MORRISON MAHONEY LLP

COUNSELLORS AT LAW

250 SUMMER STREET
BOSTON, MASSACHUSETTS 02210-1181
617-439-7500

Richard L. Neumeier
Direct Dial: 617-439-7569
Direct Fax: 617-342-4980
rneumeie@morrisonmahoney.com

February 3, 2014

Via E-mail: (lisabetha@kycourts.net)
And First Class Mail
Lisbeth Abramson
Justice, Supreme Court of Kentucky
Jefferson County Judicial Center
700 W. Jefferson St., Suite 1000
Louisville, KY 40202

Re: AAAL Rules Committee Report Concerning Kentucky Appellate Rules of Procedure

Dear Judge Abramson:

According to Bethany Breetz, she did not receive the attachment to my attachment to my letter of January 28, 2014 (copy enclosed). Because you may not have received the attachment, I am therefore resending it together with my January 28, 2014 letter.

Very truly yours,

Richard L. Neumeier

RLN/dra
Enclosure
Cc: (w/enc.)

Via E-mail: (bbreetz@stites.com)
And First Class Mail
Bethany A. Breetz
Stites & Harbison, PLLC
400 W. Market St., Suite 1800
Louisville, KY 40202

Via E-mail only:
James C. Martin, President, AAAL (jcmartin@reedsmith.com)
Lynn Turner (lturner@mgmtsol.com)
Beth W. Palys (bpalys@mgmtsol.com)

MORRISON MAHONEY LLP

COUNSELLORS AT LAW

250 SUMMER STREET
BOSTON, MASSACHUSETTS 02210-1181
617-439-7500

Richard L. Neumeier
Direct Dial: 617-439-7569
Direct Fax: 617-342-4980
rneumeie@morrisonmahoney.com

January 28, 2014

Via E-mail: (lisabetha@kycourts.net)
And First Class Mail
Lisbeth Abramson
Justice, Supreme Court of Kentucky
Jefferson County Judicial Center
700 W. Jefferson St., Suite 1000
Louisville, KY 40202

Re: AAAL Rules Committee Report Concerning Kentucky Appellate Rules of Procedure

Dear Judge Abramson:

As Chair of the Rules of Committee of the American Academy of Appellate Lawyers, I enclose comments of the American Academy of Appellate Lawyers on the proposed Kentucky Appellate Rules of Procedure which have been signed by AAAL President James C. Martin.

Very truly yours,

Richard L. Neumeier

RLN/dra
Enclosure
Cc: (w/enc.)

Via E-mail: (bbreetz@stites.com)
And First Class Mail
Bethany A. Breetz
Stites & Harbison, PLLC
400 W. Market St., Suite 1800
Louisville, KY 40202

Via E-mail only:
James C. Martin, President, AAAL (jcmartin@reedsmith.com)
Lynn Turner (lturner@mgmtsol.com)
Beth W. Palys (bpalys@mgmtsol.com)

Comments of the American Academy of Appellate Lawyers on the Proposed Kentucky Appellate Rules of Procedure

The American Academy of Appellate Lawyers has reviewed the discussion draft of the proposed Kentucky Appellate Rules of Procedure that was circulated for comment at the June 2013 Kentucky Bar Association Convention. The AAAL, through its Rules Committee, reviews proposed changes in state court appellate rules with the goals of achieving uniformity in appellate procedure and minimizing rules that tend to frustrate the appellate rights of parties. With those goals in mind, the AAAL offers the following comments on the proposed Kentucky Rules.

1. The AAAL supports the proposed KAP 2.1, which deletes the requirement of Kentucky's present CR 73.03(1) that the notice of appeal specify by name all appellees. If that requirement were merely an administrative, housekeeping provision, it would not be a concern. The AAAL supports this change due to the case law interpreting the present Kentucky rule as requiring dismissal of the appeal for failure to join an indispensable party if the notice of appeal fails to identify by name all the appellees. *See City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990)(appeal dismissed where the notice of appeal named only original plaintiffs and omitted intervenors even though copies of the notice of appeal were served on intervenors' counsel); see also *Lassiter v. Am. Express Travel Related Serv. Co.*, 308 S.W.3d 714, 719 (Ky. 2010)(naming department, "by functional equivalence, likewise named the agency's head, the treasurer in his official capacity"); *A.M.W. v. Cabinet for Health and Family Services, Commonwealth of Kentucky*, 356 S.W.3d 134 (Ky. App. 2011)(appeal from order terminating parent rights dismissed where notice of appeal did not name child). By deleting the requirement that the notice of appeal identify all appellees by name, proposed KAP 2.1 would make the

Kentucky rule identical to the federal rule and the rule in most states. See, e.g., Fed. R. App. P. 3 (c)(1)(A).

