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Appellate Procedure: Are We Playing the Game Without a Complete Set of Rules?

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The chess-board is the world, the pieces are the phenomena of the universe, the rules of the game are what we call the laws of nature. The player on the other side is hidden from us. We know that his play is always fair, just, and patient. But also we know, to our cost, that he never overlooks a mistake, or makes the smallest allowance for ignorance.[1]

I. FAILING TO FOLLOW THE RULES OF THE GAME

The rigorous standard of performance espoused by Thomas Huxley is equally applicable to today's appellate practitioner in Indiana. Unfortunately, in the appellate game, not everyone is well-prepared or familiar with all of the rules nor are the appellate rules as clear as is necessary in order to play the game.

To qualify to practice law, the Indiana Supreme Court's Rules for Admission require that an attorney complete six semester hours of civil procedure.[2] The basic civil procedure course invariably focuses on trial procedure and is usually a conglomeration of state and federal rules taught in one six-credit course. Seldom is a law student required to study, or even necessarily exposed to, proper Indiana appellate procedure.[3] This deficiency in the law school curriculum might not

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[1]T. HUXLEY, A LIBERAL EDUCATION; AND WHERE TO FIND IT IN LECTURES AND LAY SERMONS 58 (1910).

[2]IND. R. ADMISS. & DISCP. 13(V).

[3]In his article in the American Bar Association Journal, Associate Dean Martineau of the University of Cincinnati College of Law points out how pitifully inadequate

seem overly onerous were it not for the possibly tragic results that have been increasingly manifested in our appellate courts in recent years.[4] For example, in the recent case of *Moore v. State*,[5] the court of appeals found significant errors in appellant's brief and ordered the attorney to rebrief the case in compliance with the appellate rules. The appellate court noted the most significant errors: (1) The attorney brought up the entire record when he should have structured his praecipe to bring up only the pertinent parts of the record; (2) The attorney failed to make marginal notations on each page of the record; (3) The attorney failed to provide the originals of exhibits, such as photographs; (4) The attorney failed to provide a statement of the case with adequate citations to the record and made minor misstatements; (5) The attorney failed to provide a verbatim statement of the judgment; (6) The attorney failed to provide a statement of the facts with relevant citations to the record; (7) The attorney's statement of the facts contained argumentative material; (8) The attorney's argument section of the brief was composed primarily of bald assertions, without references to the record or any clear showing of how and why the trial court erred; and (9) Finally, one argument section contained only one citation to authority and that citation did not specify the date of the case or refer to the state or regional reporter.[6]

An indication of the basic deficiencies in the appellate rules can be observed in a comparison of the Indiana Trial Rules with the Indiana Appellate Rules. The trial rules consist of 115 rather substantial, well-stated principles that establish a fairly comprehensive guideline for the practicing trial attorney.[7] On the other hand, the appellate rules consist of twenty-one rather vague, incomplete principles that supposedly govern the workings of both the Indiana Courts

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law school training is in appellate procedure. His indictment of the current teaching method includes Moot Court competition. Martineau, *Moot Court: Too Much Moot and Not Enough Court*, 67 A.B.A. J. 1294 (1981).

[4]*See infra* notes 16-18 and accompanying text; *see, e.g.*, Cox v. Indiana Subcontractors Ass'n, 441 N.E.2d 222, 223-24 n.1 (Ind. Ct. App. 1982); Moore v. State, 441 N.E.2d 220 (Ind. Ct. App. 1982); Morris v. State, 433 N.E.2d 74, 76-77 (Ind. Ct. App. 1982); Skagg v. State, 438 N.E.2d 301, 303 n.2 (Ind. Ct. App. 1982); Jackson, *Professional Responsibility, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 265, 273 (1983).

[5]426 N.E.2d 86 (Ind. Ct. App. 1981).

[6]*Id.* at 88-90. In regard to the proper method of citation, IND. R. APP. P. 8.2(B)(1) specifically indicates that a case should be cited as follows: Warren v. Indiana Tel. Co., (1940) 217 Ind. 93, 26 N.E.2d 399. Apparently the placement of the initial comma is of little importance because this rule is most often observed in its breach as can be seen by examining virtually any Indiana decision. Also, there is a disparity between Indiana's preferred method of citation and that of the "official" citator, *A Uniform System of Citation*, (The Harvard Law Review Association 13th ed. 1981).

[7]*See* Indiana Rules of Trial Procedure.

of Appeals and the Indiana Supreme Court and that purportedly encompass interlocutory, as well as final, appeals.[8]

A good example of this disparity can be seen by examining the rules for dismissal of a case. Trial Rule 41 meticulously describes the possible grounds and situations for a dismissal of a lawsuit and carefully lays out the procedural path to follow in obtaining such a dismissal.[9] In contrast, there is no appellate rule whatsoever concerning dismissal on appeal. Yet it is clear from Indiana case law that motions to dismiss or affirm have been granted by an appellate court after the filing of an appellant's brief, after the filing of a petition for rehearing, and after the filing of a petition for transfer.[10] From just this example, it is readily observable that the rules of the appellate game are not always discernible in the formal appellate rules.

The vagueness of the written rules, combined with the generally deficient appellate training of most attorneys, may partially explain why more than ten percent of all cases on appeal are either dismissed or significantly modified.[11] Even though the appellate courts have adopted a more lenient standard for review of appellate procedural errors in recent years,[12] procedural errors seem to appear more frequently.[13] The increasing number of procedural errors is both staggering and frightening: staggering because of what it says about the proficiency of attorneys in the appellate arena and frightening because of the resulting potential for malpractice or disciplinary actions.

In a recent address, one court of appeals' judge stated that there

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[8]*See* Indiana Rules of Appellate Procedure.

[9]IND. R. TR. P. 41.

[10]*See, e.g.*, Steel Constr. Co. v. Rossville Alcohol & Chem. Corp., 105 Ind. App. 520, 16 N.E.2d 698 (1938) (appellate court affirmed the judgment of the trial court and the supreme court dismissed the appellant's petition for transfer because it failed to disclose that a petition for rehearing had been filed and ruled on); Ross v. Schubert, 396 N.E.2d 147 (Ind. Ct. App. 1979) (petition for rehearing dismissed due to appellee's improperly interspersing extensive argument into their petition in violation of Appellate Rule 11(A)); Warner v. Warner, 139 Ind. App. 290, 219 N.E.2d 606 (1966) (judgment affirmed).

[11]This percentage was determined as a result of the author's own research. *See infra* notes 16-18 and accompanying text.

[12]*See, e.g.*, Thompson Farms v. Corno Feed Prods., Div. of Nat'l Oats Co., 173 Ind. App. 682, 691, 366 N.E.2d 3, 9 (1977). The appellate court in this case rejected appellee's argument that appellant's appeal should be dismissed upon a technical distinction. The court noted that while prior to the enactment of Trial Rule 59 motions for a new trial were required to be worded in the precise language of the statute, no such requirement was contained within Trial Rule 59. The court held that Trial Rule 59 requires merely that the statement be "sufficiently specific to put the trial court on notice of the particular error alleged." *Id.* (citing Finch v. State, 264 Ind. 48, 338 N.E.2d 629 (1975)). Therefore, appellant's inaccurate use of the word "judgment" rather than "decision" in his motion to correct errors was not fatal to his appeal.

[13]*See infra* notes 16-18 and accompanying text; *see also* cases cited *supra* note 4.

are three keys to a successful appellate career. Essentially, these keys were "be thorough," "be brief," and "be the appellee."[14] This comment recognizes the difficult, uphill battle faced by a losing party's attorney in taking a case to the next higher court of review and obtaining a favorable decision on the merits. Unless the lower court has created new law or held against ruling precedent, the odds are so strongly in favor of the successful party below that even the most careless gambler would not bet on the loser in the lower court.

With this limited chance of success on the merits, attorneys representing the moving party can ill-afford to take any action which would increase the odds of losing. Unfortunately, in far too many cases, Indiana attorneys are not complying with the appellate rules and are failing to preserve one or more issues in appeals taken to the courts of appeals or the Indiana Supreme Court.[15] During 1980, approximately 1,245 cases from the Indiana Courts of Appeals and Indiana Supreme Court were reported in the *North Eastern Reporter, Second Series*.[16] From these reported decisions, it appears that in 131 cases, or approximately ten percent of the cases decided,[17] one or more issues were waived by the appellant, or the case was dismissed or affirmed due to an error involving the motion to correct errors, the praecipe, the record, the briefs, or subsequent petitions.[18] Obviously, there is no way to predict how many of these cases might have received more favorable treatment, from the appellant's viewpoint, without these errors.

To put these figures in their historical and conceptual framework,

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[14]Address of the Honorable Robert H. Staton, I.C.L.E.F. Seminar on Indiana Appellate Practice (June 27, 1980).

[15]*See infra* notes 18-20 and accompanying text.

[16]This figure and the figures which follow are based on the author's review of the 1980 cases found in 398 N.E.2d through 414 N.E.2d. Because the research required scanning the text of each of the Indiana cases in those volumes, a few pertinent cases may have been missed and the figures which follow may be on the low side.

[17]This calculation does not include approximately 36 cases that were dismissed in 1980 in unpublished decisions. This figure is based on a review of records carefully maintained by Mrs. Janet Blue, Commissioner of the Indiana Court of Appeals. With these cases added to both sides of the computation, the percentage of cases in which some procedural error occurs increases to thirteen percent.

[18]This figure includes cases where the court indicated that the issue was waived but went ahead and discussed the issue in obiter dictum. It does not include cases where the court indicated that waiver was possible but that it would go ahead and decide the merits of the issue.

Interestingly, even though criminal appeals are believed to be the majority of cases filed in our appellate courts, 84 out of these 131 cases were civil cases and 47 were criminal cases. This may be due to a desire on the part of our appellate courts to provide due process by avoiding technical waivers. Of the 84 civil cases, 66 were affirmed, 5 were dismissed, 8 were affirmed in part and reversed in part, and 5 were reversed. Of the 47 criminal cases, 40 were affirmed, 2 were dismissed, 4 were affirmed in part and reversed in part, and 1 was reversed.

they should be compared with similar figures for 1921, a year when the appellate courts of Indiana were more strict in their enforcement of procedural rules.[19] In 1921, 506 cases were decided by the Indiana Courts of Appeals and the Indiana Supreme Court, and only thirty-one of these cases involved a dismissal of the case, an affirmance of the judgment, or waiver of issues due to procedural irregularities beginning with the motion for a new trial or assignment of errors, the approximate equivalent to our motion to correct errors.[20] Thus, procedural error occurred in only 6.1% of the cases in 1921. Clearly, the percentage of procedural errors occurring in the appellate courts of Indiana in 1980, during a period when those courts are attempting to decide more cases on the merits and fewer cases on the basis of procedural technicalities, has more than doubled when compared with the stricter decisions by the appellate courts of 1921. Unless the comparison of 1980 cases with the 1921 cases is atypical, there has been a disturbingly significant increase in the number of errors occurring during the appellate process, especially when the less stringent standards of our present courts are taken into account. Steps must be taken to reverse this trend and to reduce the number of outright dismissals, affirmances, or waivers occurring as a result of procedural deficiencies.

