1995 Developments in Indiana Appellate Procedure: Significant Rule Amendments and Important Procedural Conventions

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Introduction

Indiana appellate procedure continued to evolve in 1995. A flurry of amendments, including the addition of a completely new rule, changed the landscape of the Indiana Rules of Appellate Procedure.[1] Additionally, the Indiana appellate courts generated a body of important decisions that offers steady guidance to those who venture into appellate practice.[2]

Part I of this Article analyzes the numerous amendments to the Indiana Rules of Appellate Procedure. Part II reviews the decisions of Indiana's appellate courts in 1995 which will help the appellate practitioner understand the dynamics of various procedural conventions that pervade appellate practice. Finally, this Article discusses the value of requesting oral arguments and what may be expected in 1996.

I. Amendments to the Indiana Rules of Appellate Procedure

The Indiana Supreme Court substantially amended the Indiana Rules of Appellate Procedure in 1995. Some of the amendments were only technical in nature. Several, however, will have a lasting effect upon the landscape of appellate practice in Indiana. For ease of reference, each affected rule will be discussed separately and in numerical order.

A. Rule 2.1

Nineteen ninety-five could aptly be declared the "Year of the Appearance Form." First, plaintiff's counsel are now obligated to file an appearance at the trial level, and all trial counsel are obligated to enter their appearances on a prescribed form. Additionally, 1995 saw the birth of a new rule requiring the filing of appearances by both appellant's and appellee's counsel, as well as the form of that appearance.[3]

The content requirements of new Rule 2.1 are relatively straightforward. An appellant's appearance[4] must contain more information than an appellee's

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1. This Article addresses amendments to the Indiana Rules of Appellate Procedure that either became effective or were adopted by the Supreme Court of Indiana during 1995.

2. This Article addresses appellate decisions from November 1, 1994 through December 31, 1995.

3. Ind. App. R. 2.1 (effective February 1, 1995).

4. As to the content of appellant's appearance, Indiana Appellate Rule 2.1(A) provides:

appearance.[5]

Rule 2.1 also addresses the timing for filing an appearance. Appellants must file their appearance contemporaneously with the first document filed with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court.[6] Appellees must file their appearance within thirty (30) days after the appellant files an appearance, or contemporaneously with the first document filed by the appellee, whichever comes first.[7]

Do not forget to appear.

B. Rule 4

Rule 4 is one of two rules[8] that the Indiana Supreme Court amended in apparent response to a debate among three districts of the Indiana Court of Appeals during 1994. This debate centered on the extent of the appellate courts' discretion to entertain appeals from administrative agency decisions when the appellant fails to include an assignment of errors in the record of proceedings.[9]

The appearance form shall set forth the following information, as applicable:

(1) Name, address, and telephone number of the parties initiating the appeal or review;

(2) Name, address, attorney number, telephone number, FAX number, and computer address of the attorneys representing the parties initiating the appeal or review, if any;

(3) The name of the lower tribunal from which appeal or review is sought, the case number, and the name of the presiding judge or agency;

(4) In criminal cases, the sentences imposed on each count of the judgment, including a separate designation of any habitual offender enhancement and the count to which the enhancement was applied;

(5) The date of filing of the praecipe;

(6) The name of the appellate or reviewing court with jurisdiction over the case;

(7) The name, address and telephone number of the court reporter responsible for preparation of the record; and

(8) Whether the attorney is requesting service of orders and opinions by FAX pursuant to Appellate Rule 12(F).

5. As to the content of appellee's appearance, Appellate Rule 2.1(B) provides:

The appearance form shall set forth the following information:

(1) Name, address, and telephone number of the parties;

(2) Name, address, attorney number, telephone number, FAX number, and computer address of the attorneys representing the parties; and

(3) Whether the attorney is requesting service of orders and opinions by FAX pursuant to Appellate Rule 12(F).

6. IND. APP. R. 2.1(A).

7. IND. APP. R. 2.1(B).

8. IND. APP. R. 7.2(A)(1) was also amended.

9. *See* William O. Harrington, *1994 Developments in Indiana Appellate Procedure: Old Lessons Revisited and the Scope of the Court of Appeals' Discretion*, 28 IND. L. REV. 985, 993-96

Rule 4(C) now includes the following provisions:

> It shall be unnecessary to file a separate assignment of errors in the Court of Appeals to assert that the decision of any board, agency, or other administrative body is contrary to law. All issues and grounds for appeal appropriately preserved before the board, agency or other administrative body may be initially addressed in the appellate brief.[10]

By virtue of this amendment, Rule 4(C) now contradicts the requirements set forth in Indiana Code section 22-4-17-12(f).[11] From the point of view of good appellate practice, it is probably safe to overlook this contradiction and simply comply with the requirements of amended Rule 4(C). The appellate courts will certainly defer to the proscriptions of the Appellate Rules as promulgated by the Indiana Supreme Court.

