

## DISCRETIONARY REVIEW PRACTICE IN THE KENTUCKY SUPREME COURT

By C. Theodore Miller

In an effort to enhance the understanding of the discretionary review process in the Kentucky Supreme Court, I have been asked to share some observations and practical pointers based upon my experience in serving the Court in central staff for over 28 years. In doing so, my comments of course are my own and not those of the Court.

### The Decision Whether to Seek Discretionary Review

Several factors should be considered before filing a motion for discretionary review, which rarely succeeds as a mere “knee jerk” reaction to having lost an appellate decision in the Court of Appeals. To begin, a prospective movant must make sure that the Court of Appeals has rendered a final decision as envisioned by CR 76.20(2)(b).<sup>1</sup> Further, although cases imposing sanctions for failure to seek discretionary review in “good faith” have not been cited in recent years, the provisions of CR 73.02(4) apply to motions for discretionary review and bear consideration.<sup>2</sup>

The most common questions involving discretionary review are, not surprisingly, what constitute CR 76.20(1) “special reasons”<sup>3</sup> and what are the statistical chances of not only procuring review but also ultimately prevailing. In attempting to describe the Court’s case-by-case exercise of discretion in continuing education seminars and otherwise over the years, my best response regarding what constitutes “special reasons” has been as follows in § 10:1 of *Baldwin’s Kentucky Lawyer’s Handbook, Appellate Practice*:

Although “special reasons” escapes precise definition, generally if a novel question of statewide significance, a legal proposition that requires reexamination, or a matter in which lower courts have conflicted is raised, the granting of review is more likely. A contention that the appellate court has clearly erred is not necessarily persuasive.<sup>4</sup>

The percentages tell more of the story. Since 1983, when the Kentucky Supreme Court began requiring four votes (rather than three) to grant discretionary review, only 15 percent of nearly 17,000 motions for discretionary

review have been granted.<sup>5</sup> In the three years since the most recent change on the Court, 18 percent of over 1,600 motions for discretionary review have been granted. Although the decision to grant review involves far more than assessment of whether the Court agrees with the Court of Appeals decision in question, reversal statistically is more likely than is affirmance after review has been granted. Still, the statistical chance of procuring discretionary review and ultimately prevailing is approximately 10 percent.

Over the years, some justices in opinions and in publications or seminars have offered their individual opinions regarding their concepts of “special reasons.” The best evidence of the Court’s collective consideration, however, comes from reviewing which motions have been granted. In that regard, an indication concerning current trends may be gleaned from reviewing the regularly updated synopses of pending granted motions on the Supreme Court’s website at [www.kycourts.net](http://www.kycourts.net), under the “Discretionary Review” resource heading.

### Highlights Concerning Contents of Motions and Responses

CR 76.20(2)(b) requires the filing of a motion for discretionary review within 30 days after a final Court of Appeals decision. If a timely petition for rehearing of an opinion or motion for reconsideration of a final order (or opinion and order) has been filed in the Court of Appeals, the 30-day period runs from the disposition of such a petition or motion. CR 76.20(2)(c) mandates dismissal of an untimely motion for discretionary review. Extensions of time requested prior to expiration of the pertinent period are not precluded.

With regard to the contents of the motion, many motions continue to contain narratives not complying with the CR 76.20(3)(d) requirement of a “clear and concise statement of (i) the material facts, (ii) the questions of law involved, and (iii) the specific reason or reasons why the judgment should be reviewed.” Such a statement should be included even for relatively short motions. As with all other considerations concerning

motions for discretionary review, case-by-case circumstances control. As a general rule, though, a page or two rarely will suffice to provide the Court with sufficient information regarding a request for review. Neither, however, should a movant feel compelled to write to the full extent of the CR 76.20(3) 15-page limit when five pages suffices to accomplish the task.

CR 76.20(4) specifies the minimum attachments to be appended to the motion. Although the decisions of the lower courts (including final post-decision rulings) and any administrative agency decisions are required, inclusion of a pertinent pretrial ruling or for example a particular contract or will at issue also should be considered. In that regard, although the Court can and does frequently request the record for review in considering whether to grant discretionary review, the record otherwise remains at the Court of Appeals unless the motion is granted. If a “not to be published” opinion rendered since 2003 is “cited for consideration” as permitted by CR 76.28(4)(c) when “there is no published opinion that would adequately address the issue,” a copy of the opinion must be included with the motion.

Although responses to motions for discretionary review are permissive rather than mandatory under CR 76.20(5), respondents always should take the opportunity to tell the Court concisely why review should not be granted under all the circumstances of the case. A one-sentence “no special reasons” response, though, is not helpful.

