I. 2006 PROPOSED AMENDMENTS TO THE KENTUCKY RULES OF EVIDENCE

A. KRE 103 Rulings on evidence

The proposed amendments to subsections (1) and (2) of section (a) of KRE 103 are:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, [and upon request of the court] stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, [upon request of the examining attorney, the witness may make a specific offer of his answer to the question] the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Motions in limine. A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. The court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial. A motion in limine resolved by order of record is sufficient to preserve error for appellate review. Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine.

(e) Palpable error. A palpable error in applying the Kentucky Rules of Evidence which affects the substantial rights of a party may be considered by a trial court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Evidence Rules Review Commission Notes (2007)

The 2007 amendment to this provision of the Rules makes two changes in the original (1992) rules on preserving errors for review. Both of the changes are in the first subsection of the provision (KRE 103(a)). None of the other subsections are affected by the 2007 amendment.

The first of the changes involves the requirement that a party make "specific" rather than "general" objections when the party desires exclusion of offered evidence. Under the 1992 version of this rule, a party was required to give grounds for objection only when requested to do so by the trial court; under the 2007 amendment, a party is required to state grounds for an objection in order to preserve error for review (and not just when requested to do so by the court) unless the ground for the objection was apparent from the context. The reasons for making this change include all of the following:

(1) One of the reasons for requiring specific objections is to impose on lawyers an obligation to assist the trial judge with difficult issues of evidence law so that the judge may rule intelligently and quickly on those issues. This policy is sufficiently sound to require a statement of grounds in all instances and not merely upon request by the court.

(2) The amendment brings KRE 103(a)(1) into alignment with FRE 103(a)(1). Uniformity with the Federal Rules has been consistently pursued by drafters of the Kentucky Rules and would be advanced by this amendment.

(3) The amendment would bring Kentucky law into alignment with the prevailing if not universal rule of other states and would bring the law into alignment with a proposal made by the drafters of the 1992 version of the Kentucky Rules. See Study Committee, Kentucky Rules of Evidence, Final Draft, pp. 2-4 (Nov. 1989).

The second of the changes involves the requirement that a party made a "proper offer" of proof in order to preserve error when offered evidence is excluded by the trial judge. Under the 1992 version of this rule, lawyers were required to use witnesses when making a record of evidence ruled inadmissible by the judge; the rule left no room for what is known widely as a "proffer" of evidence (i.e., where the lawyer states for the record what the witness would have said if allowed to testify). Under the 2007 amendment, lawyers are required to make the substance of excluded testimony "known to the court by offer" but are not required to do so through testimony of witnesses (thereby opening the door to the use of "proffers" of evidence). The reasons for this change include all of the following:

(1) It is more efficient and less burdensome to allow the lawyers to state for the record what a witness would say in testimony if permitted (using the "proffer")

and should in some instances enhance the fluidity of the production of evidence, all without imposing any burden on the opposing party or on the affected courts (trial and appeal).

(2) The amendment brings KRE 103(a)(2) into alignment with FRE 103(a)(2), brings Kentucky's law into alignment with the law of most if not all other states, and adopts a position first advanced by the original drafters of Kentucky's Rules of Evidence. See Study Committee, Kentucky Rules of Evidence, Final Draft, pp. 2-3 (Nov. 1989).

(3) The amendment also serves to eliminate an ambiguity in KRE 103 because of the inconsistency of saying on the one hand that an offer of excluded evidence must come from the witness (as in the original version of KRE 103(a)(2)) but then saying on the other hand that the trial judge "may direct the making of an offer in question and answer form" (as has always been stated in KRE 103(b)).

B. KRE 404 Character evidence and evidence of other crimes

The proposed amendments to subsection (1) of section (a) of KRE 404 are:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character or of general moral character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of victim generally. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, other than in a prosecution for criminal sexual conduct, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witnesses. Evidence of the character of witnesses, as provided in KRE 607, KRE 608, and KRE 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

(c) Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

Evidence Rules Review Commission Notes (2007)

The 2007 amendment to this rule makes a change with respect to the admissibility of evidence of the character of an accused (as provided in subsection (a)(1) of the provision) and leaves all of the other provisions of the rule unchanged.

The change expands the circumstances under which the prosecution is permitted to prove a defendant's character to show the commission of a criminal act. Under the 1992 version of this rule, the prosecution could not introduce evidence of a defendant's character except in rebuttal of character evidence first offered by the defendant (i.e., the defendant's character was not in issue until he had put it in issue). The change opens the door for the prosecution to prove the bad character of a defendant after the defense has attacked the character of the victim (although keeping his own character out of the issues of the case).

The drafters of the Federal Rules made this same change in year 2000 and offered the following explanation for doing so:

> "The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent disposition, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. . . . Thus, the amendment is designed to permit a more balanced

presentation of character evidence when an accused chooses to attack the character of the alleged victim." See Fed.R.Evid. 404, Advisory Committee Notes, 2000 Amendment.

Needless to say, the 2007 amendment to the Kentucky Rules serves to bring KRE 404(a)(1) into full alignment with its counterpart in the Federal Rules.

It needs to be noted, as stated in the commentary to the Federal Rules that "the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609." See Fed.R.Evid. 404, Advisory Committee Notes, 2000 Amendment.

C. KRE 410 Inadmissibility of pleas, plea discussions, and related statements

The proposed amendments to sections (2), (4)(A) and (B) and new paragraph of KRE 410 are:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;

(2) A plea of nolo contendere in a jurisdiction accepting such pleas[, and a plea under Alford v. North Carolina, 394 U.S. 956 (1969)];

(3) Any statement made in the course of formal plea proceedings, under either state procedures or Rule 11 of the Federal Rules of Criminal Procedure, regarding either of the foregoing pleas; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. [However, such a statement is admissible:

(A) In any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it; or

(B) In a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.]

<u>However, such a plea or statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has</u>

been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Evidence Rules Review Commission Notes (2007)

The overall purpose of KRE 410 is to bar the use of certain pleas and plea discussions when later offered into evidence in a civil or criminal trial. The 2007 amendment to this provision of the Rules makes two changes. The first change is minor but substantive and the second is solely for the purpose of correcting an error made in the original enactment of the Rules.

The first change is to eliminate some language that was unwisely added to the rule during the course of its original enactment, specifically the language prohibiting the use of "a plea under Alford v. North Carolina, 394 U.S. 956 (1969)." (A so-called "Alford plea" is a guilty plea by a criminal defendant who refuses to acknowledge guilt but waives trial and accepts all the consequences of a conviction.) This added language created a question as to whether prior convictions based on "Alford pleas" might be introduced as evidence (for impeachment purposes or to prove persistent felony offender status), which the Supreme Court has resolved in favor of admissibility. See Pettiway v. Commonwealth, 860 S.W.2d 766 (Ky. 1993). The proposed change eliminates language from the rule that serves no useful purpose and simultaneously brings the Kentucky provision into alignment with its federal counterpart.

The second change is designed to correct an error that was made upon the original enactment of the Rules. By mistake, the last sentence of the provision (beginning with the words "However, such a statement is admissible:" and ending with the words "in the presence of counsel.") has been published as an exception applicable only to subsection (4) of the rule when it was intended by drafters, the Supreme Court, and the General Assembly to be an exception applicable to all of the subsections of the rule. See Study Committee, Kentucky Rules of Evidence, Final Draft, p. 33 (Nov. 1989). The proposed change modifies the rule as needed to accomplish its original objective, while simultaneously achieving uniformity between the Kentucky and Federal Rules on this point.

D. KRE 701 Opinion testimony by lay witnesses

The proposed amendments to sections (a), (b) and new section (c) to KRE 701 are:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

(a) Rationally based on the perception of the witness[; and],

(b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue[.] , and

(c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Evidence Rules Review Commission Notes (2007)

With the adoption by the Kentucky Supreme Court of the analysis required by the decision in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), there was a risk that courts could be asked to avoid the reliability standards set out in that case by the simple process of offering "scientific, technical, or other specialized knowledge" evidence through a witness that an attorney sought to identify as a "lay witness." The Federal Rules of Evidence, Rule 701, avoided this error, by specifically adding language that excludes such evidence from the operation of Rule 701. The addition of subsection (c) to Kentucky Rule of Evidence, Rule 702, follows the exact language of the Federal Rule amendment. This subsection requires that an attempt to introduce testimony that is a part of "scientific, technical, or other specialized knowledge," must be tested for reliability under Rule 702.

The amendments to Rules 701 and 702 must be read together. The introduction and reliability of the evidence is determined not by asking whether the *witness* is lay or "expert, but, instead, by asking whether the *testimony* to be offered is lay or "scientific, technical, or other specialized knowledge." If it is of the former, then Rule 701 is applicable. If it is of the latter, then Rule 702 must be used.

E. KRE 702 Testimony by experts

The proposed amendments to KRE 702 are:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise[.], if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Evidence Rules Review Commission Notes (2007)

When the Kentucky Rules of Evidence were adopted in 1992, Ky. Rule 702 used the same language as Federal Rule of Evidence 702. In addition, the Kentucky Rule was interpreted to follow the traditional rule of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The "Frye Test" would allow admission of scientific evidence if it was generally accepted in the scientific community.

The United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) overruled the "Frye Test" and interpreted Federal Rule of Evidence 702 to require an analysis of factors by the trial judge in order to determine whether the scientific evidence was admissible. In order to admit such evidence the trial court was to act as a "gatekeeper" and make a preliminary determination that the underlying science was, in fact, "valid." In Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), the "Daubert Test" was extended to cover not only "scientific" evidence, but also any evidence of "scientific, technical, or other specialized knowledge."

In 2000, Rule 702 of the Federal Rules of Evidence was amended in order to codify the approach taken in Daubert. The items listed as numbers (1), (2), and (3) are not intended to specifically state the factors found in Daubert and Kumho Tire. They are, instead, intended to indicate that the court is to determine the reliability of such evidence based upon the flexible factors suggested by such cases. Although there is no attempt to codify the specific factors from that case, the purpose of the amendment is clearly stated by the Federal Advisory Committee Notes to that amendment.

> No attempt has been made to "codify" these specific factors. Daubert itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific Daubert factors can apply to every type of expert testimony. . . . The standards set forth in the amendment are broad enough to require consideration of any or all of the specific Daubert factors where appropriate.

In 1995, the Kentucky Supreme Court followed the lead of the United States Supreme Court and adopted the rationale of the Daubert decision as the appropriate interpretation of the language of Rule 702. Mitchell v. Commonwealth, 908 S.W.2d 100 (Ky. 1995). In 2004, the Kentucky Supreme Court restated the flexible standard originally espoused in Daubert in Toyota Motor Corp. v. Gregory, 136 S.W.3d 35 (Ky. 2004).