In this regard, a study of civil cases[21] was conducted to deter-

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[19]*See, e.g.,* Continental Casualty Co. v. Novy, 397 N.E.2d 294 (Ind. Ct. App. 1980) (the court liberally construed the meaning of Indiana Trial Rule 59 in order to avoid erecting roadblocks to the consideration of meritorious appeals because far too many litigants had been denied their right to appeal in the past).

[20]These figures are based on a review of the cases decided in 1921 found in 129 N.E. 1 through 132 N.E. 748. The year 1921 was chosen somewhat arbitrarily and primarily based on the limited number of cases required for review. Because the research requires scanning the text of each of the Indiana cases in those volumes, a few pertinent cases may have been missed and the figures may be on the low side. However, it is assumed that any errors in reviewing the 1980 cases and the 1921 cases would balance each other out.

[21]*See supra* note 16. Criminal cases were also surveyed and the figures are as follows:

I.	Motion to Correct Errors	
	A. Failure to raise the issue in the motion to correct errors	11
	B. Failure to discuss with sufficient specificity	2
	C. Failure to argue the issue in the motion to correct errors	2
	D. Failure to file motion to correct errors within the time period provided	1
II.	Praecipe	
	A. Failure to file praecipe within 30 days	0
III.	Record	
	A. Failure to timely file record with court	1
	B. Failure to include the proper part of record	9
	C. Failure to provide supporting facts; where no record is made; or where there are facts outside the record	4

mine during what stage of the appellate proceedings most procedural errors occurred and what type of error was most common. For this study, the appellate process was divided into five stages: the motion to correct errors, the praecipe, the preparation and filing of the transcript, the preparation and filing of the appellant's brief, and subsequent proceedings.[22] Subclassifications were then developed to better clarify the type of procedural error occurring in each of these stages.[23] The results of this study were as follows:

Civil

I.	Motion to Correct Errors	
	A. Failure to raise the issue in the motion to correct errors	21
	B. Failure to discuss with sufficient specificity	9
	C. Failure to argue the issue in the motion to correct errors	3
	D. Failure to file the motion to correct errors within the time period provided	4
	E. Failure to properly phrase the error	3
	F. Failure to set out findings of fact and conclusions of law in the motion to correct errors	1
	D. Failure to provide a comprehensible record or one which adequately conveys the evidence; or where all exhibits can be clearly seen or understood	2
IV.	Appellant's Brief	
	A. Failure to present cogent argument or authority	18
	B. Failure to relate the law to the evidence	4
	C. Failure to set out instructions or objections in brief	4
	D. Failure to include issues asserted in motion to correct errors	2
	E. Failure to timely serve a copy of the brief	0
	F. Issues or arguments for the first time in reply brief	1
V.	Subsequent Proceedings	
	A. Issues raised for the first time in a petition for rehearing	0

[22]This is not intended to disparage the importance of the preservation of error in the trial court. If trial counsel does not know how to preserve error during the course of the litigation, prior to judgment, and does not consult with experienced appellate counsel around the time of the pre-trial conference and preparation of the trial brief on the question of error preservation, he may effectively waive most of the appealable issues before the appellate process starts.

[23]As with the previous footnotes concerning the number of cases where waiver occurred, the author cannot guarantee that all the types of waiver in each of the 131 cases have been included in this analysis. However, it is believed that most of them are included. In addition, because many cases involve more than one type of waiver due to procedural error, figures which follow in the text will not add up to the total number of cases.

II.	Praecipe	
	A. Failure to file praecipe within 30 days	3
III.	Record	
	A. Failure to timely file the record with court	0
	B. Failure to include the proper part of the record	7
	C. Failure to provide supporting facts; where no record is made; or where there are facts outside the record	3
	D. Failure to provide a comprehensible record or one which adequately conveys the evidence; or where all exhibits can be clearly seen or understood	2
IV.	Appellant's Brief	
	A. Failure to present cogent argument or authority	31
	B. Failure to relate the law to the evidence	7
	C. Failure to set out instructions or objections in the brief	1
	D. Failure to include issues asserted in motion to correct errors	2
	E. Failure to timely serve a copy of the brief	0
	F. Failure to raise an issue prior to the reply brief	2
V.	Subsequent Proceedings	
	A. Failure to raise an issue prior to the petition for rehearing	2

The results of this study, unless the cases decided in 1980 were unusual, indicate that the adoption of a "tickler system" or better reminder system is not going to have a significant impact on the number of waivers, dismissals, or affirmances on appeal. Time limits are not the primary problem. Rather, most of the errors occur in the preparation of the motion to correct errors and the brief.[24]

Based upon these statistics, it is clear that not all of the blame for increased procedural errors can be laid at the doorsteps of our law schools and of our rule-writing authorities. The most significant number of procedural errors would suggest that the appellate attorneys simply failed to diligently research the questions involved or to painstakingly set out the errors alleged and the supporting

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[24]The fact that there is very little disparity in the number of errors occurring in the motion to correct errors and in the brief in civil cases, but a significant disparity in these same areas in criminal cases, *see supra* note 21, may be the result of the provision for a belated motion to correct errors in the criminal appeal that allows a criminal appellate attorney a second chance at the preservation of error.

arguments and authorities.[25] Thus, although a better educational method for instructing on appellate advocacy and a more complete set of appellate rules would be beneficial, these alone will not remedy the primary reasons for appellate procedural error.

These procedural errors may also pose a significant threat to appellate practitioners. Indiana courts have consistently required that attorneys be aware of the rules and principles of law declared in adjudged cases that have been duly reported.[26] A recent case stated in dictum that "good appellate advocacy" requires and, further, demands the regular reading of the advance sheets.[27] Thus, a malpractice action, based upon a failure to comply with procedural technicalities, is a very real possibility. In addition, failure to adequately perfect an appeal, after filing a motion to correct errors, has been held to constitute a basis for a disciplinary action.[28] Clearly, it behooves all attorneys involved in appeals to be fully aware of the procedural requirements set out in both the appellate rules and case law. Not only is the client's interest in jeopardy as a result of procedural errors but possibly the attorney's livelihood or financial well-being as well.

Having examined the types of procedural problems experienced by Indiana attorneys in taking appeals, the remaining portions of this article will attempt to provide some practical suggestions to the appellate practitioner.[29] First, there are practical suggestions for the ap-

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[25]Admittedly, some of the waivers in the brief, resulting from a failure to present cogent argument and authority, may have been the result of an intentional decision by appellant's attorney not to raise an issue due to questions about its strength or wisdom. However, the author doubts that this is often the case.

Moreover, these figures are only the tip of the iceberg. While it is outside the scope of this article, waiver of issues can also result from procedural errors occurring during the trial. Issues can be waived, for example, by failing to properly plead. Far from being a rare occurrence, a significant number of Indiana attorneys in their representation of appellants, or potential appellants, have made an extremely difficult challenge even more rigorous by failing to properly preserve error during either the trial or the appellate process.

[26]*See, e.g.*, Citizens' Loan, Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 146, 23 N.E. 1075, 1075 (1890).

[27]Boss-Harrison Hotel Co. v. Barnard, 148 Ind. App. 406, 408, 266 N.E.2d 810, 811 (1971).

[28]*E.g., In re* Davis, 429 N.E.2d 938, 941 (Ind. 1982).

[29]The author feels compelled to add a disclaimer. It is doubtful that any article no matter how lengthy and well researched will be able to set out all of the potential areas for waiver or dismissal. Thus, the material included in the remainder of this article may not be exhaustive. However, in researching this article a serious attempt has been made to find as many of the potential procedural problems as possible. In fact, in order to avoid leaving out any material, some of the older cases discussed herein may no longer be the basis for a waiver or dismissal, but it would appear to be better to err on the side of caution. Moreover, while these older cases may no longer provide a basis for waiver or dismissal under the purportedly more liberal

pellate attorney pursuing a decision in a higher court, and, then there are suggested steps that opposing counsel could take to turn the other party's mistakes to his client's benefit.

II. The Rules of the Game for the Moving Party

A. Extension of Time

Before dealing with the specific stages of the appellate process, a few comments would appear appropriate concerning a procedure that permeates the entire process—requests for an extension of time. The availability of an extension of time varies depending on the specific stage of the appellate process. Trial Rule 6 provides that an extension of time is not available for a motion to correct errors under Trial Rule 59(C).[30] Although Trial Rule 6 does not discuss a statement in opposition to the motion to correct errors pursuant to Trial Rule 59(E) and would therefore appear to allow for an extension, that question apparently has not been decided by an Indiana court.

Under the appellate rules, Appellate Rule 14(A) prevents an extension of time for petitions for rehearing and transfer and for any briefs connected with those petitions.[31] Although there is no clear statement in the Indiana Appellate Rules about the praecipe, it does not appear that an extension of time is available for filing the praecipe.[32] An extension of time for filing most other appellate papers is available.[33]

In seeking to obtain an extension of time, the petition for extension of time must be verified and must disclose facts establishing, to the satisfaction of the court, that the time allowed will not suffice and that the attorney has been diligent.[34] The normal requirement is that the petition must be filed at least five days before the expira-

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standard of review employed by our current courts, few of them have been specifically overruled, and, in any case, they are probably still instructive on better practice. Finally, it bears repeating that the scope of this article does not encompass the multitude of ways that trial counsel can waive an issue during the course of trial litigation and prior to the motion to correct errors. An excellent discussion of these potential areas for waiver can be found in 4A B. Bagni, L. Giddings & K. Stroud, Indiana Practice §§ 11-18 (1979 & Supp. 1982), and in 1 A. Bobbitt, Indiana Appellate Practice and Procedure 8-305 (1972 & Supp. 1982).

[30]Ind. R. Tr. P. 6(B)(2).

[31]Ind. R. App. P. 14(A).

[32]Ind. R. App. P. 14(A), (B). *But see* Soft Water Util., Inc. v. Le Fevre, 261 Ind. 260, 269, 301 N.E.2d 745, 750 (1973) (declaring that an appeal is not forfeited ipso facto when no praecipe is filed within the required 30 days).

[33]Ind. R. App. P. 14(A). An extension of time is not available for briefs appealing awards of the Industrial Board. Ind. R. App. P. 14(F).