## The Decision-Making Process

The Kentucky Supreme Court’s decision-making process regarding motions for discretionary review has remained essentially unchanged from that documented in 1985 in the *Kentucky Appellate Handbook* published by the Kentucky Bar Foundation and Banks-Baldwin Publishing Company.<sup>6</sup> Specifically, upon submission motions generally are assigned randomly to one of the Court’s several (currently four) central staff counsel for preparation of a written recommendation regarding disposition. Such recommendations are circulated, together with the motion and any response(s), for initial consideration

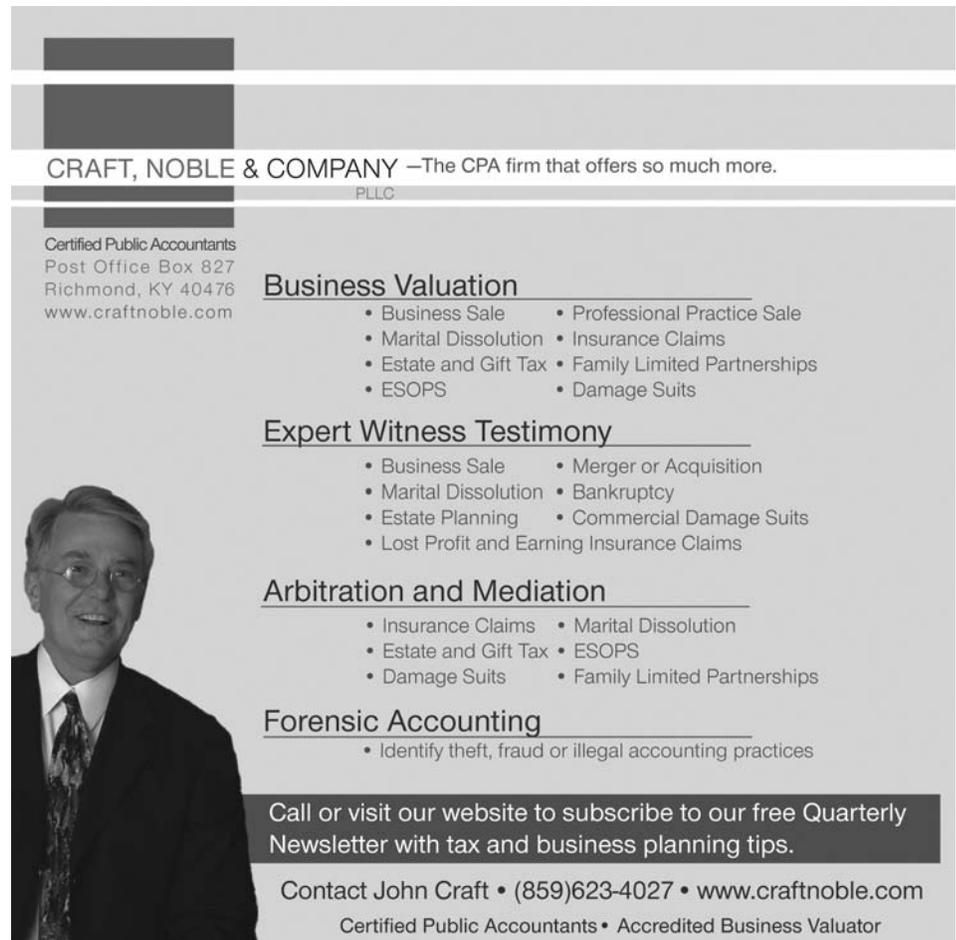
by each justice individually prior to collective consideration by all seven justices during the next Court conference week. Each motion is called on the docket and discussed during conference to the extent that any justice desires to address any aspect of the case. A minimum of four votes are necessary in order to grant discretionary review. Similarly, four votes are necessary in order to modify the publication status of a Court of Appeals opinion upon denial of discretionary review.

## What Happens After Review is Granted

If the motion is granted, unless the order indicates otherwise the case will proceed to briefing pursuant to CR 76.12 and subsequently to oral argument pursuant to CR 76.16 prior to assignment to a justice in the majority for preparation of a draft opinion. If, however, the Court is convinced that oral argument seems unnecessary in order to decide the case, the order granting discretionary review will indicate that briefing will proceed pursuant to

CR 76.12 but that no oral argument will be scheduled. When a recent opinion of the Court potentially impacts a pending motion for discretionary review, the pending motion may be granted in an order summarily vacating and remanding for reconsideration by the appropriate lower court.