The 2007 amendment to Kentucky Rule of Evidence, Rule 702 is designed to follow the development and adopts exact language set by the Federal Rules. The amendment will codify the approach taken in the Daubert case, followed in the Toyota Motor Corp. case and allow the trial court to act as gatekeeper to the introduction of "scientific, technical, or other specialized knowledge." The amendment does not

specifically require the use of all or any one of the factors suggested by the court. It allows the trial court to use those factors that are appropriate to the case at trial.

F. KRE 1103 Evidence Rules Review Commission

The proposed amendments to section (a) of KRE 1103 are:

(a) The Chief Justice of the Supreme Court or a designated justice shall serve as chairman of a permanent Evidence Rules Review Commission which shall consist of the Chief Justice or a designated justice, one (1) additional member of the judiciary appointed by the Chief Justice, the chairman of the Senate Judiciary Committee, the chairman of the House Judiciary Committee, a member of the Board of Governors of the Kentucky Bar Association appointed by the President of the Kentucky Bar Association, and five (5) additional members of the Kentucky bar appointed to four (4) year terms by the Chief Justice.

(b) The Evidence Rules Review Commission shall meet at the call of the Chief Justice or a designated justice for the purpose of reviewing proposals for amendment or addition to the Kentucky Rules of Evidence, as requested by the Supreme Court or General Assembly pursuant to KRE 1102. The Commission shall act promptly to assist the Supreme Court or General Assembly and shall perform its review function in furtherance of the ideals and objectives described in KRE 102.

Evidence Rules Review Commission Notes.

The amendment is self-explanatory. It was proposed by the Board of Governors of the Kentucky Bar Association and is unanimously recommended by the members of the Commission. Its only down side is the lack of continuity with respect to the new member. The committee normally considers rule changes over a period of two-to-three years before making a recommendation to the Court. The representative of the Board would not be appointed for, e.g., a four-year term, but would serve at the pleasure of the KBA President. However, there is always the possibility of changes in membership due to retirement, resignation, death, etc., so perfect continuity can never be achieved.

II. 2006 PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE

A. CR 3.02 (2) Circuit civil fees and costs

The proposed amendments to section (2) of CR 3.02 are:

(2) Additional costs, payable to the circuit clerk at the time the service is requested, shall be charged in Circuit Court civil cases as follows:

(a)	For a jury of six persons	$15.00
(b)	For a jury of more than six	$30.00
(c)	Filing a third party complaint	$20.00
(d)	Preparing a certification, including Act of Congress	$ 5.00
(e)	Providing a copy of a document (per page)	$ .25 [.15]
(f)	Providing a copy of a video[-tape (per tape)] recording (per individual tape, disk or other media)	$15.00
(g)	Providing a copy of an audio[-tape (per tape)] recording (per individual tape, disk or other media)	$ 5.00
(h)	Issuing orders of attachment; executions, writ of possession after judgment	$10.00
(i)	Issuing garnishments	$ 4.00
(j)	Publishing a notice	As set by Newspaper
(k)	Certified mail fees	As set by Postal Service
(l)	Original deposition, including appearance fees and mileage	Assessed as Costs
(m)	Library fees	As set by KRS 172.180 and KRS 453.060

B. CR 3.03 (3) District civil fees and costs

The proposed amendments to section (3) of CR 3.03 are:

(3) Additional costs, payable to the circuit clerk at the time the service is requested, shall be charged in District Court civil cases as follows:

(a)	For a jury of six persons including paternity cases	$15.00
(b)	Filing a third party complaint	$20.00
(c)	Preparing a certification, including Act of Congress	$ 5.00
(d)	Providing a copy of a document (per page)	$ .25 [.15]
(e)	Providing a copy of a video[-tape (per tape)] recording (per individual tape, disk or other media)	$15.00
(f)	Providing a copy of an audio[tape (per tape)] recording (per individual tape, disk or other media)	$ 5.00

(g)	Issuing orders of attachment; executions, writ of possession after judgment	$10.00
(h)	Issuing garnishments	$ 4.00
(i)	Publishing a notice	As set by Newspaper
(j)	Certified mail fees	As set by Postal Service
(k)	Original deposition, including appearance fees and mileage	Assessed as Costs
(l)	Library fees	As set by KRS 172.180 and KRS 453.060

C. CR 8.01(2) Claims for relief

The proposed amendments to section (2) of CR 8.01 are:

(2) In any action for unliquidated damages the prayer for damages in any pleading shall not recite any sum as alleged damages other than an allegation that damages are in excess of any minimum dollar amount necessary to establish the jurisdiction of the court; provided, however, that all parties shall have the right to advise the trier of fact as to what amounts are fair and reasonable as shown by the evidence. When a claim is made against a party for unliquidated damages, that party may obtain information as to the amount claimed by interrogatories; [if this is done, the amount claimed shall not exceed the last amount stated in answer to interrogatories;] provided, however, that the party claiming damages at trial may amend the amount claimed for unliquidated damages at the close of all the evidence to be presented in the instructions. No party shall be allowed to put into evidence any reference to stated amounts for unliquidated damages as stated in answers to interrogatories.

D. CR 10.01 Caption; names of parties – personal data identifiers

The proposed amendments to CR 10.01 are:

(1) Every pleading shall have a caption setting forth the name of the court, the style of the action, the file number, and a designation as in Rule 7.01. In the complaint the style of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(2) Excepting matters which are otherwise deemed confidential by rule or statue, no pleading, document or exhibit filed with the court in a civil case shall contain personal data identifiers or sensitive information which could be used in the theft of identity. If sensitive information must be included, the following personal identifiers shall be partially redacted from the document by the attorney or party preparing, unless otherwise indicated by leave of court:

(a) Social Security Numbers. If an individual's social security number must be included in a document, only the last four digits of that number shall be used.

(b) Names of Minor Children. If the involvement of a minor child must be mentioned, only the initials of that child shall be used.

(c) Dates of Birth. If an individual's date of birth must be included in a document, only the year shall be used.

(d) Financial Account Numbers. If financial account numbers are relevant, only the last four digits of these numbers shall be used.

(3) A party filing any civil document, pleading or exhibit containing any of the personal identifiers specified above shall file the unredacted copy under seal. This sealed copy shall be retained by the court as part of the record. When an unredacted copy is filed under seal the party shall also file a redacted copy for the public record. Any personal information not otherwise protected may be made available to the public.

(4) It is the sole responsibility of the counsel and the parties to ensure that all pleadings and other papers comply with the rules of this court requiring redaction of personal data identifiers. The clerk will not review each document for redaction.

(5) Counsel or parties failing to comply will be subject to the sanction powers of the court, including having relevant documents stricken from the record in their entirety.

E. CR 25.01(1) Death

The proposed amendments to section (1) of CR 25.01 are:

(1) If a party dies during the pendency of an action and the claim is not thereby extinguished, the court, within the period allowed by law, may order substitution of the proper parties. If substitution is not so made the action may be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party, and, together with the notice of hearing, shall be served on the parties as provided in Rule 5, and upon persons not parties as provided in Rule 4 for the service of summons. Upon becoming aware of their client's death, the attorney(s) of record for the deceased party, as soon as practicable, shall cause the death to be noted on the record by service of a statement of the fact of the death as provided herein for service of the motion for substitution.

F. CR 30.02 (4) Notice of examination: general requirements; special notice; nonstenographic recording; production of documents and things; deposition of organization

The proposed amendments to section (4) of CR 30.02 are:

(4) Video[taped] recorded depositions may be taken in pending actions and shall be taxed as costs. Notice to take depositions shall be in accordance with the Rules of Civil Procedure. At the deposition the video[tape] record[er]ing equipment shall be operated by a person qualified to operate such recording equipment, who is to mark the recording with the style and number of the action and the name of the witness and to file a certificate which identifies the said recording.

Video recorded depositions shall be taken under the following conditions:

(a) The party noticing the deposition shall provide the operator with a copy of this rule. At the beginning of the [taping] recording of the deposition, the operator of the video [camera] recording equipment will focus on each attorney, party and witness present at the taking of the disposition, and such person shall be identified; or the operator may read a statement introducing by name parties to the litigation and the attorneys present without focusing on each person, at the election of the noticing party.

(b) The [camera will] video recording equipment will remain stationary at all times during the deposition and will not "zoom" in or out on the witness excepting those times during the deposition when the witness is displaying, for the jury's viewing, exhibits or other pieces of demonstrative proof that can only be fairly and reasonably seen on the video[tape] recording by use of the [camera] equipment "zooming" in on said evidence. The purpose of this clause is so that the [camera] video recording equipment will not "zoom" in on a witness solely to give unfair or undue influence upon the words of the witness, and does not apply to the "zooming" in for other purposes described above.

(c) A stenographic transcript, in addition to the video[tape] recording, will not be necessary. Any party desiring [same] such a transcript may obtain it at that party's [cost] expense.

(d) The video[tape itself will] recording shall be kept in the possession of the attorney taking the deposition and will be available for the Court and [any and all] counsel to view, copy, or compare [the] with a stenographic transcript, if any[, with the videotape transcript to view or to copy said videotape]. If discrepancies appear between the stenographic transcript, [if any,] and the video[tape] recording, the discrepancies will be resolved by agreement of counsel or ruling of the Court if counsel cannot agree. The decision on the manner in which to

handle the discrepancies, insofar as the video[tape] recording is concerned, will be included in the agreement of counsel or ruling of the Court.

(e) All objections will be reserved and shall not be stated on the video[tape] recording except for objections relating to the form of the question. Objections to testimony on the video[tape and the ruling thereof will] recording will be resolved by agreement of counsel or ruling of the Court if counsel cannot agree. All objections relating to said depositions must be made at least 10 days before trial. An edited version shall be presented at trial.

(f) Admissibility of the [tape] video recording may be objected to by [any] counsel if a review of the finished [tape] video recording reveals any technical errors giving undue influence to the testimony of the witness which would unfairly prejudice the side objecting; or if the general technical quality of the [tape] video recording is so poor that its being viewed by the jury would be unfairly prejudicial to the side so objecting.

G. CR 53.03 (5) Domestic relations commissioners

The proposed amendments to section (5) of CR 53.03 are:

(5) The domestic relations commissioner shall hear all matters promptly. Testimony may be heard orally before the commissioner or by deposition or interrogatory. All actions involving indigents shall be heard by the commissioner without fee. Proceedings before the commissioner shall be reported, or recorded [on]by audio[tape] or video[tape].