[34]Ind. R. App. P. 14(A).

tion of the time sought to be extended;[35] however, the appellate rule also provides for an emergency extension of time if an affidavit is filed showing that the facts constituting the basis of the petition did not exist previously or were not then known to the applicant or his counsel.[36]

Finally, Appellate Rule 14(D) provides that notice of the application and a copy of the petition for extension of time shall be served on the opposing party or his counsel.[37] In at least one case, a failure to serve opposing counsel formed part of the basis for a dismissal of the appeal.[38]

B. The Motion to Correct Errors

For an appellate practitioner intent on avoiding the waiver of issues through procedural technicalities, probably no stage of the appellate process is more important than the preparation and filing of a motion to correct errors. Although each stage of the appellate process involves some potential for procedural error, the motion to correct errors, which frames the issues on appeal, is probably the least subject to correction by leave of court, and, statistically, error at this stage is one of the most significant reasons for waiver, dismissal of the appeal, or affirmance of the trial court's decision.[39]

The motion to correct errors has been referred to as the complaint for purposes of appeal.[40] This analogy, although apt in that both frame the issues, may be somewhat misleading to counsel admitted to the bar after 1970.[41] A motion to correct errors is dissimilar to a complaint in two respects. First, unlike a complaint, the concept of notice pleading is not applicable to a motion to correct errors. Second, there is an extremely limited opportunity for amending the motion to correct errors, which can only be found by reviewing Indiana case law.[42]

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[35]*Id.*

[36]*Id.*

[37]IND. R. APP. P. 14(D).

[38]Barker v. Hammett, 139 Ind. App. 279, 281, 219 N.E.2d 438, 440 (1966).

[39]*See supra* notes 24-25 and accompanying text.

[40]Ralston v. State, 412 N.E.2d 239 (Ind. Ct. App. 1980); *see also* State v. Normandy Farms, 413 N.E.2d 268 (Ind. Ct. App. 1980) (motion to correct error required to frame issues on appeal).

[41]*See* 4A B. BAGNI, L. GIDDINGS & K. STROUD, INDIANA PRACTICE § 321 (1979 & Supp. 1982). The Indiana Rules of Court were adopted in 1970.

[42]While a motion to correct errors can probably be amended during the 60-day period following judgment, it clearly cannot be amended or supplemented after that period has expired. For support that a motion to correct errors can be amended or supplemented within the 60-day period, see Ver Hulst v. Hoffman, 153 Ind. App. 64, 286 N.E.2d 214 (1972). For support that it cannot be supplemented or amended after the 60-day period, see Martin v. State, 236 Ind. 524, 141 N.E.2d 107, *cert. denied*, 354

Both dissimilarities emphasize the necessity of devoting a substantial period of time to the preparation of the motion to correct errors. The sixty-day period provided for filing a motion to correct errors should be devoted to completing the research on all issues to be raised on appeal, to the marshalling of facts, to obtaining the transcript, and to the painstaking phrasing of the errors to be raised.

Because the motion to correct errors must be filed within sixty days of the entry of judgment and there is no possibility of an extension of time,[43] the first step in preparing a motion to correct errors is computing the date on which the motion must be filed with the court. Although this would appear to be merely a matter of computation, recent Indiana cases have indicated some problems that appellate practitioners are having, both in obtaining a timely notification of the rendering of a judgment, and in determining the date on which the judgment was rendered.

In *Brendonwood Common v. Kahlenbeck*,[44] neither party was notified of the entry of judgment until after the time for filing a motion to correct errors had expired. Shortly after discovering that the judgment had been entered, appellant moved to vacate and for a re-entry of the judgment to permit the filing of a timely motion to correct errors. That motion was denied and an appeal ensued. Although the court of appeals found precedent for a trial court to permit a party to perfect his appeal where the party has not been notified of the entry of judgment, the appellate court also found that it was not an abuse of discretion for the trial court to refuse to act where the party failed to show the exercise of due diligence in determining the status of his case.[45] Thus, it is apparent that appellate practitioners cannot rely on the clerk of the court to notify them of the entry of judgment, but must take steps to keep apprised of whether, and when, a judgment has been entered. As Judge Sullivan pointed out in his dissenting opinion in *Brendonwood Common*, these steps apparently must now include a daily check of the court's records.[46]

In *Warriner v. State*,[47] appellants sought to appeal a judgment of the Marion County Criminal Court affirming a judgment of the Marion County Municipal Court. Appellants contended that the sixty-day period for filing a motion to correct errors began on the date

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U.S. 927 (1957) and Smith v. First Nat'l Bank of Hartford City, 104 Ind. App. 299, 11 N.E.2d 58 (1937). For additional authority supporting both propositions, see 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE at 127 (1971) and 4A B. BAGNI, L. GIDDINGS & K. STROUD, INDIANA PRACTICE § 23, at 51 (1979 & Supp. 1982).

[43]IND. R. TR. P. 59(C).

[44]416 N.E.2d 1335 (Ind. Ct. App. 1981).

[45]*Id.* at 1336-37.

[46]*Id.* at 1338 (Sullivan, J., dissenting).

[47]413 N.E.2d 638 (Ind. Ct. App. 1980).

that the trial court judgment was executed. The court of appeals disagreed and found that under Trial Rule 59(C), the sixty-day period began on the date the judgment appealed from was entered.[48] Because appellant's motion to correct errors was not filed within sixty days of the date judgment was entered, the appeal was dismissed.[49]

After determining the last date for filing, appellate counsel is now ready to begin the preparation of the motion to correct errors.[50] Actually, the preparation of a motion to correct errors involves the preparation of two separate documents or two parts of one document. Trial Rule 59(D)(2) requires that counsel provide the trial court with a statement of facts and grounds upon which the errors are based, in addition to the statement of the alleged errors. Moreover, failure to provide both the statement of the errors and the statement of facts and grounds supporting the errors can constitute a basis for dismissal.[51] Thus, both the statement of errors and the statement of facts and grounds in support of the errors must be filed with the court within sixty days in order to preserve any error for purposes of appeal.

In preparing the statement of errors, appellate counsel is required to present those errors in a clear, concise, and legally accurate manner.[52] Because the concept of a motion to correct errors is to provide the trial court with an opportunity to correct any mistakes made during the course of the litigation, the Indiana appellate courts generally have held that, in the appeal, they will consider only those questions that were raised before the trial court.[53] Thus, the motion to correct errors must include all issues sought to be raised on appeal and state them clearly and concisely.

There is an additional requirement for the statement of errors in that the statement of errors must be legally accurate; that is, the language used to describe the errors must conform with legal precedent. Several recent cases serve as examples to clarify this concept. In *Menze v. Clark*,[54] a statement that a negative judgment was not

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[48]*Id.* at 639.

[49]*Id.*

[50]Previous to this, counsel should have prepared an initial list of potential errors, researched Indiana case law on those errors including any steps necessary for the preservation of error at the trial court level, and reviewed the pleadings and transcript.

[51]Lafary v. State Farm Mut. Ins. Co., 166 Ind. App. 279, 335 N.E.2d 242 (1975).

[52]*See* Le Reau v. Teibel, 127 Ind. App. 920, 138 N.E.2d 153 (1956); *see also* Wireman v. Wireman, 168 Ind. App. 295, 343 N.E.2d 292 (1976).

[53]*See, e.g.*, Indiana Motorcycle Ass'n v. Hudson, 399 N.E.2d 775, 777 (Ind. Ct. App. 1980) (issue deemed waived due to failure to raise it in motion to correct errors); Spears v. Jackson, 398 N.E.2d 718, 719 (Ind. Ct. App. 1980) (issue deemed waived due to failure to raise it in motion to correct errors); Macken v. City of Evansville, 173 Ind. App. 60, 362 N.E.2d 202 (1977) (failure to clearly state error); Sacks v. State, 172 Ind. App. 185, 360 N.E.2d 21 (1977) (failure to clearly state error).

[54]142 Ind. App. 385, 235 N.E.2d 69 (1968).

supported by the evidence raised no error on appeal because a negative judgment can only be challenged as being contrary to law.[55] Likewise, in *Registration and Management Corp. v. City of Hammond*,[56] a statement of error alleging that a finding of fact was contrary to law presented no question for review because any specification of error concerning findings of fact, other than an allegation that the finding of fact is not supported by sufficient evidence, presents no question for review.[57] A failure to challenge all of the findings of fact *may* result in a waiver of all issues involving the findings of fact as was done in *Vogelgesang v. Shackelford*.[58] In *Merryman v. Price*,[59] the court concluded that specifications of error concerning conclusions of law, other than the specification that conclusions of law are not supported by the findings of fact, are waived.

Finally, in preparing the statement of errors, each alleged basis for error should be stated separately and not combined with any other basis for error. Not only is this required by Trial Rule 59(D)(2), but there is also at least one Indiana case holding that where there is a joint assignment of errors and the appellate court determines that one of them is not error, then the remaining errors in that joint assignment are deemed waived.[60] Although the third district of the court of appeals has subsequently rejected this "joint assignment rule" in a footnote,[61] careful practitioners will want to avoid this possible basis for waiver.

It is also apparent that an equal degree of care needs to be taken in the preparation of the statement of facts and grounds in support of the errors. Since the advent of this document as part of a motion to correct errors, many attorneys have envisioned the statement of facts and grounds as purely an argumentative document seeking to persuade the trial court that error has occurred. However, at least one recent Indiana case suggests that the title of the pleading should be viewed more literally. In *Floyd v. Jay County Rural Electric Membership Corp.*,[62] the court found most of the issues waived, due in part to an argumentative and incomplete recital of the facts in the statement of facts and grounds in support of the motion to correct errors.[63] This would appear to suggest that each motion to correct

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[55]*Id.* at 387, 235 N.E.2d at 71.

[56]151 Ind. App. 471, 280 N.E.2d 327 (1972).

[57]*Id.* at 476, 280 N.E.2d at 330.

[58]146 Ind. App. 248, 254 N.E.2d 205 (1970); *see also* Hunter v. Milhous, 159 Ind. App. 105, 305 N.E.2d 448 (1974).

[59]147 Ind. App. 295, 304, 259 N.E.2d 883, 888 (1970).

[60]State *ex rel.* Johnson v. Boyd, 217 Ind. 348, 361, 28 N.E.2d 256, 262 (1940).

[61]Thompson Farms v. Corno Feed Prods., Div. of Nat'l Oats Co., 173 Ind. App. 682, 692 n.3, 366 N.E.2d 3, 9 n.3 (1977).

[62]405 N.E.2d 630 (Ind. Ct. App. 1980).

