenient to counsel. In a sense, this is a plan to keep appellate justice close to the people where it can be administered more visibly and expeditiously. This is a commendable goal, although the logistical problems could be difficult. Arranging for judges, papers and counsel to converge in courtrooms in many locations will call for imaginative planning by the court's administrative and clerical personnel. This is one of those matters on which experience will shed much light.

The court's budget calls for one law clerk for each judge. This is the essential minimum of professional assistance which should be provided appellate judges. Whether it is adequate for this court in relation to its work load and method of operation remains to be seen. Without traditional briefs the judges may find it more than ordinarily useful to have a memorandum on each case. If the 14 law clerks collectively cannot provide them for the judges, as well as provide all the other necessary help, the court and the Legislature must consider the need for additional professional assistance. This could take the form of a second law clerk for each judge or a provision for several central staff attorneys. When the need is sensed, this matter should be given careful study in light of conditions then prevailing.

The Court, on the first day of its existence, will inherit some 800 pending cases transferred to it from the docket of the Supreme Court. Thus, at the very outset, the Court will be faced with a substantial volume of business. It will not have the luxury of easing gradually into the process

of hearing and deciding appeals. The problem is made even more substantial by the likelihood that not one of the 14 judges will have had any previous experience as an appellate judge. The judges and their law clerks must immediately commence working on matured cases already under submission. This circumstance enhances the value of having an already developed set of organizational and procedural rules such as the attached. The court would be well advised to adopt these rules promptly so that the judges can put their minds to adjudication without delay. Revision can be accomplished later, if necessary.

The creation of a wholly new appellate court is not an everyday event. The establishment of this Court of Appeals is a response to the felt need to enlarge the appellate capacity of the Kentucky judicial system so that justice at the appellate level can be done soundly and without undue delay. It is important that the personnel of this new Court -- the judges, the law clerks, the clerk, and all supporting persons -- commence their work with a positive attitude: with the desire to develop the most effective process to stay abreast of what is likely to be a high volume of cases while assuring full and fair consideration of each case. The consultants believe that these proposed rules provide an excellent starting point.

II. PROPOSED RULES FOR THE KENTUCKY COURT OF APPEALS.

Preliminary Draft

A. Procedural Rules

1. Notice of Appeal: An appeal from a final order or judgment of a circuit court in a civil or criminal case shall be taken by filing a notice of appeal with the trial court within 10 days after the entry of the judgement or order appealed from. A copy of the notice, [together with a certification of filing in the trial court and payment of the tax required by KRS 142.011(1)] shall immediately be transmitted by the Clerk of the Circuit Court to the Court of Appeals. The clerk of the Court of Appeals shall thereupon docket the case. Filing of the notice of appeal is timely if filed in the trial court within the required time, and slowness of mail delivery in Frankfort will not render the filing untimely.

The notice of appeal shall specify the parties to the appeal, shall name the court from which the appeal is taken and [designate the date of entry of] the judgement or order appealed from, shall be dated and signed by the appellant or his attorney, and shall give his address.

A copy of the notice of appeal shall be served on all other parties and proof of service as provided by CR 5 shall be filed in the Circuit Court.

Commentary: Filing of the notice in the Court of Appeals permits that court to commence monitoring the case from the outset, insuring that timetables are adhered to. More and more states are doing this. It is recognized that the slowness of mail service must be taken into account, and it is felt that the provisions of this rule gives the needed leeway.

The time for appeal runs from date of entry of the judgment rather than the date of service of notice of entry of judgment, in line with federal practice and the practice of a number of states. FRAP Rule 4; Mich. Gen. Court Rule 803; N.J. Court Rules (1969) 2:4-1. This would require amendment of CR 77.04(2), RCr 12.55, and RAP 1.090 (a) (4).

2. Extension of Time for Appeal: Either before or after the time for appeal has expired, the Court of Appeals may extend the time for appeal not exceeding 10 days from the expiration of the original time herein prescribed, upon proof of excusable neglect based on failure of a party to learn of the entry of the judgment or an order which affects the running of the time for taking an appeal. Such an extension shall be upon motion and notice in accordance with CR 5.