H. CR 53.06 (1) Report

The proposed amendments to section (1) of CR 53.06 are:

(1) Contents and filing.

The commissioner shall prepare a report of recommendations to the court upon the matters submitted by the order of reference or local rules of court and, if required to make findings of fact and conclusions of law, the commissioner shall set them forth in the report and shall file the report and sufficient copies for all parties with the clerk of the court. The clerk shall forthwith serve the report and notice of the filing upon all parties who have appeared in the action. A transcript of reported proceedings may be ordered by any party at that party's expense. In the case of proceedings recorded on video[tape] the untranscribed [tape] recording shall constitute the official record.

I. CR 72.04 Record on appeal from district court

The proposed amendments to CR 72.04 are:

The record on appeal to the circuit court shall consist of the entire original record of proceedings in the district court, including untranscribed [mechanical] audio or video recordings made under the supervision and remaining in the custody of the district court or clerk. It need not be certified unless and until the Court of Appeals grants a motion for review of the final action of the circuit court disposing of the appeal.

J. CR 73.01(2) General Provisions

The proposed amendments to section (2) of CR 73.01 are:

(2) All appeals shall be taken to the next higher court by filing a notice of appeal in the court from which the appeal is taken. Appeals from family courts that are established pursuant to Ky. Const. § 110 (5) (b) or Ky. Const. § 112 (6) shall be taken to the Court of Appeals. After such filing, if the appeal is from a circuit court, any party may file a motion for transfer of the case to the Supreme Court as provided in CR 74.02. A motion for discretionary review by the Supreme Court of a decision of the Court of Appeals, or by the Court of Appeals of an appellate decision of the circuit court, shall be made as provided in Rule 76.20.

K. CR 73.08 Certification of record on appeal

The proposed amendments to CR 73.08 are:

The record on appeal as constituted under Rule 75 or Rule 76 shall be prepared and certified by the clerk of the court from which the appeal is taken within 10 days after the filing of the transcript of evidence by the court reporter. If the proceedings were taken exclusively by video record[ation]ing, [or] if there are no proceedings to transcribe, or if the appeal is from a Circuit Court order determining paternity, dependency, abuse, neglect, domestic violence, or juvenile status offense, then the record on appeal shall be certified by the clerk within 30 days after the date of filing the first notice of appeal. For In Forma Pauperis cases, the time for certifying the record on appeal in [video appeals or in appeals] cases taken exclusively by video recording or where there [is] are no [transcript of evidence] proceedings to transcribe shall run from the date the Motion to Proceed In Forma Pauperis is granted. If CR 76.03 applies to the appeal, the time for certifying the record shall begin to run as provided in CR 76.03. The appellate court, in its discretion, may extend

the time for certification of the record upon motion and a showing of good cause.

L. CR 75.01 (1) Procedures for designation of evidence or proceedings reported by a court reporter

The proposed amendments to section (1) of CR 75.01 are:

(1) Unless an agreed statement of the case is certified as provided in Rule 75.15, the proceedings were taken exclusively by video [presentation] recording as governed by Rule 98, or there are no proceedings to transcribe, the appellant shall file a designation of untranscribed material. The designation shall be filed with the clerk of the trial court and shall be served on the appellee, the court reporter, and the clerk of the appellate court. The designation shall be filed with the clerk of the trial court within 10 days of the filing of the notice of appeal unless Rule 76.03 applies to the appeal, in which case, the designation shall be filed within 10 days of the order ending the prehearing procedure under Rule 76.03(3). The designation shall: (1) list such untranscribed portions of the proceedings stenographically or [mechanically] electronically recorded as appellant wishes to be included in the record on appeal and (2) list any depositions or portions thereof as have been filed with the clerk but were not read into evidence and are thus required by Rule 75.07(1) to be excluded from the record on appeal. Within 10 days after the service and filing of such designation, or within 10 days after the time for filing of such designation has expired, any other party to the appeal may file a designation of additional portions of the untranscribed proceedings stenographically or [mechanically] electronically recorded as that party wishes to be included. If an appellee files the original designation, the parties shall proceed under Rule 75.01 in the same manner as if the original designation had been filed by the appellant. If no designation is required, a statement identifying such depositions, if any, or any portions thereof, as have been filed with the clerk but were not read into evidence and are thus required by Rule 75.07(1) to be excluded from the record on appeal, shall be filed with the clerk of the trial court and served upon the appellee and the clerk of the appellate court within the time periods set forth in this rule.

M. CR 75.02 (1) and (3) Transcript of evidence and proceedings

The proposed amendments to sections (1) and (3) of CR 75.02 are:

(1) If there be designated for inclusion any proceedings that were not [videotaped or mechanically] electronically recorded but were stenographically recorded, the court reporter shall file promptly in the trial court the original and one copy of the transcript of the portion or portions thereof included in the designation. If the designation includes only a portion or portions

of the reporter's transcript, the court reporter at the request of the appellant shall file such additional portions as the appellee would reasonably require to enable him or her to complete the record on appeal and if the appellant fails to do so the trial court on motion may require the additional material needed to be so furnished. Initially the cost of a transcript will be borne by the party designating it.

(3) In the event any of the proceedings designated for inclusion have been [videotaped or mechanically] electronically recorded, it shall not be necessary that they be transcribed, and in lieu of a transcript the original tapes or recordings shall be transmitted by the clerk pursuant to Rule 75.07.

N. CR 75.07(1), (2) and (7) Record to be prepared and transmitted by clerk

The proposed amendments to sections (1), (2) and (7) of CR 75.07 are:

(1) The clerk of the trial court shall prepare and certify the entire original record on file in his or her office, in accordance with the requirements of paragraphs (10) and (11) of this Rule 75.07, including the designations or stipulations of the parties with respect to proceedings stenographically [or mechanically] or electronically recorded and a certified copy (rather than the original) of the docket assigned to the action, but excluding depositions not read into evidence.

(2) The transcript of proceedings stenographically recorded (or tapes or recordings of proceedings [mechanically] electronically recorded), or such lesser portions thereof as have been designated or agreed upon by stipulation, shall when filed with the clerk be certified as a part of the record on appeal.

(7) The record on appeal shall be retained under the responsibility and control of the clerk of the trial court until it is transmitted to the clerk of the appellate court. It will be made available first to counsel for the appellant and then to counsel for the appellee. If it is removed from the clerk's office, counsel for the appellant shall return it before submitting his or her brief to the appellate court in order that it may be available to counsel for the appellee. Counsel for the appellee shall return it before submitting his or her brief to the appellate court. If it is withdrawn by counsel for the appellant for the purpose of preparing a reply brief it shall be returned before such brief is submitted to the appellate court. In no event shall the original of [a tape or other mechanical] an electronic recording be removed from the clerk's office, nor shall a record on appeal be retained by counsel beyond the filing date on which his or her appellate brief is due.

O. CR 75.13(1) and (2) Narrative statement

The proposed amendments to sections (1) and (2) of CR 75.13 are:

(1) In the event no [videotape, mechanical or] stenographic or electronic record of the evidence or proceedings at a hearing or trial was [taken or] made or, if so, cannot be transcribed or are not clearly understandable from the tape or recording, the appellant may prepare a narrative statement thereof from the best available means, including his/her recollection, for use instead of a transcript or for use as a supplement to or in lieu of an insufficient [mechanical] electronic recording. This statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service upon him/her. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the trial court for settlement and approval, and as settled and approved shall be included in the record on appeal.

(2) By agreement of the parties a narrative statement of all or any part of the evidence or other proceedings at a hearing or trial may be substituted for or used in lieu of a stenographic transcript or [mechanical] an electronic recording.

P. CR 76.02(1) Perfecting appeals and cross-appeals

The proposed amendments to section (1) of CR 76.02 are:

(1) To perfect an appeal from the circuit court the appellant shall: (a)(i) cause the clerk's notice required by Rule 75.07(5) to be transmitted to the clerk of the appellate court or (ii) if the appeal is [a videotape appeal] taken of a case recorded pursuant to CR 98(1), cause the clerk's notice required by paragraph CR 98(3)(c) to be transmitted to the clerk of the appellate court; and (b) file with the clerk of the appellate court the brief required by Rule 76.12.

Q. CR 76.03(1) Prehearing conference

The proposed amendments to section (1) of CR 76.03 are:

(1) This Rule, 76.03, applies to all civil actions appealed to the Court of Appeals except prisoner applications seeking relief relating to confinement or conditions of confinement and appeals from Circuit Court orders determining paternity, dependency, abuse, neglect, domestic violence, or juvenile status offense.

R. CR 76.12(2)(a), (3)(b) and (4)(c)and (d) Briefs

The proposed amendments to sub-section (a) of section (2), sub-section (b) of section (3) and sub-sections (c) and (d) of section (4) of CR 76.12 are:

(2) Time for filing.

(a) Civil cases. In civil cases, including workers' compensation appeals, except appeals from Circuit Court orders determining paternity, dependency, abuse, neglect, domestic violence or juvenile status offense, the appellant's brief shall be filed with the clerk of the appellate court within 60 days after the date of the notation on the docket of the notification required by Rule 75.07(6). The appellee's brief (or combined briefs, if the appellee is also a cross-appellant) shall be so filed within 60 days after the date on which the appellant's brief was filed. The appellant's reply brief shall be filed within 15 days after the date on which the last appellee's brief was filed or due to be filed. If the appellant is also a cross-appellee, a combined brief may be filed within 60 days after the date on which the last appellee's brief is filed or due to be filed. When a motion for discretionary review has been granted by the Supreme Court, the time in which the movant's brief must be filed shall be computed from the date of entry of the order granting review.

(i) Civil appeals from Circuit Court orders determining paternity, dependency, abuse, neglect, domestic violence or juvenile status offense. Appeals in these cases shall be expedited. The appellant's brief shall be filed with the clerk of the appellate court within 30 days after the date of the notation on the docket of the notification required by Rule 75.07(6). The appellee's brief shall be filed within 30 days after the date of filing of the appellant's brief. The appellant's reply brief shall be filed within 10 days after the date of filing of the appellee's brief. Motions for extension of time will not be considered except under extraordinary circumstances.

(3) Number of copies.

(b) Filing of Electronic Briefs on Diskette or CD-ROM. Any party filing a brief on the merits with the Clerk of the Supreme Court or the Court of Appeals may, and is encouraged to, file with the required copies of the paper brief an electronic brief thereof on a floppy disk or CD-ROM (preferred). The [Clerk of the Supreme Court] appellate court clerk shall receive and file the floppy disk or CD-ROM with the papers of that case.