[63]*Id.* at 634.

errors should be accompanied by a separate, complete, and nonargumentative statement of the facts followed by a separate argument section, similar to those sections of the brief. If this is an accurate interpretation of the decision, it may be wise for all appellants' counsel to begin structuring their statement of facts and grounds according to the divisions discussed above or face the potential of a dismissal or waiver of issues at a subsequent stage of the appellate process. The use of this organization will also provide appellants' counsel with an opportunity to have an initial view of the statement of facts and the argument sections of the brief, prior to their presentation to the appellate court. It may also provide the attorney with some ideas of how the opposing counsel will react to these sections, if opposing counsel chooses to file a statement in opposition to the motion to correct errors.[64]

Along with the problems that may arise if the statement of facts and grounds is not structured in the manner discussed above, a number of other procedural deficiencies can occur in the preparation of a motion to correct errors and a statement of facts and grounds. One such procedural deficiency occurred in *Forth v. Forth*,[65] where the appellant's motion to correct errors failed to set out findings of fact, conclusions of law, or the judgment. Although the *Forth* court noted that these failures can result in waiver, the court may consider the issue on the merits.[66] A failure to set out evidence, objections to the evidence, and the trial court's ruling on the objections may result in a waiver of such issues.[67] Another procedural deficiency which may result in issues being waived was exemplified in *Shepler v. State*.[68] In *Shepler*, the objections raised at trial to the introduction of evidence were not the same as those raised in the motion to correct errors.[69] Lastly, issues may be waived on appeal if the alleged errors are only supported by bald assertions rather than with cogent argument and authority.[70]

It may be said that the procedural errors occurring in the statement of facts and grounds relate either to a failure on the part of counsel to fully remind the court of the facts and proceedings sur-

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[64]Concerning opposing counsel filing a motion in opposition to the motion to correct errors, see IND. R. TR. P. 59(E).

[65]409 N.E.2d 1107, 1110-11 (Ind. Ct. App. 1980).

[66]*Id.* at 1111.

[67]*See* Topper v. Dunn, 132 Ind. App. 306, 317, 177 N.E.2d 382, 388 (1961), *cited for the same proposition in* Gemmer v. Anthony Wayne Bank, 391 N.E.2d 1185, 1188 (Ind. Ct. App. 1979).

[68]412 N.E.2d 62 (Ind. 1980).

[69]*Id.* at 68.

[70]*See* Indiana Dep't of Pub. Welfare v. Rynard, 403 N.E.2d 1110, 1112-13 (Ind. Ct. App. 1980).

rounding the particular problem under consideration or to a failure to provide the court with cogent argument and authority in support of the moving party's position. Because our appellate courts perceive a motion to correct errors as providing the trial court with an opportunity to correct its own error prior to appeal, failures of these types certainly present a reasonable basis for rejecting the alleged error on appeal.

Having prepared an adequate motion to correct errors and statement of facts and grounds and having been denied relief by the trial court, counsel for the moving party is now ready to initiate the formal appellate process.

C. The Praecipe

The procedural errors occurring in the praecipe stage of the appellate process have been primarily of two types. The first of these types of error involves a failure to file the praecipe within thirty days of the denial of the motion to correct errors as required by Appellate Rule 2.[71] Somewhat related, a failure to provide notice to the court reporter may constitute a procedural error if that is the cause for failing to obtain the transcript within the time allotted.[72]

The other problem, generally occurring in the praecipe stage of the appellate process, involves a failure to request essential parts of the record. Until recently, such an error would result in a waiver of the issues relating to these omitted parts of the record.[73] However, it appears this precedent is overruled by the amendment to Appellate Rule 7.2 which now removes this type of error as grounds for dismissal or waiver of the issues.[74]

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[71]Failure to file the praecipe within the required 30-day period does not result in an automatic forfeiture; the court will consider whether the party received due process. *See* Soft Water Util., Inc. v. Le Fevre, 261 Ind. 260, 269, 301 N.E.2d 745, 750 (1973); *see also* Kelsey v. Nagy, 410 N.E.2d 1333, 1334-35 (Ind. Ct. App. 1980).

[72]As to the question of failing to provide notice to the court reporter, counsel is advised to give notice on the same date that the praecipe is filed with the clerk's office and to maintain a record of that action because it may be necessary to request a continuance for the preparation of the transcript and counsel will need to show due diligence and that the failure to obtain the transcript within the time alloted is not his fault. *See* IND. R. APP. P. 14(A), (B).

As to the nature of the problems which can arise in computing the 30-day period for filing a praecipe, these are very similar to those involved in filing the motion to correct errors. *See supra* notes 42-48 and accompanying text.

[73]*See, e.g.*, Kranda v. Houser-Norborg Medical Corp., 419 N.E.2d 1024, 1039 (Ind. Ct. App. 1981).

[74]In the amendment to Appellate Rule 7.2 by the Indiana Supreme Court on January 1, 1982, subsection (C) states that "[i]ncompleteness or inadequacy of the record shall not constitute a ground for dismissal of the appeal or preclude review on the merits." IND. R. APP. P. 7.2(C).

In addition to this recent amendment, there is another new twist for determining what portions of the record should be requested. Under the former appellate rule, to avoid the problem of waiver the attorney would merely request a full copy of the record. Although ordering a full record provides a very simple solution for appellate practitioners, this solution has not always been happily accepted by the appellate courts. On a practical basis, the obvious result of a request by most appellate practitioners for a full copy of the record is to increase the mass of material presented to appellate courts in each appellate case. In the recent case of *Moore v. State*,[75] the Fourth District Court of Appeals strongly condemned the practice of requesting a full transcript and cited appellate practitioners to Appellate Rule 7.2(B) for the proposition that it is the duty of the appellate practitioner to scrutinize the issues to be raised and to tailor the praecipe to those issues so that only the relevant portions of the record are submitted.[76]

Although the *Moore* court did not dismiss the appeal based upon a failure to tailor the record to the issues, future appellate courts might be expected to continue public censure of attorneys who unnecessarily bring up the entire record or to return the record to appellant's attorney with instructions to revise it. Even though this may require a substantially greater amount of time in determining exactly how much of the record needs to be brought up to adequately support each issue, it is certainly a better practice for the appellate practitioner to tailor his record to the issues involved in the appeal.

D. The Pre-Appeal Conference

On July 1, 1982, the court of appeals initiated the practice of conducting pre-appeal conferences in selected appeals.[77] The criterion for holding such a conference at present seems to be the susceptibility of the case for settlement.[78] One judge from each of the districts has

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[75]426 N.E.2d 86 (Ind. Ct. App. 1981).

[76]*Id.* at 87-88.

[77]The original amendment made the pre-appeal conference applicable to both the courts of appeals and the Indiana Supreme Court. Indiana Supreme Court's Order Amending Rules of Appellate Procedure filed with the Clerk of the Indiana Supreme and Court of Appeals on May 10, 1982, at 1-2 (copies of this can be found in *In the Supreme Court of Indiana, In the Matter of the Adoption of Rules of Appellate Procedure*, XXVI RES GESTAE 14 (July 1982)). On June 23, a subsequent amendment limited pre-appeal conferences to the courts of appeals only. Indiana Supreme Court's Order Amending Rules of Appellate Procedure filed with the Clerk of the Indiana Supreme and Court of Appeals on June 23, 1982, at 1-2 (the amended rule can be found in *In the Supreme Court of Indiana, In the Matter of Adoption of Rules of Appellate Procedure*, XXVI RES GESTAE 56 (August 1982)).

[78]Interview in 1982 with Judge James B. Young of the Indiana Court of Appeals, Fourth District, immediately following a pre-appeal conference.

been selected to hold these pre-appeal conferences. The judge presiding at the conference will not be one of those deciding the appeal and will not discuss the merits of the case with any of the three judges who do decide the appeal.[79] The procedure used in the conference will vary depending upon the judge. For instance, Judge Buchanan, in at least some of his pre-appeal conferences, has held a separate conference with each side of the appeal rather than meeting with all of the attorneys at one time.[80] Judge Young, on the other hand, always meets with all of the attorneys at the same time.[81]

The pre-appeal conference rule, Appellate Rule 2(C), requires the appellant to file with the clerk of the court of appeals, within ten days after the praecipe is filed, a copy of the praecipe, a copy of the motion to correct errors and the ruling thereon, a statement of the nature of the case, a copy of the judgment entered, and, in criminal cases, a statement of whether the defendant is at liberty on bond or is incarcerated, naming the particular institution.[82] After these materials are filed with the clerk in Indianapolis, the court will set a date for a pre-appeal conference if it deems it advisable, and notice will be sent to all the attorneys. On the basis of limited personal experience, the date for the pre-appeal conference appears to be about forty-five days after the praecipe and other material are filed in the court of appeals.

In the pre-appeal conference, issues are simplified for presentation on appeal. Also discussed is the possibility of an agreement to stipulate facts or other matters which will avoid the preparation and certification of an unnecessary record or part of the record and a determination and designation of what record from the trial court is necessary to properly present the issues on appeal. Dates will be designated upon which actions are to be taken in the submission of the appeal, which shall include, but not be limited to, the dates upon which the record and briefs must be filed. The possibility of settlement will be explored and any other matters will be discussed that may aid in the disposition of the appeal.[83] As part of the pre-appeal conference, the judge may check to be certain that all of the time requirements, up to the

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[79]*Id.*

[80]*See* Carroll, *New Rules Help in Speeding Appeals*, The Gary Post Tribune, July 13, 1982, § A, at 3, col. 3.

[81]*See supra* note 78.

[82]IND. R. APP. P. 2(C). Sample forms to use in connection with Appellate Rule 2(C) are available in the office of the Clerk of the Indiana Supreme and Court of Appeals and the office of the Administrator of the Indiana Court of Appeals. A copy of the sample form is reproduced in XXVI RES GESTAE 479 (April 1983).

[83]IND. R. APP. P. 2(C). Indiana Supreme Court's Order Amending Rules of Appellate Procedure, filed with the Clerk of the Indiana Supreme Court of Appeals on June 23, 1982, at 1-2.

date of the pre-appeal conference, have been met; he may also set a date for the filing of the record of the proceedings and, possibly, the briefs.[84] If nothing else, this should help to avoid procedural errors involving the timeliness of actions, as well as avoiding the embarrassment of a written opinion showing a dismissal of an appeal based on procedural errors. The attorneys are expected to come to the pre-appeal conference prepared for a potential discussion of settlement.[85] Sanctions are discussed in the appellate rule, should an attorney fail to appear or be unprepared.[86]

The pre-appeal conference is very similar to a pre-trial conference. Like a pre-trial conference, its value will depend on the attitude of the participants, the preparedness of the participants, and the flexibility of the parties and their attorneys. As with a pre-trial conference, some pre-appeal conferences will develop into debating contests on the merits of the case while others will be considerably more productive. In a pilot project conducted by the Indiana Court of Appeals prior to the amendment, approximately twenty-five percent of the cases were settled.[87] If this same percentage of settlements occurs under the appellate rule, the pre-appeal conference will certainly have a beneficial effect on the caseload of the courts and should, for at least a period of time, reduce the waiting time for appellate decisions.

There are, however, some unresolved legal problems with the conference rule, both as it presently exists and in relationship to other appellate rules. First, the rule does not indicate what sanctions the court might use when an appellant fails to file or is late in filing the required material with the clerk of the court of appeals.[88] The second problem, which is to some degree related to the first, involves a current conflict between the rules. Appellate Rule 3 currently provides that the court of appeals or Indiana Supreme Court does not obtain jurisdiction of a case until the transcript is filed.[89] This provision raises some questions concerning the pre-appeal conference such as what sanctions the court could enforce concerning the failure to file the praecipe and other materials with the clerk of the court of appeals when it does not have jurisdiction of the case, and what sanctions the court could enforce concerning a failure to appear at the pre-appeal conference or to be prepared at the pre-appeal conference when the

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[84]IND. R. APP. P. 2(C).