Commentary: This is taken from CR 73.02(1), but shortening the extension of time to an additional 10 days instead of 30 days, and giving the authority to grant the extension to the Court of Appeals instead of the circuit court, in line with the monitoring function of the appellate court. The provision for granting the extension before or after the time has expired is taken from FRAP Rule 4(a).

3. Termination of Running of Time: The running of the time for appeal is terminated by the timely filing of any of the motions hereinafter specified, and the full time for appeal commences to run and is to be computed from the entry of an order granting or denying any of the following motions:

(1) a motion for judgment notwithstanding the verdict;

(2) a motion to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted;

(3) a motion to alter, amend or vacate the judgment;

(4) a motion for arrest of judgment or for a new trial including a motion for a new trial on the ground of newly discovered evidence.

Commentary: This is taken from CR 73.02(1) and RCr 12.54; the various motions are described here instead of referring to them by rule number.

4. Joint or Consolidated Appeals: If two or more persons are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the Court of Appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

Commentary: This is taken verbatim from FRAP 3(b). The first sentence appears also in CR 73.01(2).

5. Appeals -- Miscellaneous Provisions: The taking of an appeal from a final order or judgment in any action in which the trial court has denied a defense based upon (1) lack of jurisdiction over the person, or (2) improper venue, or (3) insufficiency of process, or (4) insufficiency of service of process, shall not constitute an entry of appearance in said action in any court by the appellant.

Commentary: This is CR 73.01(3), enlarged to apply to criminal cases as well as civil cases.

6. Bond on Appeal in Civil Cases: Unless an appellant in a civil case is exempted by law or unless a supersedeas bond is filed pursuant to CR 73.04, he shall file a bond on appeal with the clerk of the Court of Appeals at the same time that the record on the appeal is filed. The bond on appeal may be a surety bond or a cash bond, and shall be in an amount set by order of the Supreme Court from time to time and shall be conditioned to secure the payment of the costs on appeal adjudged against the appellant. If a supersedeas bond is filed pursuant to CR 73.04, a previously filed bond on appeal may be cancelled.

If a supersedeas bond is not filed or if the bond filed is found insufficient, and if the action is not yet docketed with the Court of Appeals, a supersedeas bond may be filed at such time before the action is so docketed as may be fixed by the circuit court. After the action is so docketed, application for leave to file a bond may be made only in the Court of Appeals.

Commentary: This is taken verbatim from CR 73.05 and 73.06 except that the $50 fixed amount has been replaced by more flexible language, giving the Supreme Court authority to set amounts as fiscal conditions change.

7. Release in Criminal Cases: (a) Appeals from Orders Respecting Release Entered Prior to a Judgment of Conviction. A review authorized by law from an order refusing or imposing conditions of release before a judgment of conviction shall be determined promptly. Upon entry of an order refusing or imposing conditions of release, the circuit court shall state in writing the reasons for the action taken. The case shall be heard without the necessity of briefs after reasonable notice to the

appellee upon such papers, affidavits, and portions of the record as the parties shall present. The Court of Appeals or a judge thereof may order the release of the appellant pending the appeal.

(b) Release Pending Appeal from a Judgment of Conviction. Application for release after a judgment of conviction shall be made in the first instance in the circuit court. If the circuit court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review may be made to the Court of Appeals or to a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the appellee. The Court of Appeals or a judge thereof may order the release of the appellant pending disposition of the motion.

(c) Criteria for Release. The burden of establishing that the defendant will not flee or pose a danger to any person or to the community rests with the defendant.

Commentary: This is taken verbatim from FRAP 9, except that a reference to U.S.C. is deleted, and "district court" is changed to "circuit court".