C. Rule 7.2

The amendments to Rule 7.2 relate to the content of the record of the proceedings, the form of the transcript of the evidence and the proceedings at trial.[12] Historically, Rule 7.2(A)(1) required that the record of the proceedings include not only a copy of the praecipe but also a copy, when appropriate, of a motion to correct error or an assignment of errors for review from administrative decisions pursuant to Appellate Rule 4(C).[13] Under amended Rule 7.2(A)(1), a copy of the assignment of errors need not be included in the record of the proceedings.[14] This amendment goes hand-in-hand with amended Rule 4(C).

The old Rule 7.2(A)(3)(a) required that the transcript of the evidence and proceedings at trial be in a particular form, including certain marginal notations, type-face sizes, and margin widths.[15] The amendments to Rule 7.2(A)(3)(a) have modified these requirements. Marginal notations in the transcript of the evidence need *only* indicate the name of each witness, and whether the examination was direct, cross, or redirect.[16] It is no longer necessary to include marginal notations regarding motions and rulings on motions, exhibits, instructions given and refused, and rulings by the court.[17] However, the textual printing on each page must be no more than one and one-half inches from the left edge of the page, one inch on the right and bottom margins, and one inch from the edge of the top binding.[18] The

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(1995).

10. IND. APP. R. 4(C).
11. Harrington, *supra* note 9, at 993.
12. IND. APP. R. 7.2(A) (effective February 1, 1996).
13. Ind. App. R. 7.2(A)(1) (1995).
14. IND. APP. R. 7.2(A)(1) (effective February 1, 1996).
15. Ind. App. R. 7.2(A)(3)(a) (effective January 1, 1989).
16. IND. APP. R. 7.2(A)(3)(a) (effective February 1, 1996).
17. *Id.*
18. *Id.*

type-face must be no more than 12-point type.[19]

D. Rule 8.2

The *Bluebook*[20] reigns. After many aggravating years of practitioners trying to remember which hat to wear when citing cases, Indiana practitioners can now rely entirely on the *Bluebook*. Rule 8.2(B)(1) now dictates that case citations shall be in *Bluebook* format.[21] The following case citation format has been *rejected: Warren v. Indiana Tel. Co.* (1940), 217 Ind. 93, 26 N.E.2d 399; or *Condon v. Patel* (1984), Ind. App., 459 N.E.2d 1205. The *Bluebook* format has been *adopted: Warren v. Indiana Telephone Co.*, 217 Ind. 93, 26 N.E.2d 399 (Ind. 1940); or *Condon v. Patel*, 459 N.E.2d 1205 (Ind. Ct. App. 1984).[22]

Pursuant to Rule 8.2, it is also no longer necessary to use a special citation form for multiple citations.[23] Further, when briefs are copied, they cannot be reproduced by carbon paper and they must not contain more than eleven characters per inch.[24]

E. Rule 8.3

Rule 8.3(A) has been amended to clarify the requirement regarding the content of the statement of the case section in appellant's brief.[25] Prior to the amendment, the statement of the case needed to include the "disposition in the court below."[26] Rule 8.3(A)(4) is now more specific, requiring that the statement of the case include "the disposition of the case and issues in the court below."[27] Further, a copy of the sentencing order must be included in an appendix to the appellant's brief when the sentence is at issue in a criminal appeal.[28]

F. Rule 9

Rule 9(A) relates to the form of motions and petitions filed on appeal. As amended, Rule 9(A) requires that all motions utilize a typeface that is not more

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19. *Id.*

20. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (15th ed. 1991).

21. IND. APP. R. 8.2(B)(1) (effective February 1, 1996).

22. Reference to the state report, i.e., Ind. or Ind. App., is still required for cases decided by the Indiana Supreme Court prior to May 5, 1981, and for cases decided by the Indiana Court of Appeals prior to November 7, 1979. *See id.*

23. IND. APP. R. 8.2(B) (effective February 1, 1995). Rule 8.2(B)(3), relating to multiple citations, formerly provided that "If more than three authorities are cited in support of a point, the three authorities first relied upon shall be cited and printed in bold-face type, or if the brief is type-written, in capital letters." Ind. App. R. 8.2(B)(3) (1994).