[85]*Id.*

[86]*Id.*

[87]*See* Carroll, *supra* note 80, § A, at 3, col. 3.

[88]IND. R. APP. P. 2(C). Indiana Supreme Court's Order Amending Rules of Appellate Procedure filed with the Clerk of the Indiana Supreme and Court of Appeals on June 23, 1982, at 1-2.

[89]IND. R. APP. P. 3(A).

court does not have jurisdiction of the case. There is a substantial question as to the enforceability of any order or sanction when the court issuing that order, or imposing that sanction, knows that it does not have subject matter jurisdiction.[90]

E. The Transcript

In its adoption in 1982 of the provision denying a dismissal of the appeal or preclusion of review on the merits based on incompleteness or inadequacy of the record, the Indiana Supreme Court may have effectively overruled precedent for dismissing cases or holding that issues had been waived due to procedural irregularities in the preparation of the record.[91] However, it is still possible that the results of the failure to comply with the dictates of prior cases may be harmful to the appellate practitioner.

It is possible to conceive of two direct consequences of a failure to adequately prepare the record in accord with the appellate rules and interpretive case law. First, and somewhat obviously, a poorly prepared record reflects badly upon the appellate advocate and creates a negative perceptual framework in the minds of the judges assigned to review the case on appeal. This result is undesirable for the appellant's counsel who is already attempting to overcome an extremely strong presumption in favor of the appellee and the determination of the trial court. The second potential result could be even more disastrous. Although Appellate Rule 7.2(C) appears to state that a dismissal or waiver of the issue cannot result from an inadequate or incomplete transcript,[92] it would certainly allow the particular court to return the transcript to the appellant's attorney with instructions to revise it in accordance with the appellate rules.[93] Moreover, the court could couple this order with a denial of an extension of time for filing the appellant's brief. Failure to comply with that order or to correct an omission, when called to the appellant's attention, could still result in waiver.[94] Even if complied with, such an order would

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[90]*See Ex parte* Perkins, 29 F. 900 (7th Cir. 1887); *see also*, 21 C.J.S. *Courts* § 116 (1978); 17 C.J.S. *Contempt* § 64 (1974).

[91]*See, e.g.*, Jackson v. State, 241 Ind. 700, 169 N.E.2d 128 (1960); Kranda v. Houser-Norbert Medical Corp., 419 N.E.2d 1024, 1039 (Ind. Ct. App. 1981); Sears, Roebuck & Co. v. Roque, 414 N.E.2d 317, 322 (Ind. Ct. App. 1980); Davis v. Davis, 413 N.E.2d 993, 998 (Ind. Ct. App. 1980); Murphy v. Hendrick, 129 Ind. App. 655, 157 N.E.2d 306 (1959); Hickey v. Estate of Hickey, 127 Ind. App. 9, 136 N.E.2d 722 (1956).

[92]*See* Herrara v. Collection Serv., Inc., 435 N.E.2d 88, 89-90 (Ind. Ct. App. 1982) (Indiana Appellate Rule 7.2(C) prevents the waiver of issues for failure to include applicable portions of the trial court proceedings in the transcript or record of the proceedings).

[93]*See* Moore v. State, 426 N.E.2d 86 (Ind. Ct. App. 1981).

[94]Raymundo v. Hammond Clinic Ass'n, 449 N.E.2d 276 (Ind. 1983).

significantly increase the amount of work to be done by appellant's counsel within a short period of time.

At least some reference should be made to the January 1, 1982 revisions to the Indiana Appellate Rules involving the form of the transcript. Although both Appellate Rule 7.1 and Appellate Rule 7.2 have been modified by the January 1, 1982 amendments, the modifications to Appellate Rule 7.1 are probably the more substantial. The revisions to Appellate Rule 7.1 begin with a "recommendation" that post binders, rather than metal strips, be used for fastening or binding the top of the record of the proceedings.[95] It is too early to tell whether this will be treated as merely a recommendation or will be construed as a requirement. The major revisions involve the form in which the transcript is to be combined. If the total record is less than 350 pages, there is no major difference between the old method and the new method for preparing the transcript, except that there is now a requirement that a secure marginal tab be placed at the beginning of the transcript of the evidence and proceedings, and an additional requirement as to what should be included in the table of contents.[96] However, if the total record is more than 350 pages, then the following rules will apply: (1) The transcript will require more than one volume; (2) No volume may be more than 250 pages in length, except that the final volume may be up to 350 pages in length; (3) If a transcript of the evidence and proceedings is included, it must be in a separate volume or volumes; (4) Each volume should be marked as "Volume _____ of _____ Volumes, pp. _____ through _____ ," with the exception discussed immediately below; (5) A separate volume should be created for the table of contents, which will cover all of the volumes and should be titled "The Table Of Contents" and not given a volume number; and (6) In multi-volume sets, a single Clerk's Certificate at the end of the last volume will suffice, if it identifies each volume thereof by number and the page numbers therein.[97] In addition, the table of contents now must briefly describe each exhibit included in the transcript of the evidence and proceedings, as well as the volume and page number at which it was identified and the volume and page number where the court ruled on its admissibility.[98] Finally, the requirement of a certified copy of the motion to correct errors has been

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[95]IND. R. APP. P. 7.1(A) as amended on January 1, 1982.

[96]*Id.* The rule is not clear as to whether a separate table of contents volume is required where the total record is less than 350 pages, but presumptively it is not. *See infra* note 105 and accompanying text.

[97]IND. R. APP. P. 7.1(A), (C) as amended on January 1, 1982.

[98]IND. R. APP. P. 7.2(C) as amended on January 1, 1982. For a comparison with prior procedure, see Smith v. Chesapeake & O. R.R., 160 Ind. App. 256, 258, 311 N.E.2d 462, 465 (1974); State Bd. of Tax Comm'r v. Associated Auto & Truck Rental, Inc., 148 Ind. App. 611, 613, 268 N.E.2d 626, 627 (1971).

deleted from Appellate Rule 7.2 in order to bring the appellate rule into conformity with various case decisions.[99]

F. Appellant's Brief

Appellate Rules 8.2 and 8.3 discuss, in some detail, the requirements for the various briefs. Subsection (A) of Appellate Rule 8.2 discusses such items as the method of preparation of the brief, the typeface to be used, and the method in which the covers should be done. The appearance of the brief and the conformity with these rules will have some impact on the court's initial reaction to the professionalism of the brief's author. Subsection (B) of Appellate Rule 8.2 outlines the method for citing cases, the necessity and manner of references to the record, and the need to reproduce the relevant portions of statutes, rules, or regulations involved in the issues. Failure to conform with at least some of these requirements has formed the basis for dismissal, affirmance, waiver of issues, or a return of the brief to appellant's counsel with an instruction to re-do the brief.[100] Moreover, the recent cases suggest that there must be strict compliance with *all* of the provisions of Appellate Rule 8.2.[101]

Appellate Rule 8.3 contains a clear and relatively precise discussion of the format for an appellant's and an appellee's brief, provides a less clear statement about the reply brief, and fails to discuss the format required in a brief supporting a motion to dismiss, a brief supporting a petition for rehearing or in opposition to that petition, or a brief supporting or opposing a petition to transfer.[102] Subsection (A) of Appellate Rule 8.3 sets out the various sections that are necessary

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[99]*See* IND. R. APP. P. 7.2; Smith v. Chesapeake & O. R.R., 160 Ind. App. 256, 311 N.E.2d 462 (1974); Farm Bureau Ins. Co. v. Clinton, 149 Ind. App. 36, 269 N.E.2d 780 (1971); State Bd. of Tax Comm'r v. Associated Auto & Truck Rental, Inc., 148 Ind. App. 611, 268 N.E.2d 626 (1971) (overruling in part Thonert v. Daenell, 48 Ind. App. 70, 263 N.E.2d 749 (1970)); National Bank & Trust Co. of South Bend v. Moody Ford, Inc., 149 Ind. App. 479, 273 N.E.2d 757 (1971). Because it is always possible to have different interpretations of the meaning of the various rules, it is incumbent upon any appellate practitioner to review and fully digest the nature of these changes and their effect on the manner of preparing a transcript.

[100]*E.g.*, Moore v. State, 426 N.E.2d 86, 90 (Ind. Ct. App. 1981) (no citation to the record); Batter Boy Bakery v. Corn, 420 N.E.2d 1360 (Ind. Ct. App. 1981) (failure to add petition, improper use of citation, and brief in wrong color); Tapp v. State, 406 N.E.2d 296, 297 (Ind. Ct. App. 1980) (failure to support allegations of error with authority); Indiana Bonding & Sur. Co. v. State, 132 Ind. App. 626, 178 N.E.2d 65 (1961) (failure to set out relevant statute).

[101]For the proposition that both subsections (A) and (B) may be more strictly enforced in the future, see Moore v. State, 426 N.E.2d 86, 90 & n.5 (Ind. Ct. App. 1981); Alcoa v. Review Bd. of Ind. Empl. Sec. Div., 426 N.E.2d 54, 59 n.6 (Ind. Ct. App. 1981); Batter Boy Bakery v. Corn, 420 N.E.2d 1360, 1362-63 & n.6 (Ind. Ct. App. 1981).

[102]IND. R. APP. P. 8.3.

parts of a complete appellant's brief.[103] The failure of appellant's counsel to either include some of these sections, or to set them out in the order stated by the rule, may well constitute a basis for either waiver, affirmance, or dismissal.[104]

1. Table of Contents.—The first section of the brief mandated by Appellate Rule 8.3 is a table of contents. Except for the statement that the table of contents should refer to the pages in the brief on which the particular sections are found, there are no particular statements made concerning the format of the table of contents or its structure.[105] However, the following suggestions may prove helpful to the appellate practitioner: (1) In paginating the table of contents, utilize roman numerals such as i, ii, and iii to differentiate the pagination in the table of contents from the pagination in the brief itself; (2) The titles of the various sections found in Appellate Rule 8.3(A) should be treated as the primary headings in the brief; (3) Indent any subsections or sub-subsections in a consistent manner with pagination for each; (4) In the argument portion of the brief, give each separate argument a different identifying symbol such as I, A, 1; and (5) Work out a careful phrasing of each argument, as well as its subsections and sub-subsections, so that they all create a logical pattern supportive of the argument. Following these suggestions will provide one additional chance that the court, in reading the table of contents, may be persuaded to the viewpoint expressed in the brief.