8. Judgement Against Surety: By entering into a supersedeas bond or an appeal bond or bail on appeal pursuant to CR 73.04 or RCr 12.78 or 12,82 or Rule 6 of these rules, the surety submits himself to the jurisdiction of the court with which the bond is filed. His liability may be enforced on motion without the necessity of an independent action. The motion shall be served on the surety as provided

by CR 5 at least 20 days prior to the date of the hearing thereon.

Commentary: This is taken from CR 73.07, enlarged to include bail in criminal appeals.

9. Designation of Record: Within 10 days after filing the notice of appeal, the appellant shall serve upon the appellee and the circuit court clerk a designation of such portions of the original record as he deems necessary for inclusion in the record on appeal. A transcript of the evidence shall not be included in the record on appeal. (Counsel's attention is called to Rule __ providing for a statement of appeal which includes a narrative statement of the facts and a recommendation as to which portions of the proceedings are essential to a determination of the appeal. If the court determines that a transcript is necessary, it will order it.)

Within 10 days after the service and filing of such designation, any other party to the appeal may serve and file a designation of additional portions of the record to be included.

Commentary: The designation of the parts of the record to be included in the record on appeal is taken from CR 75.01. The ban on inclusion of the transcript of evidence is new, and is based on the fact that the full transcript is often not necessary for a decision in the case and its preparation is typically a cause of delay in the appellate process.

10. Transmission of Record: Within __ days after the filing of appellee's counterdesignation of the record, or after the time for filing such counterdesignation has elapsed, the clerk of the circuit court shall

transmit to the clerk of the Court of Appeals the original record or parts thereof designated by the parties and shall certify it as the record in the case. Whether or not designated, the record shall always include the judgment or part thereof appealed from, together with any opinions or findings of the trial court; the designations or stipulations of the parties as to matter to be included in the record; and a certified copy of all docket entries. The record, for the purpose of this rule, does not include nonessential orders, summons, subpeonas, notices and similar papers.

An original exhibit, when designated, shall not be transmitted by the clerk as a part of the record on appeal, unless requested by the Court of Appeals. Attorneys are invited to list any such exhibits which they deem essential to a decision of the case.

The clerk of the Court of Appeals shall acknowledge receipt of the record by mailing notice thereof to the circuit court clerk.

Commentary: This is a combination of CR 73.08, 75.04 and 75.07. The greatest change from present practice is the requirement that the original record be sent up instead of a certified copy. The provisions regarding original exhibits are also new.

11. Record for Preliminary Hearing in the Court of Appeals: If, prior to the time the record on appeal is filed in the Court of Appeals, a party desires to docket the appeal in order to make in the Court of Appeals a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the circuit court

at his request shall certify and transmit to the Court of Appeals such portion of the record of proceedings below as is needed for that purpose.

Commentary: This is taken verbatim from CR 75.10. RCr 12.62 is nearly identical.

12. Statement of Appeal: Within __ days after filing notice of appeal, the appellant shall serve on the appellee and file with the Court of Appeals a statement of appeal which shall normally consist of not more than four double-spaced typewritten pages, 8 1/2 by 11. The statement shall contain the following information:

1. A copy of the judgment or a reference to the page of the record on which it may be found.

2. A statement whether or not a supersedeas or appeal bond, or bail on appeal, has been executed.

3. Such of the following statements as are applicable:

(a) Appellant desires to waive oral argument.

(b) Appellant is of the opinion that a transcript of certain evidence is essential to a decision of the case, describing with particularity the parts deemed essential.

(c) Further briefing would be helpful to a decision of the case.

4. A concise chronological statement in narrative form of the essential facts of the case, with dates where significant, in sufficient detail to enable the court to understand the legal questions in controversy. Any other matters necessary to any understanding of the

nature of the controversy and of the questions involved on the appeal should be included.

5. A clear and concise statement of the questions of law involved, with a condensed statement of appellant's argument and citations of authorities. The statement should not be repititious, and should not contain general conclusory statements, but should be of sufficient length to inform the court of appellant's position.

6. The relief requested, specifying the order or judgment to which appellant contends he is entitled.

Commentary: This rule is intended to create a substitute for the traditional brief. The wording used here is taken from a variety of sources, principally RAP 1.210 and Mich. Gen. Court Rule 813, which cover the appellant's brief.

