

Recent Developments in Indiana Appellate Procedure: Reforming the Procedural Path to the Indiana Supreme Court

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During 1991, the Indiana Supreme Court made significant changes to the rules of appellate procedure. Recent amendments provide a new procedure for appeals from the tax court to the supreme court.¹ They also allow a United States District Court sitting in the state to certify a question of Indiana law to the state supreme court.² Finally, the amendments clarify the time deadlines for filing the praecipe and record of proceedings in interlocutory appeals.³ All lawyers who practice before Indiana's appellate courts should be aware of these changes.

These changes reflect the Indiana Supreme Court's continuing interest in systematically reviewing the appellate process. From 1976 to 1988, over eighty-five percent of the high court's docket consisted of criminal appeals that came directly from the trial court by mandate of the state constitution.⁴ On November 8, 1988, the people of Indiana voted to amend the state constitution to allow the supreme court to create a more balanced docket of criminal and civil appeals.⁵ Within a week of the election, the Indiana Supreme Court exercised its constitutional authority to shift initial review of many criminal cases to the court of

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1. IND. APP. R. 18 (effective January 1, 1992).

2. IND. APP. R. 15(O) (effective July 2, 1991).

3. IND. APP. R. 2(A) (effective January 1, 1992); IND. APP. R. 3(B) (effective January 1, 1992).

4. IND. CONST. art. VII, § 4 (criminal conviction resulting in a sentence of 10 years or more could be directly appealed to the supreme court without review by the court of appeals). Chief Justice Shepard discussed the increase in direct appeals in numerous speeches and articles. See, e.g., Chief Justice Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669, 682 n.75 (1988) [hereinafter Shepard, *Changing*]; Hon. Randall T. Shepard, *Vote 'Yes' on Proposition 2*, 32 RES GESTAE 56 (1988).

5. IND. CONST. art. VII, § 4 (appellate review of criminal cases with sentences of 50 years or less could initially be performed by the court of appeals).

appeals, the state's intermediate appellate court.⁶ In the past three years, civil transfer opinions increased from ten percent of the supreme court's docket to twenty-five percent.⁷

The shift from mandatory criminal appeals to a balance of criminal and civil appeals has focused the Indiana Supreme Court's attention on the process it uses to decide which cases to review. At the beginning of 1991, Chief Justice Randall T. Shepard stated that the state's court of last resort "must develop more refined ways of selecting cases to decide on the merits."⁸ The 1991 amendments represent a beginning; additional refinements in 1992 are likely. One of Chief Justice Shepard's expectations for 1992 is for more change in appellate procedures:

The way (the Indiana Supreme Court) decides which cases to take on the merits, the way in which we decide opinions, those methods are largely unchanged from the era in which we were mostly a criminal . . . court. We need to reorganize internally our own processes. It may be that the reorganization will show up in ways that affect appellate practice in the state.⁹

The supreme court's 1991 amendments to the appellate rules provide a glimpse of possible changes in the coming years.

The first section of this Article summarizes developments in the Indiana Rules of Appellate Procedure that occurred during 1991. Part II discusses the historical origins of the process of transfer from the court of appeals to the supreme court — a procedure that will probably be changed during 1992. The last section proposes refinements to the procedures for transfer to the supreme court, which would help lawyers direct the most important cases to the state's court of last resort.

I. RECENT DEVELOPMENTS IN APPELLATE PROCEDURE

The 1991 amendments to the Indiana Rules of Appellate Procedure will be helpful to the appellate practitioner. One change clarifies the time for filing the praecipe and record of proceedings in interlocutory

6. See Indiana Supreme Court Order of November 14, 1988 (amending IND. APP. R. 4(A)(7)), reprinted in 528-529 N.E.2d XLI (Ind. cases ed.).

7. In 1988, the Indiana Supreme Court issued 328 total opinions, of which 33 (10%) were civil transfer opinions. See Division of State Court Administration, 1988 Indiana Judicial Report Vol. I at 13. In 1991, the court issued 202 total opinions, of which 51 (25%) were civil transfer opinions. See Division of State Court Administration, 1991 Indiana Judicial Report (forthcoming).

8. Chief Justice Randall T. Shepard, *Foreword: Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499, 520 (1991) [hereinafter Shepard, *Foreword*].

9. Erik Hromadka, *Shepard Reviews 1991, Plans for 1992*, IND. LAW., Jan. 1, 1992, at 22, col. 4.

appeals.¹⁰ Another amendment allows a United States District Court sitting in the state to certify a question of Indiana law to the state supreme court.¹¹ A third amendment adds an entirely new procedure for discretionary appeals from the tax court to the supreme court.¹² This last amendment is the most significant primarily because it may be a prelude to the supreme court's adoption of new procedures for the far greater number of discretionary appeals from the court of appeals. These recent developments are discussed in turn.

A. Time Deadlines for Filing the Praecipe and Record of Proceedings in Interlocutory Appeals

The supreme court amended the appellate rules, effective January 1, 1992, to provide that in permissive interlocutory appeals under Indiana Appellate Rule 4(B)(6) a praecipe shall be filed no later than ten days after the court of appeals grants the petition for interlocutory appeal.¹³ In all other interlocutory appeals, the praecipe shall be filed within thirty days after the entry of the order being appealed.¹⁴ The record of proceedings in all interlocutory appeals must be filed no later than thirty days from the date the praecipe is filed.¹⁵

Prior to these amendments, the appellate rules did not expressly provide a time limit for filing a praecipe in interlocutory appeals and were unclear as to the time for filing the record of proceedings in discretionary interlocutory appeals under Indiana Appellate Rule 4(B)(6). The prior version of Indiana Appellate Rule 3(B) only provided that "[i]n appeals and reviews of interlocutory orders, the record of proceedings shall be filed *within thirty (30) days of the ruling.*"¹⁶ For interlocutory appeals as a matter of right under Indiana Appellate Rule 4(B)(1) through (5), the record of proceedings previously was due thirty days after the trial court's order, no matter when the party taking the interlocutory appeal filed the praecipe. The amendments now allow for the filing of a praecipe thirty days after the trial court's ruling, with the record of proceedings due an additional thirty days from the date the praecipe is filed.

