New Developments and Old Problems in Appellate Practice

The Appellate Practice Section welcomes this opportunity to provide members of the Louisville Bar Association with information that will help them preserve their clients' rights on appeal. This article is devoted to a discussion of the new amendments to the Civil Rules and to the problems that may arise when attorneys do not receive notice from the clerk that a dispositive ruling has been entered in a pending action.

The New Rules

by Russell H. Saunders

Effective February 1, 2001, the Supreme Court of Kentucky adopted amendments to the Rules of Civil Procedure. Many of these amendments pertain to appellate practice and practitioners should be mindful of their existence in all cases in which they have appeals pending. There were some deletions and, as you shall see, some significant changes.

CR 73.02(1)(b) still specifies that the filing fee must be paid at the time of tendering the notice of appeal to the clerk in routine cases, but now the Rule incorporates procedures to be used in appeals being pursued in forma pauperis. For such appeals, a motion to proceed in forma pauperis to the circuit court and a supporting affidavit are tendered to the clerk at the time of tendering the notice of appeal. The notice of appeal is then held by the clerk pending a ruling on the motion. If the motion is sustained, the notice of appeal is filed upon the relief being granted. If the motion is denied, the party has the option of paying the filing fee within ten days of the ruling denying relief or taking an appeal to the Court of Appeals from the adverse decision. Subsequent steps in the appeal are timed from the date of filing the notice of appeal.

The "special appeals" procedure has been deleted in its entirety from the amended rules. See CR 76.05. In addition, it is no longer necessary to state in a party's prehearing statement whether the appeal should proceed as a special appeal. See CR 76.03(4)(1).

One major amendment to the Rules concerns the time for filing briefs on appeal. Formerly, the time for filing was governed by whether the appeal was a video appeal, in which CR 98 applied, or not, in which case, the time for filing was governed by former CR 76.12(2)(a). Now the timing for filing all briefs is governed by amended CR 76.12(2)(a) for civil appeals and CR 76.12(2)(b) for criminal appeals.

In civil cases, the briefing schedule for appellants is sixty days from the date of notation on the docket of the notification required by CR 75.07(6). Appellees also have sixty days from the date of filing of the appellant's brief. The time for filing a reply brief remains unchanged at fifteen days from the filing of the last appellee's brief.

Criminal cases follow essentially the same schedule, but with different triggering mechanisms for briefing in certain cases. Individual practitioners would be wise to review the nature of their engagement in each case since that determines the event that commences the briefing schedule. Amended CR 76.12(2)(b) sets forth the specifics, but generally the triggering event in certain cases is the date on which the record on appeal was received by the clerk of the appellate court.

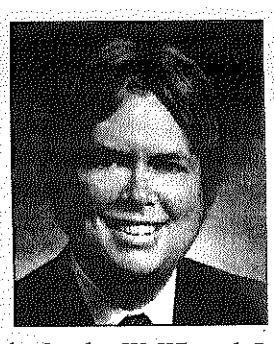
As amended, CR 76.12(4) has a new format and retains many former requirements pertaining to printed and typewritten briefs. Typewritten briefs now must be typed in print no smaller than 12 point set at standard width. As before, printed briefs must be in print no smaller than 11 point. The required color for the brief covers is unchanged. Official forms 24 and 25 now set forth what information must appear on the brief cover, as well as specify the content of the certificate of service.

The new Civil Rules pertaining to the physical format of the various briefs is essentially unchanged with some notable exceptions. Now all parties are required to include a "Statement Concerning Oral Argument" before the statement of points and authorities, and this rule should be read in tandem with amended CR 76.16(1). The purpose of the new rule is to assist the appellate courts in determining whether oral arguments would be beneficial. See CR 76.12(c)(ii), (d)(ii). In addition, reply briefs must now contain a statement of points of authorities. There shall also be a statement of relief sought and, if desired, an appellant may include an appendix or index as is permitted for other types of briefs.

The time for responding to motions for discretionary review has been increased from twenty days in the former rule to thirty days under the amended CR 76.20(5).

One significant change concerns the contents of records on appeal in cases arising under CR 98. The introductory language to CR 98(3) mandates a proper designation of the official videotape recordings in accordance with CR 75.01. Practitioners should be particularly mindful of this requirement. Under former practice, when court reporters were in regular use to record and transcribe court proceedings, a whole body of cases came down addressing the sufficiency of designations of proceedings mechanically or stenographically recorded, and appeals were dismissed because of designations that were found to be deficient. Obviously, there are no cases as yet construing this amended rule; however, caution would be advised and steps should be taken to make sure that designations are accurate and complete.

CR 77.04: The Harshest Rule



by Stanley W. Whetzel, Jr.

Although certainly there are other civil rules that can vex and trouble litigators, CR 77.04 and its constituent subrules surpasses them all as a trap and potential cause of malpractice. The Kentucky Supreme Court has adopted a policy of "substantial compliance" in the rules governing appeals, but the requirement of a timely filing of a notice of appeal remains unchanged. *Stewart v. Kentucky Lottery Corp.*, Ky. App., 986 S.W.2d 918, 921 (1998), *citing Johnson v. Smith*, Ky., 885 S.W.2d 944 (1994). CR 73.02(1)(a) provides simply: "The notice of appeal shall be filed within thirty days after the date of notation of service of the judgment or order under CR 77.04(2)." Because substantial compliance does not apply to tardy notices of appeal, and CR 77.04(4) explicitly denies any safe harbor to parties who fail to learn of the entry of a judgment or order, counsel must keep close watch on the court's docket lest, unknown to them a judgment is entered and the time for appeal expires.