13. Appellee's Counter Statement of Appeal: Within __ days after the filing of appellant's statement of appeal, the appellee shall file a counter statement of appeal.

(1) If appellant has indicated that he desires to waive oral oral argument, appellee shall indicate whether he agrees to the waiver. Oral argument will be had unless all parties enter a written waiver.

(2) He shall state that he accepts the appellant's statement of facts or shall point out such inaccuracies as he believes to exist in that statement.

(3) He shall likewise state that he accepts appellant's statement of the questions of law, or shall make such statement of the questions of law as he believes to be necessary.

(4) He shall set forth his argument with citations of authorities.

(5) He may indicate any transcript of the evidence which he deems essential to the decision of the case, or that further briefing would be helpful.

Commentary: As with appellant's statement of appeal, this is intended as a substitute for the traditional brief.

14. Appellant's Reply: Within __ days after the filing of appellee's counterstatement of appeal, the appellant may, if he desires, file a reply statement.

15. Motions: (a) Other than petitions for writ of certiorari, the provision of CR 5, 6 and 7 shall govern the form, content, supporting affidavits, service, and filing of all motions made in this court, except that the moving party shall not specify a time for hearing in the motion or notice unless such time has been fixed under section (c) of this rule.

(b) The opposing party may file a response, accompanied by a certification that a copy has been served on the movant, within 10 days after the motion is served, or within a designated time as ordered by the court.

(c) No motion will be heard orally except by pre-arrangement with the administrative assistant to the chief judge.

No motion for an intermediate order under CR 75.10 or RCr 12.62 shall be entertained until the movant has filed in this court a certified copy of the judgment appealed from and of the notice of appeal, and a copy of such portion of the record or proceedings below as is needed for the purpose of the motion.

Commentary: This is taken verbatim from RAP 1.160 and 1.170, except for deletion of "motions for appeal under RAP 1.180" and substitution of

"petitions for writ of certiorari" to conform with language of the statute on Court of Appeals.

16. Motion to Dismiss: (1) In addition to any other relief available under the rules, the appellee may file a motion to dismiss an appeal on the ground that:

(a) the appeal is not within the jurisdiction of the Court of Appeals, or

(b) the appeal was not taken or pursued in conformity with the rules, or

(c) the question or questions sought to be reviewed were not timely or properly raised.

(2) The appellant shall have 20 days from the date of receipt of a motion to dismiss or affirm within which to file a memorandum opposing the motion.

(3) Upon the filing of appellant's memorandum or after expiration of the time for filing it, the opposing motion and memorandum shall be submitted by the clerk for decision by a panel of the court. If, at the time of such submission, the record on appeal has not yet been transmitted to the Court of Appeals from the court below, the appellee shall cause such record to be transmitted to the clerk of the Court of Appeals. The motion shall be considered by the full panel of three judges. After consideration of such motion, the court will enter an appropriate order. If such order is one of denial of appellee's motion to dismiss or affirm, the case shall stand for submission.

Commentary: This is taken from Mich. Gen. Court Rule 817. The motion to dismiss goes to jurisdictional matters, and should be decided by a full panel rather than by a single judge.

17. Assignment for Oral Argument: Upon the filing of the record on appeal and all statements and counterstatements of appeal (or upon the expiration of time for filing appellee's statement if no motion to extend the time has been filed) the case will be deemed ready for oral argument unless the court makes a preliminary determination that a transcript of evidence or additional parts of the record are needed. In that event the case will be deemed ready for oral argument at such time as the court may determine.

When the case is ready for oral argument, the clerk of the court shall notify the parties that the case will be heard at a time and place designated by the clerk. No case shall be scheduled earlier than __ days from the date of the notice.

Cases will be placed on the calendar in accordance with the clerk's notice to the parties, and will be called and heard in the same sequence.

Commentary: This is largely taken from Mich. Gen. Court Rule 816.