For permissive interlocutory appeals under Indiana Appellate Rule 4(B)(6), there previously were three possible dates from which the thirty

10. IND. APP. R. 2(A) (effective January 1, 1992); IND. APP. R. 3(B) (effective January 1, 1992).

11. IND. APP. R. 15(O) (effective July 2, 1991).

12. IND. APP. R. 18 (effective January 1, 1992).

13. IND. APP. R. 2(A) (effective January 1, 1992).

14. *Id.*

15. IND. APP. R. 3(B).

16. *Id.* (emphasis added).

day period for filing the record of proceedings could be calculated: (1) the trial court's original ruling; (2) the trial court's ruling certifying the issue for appeal; or (3) the court of appeals' ruling accepting the petition for appeal.¹⁷ The court of appeals previously held that the third possible date—thirty days from the date the court of appeals found the matter appealable—was the correct interpretation.¹⁸ One judge dissented, concluding that the majority had promulgated a "new rule of appellate procedure."¹⁹ The amendments end the debate by promulgating a new rule clarifying that in appeals taken under Indiana Appellate Rule 4(B)(6) the praecipe shall be filed no later than ten days after the court of appeals grants the petition for interlocutory appeal. The record of proceedings is then due thirty days after the appealing party files the praecipe.

With these amendments, the only remaining ambiguities arise at the start of discretionary interlocutory appeals. In interlocutory appeals under Indiana Appellate Rule 4(B)(6), a lawyer is not required to move the trial court to certify an issue for interlocutory appeal within a certain time. One recent court of appeals decision stated:

[A] person could wait several months or years after an adverse ruling by the trial court, have the trial court certify the issue, file a petition with this court to accept the interlocutory appeal and, if the record of the proceedings was filed within thirty days of this court's ruling accepting the petition for appeal, the appeal would be deemed timely.²⁰

Although it is unlikely that a trial court would certify an issue "several months or years" later, the plain language of the amended rules would permit such a delayed certification. In addition, the rules do not provide time limits to petition the court of appeals for permission to take an interlocutory appeal after the trial court has certified the issue.²¹ Lawyers taking an interlocutory appeal, however, would be well advised to seek certification in the trial court and the court of appeals as expeditiously as possible to avoid denial of certification on the grounds of laches.

17. *Bayless v. Bayless*, 580 N.E.2d 962, 965 n.3 (Ind. Ct. App. 1991).

18. *Scott v. Bodor, Inc.*, 550 N.E.2d 1326, 1328 (Ind. Ct. App. 1990); *Koehn v. Devereaux*, 495 N.E.2d 211, 214 (Ind. Ct. App. 1986).

19. *Koehn*, 495 N.E.2d at 217 (Staton, J., dissenting).

20. *Bayless*, 580 N.E.2d at 965 n.3 (attorney sought to circumvent the rule by attempting to appeal as if there was a final order and delayed filing record of proceedings more than 195 days after trial court's denial of motions).

21. In the federal system, a party must petition the federal court of appeals for permission to take a discretionary interlocutory appeal within 10 days after the district court certifies an order not otherwise appealable. 28 U.S.C. § 1292(b) (1988); FED. R. APP. P. 5(a).

B. Certified Questions of Indiana Law From United States District Court to State Supreme Court

The Indiana Supreme Court's increased control over its docket since 1988 prompted one judge of the Seventh Circuit to suggest greater use of certified questions.²² Judges in the United States District Court for the Northern District of Indiana also suggested extending the certified question procedure to include district courts.²³ On July 2, 1991, the Indiana Supreme Court amended the rule to allow a district court sitting in Indiana to certify questions of state law to the state supreme court.²⁴

A recent Seventh Circuit decision illustrates an instance in which a federal district court sitting in Indiana may have wished to certify a question of Indiana law to the state supreme court.²⁵ The Seventh Circuit reversed a district court's decision based on recent and dispositive Indiana case law that had not been handed down when the district court ruled: "We note that the Indiana Supreme Court (and the Indiana Court of Appeals) issued their decisions in *Snodgrass* after the District Court had ruled in this case. Thus, the district judge did not have the benefit of these definitive Indiana decisions."²⁶ The new certification process would have allowed the district court sitting in Indiana to certify the question to the state supreme court. The supreme court first accepted certification from a United States District Court on March 13, 1992.²⁷

Only a "United States District Court *sitting in Indiana*" is allowed to certify a question to the state supreme court.²⁸ Federal district courts sitting *outside* of Indiana, however, also apply Indiana law. When the forum state's choice-of-law rules dictate that Indiana substantive law applies or when a contract provides that Indiana law governs, the federal court would apply Indiana law even though the district court was outside the state.²⁹ The amendment does not permit federal district courts outside Indiana to certify a question of state law to the Indiana Supreme Court. The purpose behind expanding certification to district courts does not suggest such a limitation, but the Indiana Supreme Court may simply

22. *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 142 (7th Cir. 1990) (Ripple, J., dissenting).

23. Shepard, *Foreword*, *supra* note 8, at 501 n.6.

24. IND. APP. R. 15(O) (effective July 2, 1991).

25. *Allied Signal, Inc. v. Acme Serv. Corp.*, 946 F.2d 1295 (7th Cir. 1991).

26. *Id.* at 1296 n.2 (citing *Indianapolis Power & Light Co. v. Brad Snodgrass, Inc.*, 548 N.E.2d 1197 (Ind. Ct. App. 1990)).

27. *Stump v. Commercial Union*, No. 02S00-9203-CQ-169 (Ind. March 13, 1992) (order accepting certification).

28. IND. APP. R. 15(O) (emphasis added).

29. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187 (1971).

have placed a reasonable limitation on certification to ensure control of the docket.³⁰

C. New Procedures from the Indiana Tax Court To the State Supreme Court: Prelude to Change

The most dramatic change in the state's appellate rules is the entirely new procedure for appeals from the Indiana Tax Court to the Indiana Supreme Court.³¹ The new rule has some similarities to the existing procedures for transfer from the court of appeals to the supreme court: a petition for rehearing is not mandatory, a petition for review must set forth briefly the same information required by a petition to transfer, no petition for rehearing will be permitted upon the denial of petition for review, no extension of time will be granted for filing a petition for review, and if the supreme court is equally divided, review will be deemed denied and the lower court's decision shall become the law of the case.³² The three major differences in the new rule indicate, however, that the Indiana Supreme Court has taken the initial steps in refining the appellate process.

First, the rule permits two briefs: a preliminary brief and, if review is granted, a brief on the merits.³³ The preliminary brief is optional and can be filed simultaneously with a petition for review. The preliminary brief is limited to ten pages. Any brief opposing the petition for review cannot exceed ten pages in length and must be filed within twenty days of the filing of the petition. The supreme court will not grant extensions of time for filing a petition for review or any preliminary brief.³⁴ If the supreme court denies the petition for review, no petition for rehearing will be considered.³⁵ If the supreme court grants review, the petitioner has thirty days to file a brief on the merits that does not exceed fifty pages.³⁶ The respondent shall file a brief on the merits not to exceed fifty pages within thirty days of the filing of the petitioner's brief.³⁷ The petitioner then has fifteen days to file any reply brief on the merits, and the reply brief must not exceed twenty-five pages.³⁸ For good cause

30. A justice of the Indiana Supreme Court informally confirmed this statement.

31. IND. APP. R. 18 (effective January 1, 1992).

32. Compare IND. APP. R. 18 (petitions for review from the tax court) with IND. APP. R. 11(B) (petitions for transfer from the court of appeals).