2. Table of Cases, Statutes, and Authorities.—Immediately following the table of contents is the table of cases, statutes, and other authorities. As with the previous table, the only requirement set out in Appellate Rule 8.3 is that reference be made to the pages in which each of the specified authorities is discussed. It is better to subdivide this section into a table of cases, a table of statutes and/or rules and regulations, and a table of other authorities. Additionally, the use of small roman numerals for pagination is recommended. A poorly done table of contents or table of authorities will create an unfavorable impression; thus a strict adherence to these requirements is recommended.

3. Statement of the Issues.—The third section of the appellant's brief, and one of the more important sections, is the statement of the issues. The issues section of the brief is vitally important because it determines the *scope* of the appeal. Indiana case law clearly holds that issues raised in the motion to correct errors, but not asserted

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[103]*Id.* Attorneys involved in cases involving either multiple appellants or cross-appeals will also want to review IND. R. APP. P. 8.3(D), (E).

[104]*See, e.g.*, Chance v. Chance, 400 N.E.2d 1207, 1209 (Ind. Ct. App. 1980).

[105]IND. R. APP. P. 8.3(A)(1).

as issues in the brief, are waived.[106] Thus, it is vital that the viable issues alleged in the motion to correct errors be stated as separate issues on appeal and in a manner which will allow the appellate court to verify that they are the same issues as those raised in the motion to correct errors.[107]

Another reason that the issues section of the brief is so significant involves strategy and persuasiveness, rather than procedural technicalities. Most appellate judges agree that the issues section of the brief is one of the first sections read in their initial review of a brief.[108] For this reason, the manner in which the issues are phrased can create a favorable impression, a neutral impression, or a negative impression. A favorable impression can be accomplished by phrasing each issue in such a manner that it both fairly presents the question and also suggests to the court the conclusion most favorable to the advocate. If this is accomplished, then the advocate has the court leaning favorably toward his position.

4. Statement of the Case.—The fourth section of the brief is the statement of the case. The purpose of the statement of the case is to provide the appellate court with an understanding of the nature of the case, the relevant proceedings in the trial court, and a nonargumentative depiction of each occurrence in the trial court that is alleged to be error. The statement of the case provides the court with a short presentation of the nature of the case and is a source of unbiased statements as to what the trial court did. Although this section may appear relatively unimportant, at least when compared to some of the other sections, a dismissal, affirmance, or waiver of issues has occurred due to a failure to properly prepare this section. The type of deficiencies resulting in an adverse ruling include: (1) A failure to fully set out the judgment in the statement of the case;[109] (2) A failure to state objections to the giving of, or refusing to give, various instructions alleged as error;[110] and (3) A failure to fully set out the conclusions of law and findings of fact in the statement of the case.[111] In order to avoid an adverse ruling, it is probably wisest

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[106]*See, e.g.*, Little v. State, 413 N.E.2d 639, 642 n.4 (Ind. Ct. App. 1980).

[107]If the appellate court is unable to determine that one or more issues raised in the statement of the issues were not also raised in the motion to correct errors, then those issues are subject to waiver. *See, e.g.*, Hinds v. McNair, 413 N.E.2d 586, 608 n.20 (Ind. Ct. App. 1980).

[108]Presentation by Robert Staton, Presiding Judge of the Third District Indiana Court of Appeals, Nuts and Bolts of an Appeal—Do You Want to Know How to Avoid Pitfalls in an Appeal? 24 (Feb. 26, 1981) (Indianapolis Bar Association Mini-Seminar); R. Staton, Seminar on How to Prepare and Write Your Brief 33 (Apr. 20, 1979) *reprinted in* APPELLATE PRACTICE SEMINAR (1979) (I.C.L.E.F.).

[109]*E.g.*, Michaels v. Johnson, 140 Ind. App. 389, 391-92, 223 N.E.2d 585, 586-87 (1967).

[110]*E.g., id.*

[111]*E.g.*, National Steel Corp. v. Manley, 135 Ind. App. 444, 194 N.E.2d 416 (1963).

for the appellate practitioner to include a verbatim statement of the incidents occurring in the trial court on which each error is predicated or paraphrase these incidents with a full citation to the record.

5. Statement of the Facts.—The fifth section of the brief, involving the statement of the facts, is another important portion of the brief from the judicial point of view. The statement of facts has been pointed to by courts of appeals' judges as one of the first two or three things considered in the initial review of the brief.[112] It is also becoming obvious that the facts involved in the case and the equities resulting from those facts are becoming much more significant in determining the result to be reached on appeal. In fact, one commentator has found that there are few, if any, appellate judges who still view the concept of *stare decisis* and precedent as a valid doctrine for determination of cases rather than merely a means for effectuating the result which they perceive as desirable.[113]

In any case, the equities of the situation are clearly a prevalent question in determining an appeal, and, while one might philosophically quarrel with this rationale for decisionmaking, the appellate practitioner must recognize this fact and structure his statement of the facts and argument so that they are both accurate and supportive of his viewpoint. Thus, the statement of facts should be something more than merely a dry recitation. It should be written in an interesting, graphic manner that presents the facts as favorably to the preparing party's point of view as possible.

In doing so, however, the appellate practitioner must always keep in mind the need for accuracy, the requirement to include all relevant facts,[114] and the requirement that each material fact be documented by citation to the record.[115] Failure to do any of these will raise the possibility of a waiver, affirmance, or dismissal and will certainly result in a loss of credibility with the particular judges involved in the appeal.

6. Summary of the Argument.—The sixth section of the brief is the summary of the argument. If the statement of the issues are the dots in one of those old "connect-the-dots" books, then the summary of the argument is the completed black and white picture, waiting only to be colored in by the argument itself. The summary of the argument is important to the extent that it may provide appellate

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[112]*See* Presentation *supra* note 108 at 25-26 and R. Staton *supra* note 108 at 33-34; Purver & Taylor, *The Criminal Appeal: Writing to Win!*, 87 CASE & COM. 3, 4 (1982).

[113]*See* R. LEFLAR, APPELLATE JUDICIAL OPINIONS 49-50 (1974).

[114]*See* Anglin v. Grimm, 157 Ind. App. 362, 300 N.E.2d 137 (1973) (failure to include relevant statement of the facts); Chance v. Chance, 400 N.E.2d 1207 (Ind. Ct. App. 1981) (failure to recite evidence presented at trial court level).

[115]*See* Moore v. State, 426 N.E.2d 86, 89 (Ind. Ct. App. 1981) (failure to cite to the record).

judges with their first full picture of both the issues and the legal concepts supporting them. Although there may be no procedural error connected with the summary of the argument, this section has a persuasive effect in creating an initial impression.

7. Argument.—The seventh section of the brief is the argument section itself. This should be the most important section of the brief because the law, legal philosophy, and facts are combined to demonstrate why the appellant's position should prevail. Unfortunately, this is also the section of the brief where most of the procedural errors occur.[116] Some of the types of errors occurring in the preparation of the argument include: (1) A failure to discuss an issue in the argument section of the brief which will result in a waiver of that issue;[117] (2) A failure to cite supporting authorities may result in a waiver of an issue or an affirmance;[118] (3) A failure to provide cogent argument;[119] (4) A failure to cite relevant portions of the record in the argument section of the brief will result in a waiver;[120] (5) A failure to set out the instruction or instructions complained of in the argument section of the brief will result in a waiver;[121] (6) A failure to deal with each alleged error, as a separate error, may result in waiver if the general argument fails to adequately address all of the questions involved;[122] and (7) A failure to accurately refer to the record to support an issue.[123]

8. Conclusion.—The primary purpose for the conclusion of a brief is not to summarize the arguments; that was accomplished by the summary of the argument. The purpose is to inform the court of the type of relief being requested; however, if the relief will be different depending on which issues are accepted as valid by the court, then

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[116]*See supra* notes 22-25 and accompanying text.

[117]*E.g.*, Ashbaught v. State, 400 N.E.2d 767, 773 (Ind. 1980) (an issue raised in the statement of issues was not discussed in the argument section of the brief for some unknown reason); Lock v. State, 403 N.E.2d 1360, 1369 (Ind. 1980) (issue was included in both the motion to correct errors and the issues section of the brief but not argued in the argument section).

[118]*E.g.*, Dayton Walther Corp. v. Caldwell, 402 N.E.2d 1252, 1261 (Ind. 1980). Many appellate judges do not consider West's Law Encyclopedia, Corpus Juris Secundum, and other general sources to constitute authority. Second, if there is no Indiana authority on the subject, then this should be specifically stated to the court and cases from other states as well as treatises and other scholarly works should be cited.

[119]*E.g.*, American Optical Co. v. Weidenhamer, 404 N.E.2d 606, 622 (Ind. Ct. App. 1980).

[120]*E.g.*, Clark v. Clark, 404 N.E.2d 23, 36-37 (Ind. Ct. App. 1980) (error contended was hearsay but no citation to any specific incidents of hearsay were noted from the record).

[121]*E.g.*, Coker v. State, 399 N.E.2d 857, 861 (Ind. Ct. App. 1980); Taylor v. State, 409 N.E.2d 1246, 1251 (Ind. Ct. App. 1980).

[122]*E.g.*, Piwowar v. Washington Lumber & Coal Co., 405 N.E.2d 576, 582 (Ind. Ct. App. 1980).

[123]*E.g.*, Williams v. State, 408 N.E.2d 123, 125 (Ind. Ct. App. 1980).

the conclusion should be written in terms of distinctly separate requests that are clear in their application. This is all that is necessary for the conclusion; the decision to include any additional material would essentially be a stylistic determination for the appellate practitioner. However, any such additional material should be very brief.

9. Service of Brief.—Only one other basis for a dismissal of an appeal, due to deficiencies related to the brief, has been discovered. An appeal will be dismissed if the appellate practitioner fails to serve a copy of the brief on all of the opposing counsel,[124] or possibly for a failure to timely serve a copy on all counsel.[125] Obviously, this same rule, or a variation of it, is equally applicable to all of the parties and to all of the pleadings needed for the prosecution of an appeal.

G. The Reply Brief

The structuring of an appellant's reply brief is not clearly "blueprinted" or defined in either the Indiana Appellate Rules or the texts on appellate practice and procedure in Indiana.[126] Further, the research for this article has not disclosed any Indiana case discussing the proper structure or format of a reply brief. Clearly, there is a complete lack of guidance in this area. Presumably, the same format required for the appellee's brief is also satisfactory for the reply brief.[127] Whether the reply brief may omit the statement of the issues or the summary of the argument without fear of dismissal, affirmance, or waiver should be addressed by our appellate courts. Until such time as it is addressed by a revision to the appellate rules or through a discussion of the question in a case, good appellate practice would seem to require the inclusion of a statement of the issues and summary of the argument in the reply brief.

Only a few cases exist that involve waiver, dismissal, or affirmance in relation to a reply brief, possibly because it is a discretionary rather than a mandatory pleading. A number of cases hold that new issues or contentions cannot be raised for the first time in the reply brief.[128] These decisions are based on the concept that it would be unfair to

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[124]*E.g.*, State *ex rel.* Dillon v. Shepp, 165 Ind. App. 453, 332 N.E.2d 815 (1975).