18. Oral Argument: Oral argument shall be had in all cases unless waived by written agreement of all parties to the appeal in their statements of appeal.

Oral arguments should complement the statement of appeal, and counsel will not be permitted to read at length from statements, records, and authorities.

The appellant shall have the opening and closing argument, and shall be prepared to give a fair statement of the case if requested by the court.

Ordinarily, 30 minutes will be allowed each side for oral argument, including rebuttal, but the court for good cause may extend or curtail the

time, and may of its own initiative direct argument on specific points outside the times limited. Counsel is not obligated to use all the time allowed, and the court may terminate argument whenever it considers further argument unnecessary.

Commentary: This is largely a distillation of North Carolina Rules of Appellate Procedure, Rule 30.

19. Decisions are Final: The decision of a majority of the judges of a panel shall constitute the decision of the Court of Appeals. Such decisions are final except as reviewed by the Supreme Court upon a writ of certiorari granted by the Supreme Court.

If, prior to the time its decision is announced, a panel of the Court of Appeals certifies to the Chief Judge that its proposed decision is in conflict with the decision of another panel on the same question, the Chief Judge may assign the case to a larger panel of 5 to 7 judges for reconsideration.

Commentary: The first paragraph is taken almost verbatim from Mich. Gen. Court Rule 800.4, and gives finality to a decision of a panel even in cases having a dissenting opinion.

The second paragraph addresses itself to the situation where a panel wishes to reach a result contrary to that of another panel of the Court of Appeals. In the interests of doctrinal consistency such conflicts should be avoid3d by internal mechanisms when possible. Justice Winslow Christian, of the California Court of Appeals, suggested the provision used here.

20. Costs: Unless otherwise directed by the Court, the costs in appealed cases and original actions shall be assessed against the unsuccessful

party. The Clerk, forthwith upon the issuance of the mandate, shall send to the attorney for the unsuccessful party a statement covering all the costs in the case due in this Court from both parties, and unless the full amount is paid within 30 days the Clerk shall proceed to collect the same as provided in CR 73.07.

Commentary: This is RAP 1.400 and 1.410.

21. Rehearing or Modification of Opinion: (a) Rehearing. A rehearing of a case after decision has been announced will not be granted except for extraordinary reasons indicating that a miscarriage of justice has occurred. The rules for motions shall apply to petitions for rehearing. The petition shall be filed within 10 days after the entry of the judgment, and any response thereto shall be filed within 10 days after the petition is filed. The court will decide the petition without oral argument.

(b) Modification or extension of opinion. When it is desired to point out and have corrected any inaccuracies in statements of law or fact contained in an opinion of the Court, or to extend the opinion to cover matters in issue not discussed therein, and the result reached in the opinion is not questioned, a party may request a modification or extension.

Commentary: Subsection (a) is designed to discourage petitions for rehearing, and to set out the procedure for such petitions. Subsection (b) is taken verbatim from RAP 1.350 (c).

22. Continuations; Dismissal for No Progress: (1) No case may be continued by stipulation of the parties or their counsel, but only upon an order of the court for good cause shown.

(2) Except for cases in which an extension of time or a continuance has been granted by the Court of Appeals, all proceedings which have not been assigned for hearing on the merits within 6 months after the filing of the claim of appeal, or of an order to show cause in original proceedings shall be designated as "Appeals in which no Progress has been made".

(3) Notice; Dismissal. In all appeals so designated, the clerk shall mail to each party, or his attorney, notice that unless cause is shown to the contrary the appeal will be dismissed and shall file due proof of such notice. Thereafter, the clerk shall place at the head of each session calendar all appeals in which notice of no progress has been mailed at least 20 days prior to the first day of that session. On the first day of each session, each appeal or original proceeding appearing on the calendar as an appeal in which no progress has been made shall be dismissed unless cause is shown to the contrary.

Commentary: This is taken largely from Mich. Gen. Court Rules 816 and 818.