33. IND. APP. R. 18(E).

34. IND. APP. R. 18(H)(4).

35. IND. APP. R. 18(H)(1).

36. IND. APP. R. 18(E)(2).

37. *Id.*

38. *Id.*

shown, the supreme court will grant extensions of time for filing the briefs on the merits.³⁹

Second, the supreme court modified the procedures for filing the record of proceedings.⁴⁰ After the filing of a petition for review and the preliminary briefs, the clerk shall transmit to the supreme court the clerk's portion of the record, together with the chronological case summary. The clerk's portion of the record of proceedings need only be contained in case folders with the documents ordered chronologically by filing date. If the supreme court grants review, the petitioner must file any necessary transcripts of evidence or hearings held by the tax court within thirty days of the order granting review. The transcripts must be bound, indexed, paginated, and marginally noted.

Third, the new rule refers to the initial pleading with the supreme court as a "Petition for *Review*," not a "Petition for *Transfer*."⁴¹ The change is more than semantic. The granting of transfer vacates and holds for naught the judgment and opinion or memorandum of the court of appeals.⁴² Procedurally, the appeal comes before the supreme court as though the matter arose in the first instance in the supreme court.⁴³ The appeal has simply been "transferred" from the court of appeals to the supreme court. A petition for review, however, implies that the supreme court will review the lower court's opinion, rather than vacating the opinion and holding it for naught.

These changes in the appellate procedure suggest that the process of "transfer" from the court of appeals to the supreme court could be revised in the near future. The supreme court may institute a two-tier briefing procedure for transfer, separating the decision to review from the decision on the merits. The supreme court may further fine-tune the procedures for compiling the record of proceedings for an appeal. The supreme court may also change the nature of its relationship with the court of appeals from one of "transfer" to one of "review." These changes would help the supreme court assert its law-giving role as the state's court of last resort. To understand the coming changes some historical perspective on the transfer procedures is helpful.

II. HISTORICAL ORIGINS OF TRANSFER FROM THE APPELLATE COURT TO THE SUPREME COURT

The history of Indiana's appellate courts is one of response to growing caseloads. In the early years of statehood, a single supreme court was

39. IND. APP. R. 18(H)(4).

40. IND. APP. R. 18(F).

41. IND. APP. R. 18(D).

42. IND. APP. R. 11(B)(3).

43. *Kraus v. Lehman*, 84 N.E. 769, 770 (Ind. 1908).

sufficient. When the supreme court's caseload grew, the legislature simply added judges, as they were then known, to the supreme court. Once the general assembly exhausted that option by reaching the constitutional limit, it added commissioners, precursors to today's judicial law clerks. Commissioners drafted opinions for review by the supreme court. Later, the legislature added an intermediate appellate court, resulting for the first time in a need to transfer cases from the appellate court to the supreme court. The legislature added panels to the appellate court in 1901, 1972, 1978, and 1990 to respond to growing appellate caseloads. This growth of the intermediate appellate court has focused the supreme court's attention on the manner in which it selects cases from that court to review on the merits.

A. Early Years of the Indiana Supreme Court (1816-1891)

The Indiana Supreme Court has existed since 1816, the year the citizens adopted the state constitution and Congress admitted Indiana into the United States. The first state constitution provided: "[T]he judiciary power of this State, both as to matters of law and equity, shall be vested in one Supreme Court, in Circuit Courts, and in *such other inferior Courts* as the General Assembly may from time to time direct and establish."⁴⁴ The three judges of the Indiana Supreme Court first gathered at Corydon on May 5, 1817.⁴⁵ The people later moved the seat of state government to Indianapolis, and the supreme court commenced its first term there on May 2, 1825.⁴⁶

The state constitution of 1851 incorporated, with minor amendments, the previous constitutional provision providing for the supreme court: "The judicial power of the State shall be vested in a Supreme Court, in Circuit Courts, and in *such inferior courts* as the General Assembly may establish."⁴⁷ The 1851 state constitution also reorganized the supreme court by making the judges subject to election and providing that their number would be "not less than three, nor more than five judges."⁴⁸ The general assembly immediately expanded the supreme court to add one judge, for a total of four.⁴⁹

Twenty years later, the general assembly responded to a burgeoning appellate backlog by providing for an additional judgeship, bringing the court to the constitutional maximum of five.⁵⁰ Also, the supreme court's

44. IND. CONST. art. V, § 1 (1816) (emphasis added).

45. LEANDER J. MONKS, COURTS AND LAWYERS OF INDIANA 181 (1916).

46. 1 Blackf. 343 (Ind. 1825).

47. IND. CONST. art. VII, § 1 (1851) (emphasis added).

48. *Id.* § 2.

49. 1852 Ind. Acts ch. 20.

50. 1872 Ind. Acts ch. 20 (spec. sess.).

earlier interpretation of the phrase "such inferior courts" in the state constitution implied that the legislature could not create courts on a parity in rank and jurisdiction with the circuit courts, such as an intermediate appellate court.⁵¹

The state's population and industrial economy grew rapidly from 1870 to 1890.⁵² The five judges of the Indiana Supreme Court wrote more opinions in an attempt to address their growing appellate docket, but they fell further behind.⁵³ The population and economic growth caused too much of an increase in the supreme court's caseload to be handled by the five judges.

In 1877, the general assembly proposed an amendment to article VII, § 1 of the constitution—striking the word "inferior" and substituting the word "other"—which was ratified by the voters of the state and finally made a part of the constitution on March 14, 1881.⁵⁴ Rather than create a permanent intermediate appellate court, however, the legislature sought temporary solutions.

The state legislature first responded in 1881 by creating a board of commissioners.⁵⁵ The supreme court selected five commissioners to prepare a draft opinion for approval by the other commissioners, which was then submitted to the supreme court.⁵⁶ The legislature intended for the commissioners to be utilized for two years, but in 1883, the legislature extended the life of the commissioner system for two more years.⁵⁷ By 1885, the supreme court was temporarily relieved of its congested docket, and the legislature did not extend the tenure of the commissioners or

51. See *Cropsey v. Henderson*, 63 Ind. 268, 271 (1878); *Clem v. State*, 33 Ind. 418, 421 (1870).

52. The state's population expanded rapidly during this time:

1870	1,681,000
1880	1,978,000
1890	2,192,000

1 Bureau of the Census, U.S. Dep't of Commerce, *Historical Statistics of the United States, Colonial Times to 1970* at 27, Series A, at 195-209 (1975).