(i) All electronic briefs shall be on a 3.5 floppy disk or CD-ROM that can be read via Microsoft Windows and shall contain in a single file all information contained in the paper brief, including the cover, the table of contents, and the certifications, in the same order as the paper brief. The electronic briefs may also contain hypertext links or bookmarks to cases, statutes and other reference materials available on the Internet or appended to the brief.

(ii) An electronic brief must be formatted in Microsoft Word [(preferred)], WordPerfect, or in a .pdf document (preferred).

(iii) An electronic brief shall contain a label indicating:

(a) The style and docket number of the case,

(b) The name of the document contained on the diskette or CD-Rom, and

(c) The language format of the document.

(4) Form and content.

(c) Organization and contents-Appellant's brief.
The organization and contents of the appellant's brief shall be as follows:

(i) A brief "INTRODUCTION" indicating the nature of the case, and not exceeding two simple sentences, such as, "This is a murder case in which the defendant appeals from a judgment convicting him of 1st –degree manslaughter and sentencing him to 20 years in prison," or "This is a case in which an insurance company appeals from a judgment construing its policy as applicable, and a co-defendant's policy as not applicable, to the plaintiff's accident claim. Plaintiff also appeals against the co-defendant."

(ii) A "STATEMENT CONCERNING ORAL ARGUMENT" indicating whether the appellant desires oral argument and why appellant believes that oral argument would or would not be helpful to the Court in deciding the issues presented. This Statement should be no longer than one brief paragraph. The appellant's statement is not binding on the Court and does not preclude a party's right to file a motion to reconsider the Court's ruling that oral argument will be dispensed with. Failure to include a statement concerning oral argument will be treated as indicating that appellant does not desire oral argument in the appeal.

(iii) A "STATEMENT OF POINTS AND AUTHORITIES," which shall set forth, succinctly and in the order in which they are discussed in the body of the argument, the appellant's contentions with respect to each issue of law relied upon for a reversal, listing under each the authorities cited on that point and the the respective pages of the brief on which the argument appears and on which the authorities are cited.

(iv) A "STATEMENT OF THE CASE" consisting of a chronological summary of the facts and procedural events necessary to an understanding of the issues presented by the appeal, with ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape [tape-] recordings, or date and time in the case of all other

untranscribed electronic recordings, supporting each of the statements narrated in the summary.

(v) An "ARGUMENT" conforming to the statement of Points and Authorities, with ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.

(vi) A "CONCLUSION" setting forth the specific relief sought from the appellate court.

(vii) An "APPENDIX" containing copies of the findings of fact, conclusions of law, and judgment of the trial court, any written opinions filed by the trial court in support of the judgment, the opinion or opinions of the court from which the appeal is taken, and any pleadings or exhibits to which ready reference may be considered by the appellant as helpful to the appellate court. The first item of the appendix shall be a listing or index of all documents included in the appendix. The index shall set forth where the documents may be found in the record. The appellant shall place the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court. Except for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs. In workers' compensation cases the appendix shall include the opinions of the Administrative Law Judge, the Workers' Compensation Board and the Court of Appeals.

(viii) Any "INDEX" the appellant may wish to provide.

(d) Organization and contents-Appellee's brief.
The organization and contents of the appellee's brief shall be as follows:

(i) A "STATEMENT CONCERNING ORAL ARGUMENT" responsive to appellant's statement indicating why appellee believes that oral argument would or would not assist the Court in deciding the issues presented.

(ii) A "COUNTERSTATEMENT OF POINTS AND AUTHORITES" similar to the statement required of the appellant by paragraph (4)(c)(iii) of this Rule.

(iii) A "COUNTERSTATEMENT OF THE CASE" stating whether the appellee accepts the appellant's Statement of the Case and, if not, setting forth the matters the appellee considers essential to a fair and adequate statement of the case in accordance with the requirements of paragraph (4)(c) (iv) of this Rule.

(iv) An "ARGUMENT" conforming to the appellee's Statement of Points and Authorities and to the requirements of paragraph (4)(c)(v) of this Rule with reference to record-references and citations of authority.

(v) An "APPENDIX" containing copies of any papers or exhibits, not included in the appellant's brief to which ready reference may be considered by the appellee as helpful to the appellate court. The first item of the appendix shall be a listing or index of all documents included in the appendix. The index shall set forth where the documents may be found in the record.

(vi) Any "INDEX" the appellee may wish to provide.

S. CR 76.28(4)(c) Opinions

The proposed amendments to section (4)(c) of CR 76.28 are:

(c) Opinions that are not to be published shall not be cited or used as [authority] binding precedent in any other case in any court of this state, however, such unpublished decisions rendered after January 1, 2003, may be cited for consideration by the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action.

T. CR 76.36(2) and (4) Original proceedings in appellate court

The proposed amendments to sections (2) and (4) of CR 76.36 are:

(2) Response.

The party against whom relief is sought and real party in interest as defined in this Rule, section (8), may within [10] 20 days after the date of filing of the petition file a response, bearing proof of service as required by Rule 5.03, accompanied by a memorandum of authorities in support of his defense.

(4) Intermediate relief.

If the petitioner requires any relief prior to the expiration of [10] 20 days after the date of filing the petition he may move the court 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.

U. 76.42(2)(a) Costs.

The proposed amendments to sub-section (a) of section (2) of CR 76.42 are:

(2) Filing fees.

(a) Filing fees for docketing the following in the Court of Appeals or in the Supreme Court shall be:

(i)	Appeal, cross appeal or certification of law	$125
[(ii)	Cross-appeal	125]
(ii)	Appeals or cross appeals from Circuit Court, Family Division, to the Court of Appeals, from orders determining:	
	(a) Paternity	
	(b) Dependency, neglect or abuse	
	(c) Domestic violence	
	(d) Juvenile status offense	60
(iii)	Motion for transfer	100
(iv)	Motion or cross-motion for discretionary review	125
(v)	Petition for rehearing, modification or extension of opinion	125
(vi)	Motion for leave to file amicus curiae brief	150
(vii)	Motion for extension of time for certification of record, for intermediate relief, or for dismissal of an adversary party's appeal, if the filing fee has not been paid theretofore	125
(viii)	Motion for relief under Rules 65.07 or 65.09	125
(ix)	Original proceeding	125
(x)	Motion for reconsideration of a final order or "Opinion and Order" under Rule 76.38	125
(xi)	Petition or cross-petition for review of a decision by the Workers' Compensation Board	125

V. CR 98. Procedures for video[taped] recorded court proceedings and appeals

The proposed amendments to CR 98 are:

(1) Scope of Rule.

The provisions of this Rule shall apply to any court proceeding presided over by, or to any appeal from a judgment entered by, a [circuit] judge upon his/her

activation and use of video[tape] recording equipment to record the court proceeding.

(2) Record of Trial Court Proceedings.

In addition to those provisions of the Kentucky Rules of Court relating to video[taped] recorded court proceedings the following procedures shall apply:

(a) Videotape Recordings. The official record of court proceedings shall be constituted of two (2) videotape recordings, recorded simultaneously, of the court proceedings utilizing video cassette equipment; or, one (1) original video recording and one (1) copy when court proceedings are otherwise electronically recorded. Upon the filing of a notice of appeal, one of the two video[tape] recordings or a court-certified copy of that portion thereof recording the court proceeding being appealed shall be filed with the clerk and certified by the clerk as part of the record on appeal. The second video[tape] recording, or a court-certified copy of that portion thereof recording the court proceeding being appealed, shall be retained by the clerk.

(i) Method of identification. [For identification purposes, t] The clerk shall [designate on each of the two original videotape recordings, on one line, the judicial circuit number, the court division number (if any), the last two digits of the current year, the letters "VCR," the number of the videotape (counting all videotapes used since the start of the current calendar year), either the letter "A," if the videotape is retained by the clerk, or the letter "B," if the videotape is filed with the clerk, the number of the videotape used in the proceeding being identified, and the case file number of the proceeding being identified (for example: 22-3-86-VCR-015-A-1, 85-CR-123). On the second line, the clerk shall designate the caption of the proceeding recorded on the videotape (for example: Smith v. Jones). On the third line, the clerk shall designate the date on which the videotape was record (for example; 10/27/86)] mark each recording with an identification pursuant to instructions set forth in the Kentucky Circuit Court Clerks Manual.

(ii) Duplicate copies. The clerk shall arrange for the recording of duplicate copies of video[tapes] recordings for use by counsel in preparing an appeal. The clerk shall charge the person requesting a duplicate video[tape] recording a reasonable fee, which shall be set by the Administrative Office of the Courts, for each individual duplicate video[tape] tape, disk or other media requested.

(b) Exhibit List: Trial Log. The trial judge or his designee shall make a written exhibit list, a written trial log, and a written log listing the [tape references] date and time of where each witness' testimony begins and ends on the video[tape] recording. The trial judge shall keep one copy of each log and list as part of the record, and shall place a second copy of each log and list with the video[tape] recording, or portion thereof.

(c) Exhibits. By pretrial order, the trial judge may require that at the time an exhibit is introduced into evidence, a photograph or photographs of the exhibit be submitted and included as part of the record, in lieu of the exhibit itself being retained by the clerk as part of the record. The photograph(s) shall serve as part of the official record, and the exhibit itself may be returned for safekeeping to the custody of the party introducing the exhibit. The clerk shall not be required to certify the exhibit itself as part of the record on appeal, unless so ordered by the appellate court.

(d) Depositions. In a court proceeding in which video[tape] recording equipment is being used to record the proceeding, the official record of a deposition admitted into evidence may be, in the trial judge's discretion, either the transcript of the deposition or the video[tape] recording of the deposition.

(e) Court Reporters in [Mechanically] Video Recorded Proceedings. Any party to the case may have a stenographic reporter present as part of the public or at counsel table and the court shall, to the extent it can do so without unduly disrupting its proceeding, accommodate the reporter inside the bar.

(3) Record on Appeal.

Unless otherwise ordered by the court, no transcript of court proceedings shall be made a part of the record on appeal except as provided in Paragraph 4 of this rule. The official video[tape] recordings, together with the clerk's written record, shall constitute the entire original record on appeal. To facilitate the timely preparation and certification of the record as set out in this rule, appellant or counsel for appellant, if any, shall provide the clerk with a list setting out the dates on which video[tapes] recordings were [recorded] made for all pre-trial and post-trial proceedings necessary for inclusion in the record on appeal. Designation of the video[tape] recordings shall be filed within the ten (10) day time limitation and in the manner described in Rule 75.01(1). Supplemental designation by other parties shall likewise conform with the requirements of Rule 75.01(1).