23. Service and Proof of Service: Computation of Time: Proceedings in the Court of Appeals are governed by the provisions of CR 5 as to service and proof of service of all papers which are required to be served; and by CR 6 as to computation and extensions of time.

24. Form and Arrangement of Papers: All papers filed in the Court of Appeals may be typewritten in clear legible type in black ink on white opaque unglazed paper, 8 1/2 by 11 inches, and shall be double-spaced. Carbon copies may not be submitted, but clear and easily readable repro-

ductions otherwise conforming with the requirements of this rule shall be acceptable. __ copies of all papers shall be filed.

Commentary: This is based on RAP 1.100. Printed briefs are not required because today's electric typewriters and photoreproduction machines produce copy which is equal in all respects to printed material.

25. Original Proceedings: (a) Original proceedings in this Court may be prosecuted upon paying the tax required by KRS 142.011 (1) and filing a verified petition setting forth:

- The name of each respondent against whom relief is sought;
- the facts showing the petitioner is entitled to relief;
- the nature of the relief sought.

The petition shall show the service therof in accord with CR 5.03. The petition shall be accompanied by a memorandum of authorities in support thereof. Upon the filing of the petition the Clerk shall forthwith mail to each respondent notice of the date the petition was filed.

(b) The party against whom relief is sought may within 10 days from the date of filing the petition file a response thereto, accompanied by a certification that a copy thereof has been served on the petitioner, and a memorandum of authorities in support of his defense.

(c) If the petitioner desires any relief prior to the expiration of 10 days from the date of filing the petition he may move the Court ex parte or on notice for a temporary order on the ground that he will suffer immediate and irreparable injury before a hearing may be had on the petition.

(d) Evidence in support of or against the petition may be presented only upon order of the Court, and it shall be by affidavit or by deposition taken as provided in the Rules of Civil Procedure. No oral evidence will be heard by the Court.

(e) Original proceedings shall be submitted for decision when the response is filed or when the time for filing it has expired, whichever is earlier, unless the Court otherwise orders.

(f) Final decisions in original proceedings shall become effective immediately upon entry by the clerk.

Commentary: This is RAP 1.350, and is perhaps, appropriate for proceedings in the Court of Appeals without change.

B. Organizational Rules

1. General Provisions: (a) Headquarters. The offices of the Court of Appeals shall be in Frankfort.

(b) Continuous session. The Court of Appeals shall be a court of continuous session.

(c) Powers of the Court. The Court of Appeals may administer oaths, punish contempts, issue necessary writs to give control over lower courts, and make rules for the conduct of its business consistent with law and with rules promulgated by the Supreme Court.

(d) Style of process. All process from the Court of Appeals shall be issued in the name of the court and signed by the clerk, and shall be styled "The Commonwealth of Kentucky, Court of Appeals".

2. Chief Judge: (a) Selection. The judges of the Court of Appeals shall elect one of their number to serve as chief judge for a term of four years, and shall elect a chief judge pro tem at the same time. The chief judge pro tem shall perform the functions of the chief judge when the latter is absent or unavailable to act, and shall perform such other functions as the chief judge shall direct.

(b) Duties. In addition to the powers and duties imposed by these rules and by statute, the chief judge shall have such other powers and duties as the Court of Appeals or the Supreme Court by rule or special order shall direct.

Commentary: The first clause of subsection (a) is taken verbatim from Const., Sec.111(3) and is repeated here solely for ease of reference. The remainder of this rule is taken almost verbatim from Mich. Gen. Court

These two rules, then, are tentative at the present time and will, of course, be subject to action of the Court of Appeals when it is activated. They are included in this package in order to give a rounded view of the probable nature of the court.

3. Division into Panels -- Places for Hearings: In order to provide for the expeditious and inexpensive appeals mandated by Section 115 of the Constitution, the Court of Appeals shall be divided by the Chief Judge into four numbered hearing panels of three judges each and the panels shall conduct hearings at the times and in the places necessary to discharge the business before the court. In addition to the four numbered panels, a special panel may be appointed by the Chief Judge at any time in his discretion. 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 accordance with these rules. Judges may be assigned to more than one panel at the same time.