53. The number of opinions issued by the Indiana Supreme Court grew rapidly during the period:

1870	332 opinions
1880	435 opinions
1890	546 opinions

See cases reported in volumes 32 to 35 of *Indiana Reports*, volumes 69 to 73 of *Indiana Reports*, and volumes 124 to 128 of *Indiana Reports*.

54. The supreme court holding in *State v. Swift*, 69 Ind. 505 (1880) that a constitutional amendment must pass by a majority of all voters delayed the ratification of the constitutional amendment.

55. 1881 Ind. Acts ch. 17, § 1.

56. *MONKS*, *supra* note 45, at 297-99.

57. 1883 Ind. Acts ch. 60, § 1.

create a new intermediate appellate court as some states had done to relieve docket pressure on the state supreme court.⁵⁸

By 1889, however, the supreme court had another backlog of appeals. The legislature again created a commission, with one difference—the legislature, rather than the supreme court, would select the commissioners.⁵⁹ The supreme court struck down the act as unconstitutional.⁶⁰ Chief Judge Byron Elliot writing for a unanimous court stated, “The power of deciding, the duty of deciding, and the duty of writing the opinions, is specifically imposed upon the court.”⁶¹

The legislature could not add additional judges to the supreme court and was reluctant to allow the supreme court to select new commissioners. Although the state constitution had been amended in 1881 to allow for an intermediate appellate court, the legislature was wary of the cost of having a permanent appellate court.⁶² The solution was a temporary appellate court with the supreme court to assume jurisdiction over all appeals at the expiration of the appellate court.

B. The Appellate Court: Court of Last Resort For Minor Matters (1891-1901)

The legislature created a second appellate court on February 28, 1891.⁶³ Then known as the Appellate Court of Indiana, it consisted of five judges who had *final* jurisdiction over minor matters, such as all cases for recovery of less than one thousand dollars.⁶⁴ When a party had plausible grounds to challenge the validity of a federal or state statute, the appellate court was to certify the matter and transmit the transcript and all papers to the supreme court “as if said cause had been originally appealed to the Supreme Court.”⁶⁵ The statute provided:

When the Appellate Court shall be organized and ready to proceed with business, the Supreme Court shall, by an order entered upon its record, *transfer* to it all cases then pending in such Supreme Court of the nature and description of those of which jurisdiction is by this act given to said Appellate Court. . . . and the action of said Appellate Court shall have the same force

58. See Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 128-32 (1977).

59. 1889 Ind. Acts ch. 32, § 1.

60. *State ex rel. Hovey v. Noble*, 21 N.E. 244, 252 (Ind. 1889).

61. *Id.* at 249.

62. CHARLES N. TAYLOR, *THE BENCH AND BAR OF INDIANA* 79 (1895).

63. 1891 Ind. Act ch. 37.

64. *Id.* § 1.

65. *Id.*; *Benson v. Christian*, 29 N.E. 26 (Ind. 1892).

and effect in all respects as if the said cause had been heard and disposed of by the Supreme Court.⁶⁶

The legislature also provided for “transferring” appeals not taken to the proper court.⁶⁷

For example, if an appeal was taken to the supreme court that should have been taken to the appellate court, the supreme court had the duty, on its own motion, to “transfer” the cause to the appellate court.⁶⁸ The appellate court had the same duty to “transfer” an appeal to the supreme court if it properly belonged there.⁶⁹ “Transfer” was at first not a procedure for the supreme court to review the decisions of the appellate court, but rather to place the appeal in the proper court.

Although transfer was meant to provide a procedure for placing the appeal in the proper court, it was also clear that the appellate court was to follow the law declared by the supreme court. The legislature expressly stated that the supreme court’s decisions governed any conflict: “The Court created by this act shall be governed in all things by the law as declared by the Supreme Court of this State and it shall not directly nor by implication reverse or modify any decision of the Supreme Court of this State.”⁷⁰ The appellate court was to be in existence for “six years from the first day of March, 1891, and no longer, at the end of which time the Supreme Court shall assume jurisdiction of all causes pending in and other business of said Appellate Court as if this act had never been passed.”⁷¹

On March 10, 1891, the supreme court, on the petition of the clerk, entered an order transferring appeals to the newly created appellate court.⁷² Judge Elliot wrote:

It is so evident that the act recognizes the general and superior appellate jurisdiction of the supreme court that little else is required than the bare statement that the appellate authority not expressly or impliedly vested in the newly-created tribunal remains where the constitution and the law place it, in the supreme court of the state. . . . It carves out of the general appellate jurisdiction

66. 1891 Ind. Acts ch. 37, § 19 (emphasis added).

67. *Id.* § 25.

68. *Id.*

69. *Id.* The procedure of transfer both ways still exists today. See IND. APP. R. 4(D); IND. APP. R. 15(M).

70. 1891 Ind. Acts ch. 37, § 25.

71. *Id.* § 26.

72. *Ex parte Sweeney*, 27 N.E. 127 (Ind. 1891).

of the state a part, and *transfers* it to the court it creates. . . . What is not expressly or by necessary implication *transferred* to the new tribunal abides in the old.⁷³

The supreme court transferred other appeals as they arose that were "within the exclusive jurisdiction of the appellate court."⁷⁴ However, the jurisdiction of the appellate court was not made broad enough, and consequently, the supreme court was still burdened by too many appeals.⁷⁵

Lawyers also objected to the lack of a procedure for appealing from the appellate court to the supreme court. A contemporary noted, "Those objections arose chiefly from the fact that the decisions [the appellate court] rendered, while from the Court of last resort as to the cases in which they were rendered, were not from the Court of last resort in the State."⁷⁶ One attorney challenged the constitutionality of the legislation creating the appellate court, but the supreme court held that the legislature could create an appellate tribunal inferior to the supreme court by limiting the jurisdiction to cases not of the highest grade.⁷⁷

In order to divide the docket more evenly between the appellate court and the supreme court, the legislature raised the maximum amount-in-controversy for jurisdiction from one thousand dollars to three thousand five hundred dollars.⁷⁸ The supreme court transferred appeals involving less than three thousand five hundred dollars to the appellate court.⁷⁹ Even this increase of the appellate court's jurisdiction did not divide the work equally between the two courts.⁸⁰

73. *Id.* (emphasis added).

74. *Baker v. Groves*, 26 N.E. 1076 (Ind. 1891). See also *City of Hammond v. New York, C. & St. L. Ry Co.*, 27 N.E. 130 (Ind. 1891); *Parker v. Indianapolis Nat'l Bank*, 26 N.E. 881 (Ind. 1891).