[125]*See* Murphy v. Indiana Harbor Belt R.R., 152 Ind. App. 455, 284 N.E.2d 84 (1972).

[126]*See* IND. R. APP. P. 8.3(C); 4A B. BAGNI, L. GIDDINGS & K. STROUD, INDIANA PRACTICE § 64 (1979 & Supp. 1982); 2 A. BOBBITT, INDIANA APPELLATE PRACTICE AND PROCEDURE 601-02 (1972 & Supp. 1982).

[127]This would require a table of authorities, a statement of the issues, a summary of the argument, the argument, and a conclusion. Sections dealing with the statement of the case and the statement of the facts would be optional and would probably depend on whether there were any need to respond to the appellee's brief in these areas. For the rule concerning the brief of the appellee, see IND. R. APP. P. 8.3(B).

[128]*E.g.*, City of Richmond v. Pub. Serv. Comm'n, 406 N.E.2d 1269, 1278 (Ind. Ct. App. 1980); Saloom v. Holder, 158 Ind. App. 177, 186, 307 N.E.2d 890, 891 (1974).

effectively deny the appellee an opportunity to respond to an issue by permitting the appellant to assert it for the first time in the reply brief. For similar reasons, if an appellant has failed to support an issue with cogent argument or authority in the initial brief, citation of argument and authority in the reply brief will not remedy this defect.[129]

While the appellant's reply brief is discretionary, some cases indicate that the failure to file it may constitute an admission of statements made in the appellee's brief.[130] Thus, a reply brief may be mandatory if the appellee's brief contains misstatements of fact or inaccurately accuses the appellant of misstating or omitting facts.[131]

In addition to those items discussed above, there is possibly one other way in which an appellant might waive an issue, suffer a dismissal, or cause an affirmance through the reply brief. While there are no cases directly on point, it is submitted that a significant number of false, inaccurate, or misleading statements concerning the facts of the case, the citation to the record, or even to Indiana cases might so prejudice a court as to produce a waiver of issues, an affirmance, or a dismissal.

H. The Petition for Rehearing

After the reply brief is filed, the case is submitted to the court of appeals for a determination. When that court's determination is made, the disgruntled party may consider an appeal to the Indiana Supreme Court. The first step in that process is the filing of a petition for rehearing. The petition for rehearing is similar to the motion to correct errors.[132] Both are presented to the lower court, appellate court or trial court, respectively, after the initial determination. Both the petition for rehearing and motion to correct errors are intended to allow the lower court to correct its determination based on the rationale presented to it by the losing party. Like the motion to correct errors, the petition for rehearing forms and limits the issues available to the losing party in its attempt to obtain a reversal from the Indiana Supreme Court.[133] Finally, the issue must also have been preserved in the earlier stages of the appeal.[134]

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[129]*See* Michaels v. Johnson, 140 Ind. App. 389, 391-92, 223 N.E.2d 585, 586-87 (1967); Rudolph v. Ayde, 84 Ind. App. 202, 204, 149 N.E. 734, 735 (1925).

[130]*See, e.g.*, Campbell v. Colgate-Palmolive Co., 134 Ind. App. 45, 184 N.E.2d 160 (1962).

[131]*See* Indiana Bonding & Sur. Co. v. State, 132 Ind. App. 626, 178 N.E.2d 65 (1961).

[132]*See* 4A B. BAGNI, L. GIDDINGS & K. STROUD, INDIANA PRACTICE § 151 (1979 & Supp. 1982).

[133]IND. R. APP. P. 11(B). *See* Dorweiler v. Sinks, 238 Ind. 368, 370-71, 151 N.E.2d 142, 143-44 (1958) (commingling argument with petition for rehearing was grounds for dismissal).

[134]*See* Cunningham v. Hyles, 402 N.E.2d 17, 21 (Ind. Ct. App. 1980).

There do appear to be two possible exceptions to this general rule in a petition for rehearing. First, because jurisdiction over the subject matter may be raised at any stage of the proceedings, it can be raised for the first time in a petition for rehearing.[135] Second, it would seem that the petitioner should be allowed to address issues raised for the first time by the court of appeals *sua sponte*, since those issues have not been previously briefed by either party.

Along with a waiver of all issues not included in the petition for rehearing, the entire right to appeal to the Indiana Supreme Court may be waived by a failure to timely file the petition for rehearing.[136] Appellate Rule 11(A) provides that the petition and any accompanying brief must be filed with the court within twenty days from the rendition of the adverse decision.[137] Appellate Rule 14(A) further provides that "[n]o extension of time shall be granted to file a petition for rehearing or a petition to transfer or any briefs in connection therewith."[138]

The right to appeal to the Indiana Supreme Court may also be waived due to a defect in the format of the petition.[139] Appellate Rule 11 does not discuss format at length; it requires only that the petition state precisely the reasons why the decision is thought to be erroneous. Appellate Rule 11 further provides that a brief may accompany the petition, but the rule does not further elaborate on any other requirements. However, based on the policy that a petition's purpose is merely to contain a concise recitation of grounds for the appeal coupled with the allowance for filing a brief if the party feels arguments and authorities need to be advanced to the court, a number of Indiana decisions have held that such petitions should not contain argumentative materials.[140] Thus, the insertion of arguments into the petition for rehearing may result in a dismissal and preclude a transfer of the substantive issues to the Indiana Supreme Court, although a transfer to determine the propriety of the dismissal may still be available.

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[135]*See* Baltimore & O.S.W. Ry. v. New Albany Box & Basket Co., 48 Ind. App. 647, 94 N.E. 906, *reh'g denied*, 48 Ind. App. 657, 96 N.E. 28 (1911).

[136]*E.g.*, Indiana State Fair Bd. v. Hockey Corp. of America, 429 N.E.2d 1121 (Ind. 1982). The appellee's petition to transfer the case to the Indiana Supreme Court was denied because the appellee failed to file a petition for rehearing in the Indiana Court of Appeals. *Id.* at 1122.

[137]IND. R. APP. P. 11(A).

[138]IND. R. APP. P. 14(A). Similarly, the same rule provides the opposing party with 10 days in which to file a brief in opposition which also cannot be extended. IND. R. APP. P. 11(B)(6).

[139]IND. R. APP. P. 11(B).

[140]*E.g.*, Ross v. Schubert, 396 N.E.2d 147 (Ind. Ct. App. 1979); Wyler v. Lilly Varnish Co., 146 Ind. App. 91, 252 N.E.2d 824 (1969), *reh'g denied*, 146 Ind. App. 115, 122, 255 N.E.2d 123, 128 (1970).

Because Appellate Rule 11(A) does not specify the format of a petition for rehearing, the exact method for structuring the petition is left to the appellate practitioner. According to Appellate Rule 11(B), only issues raised in the petition for rehearing may be asserted in the petition to transfer. Because the petition for transfer must be phrased in the manner prescribed in Appellate Rule 11(B)(1), the safest approach would be to structure the petition for rehearing in the same language. In this way, there can be no question as to whether the issues in the petition to transfer are compatible with those raised in the petition for rehearing.

Although Appellate Rule 11 indicates that filing a brief with the petition for rehearing is discretionary, it is strongly recommended. Most authorities agree that a petition for rehearing without a brief has no chance for success,[141] and there simply is no rational basis for throwing away even the smallest possibility for a reversal. Additionally, if the petition for rehearing is prepared in the same format as the petition to transfer, the appellate practitioner may prepare the petition to transfer by merely polishing the prior petition and brief. Here again no guidance is given in the rules, the procedural manuals, or case law regarding the structure of the brief in support of the petition for rehearing; however, the brief should contain a table of contents, a table of authorities, a separate discussion in the argument section on each action of the court alleged to be erroneous, and a conclusion. A statement of the facts and a statement of the case would apparently not be necessary, but something similar to a summary of the argument would probably be advantageous. Finally, a conclusion setting out the relief requested would appear to be necessary to fully inform the court.

I. The Petition to Transfer

If the court of appeals denies the petition for rehearing, then it is necessary to file a petition to transfer with the Indiana Supreme Court within twenty days. As with a petition for rehearing, this time period cannot be extended, and the failure to file within that period of time will result in a dismissal.[142] Because the petition to transfer is jurisdictional in nature, the petitioner must demonstrate compliance with all the prerequisites and state the alleged error in the language required by Appellate Rule 11(B). Failure to do so may also result in the dismissal of the petition.[143] In order to avoid a potential

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[141]*See, e.g.*, 2 A. BOBBITT, INDIANA APPELLATE PRACTICE AND PROCEDURE 627 (1972 & Supp. 1982).

[142]*E.g.*, Pipe Creek School Township v. Wagler, 194 Ind. 496, 143 N.E. 514 (1924).

[143]*E.g.*, Baker v. Fisher, 260 Ind. 513, 296 N.E.2d 882 (1973); *In re* Aurora Gaslight, Coal & Coke Co., 186 Ind. 690, 692, 115 N.E. 673, 673 (1917).

dismissal, the petitioner must allege in his petition that: (1) On a specified date the court of appeals decided the particular case with a written opinion or memorandum decision; (2) The decision of the court of appeals was against the party seeking transfer; (3) A petition for rehearing was timely filed with the court of appeals; (4) The court of appeals denied the petition for rehearing on a particular date; and (5) The court of appeals committed certain errors, phrased in the language prescribed by Appellate Rule 11(B).[144]

Appellate Rule 11(B) specifies the type of errors which are appealable to the Indiana Supreme Court.[145] While Indiana case law requires that the alleged errors be phrased in the manner suggested in Appellate Rule 11(B)(2), the true intent of Appellate Rule 11 is to limit transfers to these areas rather than to provide the appellate practitioner with the challenge of making his errors fit into the required categories.[146] In establishing these bases for transfer, the petitioner must clearly and concisely show the specific circumstances surrounding the alleged error.[147] Good appellate practice would suggest that argumentative material should be avoided in the petition to transfer. In addition, the errors raised in the petition to transfer must have been first presented to the appellate court in a petition for rehearing and preserved in the earlier stages of the appeal.[148]

As with a petition for rehearing, the party filing the petition to transfer is not required to file a supporting brief. However, considering the general presumptions favoring the lower court's determination, it is doubtful that the petitioner has much chance of success without a substantial brief supporting the petition. The party or parties opposing the petition to transfer, as with the petition for rehearing, have ten days after the filing of the petition or briefs of petitioner, whichever is later, to file a brief in opposition.[149] As with the petition to transfer, there is no extension of time allowed for the filing of a brief in opposition.[150] If copies of the briefs, and presumptively the petition, are not properly served upon all of the parties, then the petition will be dismissed upon a proper motion by the party who was not served with a copy.[151]

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[144]These allegations are a slightly modified version of those discussed in *In re* Aurora Gaslight, Coal & Coke Co., 186 Ind. 690, 115 N.E. 673 (1917) and 2 A. BOBBITT, INDIANA APPELLATE PRACTICE AND PROCEDURE 634-35 (1972 & Supp. 1982).