(a) Preparation and Certification by Clerk. The circuit court clerk shall prepare and certify the entire original record on file in his office. All parts of the written record on appeal shall be arranged in the order in which they were filed or entered. If the record comprises more than 150 pages, it shall be divided into two or more volumes not exceeding 150 pages each. Each volume shall be securely bound at the left side. There shall be a general index at the beginning of the record and an index to each volume in the front thereof which shall show, in the order in which they appear, the pages on which all pleadings, orders, judgments, instructions, and papers may be found. Except for documents, maps and charts, and other papers reasonably capable of being enclosed in envelopes, exhibits, unless otherwise ordered by the trial court pursuant to paragraph (2)(c) of this rule, shall be retained by the clerk and shall not be

transmitted to the appellate court unless specifically directed by the appellate court on motion of a party or upon its own motion. All exhibits filed with the record shall be sufficiently identified and the index shall direct where they may be found.

(b) Time for Certification. The record on appeal shall be prepared and certified by the circuit court clerk as soon after the filing of the notice of appeal as possible, but in any even within thirty (30) days after the date of filing the notice of appeal. Extension of time for certification shall be by motion for cause filed with the court to which the appeal is taken.

The matter certified under this section shall constitute the record on appeal. It is the responsibility of the appellant to see that the record is prepared and certified by the clerk within the time prescribed by this rule.

(c) Notice of Certification. The circuit court clerk shall immediately give written notice to the clerk of the appellate court when the record has been completed and certified as required herein, and shall simultaneously serve copies of such notice upon all parties to the appeal. The clerk shall enter the fact and date of such notice in the docket of the case.

(d) Withdrawal and Transmission of Record on Appeal. The circuit court clerk shall transmit the record on appeal to the appellate court when so requested by the clerk of the appellate court. Until the record on appeal is so requested, the record on appeal shall be retained under the responsibility and control of the clerk of the circuit court. Except for the official video[tape] recording of the proceedings which shall be retained by the clerk until transmitted to the appellate court, the record on appeal will be made available first to counsel for the appellant and then to the counsel for the appellee. If the record on appeal is removed from the clerk's office, counsel for the appellant shall return it before submitting his brief to the appellate court in order that it may be available to counsel for the appellee. If it is withdrawn by counsel for the appellant for the purpose of preparing a reply brief it shall be returned before such brief is submitted to the appellate court. A record on appeal shall not be retained by counsel beyond the filing date on which his brief is due. Withdrawals and returns of the record on appeal shall be noted by the clerk on the docket kept for that action.

(e) Perfection of Appeal. An appeal shall be perfected within sixty (60) days after the date of the notation on the docket of the service of notice required by paragraph (3)(c) of this rule. To perfect an appeal, the appellant shall: (1) cause the clerk's notice required by paragraph (3)(c) of this rule to be transmitted to the clerk of the appellate court; and (2) file with the clerk of the appellate court the brief required by CR 76.12.

(4) Briefs.

The provisions of CR 76.12 pertaining to briefs shall apply to appeals taken pursuant to this rule, [except that the appellant's brief shall be filed within 60 days of the notification of certification required by paragraph (3)(c) of this rule and the appellee's (or a combined brief, if he is a cross-appellant) shall be so filed within 60 days after the date on which the appellant's brief was filed,] as well as the following provisions:

(a) [Tape] Video Recording Reference. Each reference in a brief to a segment of the video[tape] recordings [(hereinafter referred to as a tape reference)] shall set forth in parentheses the [word "TAPE,"] letters "VR" the number of the video[tape] recording, and the month, day, year, hour, minute, and second at which the reference begins as recorded on the video[tape] recording. For example: ([TAPE] VR No. 1: 10/27/86; 14:24:05).

(b) Evidentiary Appendix. An appendix of the evidence (hereinafter, evidentiary appendix) that consists of a transcription of the evidence or other court proceeding may be attached to a brief on appeal. The filing of an evidentiary appendix and index attached to a brief shall not exceed fifty (50) pages if filed in the Supreme Court, nor twenty-five (25) pages if filed in the Court of Appeals, except that an evidentiary appendix and index attached to a reply brief shall not exceed fifteen (15) pages. An evidentiary appendix shall contain transcriptions of only those parts of the video[tape] recording that support the specific issues or contentions raised in a brief on appeal, or that relate to the question of whether an alleged error was properly preserved for appellate review.

(i) Organization of Appendix. At the top of each page of an evidentiary appendix, there shall be a [tape] video recording reference which corresponds to the transcription on each page of the appendix. Each evidentiary appendix shall include an index setting forth: (a) a list of [tape] video recording references cross-indexed to pages of the appendix; (b) an alphabetical list of witnesses whose testimony is transcribed in the appendix, listing the [tape] video recording references with the pages of the appendix where each witness' testimony begins; (c) the name of each witness at the place in the appendix where the testimony of that witness begins.

(ii) Purpose of Appendix: Sanctions. The purpose of this evidentiary appendix is to facilitate the efforts of each appellate judge in studying the briefs in a meaningful way. Inclusion of transcript unnecessary to the disposition of the case imposes a burden on both the parties and the court and may subject counsel to sanctions set forth below:

(a) The appellate court may deny costs to, or assess costs against, a party who has been responsible for the insertion of unnecessary material into an evidentiary appendix. Moreover, any counsel who so multiplies an appendix in

any brief as to increase delay or costs may be required by the court to satisfy personally such excess costs, and may be subject to the imposition of fines as set forth in CR 73.02(2)(c).

(b) The appellate court may strike any part or all of an evidentiary appendix, or brief to which it is attached, which has been determined by the appellate court to contain unnecessary material.

(5) Further Provisions.

(a) Transcription for Appellate Court. The appellate court may request the Administrative Office of the Courts to transcribe any portion of the video[tape] recordings it determines is necessary for a decision in the case. The costs of transcriptions under this paragraph shall be certified by the Director of the Administrative Office of the Courts, or his or her designee, and shall be paid by the parties to the appeal in such proportions as directed by the appellate court requesting the transcription.

(b) Effect of Rule on Practice in Court of Appeals. Nothing in this rule shall be construed to supersede the provisions of CR 76.03.

III. PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

A. RCr 11.02(1) Sentence

The proposed amendments to RCr 11.02(1) are:

(1) Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall, if the defendant is guilty of a felony, cause a presentence investigation to be conducted, examine and consider the report, and advise the defendant or the defendant's counsel of the contents of the report pursuant to KRS 532.050 not later than 10 days prior to final sentencing. The defendant may waive the presentence investigation report. The court shall consider the possibility of probation or conditional discharge and shall afford the defendant and the defendant's counsel an opportunity to make a statement or statements in the defendant's behalf and to present any information in mitigation of punishment.

B. Proposed new RCr 11.43 Procedure for obtaining post-conviction DNA testing

The proposed new RCr 11.43 shall read:

(1) Request for testing. Notwithstanding any other provision of the rules of criminal procedure governing postconviction relief, a person who was convicted of and sentenced for a crime may, at any time, file a petition requesting the forensic DNA testing of any evidence that is in the possession or control of the prosecution, law enforcement, a laboratory, or court personnel and that is related to the investigation or prosecution that resulted in the judgment of conviction, and that may contain biological evidence.

(2) Mandatory testing. After notice to the prosecution and an opportunity to respond, the court shall order testing if it finds that:

(a) A reasonable probability exists that petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing;

(b) The evidence is still in existence, and in such a condition that DNA testing may be conducted;

(c) The evidence was never previously subjected to DNA testing, or was not subjected to the testing that is now requested which can resolve an issue not resolved by previous testing; and

(d) The application for testing is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

(3) Testing in the Court's Discretion. After notice to the prosecution and an opportunity to respond, the court may order testing if it finds that:

(a) A reasonable probability exists that testing of the evidence will produce DNA results, which would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgement of conviction;

(b) The evidence is still in existence, and in such a condition that DNA testing may be conducted;

(c) The evidence was never previously subjected to DNA testing, or was not subject to the testing that is now requested which can resolve an issue not resolved by previous testing; and

(d) The application for testing is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

(4) Procedures.

(a) Payment. In the case of an order under subsection 2 or 3 of this rule, the court may order testing paid for pursuant to KRS 31.185 for needy persons as defined in KRS Chapter 31.

(b) Counsel. The court may, at any time during proceedings instituted under this rule, appoint counsel for an indigent petitioner.

(c) Discovery. If evidence has previously been subjected to DNA testing, by either the prosecution or defense, the court may order the prosecution or defense to provide all parties and the court with access to the laboratory reports prepared in connection with the previous DNA testing, as well as the underlying data and laboratory notes. If any DNA or evidence testing was previously conducted by either the prosecution or defense without knowledge of the other party, such testing shall be revealed in the motion for testing or response, if any. If the court orders DNA testing in connection with a proceeding brought under this rule, the court shall order the production of any laboratory reports prepared in connection with the DNA testing and may, in its discretion, order production of the underlying data and laboratory notes.

(d) Preservation Order. When the petition is not summarily dismissed, the court shall order that all evidence in the possession of the prosecution, law enforcement, a laboratory, or court personnel that could be subjected to DNA testing must be preserved during the pendency of the proceeding. The intentional destruction of evidence after such an order may result in appropriate sanctions, including criminal contempt, for a knowing violation.

(e) Choice of Laboratory. If the court orders testing, it shall select a laboratory that meets the standards adopted pursuant to the DNA Identification Act of 1994.

(f) Additional orders. The court may in its discretion make such other orders as may be appropriate.

(5) Procedure after testing results are obtained. If the results of the postconviction DNA testing are not favorable to the petitioner, the court shall dismiss the petition, and make such further orders as may be appropriate. If the results of the postconviction DNA testing are favorable to the petitioner, the court shall order a hearing, notwithstanding any provisions of law that would bar such a hearing as untimely, and thereafter make such orders as are required by the rules or statutes regarding postconviction proceedings.

C. **Adopt New Rule Successive collateral attacks**

The adopted new rule shall read:

A. DEATH PENALTY CASES

(1) In any case in which a prisoner is under a sentence of death and a prior collateral attack motion has been overruled, no subsequent collateral attack motion shall be filed unless in accordance with this rule.

(2) For purposes of this rule, "collateral attack motion" includes any motion filed or to be filed under RCr 11.42, CR 60.02, or CR 60.03.