Commentary: In addition to language taken from the Constitution, this is based on N.C. Gen. Stat. Sec. 7A-19(c), and Mich. Comp. Laws Sec. 27A.311(3) and 27A.312. An analogous provision may be found in Rules of U.S. Court of Appeals for the Sixth Circuit, Rule 3(a).

4. Assignment to Panels: The Chief Judge shall assign the members of the Court of Appeals to panels every three months so that each judge sits with each other judge with substantially equal frequency as far as is consistent with the efficient administration of the business of the court.

During the time a judge is not assigned to a panel, he shall be available for the determination of motions and other interlocutory matters, and for temporary service on any panel in which a judge is unavailable or disqualified, or in which a rehearing before a larger panel is ordered, or for such other assignment as the Chief Judge determines to be necessary.

Commentary: Based on N.C. Gen. Stat. Sec. 7A-16. The rotation of judges is found in several states, e.g., Mich. Gen. Court Rule 800.1; N.C. Gen. Stat. Sec. 7A-16. A study of the Alabama courts by the National Center for State Courts suggested a 6- or 12-month rotation plan. In the opinion of the Office of Judicial Planning a period of several months rather than a few days (or a week or two) makes for collegiality and esprit among the members of a panel but the 12-month period is regarded as overly long. We take no position as between the 3-month and the 6-month period.

JUDGE NOT TO SIT IN HIS OWN APPELLATE DISTRICT:

No rule is proposed.

Commentary: The Supreme Court has an informal rule that no member is assigned a case arising from his own district, and has proposed that members of the Court of Appeals not even sit on cases from their districts. The Office of Judicial Planning is not recommending a prohibition against sitting in one's own district for several reasons:

(1) Such a rule would require the judge to do more travelling than he would otherwise be required to do, since every assignment to a hearing panel would force him to go a distance to some other appellate district. The realities of the energy crisis and the increasing cost of gasoline and automobiles, as well as the governor's very limited travel budget for

this court, must be borne in mind. And the time spent on the road is wasted time, time which might better be spent in other ways.

(2) By virtue of the rotational scheme, a judge will necessarily be sitting outside his district most of the time.

(3) It is important to have a judge nearby to rule on motions and other interlocutory matters.

(4) The judge can recuse himself in cases of conflict of interest or prejudice. If he is habitually guilty of prejudice, he can be brought before the retirement and removal commission.

5. Presiding Judge: The Chief Judge shall preside over any panel of which he is a member, and shall designate the presiding judge of other panels. The presiding judge of each panel shall preside at the hearings and perform such other functions as the Court of Appeals or Supreme Court by rule or special order shall direct.

Commentary: The first sentence is nearly verbatim from N.C. Gen. Stat. Sec. 7A-16. The second sentence is taken from Mich. Gen. Court Rule 800.7.

6. Clerk of the Court of Appeals: (a) The office of the clerk of the Court of Appeals shall be in Frankfort. All papers filed with the Court of Appeals shall be filed in the office of the clerk. Filing is not timely unless the papers are received by the clerk within the time fixed for filing.

(b) The clerk's office shall be operated under the direction of the Court of Appeals. The clerk shall:

- Collect all fees of his office and deposit them with the state treasurer at regular intervals as directed by the Chief Judge;

- Provide and maintain such books and other records for the recording of court proceedings and activities as the Court of Appeals directs;

- Care for and maintain custody of all records, books and papers filed or deposited in his office;

- After the determination of an appeal, and after appropriate statistics have been compiled, promptly make proper disposition of all original records which he may have in accordance with rule ____.

- Perform such other duties as the Chief Judge or the Court of Appeals by rule or order shall direct.

Commentary: The list of the clerk's duties is taken from Mich. Gen. Court Rule 902(2). The requirements as to record keeping have been left flexible so that the most modern systems may be utilized.