[145]IND. R. APP. P. 11(B)(2).

[146]*See* Baker v. Fisher, 260 Ind. 513, 515-16, 296 N.E.2d 882, 883-84 (1973).

[147]*See* IND. R. APP. P. 11(B)(2); *see also* Baker v. Fisher, 260 Ind. 513, 296 N.E.2d 882 (1973).

[148]*See, e.g.*, Dorweiler v. Sinks, 238 Ind. 368, 151 N.E.2d 142 (1958); Cunningham v. Hyles, 402 N.E.2d 17, 21 (Ind. Ct. App. 1980).

[149]IND. R. APP. P. 11(B)(6).

[150]IND. R. APP. P. 14(A).

[151]*See* Sizemore v. Pub. Serv. Comm'n, 242 Ind. 498, 499-500, 180 N.E.2d 232, 233 (1962).

In 1969, in the case of *West v. Indiana Insurance Co.*,[152] the Indiana Supreme Court considered the question of whether a petition for rehearing of a petition to transfer was available after the denial of transfer and stated the following:

> A rehearing is a procedure by which a court can recognize and correct errors in its original ruling. There is no less likelihood that the Supreme Court will commit an error in denying a petition to transfer than there is when it grants such a petition. Furthermore, this court has often recognized a petition for rehearing filed by the respondent after a petition to transfer has been granted. It does not seem to be an equitable procedure to deny the petitioner this same procedure when we deny the petition to transfer.[153]

In the *West* case, the Indiana Supreme Court recognized its fallibility and the desirability of providing an opportunity for the correction of possible errors in their initial determination and opinion.[154] In addition, they recognized the essential unfairness in allowing a petition for rehearing if transfer has been accepted, but denying it when transfer has been denied.[155]

Less than three years later, on January 1, 1972, the Indiana Supreme Court adopted the current Rules of Appellate Procedure. Appellate Rule 11(B)(8), then and now, provides that no petition for rehearing will be permitted to be filed upon the denial of a petition to transfer. On the other hand, no comment is made about the availability of a petition for rehearing when transfer is granted. Thus, the Indiana Supreme Court has overruled the *West* case by its adoption of Appellate Rule 11(B)(8). Under the rule as it presently exists, and until such time as that rule is either revised by the Indiana Supreme Court or modified by case law, it would appear that a petition for rehearing is proper when a transfer is granted, but improper when transfer is denied.

For those who wish to file a petition for rehearing after the granting of a petition to transfer, there are again no clear guidelines set out in the rules for the form of the petition or of the brief. However, it would appear that the format suggested for the petition to transfer would be the safest format for a petition for rehearing of the petition to transfer and that the brief should contain a table of contents, table of cases, statement of the issues or alleged errors,

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[152]253 Ind. 1, 247 N.E.2d 90 (1969) (decided under the prior rules).
[153]*Id.* at 3, 247 N.E.2d at 92.
[154]*Id.* at 4, 247 N.E.2d at 92.
[155]*Id.* at 3, 247 N.E.2d at 92.

summary of the argument, an argument section with each individual alleged error discussed separately, and a conclusion.

A petition for rehearing of a successful petition to transfer is the last resort for the appellate practitioner in the Indiana appellate courts. Although there may be a potential appeal to the United States Supreme Court if the case involves federal constitutional issues, such an appeal is beyond the scope of this article. Rather, the remainder of this article will explore the availability and utilization of a motion to dismiss as a means of calling procedural errors to the attention of the appellate courts in Indiana.

III. The Rules of the Game for the Opposing Party

If one of the parties to an appeal commits one or more procedural errors, each of which would constitute a possible basis for dismissal, affirmance, or waiver based on prior cases, what can the opposing party do to be certain that these are called to the attention of the particular appellate court? If the error occurred in a trial court, then the automatic reaction to this question would be either a motion to dismiss or motion to strike pursuant to Indiana Trial Rule 12. However, the Indiana Appellate Rules do not discuss the availability of either of these motions.[156] The mechanism available for drawing these errors to the appellate court's attention is provided by case law and is not discussed in the somewhat less than complete rules of appellate procedure.

As in the Indiana Trial Rules, the mechanism for drawing the court's attention to procedural errors during an appeal is either a motion to dismiss or a motion to affirm. Although the difference between a motion to dismiss and a motion to affirm is considered by most authorities to be less than clear,[157] it appears that a dismissal is the appropriate remedy for jurisdictional defects and an affirmance is the proper remedy for nonjurisdictional defects.[158] Jurisdictional defects would include the failure to timely file the motion to correct errors, the praecipe, or the record of proceedings.[159] However, the failure to timely file the appellant's brief, although in no way jurisdictional, is another basis for an automatic dismissal of the appeal.[160] Other

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[156]*See* Ind. R. App. P. 1-15.

[157]*See* 4A B. Bagni, L. Giddings & K. Stroud, Indiana Practice §§ 81-82 (1979 & Supp. 1982); 1 A. Bobbitt, Indiana Appellate Practice and Procedure 532-33 (1972 & Supp. 1982).

[158]*See supra* note 157.

[159]*See, e.g.*, Bradburn v. County Dep't of Pub. Welfare, 148 Ind. App. 387, 266 N.E.2d 805 (1971); American Metal Climax, Inc. v. State Bd. of Tax Comm'r, 159 Ind. App. 468, 307 N.E.2d 507 (1974); *In re* Little Walnut Creek Conservancy Dist., 419 N.E.2d 170 (Ind. Ct. App. 1981).

[160]*See* 4A B. Bagni, L. Giddings & K. Stroud, Indiana Practice § 82 (1979 & Supp. 1982).

cases also tend to obscure the jurisdictional/nonjurisdictional distinction between a motion to dismiss and a motion to affirm. For that reason, one authority suggests that the appellate practitioner phrase the motion in the alternative, unless the attorney has a recent case indicating that the issue involved is specifically one to dismiss or affirm.[161]

The question as to whether to file a motion to dismiss or affirm in a particular factual situation involves both questions of strategy and practicality. On the strategic side, a motion to dismiss or affirm, if well-taken, may raise serious questions in the minds of the court as to the competency of the opposing counsel and the reliability of other material filed by the opposing party, as well as creating a possible basis for the speedy resolution of the case. Thus, there is a psychological advantage in filing a motion to dismiss or affirm and the potential advantage of obtaining an early resolution of the matter, especially if there is some question about the chances of success on the substantive issues. On the other hand, a weak motion to dismiss or affirm may well cause the court to view the moving counsel as an obstructionist. Therefore, in each case, it is important to weigh the potential advantages and disadvantages in relationship to the strength of the potential grounds for a dismissal or affirmance.

The practical side of the question involves both the potential for waiving the procedural errors and the costs involved in a motion to dismiss or affirm. Appellate Rule 14(B) provides that a petition for an extension of time, when filed by the appellee, must show the court that no other dilatory motions or motions to dismiss will be filed on his or her behalf.[162] Our appellate courts have interpreted this appellate rule to mean that a request for an extension of time to file a brief results in a waiver of the right to assert any future dilatory motions, including a motion to dismiss or affirm.[163]

Because the normal time for filing a motion to dismiss or affirm is after the appellant has filed his brief, this means that any request for an extension of time waives the right to file a motion to dismiss or affirm.[164] As a practical consideration, it is incumbent upon counsel for the appellee to make a determination as quickly as possible after receipt of appellant's brief and the transcript as to whether a sufficient basis exists for a motion to dismiss or affirm. This decision also requires appellate counsel to consider the increased costs of filing a

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[161]1 A. BOBBITT, INDIANA APPELLATE PRACTICE AND PROCEDURE 533 (1972 & Supp. 1982).

[162]IND. R. APP. P. 14(B).

[163]*See* Clyde E. Williams & Assoc., Inc. v. Boatman, 176 Ind. App. 430, 375 N.E.2d 1138 (1978).

[164]*Id.* at 433-34, 375 N.E.2d at 1140.

motion to dismiss or affirm with a supporting brief, especially because the appellate court may merely take the motion under advisement and require the appellee to go ahead and file his brief on the merits.[165]

Although up to this time the discussion has centered on a motion to dismiss or affirm after the filing of the appellant's brief, this is not the only time that such a motion is available to the appellate practitioner. In addition to this opportunity, the appellate practitioner may file a motion to dismiss or affirm in response to a petition for rehearing and a petition to transfer.[166] As to the time factors involved in this motion, there is no case discussing when the motion to dismiss or affirm should be filed in response to a petition for rehearing. It should probably be filed within the time provided for filing a brief in opposition to the petition for rehearing and, certainly, before the particular court of appeals has reached a determination on the merits. In regards to a petition to transfer, there is authority that a motion to dismiss or affirm must be filed before the Indiana Supreme Court decides whether to accept transfer or the issues will be deemed waived.[167]

Because the Indiana Appellate Rules do not even discuss a motion to dismiss or affirm, they do not indicate any particular format for either the motion or the brief accompanying the motion. However, along with asserting the specific facts relating to each basis for dismissal or affirmance, the motion should probably indicate enough of the history of the case to show that the motion is being timely filed. The brief supporting the motion to dismiss or affirm should contain a table of contents, a table of authorities, a statement of each of the errors alleged similar to a statement of the issues, an argument section containing a separate argument on each of the alleged errors, and a conclusion indicating exactly what relief is requested. In addition, it would probably be wise to include a statement of what has occurred in the case relative to the motion to dismiss or affirm.

IV. Winning The Game

The purpose of this article has been to provide appellate practitioners with an awareness of the increasingly significant areas of potential problems, to point out the types of procedural errors which can occur in each stage of the appellate process, and to remove the veil of obscurity surrounding the availability of a motion to dismiss or affirm, as well as the relatively few criteria for its use. It is hoped

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[165]After reviewing the matter and reaching an initial decision on the questions, the matter should probably be presented to the client for a final determination.

[166]*See* Ross v. Schubert, 396 N.E.2d 147 (Ind. Ct. App. 1979); Automobile Underwriters, Inc. v. Smith, 241 Ind. 302, 171 N.E.2d 823 (1961).

[167]*See* Kraus v. Lehman, 170 Ind. 408, 422, 84 N.E. 769, 769 (1908).

that the emphasis on the potential hazards arising from the commission of procedural errors, coupled with a fairly complete discussion of the types of errors that can occur in each stage of the appellate process, will result in a significant decrease in the number of cases or issues being decided on procedural grounds and a corresponding increase in the number of cases in which all issues are decided on the merits. All attorneys involved in the appellate game, whether on rare occasions or on a regular basis, should be fully cognizant of the pertinent rules, in order to avoid any error and in order to take advantage of any error by the opposing player.