The genesis of this article lies in casual conversations with attorneys who, increasingly it seems, report **not** receiving the clerk's CR 77.04(1) mailed notice of the entry of an order or judgment under CR 77.04(2). Here's one recent anecdote: A lawyer filed timely objections to the commissioner's findings only to open his mail a few days later and discover opposing counsel's postjudgment motion for attorney fees. A hasty visit to the clerk's office revealed that the court had granted opposing counsel's motion for judgment before the response time expired. However, the docket properly reflected the clerk's entry of the judgment and mailing of notice of entry in compliance with CR 77.04(1) and (2). Fortunately for the lawyer in my anecdote, opposing counsel's fees motion arrived on the eighth day following the clerk's entry of judgment, and he was able to move in a timely manner to alter, amend, or vacate the judgment.

But what if opposing counsel had waited thirty days before making his post-judgment motion? CR 77.04(4) reads in part ". . . the failure of the clerk to serve such notice, or the failure of a party to receive notice, shall not affect the validity of the judgment or order, and does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in CR 73.02(1). We know that CR 73.02 pertains to notices of appeal. Turning to that Rule, we find little help available.

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True, CR 73.02(1)(d) allows a court to exercise discretion to extend the time for appeal up to ten days "upon a showing of excusable neglect based on the 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." However, ten days after the clerk notes entry of the judgment on the docket, if no CR 59 or similar motion has been filed, the court loses control of the judgment. It then can no longer modify or vacate the judgment. Counsel's only remaining recourse would be to plead "excusable neglect" and seek leave to appeal. But counsel will find no help in CR 77.04's simple and direct instructions to the courts and their clerks.

CR 77.04 contains five subsections or subrules that apply only to the district and circuit courts. CR 77.04(5). This article is concerned only with subsections (1), (2), and (4). With exceptions only for parties waiving notice, and those in default for failure to appear, subsection (1) requires the clerk "Immediately" to serve all parties with notice of the entry of a judgment, final order, an order affecting the running of time for an appeal, or an order that must by its terms be served. Thus parsed, CR 77.04(1) reads:

> Immediately upon the entry in the trial court of a judgment, a final order, an order which affects the running of time for taking an appeal, or an order which by its terms is required to be served, the clerk shall serve a notice of the entry by mail ... upon every party ... .

Subsection (2) declares that the date of the clerk's notation of entry on the docket (or the filing of a waiver if earlier) "... shall be the date of entry for the purpose of fixing the running of time for appeal under CR 73.02(1)." Parsed accordingly, CR 77.04(2) says that

> The clerk shall ... note in the case docket ... the service required in paragraph (1) and ... the date of service. The date of the notation on the docket ... shall be the date of entry for ... fixing the running of ... time for appeal under CR 73.02(1).

But the clear and mandatory directives of CR 77.04(1) and (2) are of no avail to the party that does not receive the required notice. The full text of subsection (4) reads:

> **Failure of the trial court to require service** of notice of entry of any judgment or order under this rule **or the failure of the clerk to serve such notice, or the failure of a party to receive notice, shall not affect the validity of the judgment or order, and does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed,** except as permitted in CR 73.02(1).

Id. (Emphasis supplied.)

The Court of Appeals recently enforced "the harsh dictates o CR 77.04(4)" in *Stewart v. Kentucky Lottery Corp.*, Ky. App, 986 S.W.2d 918 (1998) The problem in *Stewart* was that neither the plaintiff Stewart nor the defendant Lottery received a copy of the trial court's order denying Stewart's motion for reconsideration of summary judgment for the Lottery. Months later Stewart learned that his motion had been denied. The trial court denied Stewart relief under CR 60 and he appealed. The Lottery moved to dismiss his appeal as untimely.

Stewart argued that his appeal should not be dismissed because neither party had received notice of entry of the order denying reconsideration. Citing a line of cases in support of its decision, the Court of Appeals rejected Stewart's notice argument:

> **True enough, apparently neither party received notice of entry of the order denying the motion to reconsider. Nevertheless, CR 77.04(4) plainly states that the clerk's failure to serve notice or a party's failure to receive notice does not affect the time for taking an appeal.** The Rule further provides that a trial court is not authorized to grant an extension of time for filing a notice of appeal for any period beyond ten days past the expiration of the time for taking an appeal.

Id. (citations omitted; emphasis supplied.) The Court of Appeals explained, "We are not unsympathetic to [Stewart's] plight ..." but "CR 77.04(4) permits but one interpretation and has been consistently applied in conformity with that interpretation both by this court and by the Supreme Court. To refuse to apply the rule in the instant action, therefore, would ignore the plain meaning of the rule and existing precedent which we are required to follow." *Id.* at 920.

For all practical purposes, the duties imposed upon the court and the clerk by CR 77.04 afford parties and their counsel no rights and no safe harbor. A retired judge of the Court of Appeals once said to me that the Rule in effect requires "every lawyer to go to the courthouse every day and check the docket in every one of his cases." Of course, nothing of the sort is done. The clerk's office would be overwhelmed if on any given day, 10% of Jefferson County litigants attempted to check the docket. What, then is to be done?

By the time this article sees print, the "kycourts" internet technology initiative of the Administrative Office of the Courts and the Kentucky Circuit Court Clerks will have been presented to the Kentucky Supreme Court by the joint AOC/KCCC technology committee. According to an AOC member of the technology committee, if approved by the Supreme Court, the "kycourts" protocol will allow lawyers, among others, to visit the courthouse via the internet at *www.dockets.kycourts.net* and check the dockets (at no cost!) for judgments and orders in their cases. Perhaps "kycourts" will not prove to be a panacea. But given the "harsh dictates of CR 77.04(4)" and cases like *Stewart v. Kentucky Lottery Corp.*, we can only hope that the "kycourts" initiative will be swiftly implemented.

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The copy deadline for the June issue of Bar Briefs is May 1.