2. The AAAL supports the addition of KAP 19, which expressly provides a procedure for a stay pending appeal of a non-monetary judgment. This support specifically includes the portion of KAP 19.3(c) prescribing that, in reviewing a decision by the Court of Appeals as to an application for a stay, the Supreme Court will apply the same criteria applicable to its review of a Court of Appeals decision in an interlocutory appeal of an order granting or denying a temporary injunction. These proposals clarify current Kentucky appellate procedure, superseding *Russell Hosp. Dist. v. Ephraim McDowell*, 152 S.W.3d 230 (Ky. 2004) and *Green Valley Environmental Corp. v. Clay*, 798 S.W.2d 141 (Ky. 1990), and are consistent with practice in the courts of other states and the United States.

3. The AAAL has concerns about proposed KAP 21.3(b), which provides as follows:

> A party shall be limited on appeal to issues identified in the prehearing statement, except that upon a timely motion demonstrating good cause, the Court of Appeals may permit additional issues to be raised.

In most states the appellant is not required to identify the issues presented until the filing of the appellant's brief, and the question whether the issue has been preserved for appeal turns upon preservation in the trial court, not upon a preliminary filing in the appellate court. Requiring the appellant to file a preliminary document cataloging all the issues that may (or may not) be included in the appellant's ensuing brief unnecessarily requires the appellant to file a laundry list of potential appellate issues in an effort to avoid the draconian result that an issue may not have been preserved for appeal. While identifying the issues in the preliminary document may facilitate the administrative decision whether to convene a prehearing conference for purposes of

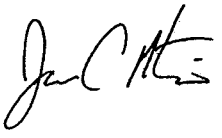
a mediation, the inclusion in the rule of the provision that an issue is waived if not included in that preliminary document unnecessarily poses risks to the appellate rights of the parties. Furthermore, the client (or trial lawyer) may engage an appellate specialist after the initial document is filed. Under this proposed rule, persuasive appellate issues might be lost if the trial lawyer did not recognize them. This would prejudice the client without really benefitting the appellate courts. Finally, appellate courts benefit when the brief writer really hones the issue(s), as the brief is finalized, to the most precise and useful description possible. The AAAL suggests that proposed KAP 21.3(b) not be adopted.

4. The present practice of the Supreme Court of Kentucky Clerk is not to accept for filing a motion for leave to file an amicus curiae brief in support of a motion for discretionary review or a motion to transfer an appeal from the Court of Appeals to the Supreme Court of Kentucky. This practice apparently has been followed by the clerk's office because the rule permitting amicus briefs appears in the rule pertaining to briefs on the merits. The AAAL suggests that motions seeking to invoke the discretionary jurisdiction of a state's highest appellate court are a procedural step in which friend of court briefs stating reasons why the court should exercise its discretionary jurisdiction to review a case are of optimum value to the court. For example, the United States Supreme Court rules expressly allow amicus curiae briefs in support of petitions for certiorari. See Sup. Ct. R. 37.2(a). Such a rule is also commonplace in state courts. See, e.g., Ind. R. App. P. 41; Ohio S. Ct. Prac. R. 3.5 ("An amicus curiae may file a jurisdictional memorandum urging the Supreme Court to accept or decline to accept a claimed appeal of right or a discretionary appeal."). This proposal could be implemented by revising proposed KAP 33.4(d) — which presently codifies the rule on amicus curiae briefs within the

rule pertaining to briefs on the merits — or by an addition to the rules pertaining to transfer and discretionary review, respectively.

5. While the provision entitled "Scope of Rules" provides that "[t]hese rules govern appellate procedure in all Kentucky courts," several rules continue to refer specifically to the "Court of Appeals", creating potential confusion for appeals in circuit courts from district court decisions. For example, KAP 40.2(a)(1) specifies that a petition for rehearing is applicable to "an opinion of the Supreme Court or Court of Appeals," omitting a decision by a circuit court in an appeal from a district court. This leaves open the question whether reconsideration of an appellate decision by a circuit court is governed by the rules applicable to post-judgment decisions when the circuit court is sitting as a trial court. See, e.g., *Bates v. Connelly*, 892 S.W.2d 586 (Ky. 1995). The AAAL suggests that this and similar rules should be clarified so that appeals from district court to circuit court are, in fact, governed entirely by the Appellate Rules of Procedure.

Respectfully submitted,



James C. Martin, President
American Academy of Appellate Lawyers