75. TAYLOR, *supra* note 62, at 55.

76. *Id.* at 80.

77. *Branson v. Studebaker*, 33 N.E. 98, 99 (Ind. 1892). The opinion contains an eloquent exposition on the role of the supreme court:

There must be in every State a court capable of exercising ultimate judicial power; otherwise there would be unending conflict. In this State there is a court invested with ultimate judicial power, and this is the supreme court. If it were otherwise, there would be no organ of government capable of authoritatively and finally settling judicial questions and that there must be such an organ there can be no doubt, for the judicial department is an independent one, and the element of sovereignty delegated to that department must, as in the case of the executive and legislative, reside in its last and highest form in one tribunal, one officer or body of officers. But, while we are clear that no statute can deprive the supreme court of its rank as the highest and ultimate repository of judicial power, we are equally clear that appellate jurisdiction of an inferior grade may be conferred upon other appellate tribunals.

Id. (citation omitted).

78. 1893 Ind. Acts. ch. 32, § 1; TAYLOR, *supra* note 62, at 80.

79. *City of Huntington v. Burke*, 38 N.E. 597 (Ind. 1894).

80. *Id.*

More important than its attempt to divide the appellate docket evenly, the 1893 act provided a procedure for the *appellate court* to transfer an appeal to the supreme court:

That in any case pending in the Appellate Court, in which said Appellate Court shall conclude that any decision of the Supreme Court should be overruled or modified, it shall be their duty to *transfer* said cause, with their opinion of what the law should be held to be, to the Supreme Court, and the Supreme Court shall thereupon have jurisdiction of and decide the entire case, the same as if it had original jurisdiction thereof, and it may either modify, overrule or affirm its former decision, on that question as it shall deem right, and such decision of the Supreme Court shall be final.⁸¹

Although the statute only gave the appellate court authority to transfer an appeal to the supreme court, crafty lawyers still sought to get their appeals before the supreme court. One attorney used a writ of mandamus to challenge the jurisdiction of the appellate court as an alternative to transfer, but the supreme court rebuffed the challenge.⁸² Another attorney stated in his brief, "Private property can only be taken for public purpose upon just compensation given," in an attempt to create a constitutional question solely within the province of the supreme court.⁸³ The supreme court denied the petition for a writ of mandate, holding that no constitutional question was duly presented.⁸⁴ Similarly, when a party had a constitutional claim but failed to argue it in its brief, the supreme court would transfer the matter to the appellate court.⁸⁵

In addition to petitions for writs of mandate and cursory constitutional arguments, lawyers attempted to use petitions for writs of certiorari to challenge appellate court decisions in the supreme court. The supreme court quickly ended the practice:

We are of the opinion . . . that no authority is shown in the petition before us for a writ of certiorari from this court to the appellate court. The act creating that court provides expressly for a court of final resort, although with certain defined and limited jurisdiction. In all cases in which the appellate court is given jurisdiction its decisions are made final, and not subject

80. *Id.*

81. 1893 Ind. Acts. ch. 32, § 3 (emphasis added).

82. State *ex rel.* Kiley v. Gavin, 34 N.E. 989 (Ind. 1893).

83. Pittsburgh, C., C. & St. L. Ry Co. v. Hays, 47 N.E. 151 (Ind. 1897).

84. *Id.* at 153.

85. Lewis v. Albertson, 49 N.E. 34 (Ind. 1898).

to review, whether by appeal or by writ of certiorari. The evident purpose of the legislature was not to provide for an intermediate court, but for one of last resort.⁸⁶

The supreme court continued by noting that in the creation of the United States Circuit Court of Appeals, Congress made express provision for transferring cases to the Supreme Court in all matters, either by appeal or by certiorari.⁸⁷ In the act creating the appellate court no procedure was provided, however, to advance from the appellate court to the supreme court, "nor [was] there anything in the constitution or laws from which it might be implied."⁸⁸ The absence of a procedure for appealing generated controversy.⁸⁹ The supreme court had no supervisory authority over the decisions of the appellate court.⁹⁰ The appellate court, so the argument went, was coordinate with the supreme court:

[O]n account of the supposed absence of authority on the part of the Supreme Court to exercise in some manner a revisory or reviewing right over the decision of the Appellate Court in order to make them conform, if necessary, to the ruling precedents of the Supreme Court, and thereby keep them in harmony with those of the latter court, two lines of decision were created. Consequently there arose much confusion in respect to the law which would control in a particular case. Under the circumstances as they then existed, that question seemingly depended upon the court . . . to which the cause might finally be appealed.⁹¹

The lack of a procedure for advancement from the appellate court to the supreme court may have resulted from the temporary nature of the appellate court. In 1897, the general assembly extended the appellate court's existence for another four years.⁹² In 1899, the legislature added two additional years.⁹³ Finally, in 1901, the general assembly relented and made the appellate court a permanent body.⁹⁴

C. Transfer From the Appellate Court to the Supreme Court (1901-1940)

In 1901, the appellate court's function shifted from a court of last resort over minor matters to an intermediate appellate court. The leg-

86. *Newman v. Gates*, 49 N.E. 826, 827 (Ind. 1898).

87. *Id.* (citing *Forsyth v. Hammond*, 166 U.S. 506 (1897)).

88. *Id.*

89. *See Ex parte France*, 95 N.E. 515 (Ind. 1911) (clerk of supreme court petitioned for directions about his official statutory duty).

90. *Id.*

91. *Id.* at 520.

92. 1897 Ind. Acts ch. 9, § 3.

93. 1899 Ind. Acts ch. 22, § 1.

94. 1901 Ind. Acts ch. 247, § 19.

islature added one judge to the appellate court, for a total of six, and instructed the court to sit in two divisions, designated as the Appellate Court of Indiana, Divisions Number One and Two, respectively.⁹⁵ Rather than specifying the cases over which the appellate court had final jurisdiction, as in prior statutes, the 1901 act provided that “[n]o appealable case shall hereafter be taken directly to the Supreme Court unless it be within” a list of nine classes of appeals with “[a]ll other appealable cases . . . taken to the Appellate Court.”⁹⁶

Appeals could be transferred to the supreme court.⁹⁷ A party, after seeking rehearing in the appellate court, could file an application for transfer of the case to the supreme court on the ground that the opinion of the appellate court (1) contravened a ruling precedent of the supreme court or (2) erroneously decided a new question of law. If the application for transfer was granted, the supreme court vacated the judgment of the appellate court and transferred the cause to the docket of the supreme court. The purpose of authorizing transfers from the appellate court to the supreme court was to give the supreme court “a revising hand over the opinions of the Appellate Court, when necessary, in order to control the declaration of legal principles.”⁹⁸ This basic procedure for transfer has survived to the present—more than ninety years.