(3) In any case described in section (1) of this rule, the prisoner shall file a motion in the Supreme Court requesting leave to file a subsequent collateral attack motion together with a copy of the collateral attack motion that the prisoner proposes to file in the circuit court.

(4) The motion for leave to file a subsequent collateral attack motion shall comply with RCr 11.42(2) and (3) and shall state the specific facts and legal grounds that establish that each claim in the collateral attack motion could not have been raised in a prior motion or proceeding and that the claim is being presented on a timely basis.

(5) The collateral attack motion shall comply with RCr 11.42(2) and (3) and shall state the specific facts and evidence that support each claim in the motion. If the motion requests a hearing, the motion shall identify the witnesses who would be called to testify and the expected testimony of each witness as to each claim.

(6) The motion for leave to file and the subsequent collateral attack motion shall be served upon the Attorney General and the Commonwealth's Attorney whose office prosecuted the case.

(7) Upon the filing of the motion, the Clerk of the Supreme Court shall request that the circuit court clerk transmit the trial court record to the Supreme Court.

(8) The clerk shall make the record available to the Attorney General for the purpose of filing a response, and the Commonwealth's response shall be filed in the Supreme Court within thirty (30) days after the record was made available unless otherwise ordered by the Court.

(9) If upon review of the motion for leave to file the subsequent collateral attack motion, the subsequent collateral attack motion, the Commonwealth's response, and the trial court record, the Supreme Court

determines that the claim or claims are not procedurally barred and that one or more claims establish a reasonable probability that the prisoner's capital offense conviction or death sentence is unconstitutional or that a new trial is justified, the Supreme Court shall order the case remanded to the circuit court and specify the claim or claims that shall be reviewed by the circuit court and the claim or claims, if any, that warrant an evidentiary hearing. The Court's ruling upon the motion shall be in the form of an order under CR 76.38.

(10) Upon remand, the circuit court shall review the claim or claims in accordance with the Supreme Court's order and, if ordered by the Supreme Court, shall conduct a hearing upon the claim or claims specified in the order. Upon conclusion of its review and any hearing, the circuit court shall issue written findings of fact and conclusions of law in accordance with RCr 11.42(6).

(11) Any appeal shall be governed by RCr 11.42(7) and (8), RCr 12.02, and RCr 12.04.

B. NON-CAPITAL CASES

(1) In any case in which a party has been convicted of a crime and is not under a sentence of death and a prior collateral attack motion has been overruled, no subsequent collateral attack motion shall be filed unless in accordance with this rule.

(2) For purposes of this rule, "collateral attack motion" includes any motion filed or to be filed under RCr 11.42, CR 60.02, or CR 60.03.

(3) In any case described in section (1) of this rule, the party shall file a motion in the Court of Appeals requesting leave to file a subsequent collateral attack motion together with a copy of the collateral attack motion that prisoner proposes to file in the circuit court.

(4) The motion for leave to file a subsequent collateral attack motion shall comply with RCr 11.42(2) and (3) and shall state the specific facts and legal grounds that establish that each claim in the collateral attack motion could not have been raised in a prior motion or proceeding and that the claim is being presented on a timely basis.

(5) The collateral attack motion shall comply with RCr 11.42(2) and (3) and shall state the specific facts and evidence that support each claim in the motion. If the motion requests a hearing, the motion shall identify the witnesses who would be called to testify and the expected testimony of each witness as to each claim.

(6) The motion for leave to file and the subsequent collateral attack motion shall be served upon the Attorney General and the Commonwealth's Attorney whose office prosecuted the case.

(7) Upon the filing of the motion, the Clerk of the Court of Appeals shall request that the circuit court clerk transmit the trial court record to the Court of Appeals.

(8) The clerk shall make the record available to the Attorney General for the purpose of filing a response, and any response by the Commonwealth may be filed in the Court of Appeals within thirty (30) days after the record was made available unless otherwise ordered by the Court.

(9) If upon review of the motion for leave to file the subsequent collateral attack motion, the subsequent collateral attack motion, the Commonwealth's response, and the trial court record, the Court of Appeals determines that the claim or claims are not procedurally barred and that one or more claims establish a reasonable possibility that the prisoner's conviction or sentence is unconstitutional or that a new trial is justified, the Court of Appeals shall order the case remanded to the circuit court and specify the claim or claims that shall be reviewed by the circuit court and the claim or claims, if any, that warrant an evidentiary hearing. The Court's ruling upon the motion shall be in the form of an order under CR 76.38.

(10) Upon remand, the circuit court shall review the claim or claims in accordance with the Court of Appeals' order and, if ordered by the Court of Appeals, shall conduct a hearing upon the claim or claims specified in the order. Upon conclusion of its review and any hearing, the circuit court shall issue written findings of fact and conclusions of law in accordance with RCr 11.42(6).

(11) Any appeal shall be governed by RCr 11.42(7) and (8), RCr 12.02, and RCr 12.04.

D. RCr 12.02 Applicability of Civil Rules

The amendments to RCr 12.02 are:

Civil Rules 72, 73.01(2), 73.02(1)(e), 73.02(2)(c), 73.02(4), 73.08, 75.01, 75.06 to 75.15 inclusive, and 76 shall apply also in criminal actions, except that an appeal from a judgment imposing a sentence of death, life imprisonment, or imprisonment for 20 years or more shall be taken directly to the Supreme Court. Payment of the filing fee prescribed by Civil Rule 73.02(1)(b) and (c) is required.

E. CR 76.12(4)(c)(vii)(d)(v) Form and content.

The amendments to subsections (c)(vii) and (d)(v) of section (4) of CR 76.12 are:

(4)(c)(vii) *Organization and contents-Appellant's brief.*

An "APPENDIX" with appropriate extruding tabs containing copies of the findings of fact, conclusions of law, and judgment of the trial court, any written opinions filed by the trial court in support of the judgment, the opinion or opinions of the court from which the appeal is taken, and any pleadings or exhibits to which ready reference may be considered by the appellant as helpful to the appellate court. The first item of the appendix shall be a listing or index of all documents included in the appendix. The index shall set forth where the documents may be found in the record. The appellant shall place the judgment, opinion or order under review immediately after the appendix list so that it is most readily available to the court. Except for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs. In workers' compensation cases the appendix shall include the opinions of the Administrative Law Judge, the Workers' Compensation Board, and the Court of Appeals.

(4)(d)(v) *Organization and contents-Appellee's brief.*

An "APPENDIX" with appropriate extruding tabs containing copies of any papers or exhibits, not included in the appellant's brief, to which ready reference may be considered by the appellee as helpful to the appellate court. The first item of the appendix shall be a listing or index of all documents included in the appendix. The index shall set forth where the documents may be found in the record.

IV. 2006 PROPOSED AMENDMENTS OF THE SUPREME COURT RULES

A. SCR 2.024 Re-application for admission by examination

The proposed amendments to SCR 2.024 are:

An applicant who withdraws from or fails the bar examination shall be permitted to re-apply for the next scheduled bar examination on a form approved by the Board along with a fee of $75.00. The $175.00 examination fee is also required of applicants who failed the bar examination. The re-application form must be filed by November [December] 10 prior to the February examination and May 10 prior to the July examination.

B. SCR 2.042 Conditional admission, restoration and reinstatement

The proposed amendments to SCR 2.042 are:

(1) As a part of its certification process for all applicants, including applicants for restoration or reinstatement under SCR 3.500 or 3.510, the Character and Fitness Committee may require that an applicant enter into an agreement as a condition of his/her admission to the Bar. The conditions of admission, as determined by the Character and Fitness Committee, shall be set forth in a written agreement with specific terms and conditions. These terms and conditions shall be monitored by the Committee or its agents or designees.

(2) Upon failure to comply with the terms and conditions of the agreement, the Committee may:

(a) extend the term and impose additional condition(s).

(b) recommend to the Court revocation of the license to practice law.

(3) Additionally, in the event of failure to comply with the conditions of the agreement, or other conditions imposed by the Court upon admission, restoration or reinstatement, the Office of Bar Counsel may:

(a) request that the Court extend the term and impose additional condition(s).

(b) recommend to the Court revocation of the license to practice law.

([3]4) All information relating to conditional admission of an applicant or an attorney shall remain confidential in accordance with SCR 2.008.

([4]5) Any member whose license is revoked by the Court for failure to comply with the terms of a conditional admission agreement shall be deemed to have been subject to a disciplinary action and restoration or reinstatement shall be subject to the rules set forth in SCR 3.510.

C. SCR 3.023 Requirement of Disclosure of Professional Liability Insurance Status

The proposed new rule SCR 3.023 shall read:

(1) A lawyer shall inform a client at the time the lawyer is engaged if the lawyer does not maintain professional liability insurance in the amount of at least $100,000.00 per occurrence and $300,000.00 in the aggregate. At any time

subsequent to the engagement of the lawyer, if the lawyer's professional liability insurance is terminated or the coverage amounts fall below that amount, the lawyer shall so inform the client. The notice shall be provided to the client on a separate form which states: "I acknowledge receipt of the notice required by Supreme Court Rule 3.023 that [insert lawyer's name] does not maintain professional liability (malpractice) insurance of at least $100,000.00 per ocurrence and $300,000.00 in the aggregate." The client shall sign and date the acknowledgement.

(2) The lawyer shall maintain a copy of the acknowledgement for five (5) years after termination of representation of the client.

(3) The notice required shall not apply to a lawyer engaged in rendering legal services to a governmental entity, to a lawyer employed by any organization providing pro bono services to the public, to a lawyer employed by or contracted with the Department of Public Advocacy who is appointed by a court, to a lawyer appointed directly by any court to represent the interests of a litigant, or to a lawyer rendering legal services to the entity that employs the lawyer as in house counsel.

(4) Lawyers providing malpractice insurance at or above the specified amounts may so notify their clients.

D. SCR 3.060 Records to show status of members

The proposed amendments to SCR 3.060 are:

(1) The records of the association shall show the status as to membership and standing of each member and former member of the association. Specifically, those records shall show at least the following data:

(a) As to each present member of the association concerning whom the information is known, and as to each new member hereafter admitted, the date of his admission to the bar and where the court's order granting such admission may be found.

(b) When known, the year of each member's death.

(c) The fact and date of each honorary membership, the reason therefor, and, when the honorary membership terminates, the fact and date of such termination and the reason therefor.

(d) The information concerning professional liability insurance coverage provided pursuant to SCR 3.023.

