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## EXPEDITED APPEALS IN KENTUCKY

Susan Hanley Kosse and Kristen S. Miller\*

### I. INTRODUCTION

In 1985, the Kentucky Court of Appeals was struggling with a backlog of an estimated 1,000 appeals. In response, the Kentucky Supreme Court established the expedited appeals process.<sup>1</sup> The overall goals of this new process were:

(1) to continue to provide full appellate review for all cases which came to the Court; (2) to resolve cases in as short a time frame as possible without any sacrifice in the quality of review or fairness to the parties involved; (3) to promote a decrease in the amount of time to be spent by the attorneys in preparing their appeals and a commensurate decrease in costs to the litigants; and (4) to dispose of the growing backlog, which was assuming alarming proportions.<sup>2</sup>

The new program gave expedited treatment to appeals that involved relatively simple issues, did not require extensive transcription of the record, and were previously briefed in the court below. The special appeal procedure, outlined in Kentucky Civil Rule 76.05,<sup>3</sup> called for abbreviated pleadings and oral arguments before a special panel of judges.

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1. Rick Buchanan, *The Special Appeals Panel of the Court of Appeals of Kentucky*, 50 Ky. Bench & B. 29, 31 (Fall 1986).

2. *Id.* at 29.

3. Ky. R. Civ. P. 76.05 (repealed 2001) (reprinted in Kurt A. Phillips, Jr., *Kentucky Practice* vol. 7, 641-643 (5th ed., West 1995)).

However, effective February 1, 2001, the Kentucky Supreme Court repealed Civil Rule 76.05 in its entirety.<sup>4</sup> And, for the first time in recent memory, the backlog that was such a concern in the late eighties and early nineties was suddenly non-existent.

This Article will explore the original procedure set out by Civil Rule 76.05, and compare it to the method used now to advance appeals in Kentucky. This information will be useful in case the backlog ever returns and for comparison to other states.

## II. CASE SELECTION UNDER FORMER CIVIL RULE 76.05

Civil Rule 76.03 requires a prehearing statement to be filed in every civil case within twenty days of filing a notice of appeal.<sup>5</sup> Although nothing in Civil Rule 76.03 or Civil Rule 76.05 authorized requests for special appeals, the rules did not specifically prohibit a party from asking for a special appeal. Regardless of any request, the court granted expedited appeals after reviewing the prehearing statement. The staff reviewed the nature of the appeal to determine if it involved single or non-complex issues that could be resolved quickly without further briefing or record additions. Until 1986, the designation of a special appeal often occurred at the prehearing conference as a suggestion of the presiding judge or conference attorney or by agreement of the parties.<sup>6</sup> Thereafter, special appeals were designated by court of appeals staff after undergoing a screening process.

In 1991 and 1992, only ten percent of all appeals were submitted through the special appeals procedure.<sup>7</sup> Certain types of cases were deemed most appropriate for the expedited procedures. These included cases from the circuit courts that had been resolved on Rule 12 dismissals or Rule 56 summary judgments. Also appropriate were cases appealed to the circuit courts from administrative agencies. Those cases usually had

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4. *See In Re: Rules of Civil Procedure*, 65 Ky. Bench & B. 37, 37, 39 (Jan. 2001).

5. Ky. R. Civ. P. 76.03(4) (2002). Prior Civil Rule 76.14(3) required filing a prehearing statement within fourteen days of filing a notice of appeal. Civil Rule 76.14 was deleted on November 15, 1991.

6. *See* Ky. R. Civ. P. 76.05 author's cmt. (reprinted in Phillips, *supra* n. 3, at 643).

7. *Baldwin's Kentucky Practice* vol. 3, § 5.03, at 36 (West 1998).

been briefed and argued extensively in the administrative bodies from which they originated and before the circuit courts. Finally, certain domestic relations cases that already had transcribed records or were tried by deposition were candidates for expedited review. Expedited review was not appropriate for “jury trials, bench trials, custody hearings, or any other case in which untranscribed evidence [wa]s a factor.”<sup>8</sup> In addition, criminal cases were not included in this program because there was no document similar to a prehearing statement required in the criminal system.<sup>9</sup>

### III. ORDER AND RECORD

The order designating the case as a special appeal provided procedural directions and required all counsel within twenty days to file with the court:

- (i) A concise position statement of no more than three (3) pages in length setting forth the position and contentions of the party and including citations of authority in regard to the issues set forth in the prehearing statement;
- (ii) Any prehearing document (either the prehearing statement or the optional supplemental prehearing statement, whichever pertain[ed]) filed by the party pursuant to CR 76.03;
- (iii) A copy of the final judgment, findings of fact and conclusions of law, and any other orders, judgments, etc., incorporated by reference into the final judgment;
- (iv) Any memoranda and briefs pertaining to the issues on appeal filed by that party with the circuit court, district court, or administrative body.<sup>10</sup>

In addition, Rule 76.05 required that each party submit a cover letter containing a list of documents filed by that party with the court, as well as a certificate of service showing that the party provided opposing counsel with copies of the cover letter and the position statement.<sup>11</sup> These documents had to be filed

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8. Buchanan, *supra* n. 1, at 29.