The judges of the supreme and appellate courts were involved in the drafting of the legislation providing for a permanent appellate court.⁹⁹ The provision for transfer from the appellate court to the supreme court was modeled after a provision of the Act of Congress of March 3, 1891, which created the federal circuit courts of appeals.¹⁰⁰ This Act provided that decisions of the federal courts of appeals would be reviewed by writs of certiorari to the United States Supreme Court.¹⁰¹

95. *Id.* § 2.

96. *Id.* § 9.

97. *Id.* § 10. This section provided two other grounds for transfer. First, if two judges of the appellate court were of the opinion that a ruling precedent of the supreme court was erroneous, the case, with a written statement of the reasons for such an opinion, would be transferred to the supreme court. Second, the losing party in the appellate court had a right to appeal the cause to the supreme court when the amount in controversy exceeded six thousand dollars. These other grounds for transfer are not discussed in this Article because they do not deal with transfers over which the supreme court had discretionary review.

98. *Ex parte France*, 95 N.E. 515, 520 (Ind. 1911) (citing *United States Cement Co. v. Cooper*, 88 N.E. 69 (Ind. 1909); *Klein v. Nugent Gravel Co.*, 70 N.E. 801 (Ind. 1904)).

99. *Id.*

100. *Id.* (citing Act of March 3, 1891, ch. 517, 26 Stat. 826 (1901)).

101. *Forsyth v. Hammond*, 166 U.S. 506 (1897). Justice Brewer, speaking for the Court regarding the act of Congress creating the Circuit Courts of Appeals, said:

Near the end of 1901, the Indiana Supreme Court construed the transfer process as a means to protect the law-giving role of the state's court of last resort:

The plain purpose of the subdivision in question, however, was not to give this court jurisdiction to determine whether the facts in cases which are not appealable here as a matter of right have been correctly understood and stated by the appellate court, but to authorize this court to control the declaration of legal principles.¹⁰²

The supreme court examined a written opinion of the appellate court to determine whether the petitioner's grounds assigned for the transfer had merit without examining the record of proceedings or the parties' briefs filed in the appellate court.¹⁰³

The first grant of transfer upon application of a party losing in the appellate court occurred on January 10, 1902.¹⁰⁴ The supreme court opened its opinion simply: "By sustaining appellee's petition for an order of transfer, this court has vacated the decision of the appellate court, and has brought the cause here for final determination."¹⁰⁵ When the supreme court ordered a case transferred from the appellate court, the case was before the supreme court as if appealed directly to the supreme court from the trial court.¹⁰⁶ The bench and bar of the state were satisfied with the new procedure for transfer.¹⁰⁷

Despite general satisfaction with the procedure, one series of transfers rivaled the most famous case in English literature. The proceeding is known as *Jarndyce v. Jarndyce* and is fully reported by Charles Dickens

While this division of appellate power was the means adopted to reduce the accumulation of business in this court, it was foreseen that injurious results might follow if an absolute finality of determination was given to the Courts of Appeal. Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this court, create an unfortunate confusion in respect to the rules of Federal decision. . . . Cases of a class in which finality of decision was given to the Circuit Courts of Appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation.

Id. at 512. Interestingly, this case arose in Indiana and was argued by Benjamin Harrison.

102. *Barnett v. Bryce Furnace Co.*, 62 N.E. 6, 7 (Ind. 1901).

103. *American Quarries Co. v. Lay*, 76 N.E. 517 (Ind. 1906); *City of Huntington v. Lusch*, 71 N.E. 647 (Ind. 1904); *Craig v. Bennett*, 62 N.E. 273 (Ind. 1901).

104. *Payne v. Terre Haute & Indpls. Ry. Co.*, 62 N.E. 472 (Ind. 1902). *See also Oster v. Broe*, 64 N.E. 918 (Ind. 1902).

105. *Payne*, 62 N.E. at 472-73.

106. *Kraus v. Lehman*, 84 N.E. 769, 770 (Ind. 1908).

107. *See Ex parte France*, 95 N.E. 515, 521 (Ind. 1911).

in *Bleak House*. In the Indiana version, a trial court granted a judgment of \$4,000 against a railroad company, which appealed to the appellate court. In February, the appellate court transferred the appeal to the supreme court, noting a constitutional question.¹⁰⁸ In March, the supreme court transferred the appeal back to the appellate court on the ground that the supreme court had previously found the challenged statute valid against the same constitutional attack.¹⁰⁹ The appellate court in June retransferred the case to the supreme court.¹¹⁰ The supreme court in July retransferred the appeal to the appellate court, stating the supreme court's initial ruling should be considered final.¹¹¹ In January of the next year, the appellate court retransferred the appeal to the supreme court when four judges of the appellate court could not agree upon a decision.¹¹² In the interim, the appellee died.

This transfer procedure remained unchanged until 1911, when the state legislature repealed the section providing for transfer to the supreme court. The general assembly returned to the old thinking that a decision of the appellate court would be final.¹¹³ The 1911 act also rearranged the dividing line between the jurisdiction of the supreme court and the appellate court by substantially increasing the jurisdiction of the latter.

The supreme court quickly struck down the legislation in the case of *Ex parte France*.¹¹⁴ The clerk had petitioned the supreme court for instructions as to the transfer of cases to conform to the new jurisdiction of the appellate court. The supreme court reviewed its own constitutional history and the legislative and political history of the appellate court. The supreme court held that the state constitution specially invested it with final appellate jurisdiction and that the legislature had no constitutional authority to create an intermediate appellate court whose decisions were not subject to review by the supreme court.¹¹⁵ The supreme court further held that the legislation was invalid because it gave the appellate court jurisdiction in cases that were not minor.¹¹⁶

Two years later, the legislature again undertook to repeal the provision permitting transfer to the supreme court.¹¹⁷ The supreme court

108. Pittsburgh, C., C. & St. L. Ry Co. v. Peck, 87 N.E. 153 (Ind. App. 1909).

109. Pittsburgh, C., C. & St. L. Ry Co. v. Peck, 87 N.E. 644 (Ind. 1909).

110. Pittsburgh, C., C. & St. L. Ry. Co. v. Peck, 88 N.E. 627 (Ind. App. 1909) (holding that the supreme court erred in retransferring case because appellate court was divested of jurisdiction upon the original transfer to the state supreme court).