Briefing time is suspended if the respondent files a CR 76.21 cross-motion.<sup>7</sup> The respective time requirements for a cross-motion and cross-response are only 10 days. The standard for a cross-motion is not “special reasons” but a much more easily satisfied standard specified in CR 76.21(1) as “designating issues raised in the original appeal which are not included in the motion for discretionary review but which should be considered in reviewing the appeal in order to properly dispose of the case.” Although the 1986 adoption of CR 76.21 solved problems relating to whether parties needed to file “protective” motions for discretionary review which were frequent in the first decade after the passage of the Judicial Article creating an intermediate



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appellate court in Kentucky beginning in 1976, the failure to file cross-motions also occasionally created traps for the unwary. In the recent case of *Fischer v. Fischer*, 348 S.W.3d 582 (Ky. 2011), the Court sought to eliminate such traps by stressing the permissive language of CR 76.21 and the need to file such motions only when the Court of Appeals resolves an issue against a respondent in a decision regarding which the movant's motion for discretionary review has been granted.<sup>8</sup>

## Summary

As is apparent, motions for discretionary review are resolved by individual and careful case-by-case consideration. Although the number of such motions has gone down in recent years, as has the number of Court of Appeals decisions, motions for discretionary review still account for over half of the filings in the Supreme Court and the primary area in which the Court can control the content of a crowded docket.<sup>9</sup> 

## ENDNOTES

1. CR 76.20(2)(b) provides as follows: "A motion for discretionary review by the Supreme Court of a Court of Appeals decision shall be filed within 30 days after the date of the order or opinion sought to be reviewed unless (i) a timely petition under Rule 76.32 or (ii) a timely motion for reconsideration under Rule 76.38(2) has been filed or an extension of time has been granted for that purpose, in which event a motion for discretionary review shall be filed within 30 days after the date of the order denying the petition or motion for reconsideration or, if it was granted, within 30 days after the date of the opinion or order finally disposing of the case in the Court of Appeals." CR 76.20(3)(b) also provides in pertinent part that a motion for discretionary review "shall contain . . . the date of final disposition by the Court of Appeals."
2. In *Freeman v. Commonwealth*, 697 S.W.2d 133 (Ky. 1985) and *Walker v. Commonwealth*, 714 S.W.2d 155 (Ky. 1986), attorneys for movants were sanctioned for filing "frivolous"

3. In pertinent part, CR 76.20(1) provides as follows: "A motion for discretionary review by the Supreme Court of a decision of the Court of Appeals . . . shall be prosecuted as provided by this CR 76.20 and in accordance with the Rules generally applicable to other motions. Such review is a matter of judicial discretion and will be granted only when there are special reasons for it."
4. *Baldwin's Kentucky Lawyer's Handbook with Forms, 2011 Edition* (Thomson Reuters). The author has updated "Appellate Practice" Chapters 9 and 10 of that publication, entitled "Pleadings and Practice in the Supreme Court," since 1984. The quoted statement regarding "special reasons" has been included in that material since 1984.
5. From 1983 until the present, the percentage of motions for discretionary review granted has varied only several percentage points from the 15 percent average. This has been the case even though 30 justices have served on the Court in that time and even though the number of such motions filed has varied over the years from less than 500 to over 900.
6. The *Kentucky Appellate Handbook*, updated with cumulative services in 1989 and 1993, was the precursor of the current *Kentucky Practice, Appellate Practice*, Volume 19, which also addresses the Kentucky Supreme Court's deliberative process in Chapter 1:2.
7. The full time for briefing the previously granted discretionary review starts again upon entry of an order granting or denying the cross-motion. See CR 76.21(3).
8. If a cross-motion is granted, CR 76.21(4) provides that briefing pur-

suant to CR 76.12 is expanded to permit the cross-motion issues to be addressed in the combined appellee/cross-appellant's brief, with the response to those issues being addressed in the combined cross-appellee/reply brief.

9. Although far fewer in number, CR 74.02 motions to transfer from the Court of Appeals and CR 76.37 motions for certification of questions of law also are matters within the Kentucky Supreme Court's discretion, as are CR 65.09 injunction proceedings. The majority of opinions rendered by the Court, however, involve appeals as a matter of right in (1) RCr 12.02 appeals in criminal cases from judgments imposing sentences of death, life or 20 years or more, or (2) CR 76.36(7) appeals in cases filed as original actions in the Court of Appeals, including workers' compensation cases and original actions in the nature of petitions for writs of prohibition or mandamus sought against circuit judges. In addition, the Kentucky Supreme Court has original jurisdiction over cases commenced in the Kentucky Bar Association and the Judicial Conduct Commission.



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