7. Hearings and Orders by a Single Judge: (a) Any judge designated by the Chief Judge may rule on any motion. Any judge who rules on a motion may sign the order ruling on such motion.

(b) Any judge may sign any necessary interlocutory order of a procedural nature relating to any suit, proceeding or process in the Court of Appeals preparatory to a hearing, trial or decision thereof. This rule shall include, but is not limited to, petitions to extend the time for filing briefs and other papers; to consolidate cases; to substitute parties;

to appear as amicus curiae; to advance or continue cases; to enlarge the time for appeal in forma pauperis, including applications for a transcript of testimony at government expense; and to stay or recall a mandate.

Commentary: Subsection (1) and the first sentence of subsection (2) are taken verbatim from Kentucky's Supreme Court Rule 1.010 (c), substituting "Chief Judge" for "Chief Justice". The listing of particular matters is taken from Rules of U.S. Court of Appeals for the Sixth Circuit, Rule 3(d).

8. Written Opinions: (a) Written opinions. Orders and opinions of the Court of Appeals may be delivered orally but shall be reduced to writing in all cases and shall name all the judges who participate in the decision. Per curiam and memorandum decisions and orders shall be signed by the presiding judge; other opinions shall be signed by the author thereof. In all cases in which oral argument is held, the opinion shall state the date and city in which the oral argument took place, and shall also state the names of counsel together with the city where their offices are located.

(b) Publication. The Court of Appeals may recommend publication of those opinions which it deems to be of value as precedents in the development of the law. Opinions which are not published shall not be cited or otherwise used in unrelated cases in any court.

Commentary: KRS 21.135 simply required the old Court of Appeals to "deliver written opinions in all cases". In a court whose panels are rotating, it is important to identify all participants in a decision. The language used here is a variation of that found in Mich. Gen. Court Rule 821.

9. Disposition of Record: Upon the granting of a petition for review by the Supreme Court, the clerk of the Court of Appeals shall forward to the clerk of the Supreme Court all papers in the case on file in his office. After the time for timely application for review, or upon the denial of such application, the clerk of the Court of Appeals shall return the original record to the clerk of the court from which it was received.

Commentary: This rule assumes that the Supreme Court will review cases on the original record, rather than having the record sent back to the trial court and a copy made there for transmittal to the Supreme Court. It is based on Mich. Gen. Court Rule 812.11.

10. Support Personnel: The Court of Appeals may appoint law clerks and secretaries for each judge, and may appoint its staff attorneys and administrative assistants. No officer or employee of the Court of Appeals shall engage in the private practice of law during his employment by the Court of Appeals.

Commentary: Since the number of staff attorneys and administrative assistants may vary according to the budget and/or caseload of the court, it is felt that a flexible rule is needed. Therefore no specific number of attorneys and assistants is spelled out here. The second sentence is taken from Kentucky's Supreme Court Rule 1.030.

11. Temporary Judges: The total number of judges of the Court of Appeals shall not exceed ___ by virtue of temporary appointments under authority of Section 110(5)(b) of the Constitution, and such appointments shall be for no longer than ___ months.

Commentary: The limitation on the number of temporary judges who may be appointed is based on Mich. Gen. Court Rule 800.3.

The Michigan rule also provides that only one temporary judge may sit in any hearing. If it can be assumed that the appointees will be competent and experienced, then a numerical limit on their sitting on a panel might make it impossible for a panel to sit in cases where two regular judges were ill or snowbound or injured in an automobile accident.

12. Meeting of Judges: At least once each year, and as often in addition thereto as the Supreme Court, the Court of Appeals or its Chief Judge shall deem necessary, at times and places determined by them, the judges of the Court of Appeals shall meet to consider the promulgation and amendment of rules of practice and procedure before that Court, the improvement of the administration of the law, including operations of that Court and the transaction of any business which properly may come before it.

Commentary: This is taken verbatim from Mich. Gen. Court Rule 800.8. In the opinion of the Office of Judicial Planning, the members of the court will need to meet regularly to discuss their problems, but perhaps it is not necessary to spell this out by rule.

END