111. Pittsburgh, C., C. & St. L. Ry. Co. v. Peck, 88 N.E. 939, 944 (Ind. 1909).

112. Pittsburgh, C., C. & St. L. Ry. Co. v. Peck, 90 N.E. 339 (Ind. App. 1910).

113. 1911 Ind. Acts ch. 117, § 4.

114. 95 N.E. 515, 521-22 (Ind. 1911).

115. *Id.*

116. *Id.* at 522.

117. 1913 Ind. Acts ch. 166.

again struck down the legislation on the same grounds, but curiously, it did not rely upon *Ex parte France*.¹¹⁸ One commentator has speculated that the omission may be related to the fact that the *France* appeal was not an adversary proceeding, at least in form.¹¹⁹

In 1931, the supreme court retreated somewhat from its absolutist position in *Ex parte France*. The legislature passed an act that gave the appellate court final jurisdiction over appeals from misdemeanor convictions.¹²⁰ The supreme court ruled that the act was constitutional.¹²¹ Approximately ten years later, however, the supreme court repeated its doubts concerning the constitutional authority of the legislature to make a decision of the appellate court final:

Uniformity in the interpretation and application of the law is the keystone of our system of jurisprudence. . . . [U]niformity cannot be attained or preserved if the courts that interpret and apply the laws are not required to take their controlling precedents from some common source. If other courts than this court are to be permitted to construe statutes and state rules of substantive law, *without recourse being provided for review by this court*, the result will be . . . destructive

We are not unmindful that it has been many times said that there is no inherent right to appeal any case to this court and that it is for the Legislature to say what cases may and what may not be brought here. . . . We therefore disapprove of the language contained in the many cases which seem to suggest that the right of appeal to this court exists only by the grace of the legislative branch of the government.¹²²

When the legislature created the appellate court in 1891, a debate began over whether the appellate court was an intermediate appellate court

118. *Curless v. Watson*, 102 N.E. 497 (Ind. 1913).

119. BERNARD C. GAVIT, *INDIANA PLEADING AND PRACTICE* § 503, at 2492 (1942).

120. 1929 Ind. Acts ch. 123, § 1.

121. *In re* Petition to Transfer Appeals, 174 N.E. 812 (Ind. 1931).

122. *Warren v. Indiana Tel. Co.*, 26 N.E.2d 399, 405-06 (Ind. 1940) (emphasis added). This case probably was the genesis for an additional ground for transfer:

When a proper showing is made in and as a part of the petition to transfer that the Appellate Court has failed to consider and pass upon a substantial question duly presented to it, this court will examine the record, papers, and briefs in the same manner and to the same extent as if these had been brought up by a writ of error.

Id. at 407-08. Failure to consider a substantial question duly presented to the appellate court later became a third ground for transfer, adding to the two previous grounds for transfer in existence since 1901: the opinion of the appellate court (1) contravenes a ruling precedent of the supreme court or (2) erroneously decides a new question of law.

subject to the supervisory power of the supreme court or a court of last resort regarding minor matters. In 1940, the debate came to a conclusion: the appellate court was an intermediate court of appeals, and the supreme court had the final authority to review the appellate court's decision under the state constitution.

*D. Constitutional Court: The Court of Appeals of Indiana
(1940-Present)*

The right of a losing party to transfer a case from the appellate court to the supreme court was firmly fixed, and thus, attention shifted from statutes to court rules. The supreme court's procedures for transfer were and are embodied within Indiana Appellate Rule 11(B). Although it may seem strange today that a heavily used procedure such as transfer is only a subsection of a larger rule, prior to the constitutional amendment in 1988 limiting direct criminal appeals to the supreme court, transfers were rarely granted.¹²³

At first, transfer was not a tool commonly needed because Indiana had only two panels of the appellate court that issued few conflicting opinions. The intermediate appellate court grew significantly, however, during the 1970s and 1980s. As a part of substantial amendments to the judicial article in 1970, the Indiana Constitution now provides for an intermediate appellate court, called the Indiana Court of Appeals:

The judicial power of the State shall be vested in one Supreme Court, one Court of Appeals, Circuit Courts and such other courts as the General Assembly may establish.¹²⁴

. . . .

The Court of Appeals shall consist of as many geographic districts and sit at such locations as the General Assembly shall determine to be necessary. Each geographic district of the Court shall consist of three judges. . . .¹²⁵

As a part of the legislation implementing the constitutional amendment, the general assembly expanded the court of appeals to three districts consisting of three judges each.¹²⁶ In 1978, the legislature again expanded

123. From 1976 to 1988, civil transfer opinions were less than 10% of the supreme court's total opinions, except for 1981, when 13% of the supreme court's total opinions were on civil transfer.

124. IND. CONST. art. VII, § 1 (amended 1970).

125. *Id.* § 5 (amended 1970). One wonders whether this constitutional provision would permit a statutory reform structuring the court of appeals into three geographic units of five judges sitting in panels of three.

126. Pub. L. No. 427, § 3, 1971 Ind. Acts (codified at IND. CODE § 33-2.1-2-2 (1988)).

the court of appeals, this time adding three judges for a fourth district.¹²⁷ In 1990, three more judges were added forming a fifth district.¹²⁸

The growth in districts naturally resulted in a greater number of conflicting decisions among the districts. During the 1970s, the supreme court expanded the grounds under Indiana Appellate Rule 11(B)(2) for transfer:

- (c) that there is a conflict between the opinion or memorandum decision and a prior opinion of the Court of Appeals stating concisely the conflict and opinion in which it occurs, or
- (d) that the opinion or memorandum decision of the Court of Appeals correctly followed ruling precedent of the Supreme Court, but such ruling precedent is erroneous or is in need of clarification or modification¹²⁹

These additional grounds are helpful in directing important cases to the supreme court.

Also during the 1970s, the criminal docket was expanding.¹³⁰ The burgeoning criminal docket crowded out important civil matters that needed to be clarified or modified and inadvertently turned the court of appeals into a court of last resort on civil matters. The historic problem that Indiana faced with its appellate system resurfaced: the supreme court was not able to function as the court of last resort on all matters as provided by the state constitution.

The 1988 constitutional amendment limiting direct appeals of criminal cases to the supreme court has allowed the supreme court to create a more balanced docket of criminal and civil appeals. With five districts of the court of appeals generating opinions, the pressure on the supreme court in the coming years will be to develop a comprehensive procedure for selecting cases to consider. The procedures for transfer to the supreme court should be revised to help lawyers direct the most important cases in the state to its court of last resort.