9. Baldwin's *Kentucky Practice* vol. 3, *supra* n. 7, § 5.03, at 36.

10. Ky. R. Civ. P. 76.05(3)(B)(i–iv) (reprinted in Phillips, *supra* n. 3, at 642).

11. *Id.* at R. 76.05(3)(B)(v) (reprinted in Phillips, *supra* n. 3, at 642).

simultaneously by all counsel and no responsive filings were permitted.<sup>12</sup> Unless ordered by the court, no appellate briefs were filed.<sup>13</sup> Upon receipt of the documents, the clerk of the court of appeals notified the circuit court clerk to “prepare, certify, and forward the original record.”<sup>14</sup> The time limits for perfecting an appeal were suspended until a final disposition of the case.<sup>15</sup>

#### IV. ORAL ARGUMENT

After the required documents were received, the case was set for oral argument before the three-judge special appeals panel of the Kentucky Court of Appeals.<sup>16</sup> This panel heard only special appeals, and the same three judges sat on the panel together for six months at a time.

Oral arguments before this panel were much less formal than regular oral arguments. The presiding judge typically set out the facts and issues of the case and allowed each party to correct any misconceptions. Each party was allowed to present arguments and respond to questions with no time limit imposed. A normal special appeals oral presentation lasted twenty to thirty minutes.<sup>17</sup> The panel then took the case under consideration and a decision was announced by opinion usually within six to eight weeks from the date of the oral argument.<sup>18</sup>

Toward the end of Civil Rule 76.05’s reign, the court of appeals decided to disband the special appeals panel. Thereafter, all special appeals were assigned to regular judicial panels for review until the eventual demise of Civil Rule 76.05.

#### V. REACTIONS TO THE KENTUCKY SPECIAL APPEALS PROCESS

The Buchanan article, written a year and a half after the creation of the expedited appeals process, praised the new system. He noted that a regular appeal took approximately

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12. Buchanan, *supra* n. 1, at 30.

13. Ky. R. Civ. P. 76.05(D)(reprinted in Phillips, *supra* n. 3, at 643).

14. *Id.* at R. 76.05(C) (reprinted in Phillips, *supra* n. 3, at 642).

15. *Id.* at R. 76.05(A) (reprinted in Phillips, *supra* n. 3, at 642).

16. *Id.* at R. 76.05(D) (reprinted in Phillips, *supra* n. 3, at 642-643).

17. Buchanan, *supra* n. 1, at 30.

18. *Id.* at 31.

sixteen months compared to nine months for a special appeal. The benefits of the new system could also be quantified by the backlog reduction of nearly 500 cases.<sup>19</sup> He argued that the positive response from the bar and the benefits including “greater savings in time and money spent within the court system, less work and preparation time for the attorneys, and, ultimately, a commensurate decrease in expense to the litigants and to the taxpayer” justified its continuance.<sup>20</sup> But still, just years later, it was repealed. Why?

There does not seem to be one specific event that caused the death of Civil Rule 76.05, but there are several theories. First, the procedure demanded by Civil Rule 76.05 was very labor intensive. Since attorneys were only required to submit abbreviated written pleadings and participate in informal oral arguments, the judges of the special appeal panel had to rely heavily on the circuit court record. This meant the presiding judge of the panel and his or her staff had to put in long hours sifting through the record to determine which parts were necessary for the adjudication of the appeal. Then they were responsible for preparing and copying the entire record in each case for distribution to the other judges on the panel.

Indeed, the procedure was laborious for the entire panel of judges selected to hear the appeals. The three judges on the special panel sat for six months at a time instead of changing panels each month as the other court of appeals judges did. Further, the design of the special appeals panel called for the judges to hear twice as many cases as the other appeals judges. The confluence of these factors made it difficult to find judges willing to sit on the special panel.

Eventually, the court did away with the special panel and began sending the appeals out to the regular judicial panels to alleviate this problem. However, this option also proved unsuccessful, because sending the cases to regular panels took the speed out of the procedure. And since the appeals that were chosen for advancement were often limited to simple, single-issue appeals, judges found themselves reluctantly vacillating

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19. *Id.*

20. *Id.*

between lengthy, in-depth case review and speedy decisionmaking.

Maybe most importantly, the system created by Civil Rule 76.05 became too formal and lost its effectiveness. As time wore on, the previously informal oral arguments became formal, but were still based on limited, three-page position statements. There was not enough information provided to the panel, and the discussions lost their almost mediation-like feel. In the end, the procedure that seemed clear and self-explanatory simply became unworkable, and it was completely repealed.

## VI. TODAY'S SYSTEM<sup>21</sup>

One would assume that the procedure developed to take the place of Civil Rule 76.05 would be even simpler, and in truth, it is. After all, the new expedited appeals procedure in Kentucky is no procedure at all. That is right—there is currently no written procedure for the advancement of appeals in the state of Kentucky.