(e) The final disposition of each motion to resign, and where the court's order finally disposing of each such motion may be found, and, where the motion to resign is sustained, the effective date of the resignation.

(f) [e] The effective date of each disbarment, suspension and reinstatement and where the court's judgment or order of disbarment, suspension or reinstatement may be found, and in the case of suspension, the length of time for which the respondent has been suspended.

(g) [f] In the case of any disciplinary action other than disbarment or suspension (as, for instance, public reprimand), the date, when such disciplinary action was ordered, where the court's judgment or order directing such disciplinary action may be found, and the date when and manner in which such judgment or order was carried out.

(h) [g] The final disposition of each contemplated proceeding brought against a former member of the association under the provisions of Rule 3.460, and where the court's judgment or final order in such proceeding may be found, and the date and manner in which the punishment, if any adjudged therein was inflicted.

(i) [h] Disciplinary complaints filed with the director pursuant to Rule 3.160(1) against attorneys that have been dismissed by the inquiry tribunal shall be maintained by the director for a period of one (1) year after final disposition of the complaint.

(j) [i] Those records which are disciplinary complaints against attorneys that have resulted in discipline of attorneys shall be maintained by the director until five (5) years after the death of the attorneys.

(k) [j] At the end of the period stated in paragraphs (i) and (j) of this rule, the director shall destroy the described complaints and/or records.

E. SCR 3.181 Assistance to Other Lawyer Disciplinary Jurisdictions

The proposed new rule SCR 3.181 shall read:

(1) Upon receipt by the Director of a subpoena certified to be duly issued under the rules or laws of another lawyer disciplinary jurisdiction, or by a clients' security fund of any jurisdiction, the Inquiry Commission may issue a subpoena directing a person domiciled or found within the Commonwealth of Kentucky to give testimony and/or produce documents or other things for use in the other lawyer disciplinary or clients' security fund proceedings as directed in the subpoena of the other jurisdiction.

(2) The testimony or production shall be only in the county wherein the person resides or is employed, or as otherwise fixed by the Inquiry Commission for good cause shown, and shall be taken as provided in CR 28.01.

(3) Any attack on the validity of a subpoena issued by another jurisdiction may be heard and determined by the disciplinary authority of the other state in accordance with the law of the issuing jurisdiction.

(4) In addition to the relief available under the law of the requesting disciplinary jurisdiction or clients' security fund, upon motion made by a party or by the person from whom appearance or production is sought, and for good cause shown, the Inquiry Commission may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (a) that the testimony or production not be had; (b) that it may be had only on specified terms and conditions, including a designation of the time or place; (c) that it may be had only by a method other than that selected by the party seeking testimony or production; (d) that certain matters not be inquired into, or that the scope of the subpoena be limited to certain matters; (e) that the testimony be taken with no one present except persons designated by the Inquiry Commission; (f) that testimony may be sealed to be opened only by order of the original issuing jurisdiction; (g) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (h) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the original issuing jurisdiction.

F. SCR 3.370 (6), (8), (9) and (10) Procedure before the Board and the Court

The proposed amendments to sections (6), (8), (9) and (10) of SCR 3.370 are:

(6) The Board shall decide, by a roll call vote, whether the decision of the Trial Commissioner as to the finding of a violation and degree of discipline imposed is supported by substantial evidence or is clearly erroneous as a matter of law. The Board, in its discretion, may conduct a review *de novo* of the evidence presented to the Trial Commissioner. Both the findings and any disciplinary action must be agreed upon by eleven (11) or three-fourths (3/4) of the members of the Board present and voting on the proceedings, whichever is less. The result of each of the two (2) votes shall be recorded in the Board's minutes and in a written decision of the Board setting forth the reasons therefore as stated in paragraph seven (7) of this rule. The President shall sign and file with the Disciplinary Clerk an order setting forth the action and decision of the Board. The Disciplinary Clerk shall mail copies of such order and decision, together with a copy of the Trial Commissioner's report, to the Respondent and his/her counsel, and to each member of the Inquiry Commission, [and] shall

place ten (10) copies in the file, and file the entire record of the case with the Court. The Board by a vote of a majority of the Board present and voting, may remand the case to the Inquiry Commission for reconsideration of the form of the charge, remand the case to the Trial Commissioner for clarification of the Trial Commissioner's report, or for an evidentiary hearing on points specified in the order of remand. The Board may order the parties to file additional briefs on specific issues.

(8) Bar Counsel or the Respondent may file with the Court a notice for the Court to review the Board's decision within thirty (30) days after the Board's decision is filed with the Disciplinary Clerk, stating reasons for review, accompanied by a brief supporting his/her position on the merits of the case. The opposing party may file a brief within thirty (30) days thereafter. Before the notice for review can be filed, the Respondent shall furnish a bond with surety acceptable to the Disciplinary Clerk, conditioned that if the principal in the bond be disciplined by the Court, he/she will promptly pay all costs incurred in the proceeding, including those certified under Rule 3.370. If Respondent files a response *in forma pauperis,* no bond shall be required.

(9) The Court may, within sixty (60) days of the filing with the Court of the Trial Commissioner's report as provided by 3.360(4), or of the Board's decision, notify Bar Counsel and Respondent that it will review the [Board's] decision. If the Court so acts, Bar Counsel and Respondent may each file briefs within thirty (30) days, with no right to file reply briefs unless by order of the Court, whereupon the case shall stand submitted. Thereafter, the Court shall enter such orders or opinion as it deems appropriate on the entire record.

(10) If no notice of review is filed by either one of the parties, or the Court under paragraph nine (9) of this rule, the Court shall enter an order adopting the decision of the Board or the Trial Commissioner, whichever the case may be, relating to all matters.

G. SCR 3.500 Restoration to membership

The proposed amendments to SCR 3.500 are:

(1) Any former member who has retired under Rule 3.480, or who has been suspended for failure to pay dues as provided by Rule 3.050, or any member who has failed to pay dues for such period of time as to warrant suspension under that Rule, or any member who has been suspended for failure to comply with the continuing legal education requirements as provided by Rule 3.661, and such status has [had] prevailed for less than a period of five (5) years, may apply for restoration by completing forms provided by the Director, to include a certification from the KBA that there is no pending disciplinary matter, tendering a fee of $250.00, and payment of dues for the current year and all back years,

unless he/she has been in a retired status by order of the Court. In cases where a suspension has prevailed for five years or less and the [reinstatement] restoration application is referred to the Character and Fitness Committee, a fee of $250.00 shall be made payable to the Kentucky Office of Bar Admissions.

Upon receipt of such application and payments, the Clerk shall tender the same to the Director who shall refer the application to the Continuing Legal Education Commission for [proceedings] certification under Rule 3.675 within thirty (30) days of the referral. The Continuing Legal Education Commission shall make its [recommendation] certification which shall be added to the record in the restoration proceeding. The Director shall in turn advise each member of the Board and furnish them all pertinent information available.

(a) The Board shall, within thirty (30) days of review of the information, make its recommendation to the Court for approval of an entry of an order restoring the Applicant or

(b) Refer the matter to the Committee for proceedings under Rule 2.040 and SCR 2.011. The Committee's recommendation shall be made to the Board for its action and recommendation to the Court.

(c) As to any Applicants, including those who have been suspended for failure to pay dues or failure to meet continuing legal education requirements, the mere submission of the application for [reinstatement] restoration and tendering the required fee shall not automatically restore the privilege of practicing law, and such suspension shall remain in force pending entry of the order of the Court restoring the Applicant.

(2) Any former member who has withdrawn or retired or has been suspended for failure to pay dues or has been suspended for failure to meet continuing legal education requirements, and such status has prevailed for five (5) or more years, may file an application for restoration which shall include a certification from the KBA that there is no pending disciplinary matter, and [pay] payment [a fee] of $500.00. If the former member has been suspended for nonpayment of bar dues he shall also tender payment for current dues and all back dues. The application shall then be referred to the Committee for proceedings under Rule 2.040 and SCR 2.100 and to the Continuing Legal Education Commission for [proceedings] certification under Rule 3.675. An additional fee of $500.00 shall be made payable to the Kentucky Office of Bar Admissions.

The Committee [and Continuing Legal Education Commission] shall make [their] its recommendation[s] to the Board.

(3) If the Committee recommends approval of the application and the Board concurs, and the status of suspension has prevailed for five (5) or more

years, then the application shall be referred to the Board of Bar Examiners, which Board shall administer a written examination which shall cover the subject of ethics and five (5) of the subjects listed in SCR 2.080(1). Each of these subjects must be passed by the Applicant, and not averaged or combined with each other, or with the score obtained on the examination required by Rule 2.015. The fees required by Rules 2.022 and 2.023 shall be paid prior to taking the examination.

If an Applicant passes an examination, such fact shall be certified to the Court and the Director, together with a recommendation that the Applicant be readmitted to membership. Upon this certification, the Director shall forward the file to the Court to consider whether to restore the Applicant. If the Applicant fails to pass an examination, the Board of Bar Examiners shall certify the fact of failure to the [Association] Court and the [Court] Director. Upon certification that Applicant failed to pass, the Director shall forward the file to the Court for entry of an order denying the Applicant for [reinstatement] restoration.

The provisions of Rules 2.015 and 2.080 shall apply where not inconsistent.

(4) If the Committee recommends disapproval of the application referred to in paragraph (2) after its hearing, then the [information] application shall be referred to the Board for review. The Applicant [shall be promptly notified of such disapproval and, if he/she so requests, the Board shall appoint a Trial Commissioner to conduct a hearing and make recommendation to the Board] and the KBA may file briefs and an oral argument may be held at the request of either party. If, after such [hearing] consideration, the Board concurs in disapproval of the application, its findings and recommendation shall be filed with the Clerk, and [then] the Applicant and the Committee shall be notified of this decision by the [Clerk] Director. The Applicant shall be sent notice by certified mail, return receipt requested, at his/her [last known] bar roster address.

For a period of twenty (20) days after the Clerk shall have mailed said notice, the Applicant may petition the Court for a review of the action of the Board.

Should the Board or the Court reverse the disapproval recommendation[s] of the Committee, then the file shall be referred to the Board of Bar Examiners for procedure under paragraph (3).

(5) All costs incurred in excess of the filing fee shall be paid by the Applicant. A cash or corporate surety bond in the amount of $2500.00 to secure costs to be incurred shall be posted with the Clerk before the Clerk files the application.

(6) The burden of proof is on the Applicant to establish his/her present qualifications to practice law in Kentucky.

(7) If the Committee and Board recommend approval of restoration on conditions, as provided in SCR 2.042, or approval with such additional conditions as the Board may recommend, the Court may include such conditions in any order of restoration.