III. NEW PROCEDURES TO REACH THE SUPREME COURT: RETURNING TO THE ORIGINAL MODEL OF TRANSFER

The judges of the supreme and appellate courts who developed the original procedure for transfer in 1901 modeled it on the procedure for certiorari from the federal courts of appeals to the United States Supreme

127. Pub. L. No. 137, § 1, 1978 Ind. Acts (codified at IND. CODE § 33-2.1-2-2 (1988)).

128. Pub. L. No. 158, § 1, 1990 Ind. Acts (codified at IND. CODE ANN. § 33-2.1-2-2 (1988)).

129. IND. APP. R. 11(B)(2).

130. Shepard, *Changing*, *supra* note 4, at 682.

Court.¹³¹ The Indiana Supreme Court should return to this model when developing a new procedure for transfer. The United States Supreme Court is asked to review 5,000 cases a year, but picks only a small fraction—around 150—for briefing, oral argument, and decision by the full Court. The Indiana Supreme Court, however, receives between 800 and 900 requests for review per year and drafts more than 200 opinions a year. If the United States Supreme Court's procedures can process more than six times as many petitions for writs of certiorari, *a fortiori* such procedures would serve Indiana's appellate needs in the future.¹³²

A comparison of the procedures for petitions for transfer and petitions for writs of certiorari is instructive. First, the decision on whether to grant transfer should be done separately from the decision on the merits, even though the two cannot be completely divorced. In the United States Supreme Court, the important considerations on certiorari are largely unrelated to the merits. Former Chief Justice Vinson said:

Lawyers might be well-advised, in preparing petitions for certiorari, to spend a little less time discussing the merits of their cases and a little more time demonstrating why it is important that the Court should hear them. . . . What the Court is interested in is the actual, practical effect of the disputed decision—its consequences for other litigants and in other situations. A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court. If it only succeeds in demonstrating that the decision below may be erroneous, it has not fulfilled its purpose.¹³³

The United States Supreme Court relies on a number of criteria. Conflict in the circuits leads the list.¹³⁴ Other dominant factors include whether the issue needs to "percolate" in the lower courts or whether the case is a "good vehicle" to resolve the issue.¹³⁵ Although Indiana's appellate system is not as mature as the federal appellate system, a system that can respond to 5,000 requests for review in one year provides a useful model.

131. *Ex parte France*, 95 N.E. 515, 520 (Ind. 1911).

132. One might also study the procedures of states with large intermediate appellate courts. California, for example, had 77 members on its intermediate appellate court in 1985, and more judges were added in 1987. See 1987 Cal. Stat. ch 1211, §§ 2-4.

133. Speech of Chief Justice Vinson before American Bar Association at St. Louis, September 7, 1949, *reprinted in* 69 S. Ct. v, vi-vii (1949).

134. Justice White has long expressed the view that certiorari should be granted when there is a conflict, even if he otherwise agrees with the decision below. See *Brown Trans. Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978) (White, J., dissenting).

135. See H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 278-79 (1991).

The Indiana Supreme Court's current procedures for accepting transfer from the courts of appeals appears to be part of the decision on the merits. The supreme court usually grants transfer on the same day it hands down the opinion. The supreme court should implement a procedure formally separating a decision to grant review from the decision on the merits. In reality, the supreme court already makes a decision on whether to take a case long before an opinion is rendered. Litigants and their counsel should be directly and formally informed whether the supreme court will review their case. Notifications could be published much like the grants and denials of certiorari are published by the United States Supreme Court.

Currently, practitioners do not know when they are hurriedly preparing a petition for transfer whether or not the Indiana Supreme Court will grant transfer.¹³⁶ If litigants knew in advance that review had been granted on particular issues, attorneys could draft higher quality briefs directed to the issues of the court's concern, *amicus curiae* could become more involved in their areas of expertise, and oral argument could easily become a standard part of the decisionmaking process.

Furthermore, separating the decision to review a case from the decision on the merits will help the supreme court select those cases that have statewide importance. The petition for review and preliminary brief need not be long, but must set out the reasons why the Indiana Supreme Court should hear the case regardless of the merits. Many cases will not rise to the level of statewide importance and review will be denied without further briefing. Under this procedural system, the Indiana Supreme Court Administrator's office will be relieved of reviewing overly long briefs that are directed more to the merits of an appeal rather than to why the Indiana Supreme Court should hear the case.¹³⁷

Another difference between petitions for writs of certiorari and transfer is whose decision is being reviewed. A petition for writ of certiorari is directed to a federal court of appeals, not the district court. The United States Supreme Court reviews the opinion of the circuit

136. The Indiana Rules of Appellate Procedure allow a mere 20 days to petition the supreme court for transfer when the court of appeals hands down a decision or denies rehearing. IND. APP. R. 11(B). Few practitioners have the time to digest the opinion of the court of appeals, research the cases cited in the opinion, and prepare a petition to transfer with a supporting brief in only 20 days. Furthermore, no extension of time can be granted for filing a petition to transfer or accompanying brief. IND. APP. R. 11(B)(8). The short time deadline promotes the filing of a petition for rehearing in the court of appeals solely to buy time to review adequately the opinion. In contrast, the U.S. Supreme Court allows 90 days to petition for a writ of certiorari. 28 U.S.C. § 2101(c) (1988).

137. The administrator's office reviews the record and briefs in preparing a memorandum for the supreme court. The memorandum usually includes a recommendation to grant or deny transfer. Shepard, *Changing, supra* note 4, at 678.

court, not the district court. Under the current Indiana rules, when transfer is granted, the Indiana Supreme Court technically reviews the trial court's actions, not the court of appeals opinion.¹³⁸ The current appellate rules direct the supreme court to disregard the helpful work of the intermediate appellate court, three judges who collegially thought about a legal problem.¹³⁹ Although the rules direct the supreme court to review the trial court's decision, the reality today is that the supreme court is reviewing the work of the court of appeals.

The rules should be amended to allow the supreme court to review the court of appeals decision. These changes would help the supreme court refine the appellate process to meet the demands of the 1990s and beyond. These suggestions are consistent with the 1991 developments in the appellate rules, particularly the new procedure from the tax court to the supreme court. They are also firmly grounded on the historical origins of the process by directing those cases to the state's highest court where it can declare state law. The procedures should direct the most important appeals to the supreme court, appeals that transcend the litigants: "The question involved is not one merely of private or personal benefit, but is one which concerns all persons of the state, and is not to be tied down solely to the mere rights of litigants."¹⁴⁰ Anything less from the procedures directing cases to the supreme court will limit the constitutional effectiveness of our state's court of last resort.

138. The Indiana Supreme Court recently amended its rules to provide that it may grant transfer and expressly adopt or summarily affirm the opinion of the court of appeals. IND. APP. R. 11(B)(3).

139. *Id.* ("If transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught").

140. *Ex parte France*, 95 N.E. 515, 518 (Ind. 1911).

