



Right of Co-Parties to File Separate Appellate Briefs

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Confusion sometimes arises in appeals in which there are co-parties as to whether each co-party is entitled to file its own appellate brief, or whether the co-parties must jointly submit one brief. CR 73.01(3) states that two or more persons entitled to appeal from a judgment may join as appellants by: (a) filing a joint notice of appeal; or (b) after filing separate notices of appeal, joining in one appeal (if practicable). If such parties join in appeal, the Rule provides that they “shall thereafter proceed as a single appellant.” Proceeding as a single appellant entails filing a single brief, absent permission of the appellate court to file separate briefs.

The issue of the right to file separate briefs involves some ambiguity under the rules, however, in the case in which two parties file separate notices of appeal from the same judgment (thereby initiating two separate appeals), yet do not wish to combine their briefing as one appellant. No civil rule expressly addresses this situation. In practice, such parties are typically afforded the right to file separate briefs.

The Kentucky Court of Appeals Basic Appellate Practice Handbook provides some insight on this issue. It states: “It is important to remember that only one appellant brief may be filed in each appeal. If appellants or groups of appellants have separate interests that will make it desirable to file separate briefs, separate notices of appeal must be filed.” [FN: Basic Appellate Practice Handbook, *supra* Comment 7, at 14.] This statement confirms that the filing of separate notices of appeal normally entitles those who were co-parties in the trial court to file separate appellate briefs. The prosecution of separate appeals is normally not economical if the appeals concern the same parties and the same judgment, and it could also create inconsistent results. For those reasons, the Court of Appeals routinely orders that separate appeals from the same judgment be consolidated for oral argument (if held) and decision by the same appellate panel, while affording the separate appellants the right to file separate briefs.

With respect to the procedure for consolidating contemporaneous appeals, CR 75.11 (“Several Appeals”) mandates that a single record on appeal be prepared in the event that more than one appeal is taken from the same judgment. This, of course, paves the way for an economical consolidation of the appeals.

CR 76.03 requires the appellant to file a prehearing statement within 20 days of filing the notice of appeal. The prehearing statement provides a set of background information to the Court about the case and appeal. That information includes, *inter alia*, whether the matter has been before the Court of Appeals on a previous occasion and whether other appeals arising from the same case or controversy are pending before the appellate courts. The primary purposes of the prehearing statement are to provide the Court of Appeals with a case background and to allow the Court to determine whether a prehearing conference should be held. The prehearing conference, if held, provides the parties and Court an opportunity to agree on a number of ground rules for the appeal, including simplification of issues, the content of the record, the time for filing briefs, and other matters to aid in the disposition of the appeal. See CR 76.03(10). Since the prehearing statement will have provided information on contemporaneous appeals, this is an ideal time for the Court to consolidate any such appeals, if practicable, and for the Court and parties to address related matters such as the issue of separate briefs by multiple parties.

In the event the Court of Appeals consolidates separate appeals but the appellants do not join, the Rules likewise do not expressly provide whether the appellee(s) may file a separate brief for each appellant's brief, whether the appellee(s) may file only one brief, or whether the appellee(s) may file a combined brief with an enlarged page limit. However, fairness and a reasonable interpretation of the rules indicates that the appellees should be provided the opportunity to respond to each appellant's brief separately, if desired. By analogy, CR 76.20(5) governing responses to motions for discretionary review provides that a

response may be filed by each respondent. Questions as to such matters should ideally be resolved by agreement of the parties confirmed by an agreed order or by the Court following a prehearing conference if one is held.

Where the Court consolidates for oral argument and/or decision separate appeals of separate judgments by different parties on the basis that the issues raised in the separate appeals are identical or overlapping, the separate appellants are given the right to file separate briefs, and the appellees have the right to file one responsive brief for each appellant's brief filed.

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