Today, the clerk of the Kentucky Court of Appeals is in charge of the entire advancement process. When an appeal—including all briefs and the full record—is sent to the court, the clerk screens it and determines whether it is eligible to be advanced. The screening is wholly objective; cases are advanced as a matter of court policy purely on the basis of the issue involved.

The following are the only issues that will trigger advancement:

- Criminal appeals in which the Commonwealth of Kentucky is the appellant
- Domestic civil cases involving a change of custody or visitation and termination of parental rights
- Adoption cases

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21. Information in this section was provided by George Fowler, Chief Staff Attorney of the Kentucky Court of Appeals and George Geoghegan, Clerk of the Kentucky Court of Appeals. *See* Telephone Interview with George Fowler, Chief Staff Atty., Ky. Ct. App. (Nov. 15, 2001) (notes on file with authors); Telephone Interview with George Geoghegan, Clerk, Ky. Ct. App. (Dec. 26, 2001) (notes on file with authors).

When a case dealing with one of these issues is advanced, it is marked with a special notation both on the actual file itself and the case information sheets included with the file. The case is then sent out to a regular judicial panel with the rest of that panel's cases, leaving the presiding judge with the responsibility of making sure the case is given preferential treatment and reviewed quickly.

There are also certain other appeals that are automatically advanced by law before even reaching the court clerk's desk. These include:

- Appeal of a habeas corpus proceeding, advanced by Kentucky Revised Statutes section 419.130(1)
- Appeal of a decision on a motion to change conditions of pre-trial bail, advanced by Kentucky Rule of Criminal Procedure 4.43 (1)(a)
- Appeal from the denial of a motion for leave to proceed in forma pauperis, advanced by Kentucky Rule of Civil Procedure 5.05
- Appeal of a decision in an election contest, advanced by Kentucky Revised Statutes section 120.075
- Motion to set aside a decision determining the qualifications of a candidate for election, advanced by Kentucky Revised Statutes section 118.176
- Appeal of a decision in an abortion case, advanced by Kentucky Revised Statutes section 311.732(5)
- Motions for interlocutory and emergency relief under Kentucky Rules of Civil Procedure 65.07 and 65.08

Whether the matter is screened and advanced as a matter of court policy or advanced as a matter of Kentucky law, no special filing fee is required.

A party may also make a motion to advance his or her appeal, but ironically, this strategy could actually delay the resolution of the case. A motion to advance effectively stops the forward progression of a case in the appeals process and puts it "on hold" until the court's special motion panel can review it and decide whether it should be advanced. If the motion to advance is denied, the case returns to the point in the process from which it came, but even if the motion is granted, the case

has already been delayed several weeks while being considered by the motion panel.

### VII. DOES IT WORK?

Surprisingly, the “un-process” is working, but it may be only a temporary fix. Kentucky has had no need for a full, written advancement policy because for the first time in anyone’s memory, the Kentucky Court of Appeals is caught up on its caseload. This means that when cases come in to the court’s office, they no longer have to wait to be assigned to a panel. Instead, the cases are immediately assigned and distributed to the judges, thus allowing for a rapid review and issuance of a ruling on whether a case is advanced.

There is no accepted explanation for the sudden disappearance of the case backlog. Some attribute it to the hard work of the court of appeals staff and judges; others say the Civil Rule 76.05 process proved so effective that many small issues were either decided quickly or settled outright. Still others point to a general decrease in filed appeals, especially in the worker’s compensation arena. Whatever the reason, it raises a legitimate concern. If the number of filings increases as suddenly as it dropped off, will the “un-process” become unworkable?

The current clerk of the court of appeals says no. He believes that since the screening process is so objective and does not involve parsing through cases to search for pre-determined criteria, the number of cases filed should not affect the advancement process. If the caseload grows too large, he says the solution would be to hire an assistant, not overhaul the advancement procedure altogether.<sup>22</sup>

### VIII. CONCLUSION

In conclusion, it seems as though Kentucky’s expedited appeals process is effective, at least as long as the court is “caught up.” But flaws in the process remain. The current decrease in filings with the court was relatively sudden and

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22. Geoghegan interview, *supra* n. 21.

unexplained; it would be reasonable to assume that a similar increase could occur, including an increase in cases with the potential to be advanced. Even if, as Mr. Geoghegan points out, adding an assistant would alleviate any backlog of cases to be advanced, this does not ensure that the cases will be swiftly handled once they are sent out to members of the judicial panels. For example, if a panel were to be assigned ten advanced appeals in any given month, one of those appeals has to be the tenth and final appeal to be reviewed, taking the urgency out of the process for not all, but some advanced appeals.

Further, an argument can be made for the expansion of the criteria for advancement. The court's policy currently provides for advancement in only three limited areas. With the variety of issues that comes before the court, there are surely other issues that might merit urgent attention, such as criminal appeals where the defendant's conviction is in question (i.e., post-conviction collateral attack for ineffective assistance of counsel), and he or she has not been released on bail pending appeal.

As long as the un-process continues to meet the needs of Kentucky's citizens, it is a satisfactory one. But the court will have to remain responsive, as it has shown itself to be, if the needs of the citizenry begin to change.