H. SCR 3.510 Reinstatement in case of disciplinary suspension

The proposed amendments to SCR 3.510 are:

(1) No former member of the Association who has been suspended for a disciplinary case for more than one hundred eighty (180) days shall resume practice until he/she is reinstated by order of the Court. Application for reinstatement shall be on forms provided by the Director and Continuing Legal Education Commission, filed with the Clerk, and shall be accompanied by a filing fee of $250.00 which shall be made payable to the Kentucky Bar Association. An additional filing fee of $1250.00 shall be made payable to the Kentucky Office of Bar Admissions. The Clerk shall not accept an application for filing unless all costs incurred in the suspension proceeding have been paid by the former member, the Office of Bar Counsel has certified to the Applicant that there is no pending disciplinary file, and the costs in the reinstatement proceeding (whether costs of the Association or of the Character and Fitness Committee or of the Office of Bar Admissions) have been secured by the posting of a cash or corporate surety bond of $2500.00. Any additional costs will be paid by Applicant. Upon filing of an application and payment of the filing fee, the Clerk shall promptly deliver the application to the Director together with the original record of suspension proceeding. The Director shall refer the application to the Continuing Legal Education Commission within ten (10) days of receipt for [proceedings] certification under Rule 3.675. The Continuing Legal Education Commission shall make its [recommendation] certification within twenty (20) days of the referral which shall be added to the record in the reinstatement proceedings.

(2) If the period of suspension has prevailed for one hundred eighty (180) days or less, the suspension shall expire by its own terms upon the filing with the Clerk and Bar Counsel of an affidavit of compliance with the terms of the suspension, which must include a certification from the CLE Commission that the Applicant has complied with SCR 3.675. The Registrar of the Association will make an appropriate entry in the records of the Association reflecting that the member has been reinstated; provided, however, that such suspension shall not expire by its own terms if, not later than ten (10) days preceding the time the suspension would expire, Bar Counsel files with the Inquiry Commission an opposition to the termination of suspension wherein Bar Counsel details such information as may exist to indicate that the member does not, at that time, possess sufficient professional capabilities and qualifications properly to serve the public as an active practitioner or is not of good moral character. A copy of

such objection shall be provided to the Character and Fitness Committee, to the member concerned, and to the Registrar. If such an objection has been filed by Bar Counsel, and is not withdrawn within thirty (30) days, the Character and Fitness Committee shall conduct proceedings under [Rule 2.040] SCR 2.300. In cases where a suspension has prevailed for one hundred eighty (180) days or less and the reinstatement application is referred to the Character and Fitness Committee, a fee of $1250.00 shall be made payable to the Kentucky Office of Bar Admissions.

(3) If the period of suspension has prevailed for more than one hundred eighty (180) days, the matter shall be referred to the Character and Fitness Committee for proceedings under [Rule 2.040] SCR 2.300. The Character and Fitness Committee will determine whether the application of a member who has been suspended one hundred eighty (180) days or less but whose termination of suspension has been objected to, or a member who has been suspended for more than one hundred eighty (180) days, should be approved. The Character and Fitness Committee shall file with the Director [and the Clerk] the entire record, including a written report and recommendation by the Character and Fitness Committee. The Board shall review the record and report and recommend approval or disapproval of the application to the Court. The Court may enter an order reinstating the Applicant to the practice of law or deny the application.

(4) If the period of suspension has prevailed for more than five (5) years, the Director shall refer the application to the Character and Fitness Committee for proceedings under [Rule 2.040] SCR 2.300. The Committee shall file a written report and recommendation with the Director and the Clerk. The Board shall review the record and report and recommend approval or disapproval of the application to the Court. [If] In the event both the Committee and the Board, or the Board, recommends approval of the application, the Director shall notify the Applicant and the Committee, and the Committee shall refer the application to the Board of Bar Examiners for processing in accordance with Rule 3.500(3) [and shall file the entire record with the Clerk, including the written report and recommendation of the Committee]. The Board of Bar Examiners shall certify the results of the examination to the Director and the Court. The Director shall then file the entire record with the Clerk, including the written report and recommendation of the Committee and the Board. If the Applicant successfully completes the examination, the Court may, at its discretion, enter an order reinstating the suspended member to the practice of law. However, if the Applicant fails to pass the examination, the Court shall enter an order denying the application.

(5) A suspended member of the Association who desires to resume practice as quickly as possible following a period of suspension may file an application to do so at any time during the last ninety (90) days of the period of suspension.

(6) If the Committee and Board recommend approval of reinstatement on conditions, as provided in SCR 2.042, or approval with such additional conditions as the Board may recommend, the Court may include such conditions in any order of reinstatement.

I. SCR 3.530 Ethics Committee and Unauthorized Practice Committee –Advisory opinions – Informal and formal

The proposed substituted SCR 3.530 shall read:

(1) The Ethics Committee and the Unauthorized Practice Committee are authorized to issue informal opinions, and to submit to the Board for its action formal opinions, on questions of ethics or unauthorized practice, as applicable.

(2) Any attorney licensed in Kentucky or admitted under SCR 3.030(2), who is in doubt as to the ethical propriety of any professional act contemplated by that attorney may request an informal opinion. The President shall designate members of the Ethics Committee to respond to such requests. Ordinarily, the request shall be directed to a member of the requestor's Supreme Court district. Such request shall be in writing or by telephone followed by a request in writing. The committee member to whom the request is directed shall attempt to furnish the requesting attorney with a prompt telephonic answer and written informal letter opinion as to the ethical propriety of the act or course of conduct in question. A copy of any such informal opinion shall be provided to the Director for safekeeping and statistical purposes, and to the Chair of the Ethics Committee, to determine whether the informal opinion has broader application.

(3) Communications between the requesting attorney and the Ethics Committee member shall be confidential. However, the requesting and giving of advice under this Rule does not create an attorney-client relationship. In order to promote uniformity of advice, redacted copies of informal opinions may be circulated among members of the Ethics Committee, as applicable, provided that such confidentiality is preserved.

(4) If the Ethics Committee determines an ethical issue to be of sufficient importance, the Committee may issue and furnish to the Board of Governors a proposed opinion authorized by such Committee for approval as a formal opinion. Such approval shall require a vote of three-fourths of the voting members present at the meeting of the Board. If the Board is unable to approve of the opinion as written, then the Board may return the matter to the Committee for further review and consideration, or may modify the opinion and approve the opinion as modified by the three-

fourths vote, or may direct the Committee to furnish the requesting attorney, if any, with an informal opinion in the form of a Chair's letter opinion, with a copy to the Director.

(5) Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act performed by that attorney in compliance with an informal opinion furnished by the Ethics Committee member pursuant to such attorney's written request, provided that the written request clearly, fairly, accurately and completely states such attorney's contemplated professional act.

(6) Any attorney licensed in Kentucky who is in doubt as to the propriety of any course of conduct or act of any person or entity which may constitute the unauthorized practice of law may make a request in writing, or in emergencies, by telephone, to the Chair of the Unauthorized Practice Committee, or such other members of the Unauthorized Practice Committee as are designated by the Chair, for an advisory opinion thereon. Local bar associations may also request advisory opinions. The Committee member to whom the request is directed shall bring this matter to the attention of the Committee at its next meeting. The Committee may attempt to furnish the requesting attorney with a prompt telephonic answer and written informal letter opinion as to whether the conduct constitutes the unauthorized practice of law. A copy of such informal opinion shall be provided to the Director and the Chair of the Unauthorized Practice Committee.

(7) Any attorney licensed in Kentucky or admitted under SCR 3.030(2) who is in doubt as to the ethical propriety of any professional act contemplated by that attorney with respect to the unauthorized practice of law shall be referred to the Ethics Committee district member for an informal opinion as set forth in (2) and (3). Communications about such an inquiry between the requesting attorney and the unauthorized practice committee member, and between the committee members of the two committees, shall be confidential.

(8) The requesting and giving of advice by the Unauthorized Practice Committee under this Rule does not create an attorney/client relationship.

(9) If the Unauthorized Practice Committee determines an issue regarding the unauthorized practice of law to be of sufficient importance, the Committee may issue and furnish to the Board of Governors a proposed opinion authorized by such Committee for approval as a formal opinion. Such approval shall require a vote of three-fourths of the voting members present at the meeting of the Board. If the Board is unable to approve the opinion as written, then the Board may return the matter to

the Committee for further review and consideration, or may modify the opinion and approve the opinion as modified by the three-fourths vote, or may direct the Committee to furnish the requesting attorney, if any, with an informal opinion in the form of a Chair's letter opinion, with a copy to the Director.

(10) Ethics Committee and Unauthorized Practice Committee members shall be immune from suit for advice given in the performance of duties under this Rule.

(11) All formal opinions of the Board arising from either Committee shall be published in full or in synopsis form, as determined by the Director, in the edition of the KENTUCKY BENCH & BAR next issued after the adoption of the opinion.

(12) Any person or entity aggrieved or affected by a formal opinion of the Board may file with the clerk within thirty (30) days after the end of the month of publication of the KENTUCKY BENCH & BAR in which the full opinion or a synopsis thereof is published, a copy of the opinion, and, upon motion and reasonable notice in writing to the Director, obtain a review of the Board's opinion by the Court. The Court's action thereon shall be final and the Clerk shall furnish copies of the formal order to the original petitioner, if any, the movant and the Director. The movant shall file a brief in support of the review, and the Director may file a response brief thirty days thereafter.

(13) The filing fee for docketing a motion under paragraph (7) of this Rule 3.530 shall be as provided by Civil Rule 76.42(1) for original actions in the Supreme Court.

J. SCR 3.668(1) Non-compliance, definition

The proposed amendments to section (1) of SCR 3.668 are:

(1) Delinquency of Certification. Any certification of Continuing Legal Education activity for an educational year (July 1-June 30) which is submitted after the August 10th immediately following the close of that educational year, shall be deemed past due and in non-compliance. All past due reports shall be accompanied by a late filing fee of fifty dollars ($50) per certificate or report to cover the administrative costs of recording credits to the prior year. All past due reports for completion of an activity in the immediately preceding educational year must be received by the Commission with the late fee of $50.00 per certificate or report no later than the close of the current educational year (June 30). This deadline (June 30) will not apply in instances where the member or former member is in the process of removing an exemption per SCR 3.666(6) or

attempting certification per SCR 3.675, but the late fee of $50 per certificate or report shall be applied if the report is received after the August 10th reporting deadline described above.