24. IND. APP. R. 8.2(A)(1) (effective February 1, 1996).

25. IND. APP. R. 8.3(A)(4) (effective February 1, 1996).

26. IND. APP. R. 8.3(A)(4) (effective January 1, 1989).

27. IND. APP. R. 8.3(A)(4) (effective February 1, 1996).

28. *Id.*

than eleven characters per inch.[29]

G. Rule 11

Rule 11 relates to the procedures for rehearings and transfers. This rule was the subject of significant amendments in 1995. For clarification purposes, Rule 11(A) and Rule 11(B) were amended to reiterate that Indiana Appellate Rule 12(D) does not extend the time period for filing either a petition for rehearing or a petition for transfer.[30] Rule 12(D) already expressly states that it does not apply to Rule 11.[31] Thus, this amendment is apparently designed to provide a road map for practitioners who fail to read Rule 12(D) prior to calculating the deadline for filing a petition for rehearing or a petition to transfer.

Rule 11(B) relates to petitions to transfer.[32] It has been completely rewritten. In part, the amendment is merely an exercise in word-economy. However, much of the rewrite is substantive.[33] The petition to transfer is now limited to five (5) pages in length.[34] Any brief in support of the petition to transfer is limited to fifteen (15) pages in length.[35] Briefs in support of petitions to transfer must comply with the requirements of Rule 8.2, and any petitions or briefs filed in regard to a petition to transfer need not comply with Rule 8.3.[36] There is also no longer a provision, when a petition for rehearing has previously been filed and denied, that limits the grounds for a petition to transfer to those set forth in the petition for rehearing.[37]

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29. IND. APP. R. 9(A) (effective February 1, 1996).

30. IND. APP. R. 11 (effective February 1, 1996). Indiana Appellate Rule 12(D) provides:

> In any and all cases where motions, petitions, briefs and other papers are served upon the opposing party or his or her counsel by mail or with any properly bonded carrier, the time period specified for the filing of any answers or briefs with the clerk in response thereto shall be extended automatically and without order of the court for an additional period of five days from the date of such deposit in the Untied States Mail or with any properly bonded carrier. This rule does not extend the time period for filing a petition for rehearing or a petition to transfer under Ind. Appellate Rule 11.

31. *See supra* note 30.

32. IND. APP. R. 11(B) (effective February 1, 1996).

33. In addition to express amendments contained in the rewrite of Rule 11(B), the Indiana Supreme Court has also modified its unwritten procedures with respect to its review of an ever-growing number of petitions to transfer. Historically, the Indiana Supreme Court did not issue a separate order indicating its grant of a petition to transfer. The Supreme Court now issues an order on the date that it grants or refuses to grant transfer. *See, e.g.*, Chandler v. Board of Zoning Appeals, 658 N.E.2d 80 n.1 (Ind. 1995). This change in procedure is obviously significant because an opinion of a court of appeals is vacated upon the grant of transfer. *See* IND. APP. R. 11(B)(3). The Supreme Court's vote on transfer will be published by West in the advance sheets.

34. IND. APP. R. 11(B) (effective February 1, 1996).

35. IND. APP. R. 11(B)(6) (effective February 1, 1996).

36. *Id.*

37. IND. APP. R. 11(B) (effective February 1, 1996).

H. Rule 12

Rule 12(D) is now politically correct. It formerly contained the phrase "his counsel." After a gender-neutralizing amendment, it now contains the phrase "his or her counsel."[38] This amendment does, of course, beg the question of why Rule 12(D) was not amended to read "her or his counsel."

I. Rule 18

The last of the 1995 amendments to the Indiana Rules of Appellate Procedure is an amendment to Rule 18 regarding appeals from the Indiana Tax Court. Rule 18(E) now provides that "Any brief may contain and discuss the fiscal impact of the Tax Court's decision on taxpayers or government."[39]

II. IMPORTANT PROCEDURAL CONVENTIONS: MORE LESSONS REVISITED

Every year, Indiana's appellate courts publish a body of decisions that offers guidance to practitioners regarding the trials and travails of appellate practice. Nineteen ninety-five was not unique in this regard. This Part examines a series of opinions on procedural issues that consistently, and hopefully predictably, attend practice before Indiana's appellate courts. The goal of this Part is to identify the practical import of these decisions and the lessons that they teach.

A. Motions to Correct Error

Even the most fundamental of principles justify occasional comment. Filing a motion to correct error is generally not a prerequisite to filing an appeal, except under the limited circumstances set forth in Trial Rule 59(A) when a motion to correct error is mandatory.[40] The Indiana Court of Appeals reiterated this principle in *Corkell v. Corkell*,[41] when it held that:

> T.R. 59(A) provides that a motion to correct error is a prerequisite to appeal only in certain circumstances. When, as here, the filing of a

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38. IND. APP. R. 12(D) (effective February 1, 1995).

39. IND. APP. R. 18(E)(1) (effective February 1, 1996).

40. Indiana Trial Rule 59(A) provides:

> A Motion to Correct Error is not a prerequisite for appeal, except when a party seeks to address:
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> (1) Newly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final judgment which, with reasonable diligence, could not have been discovered and produced at trial; or
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> (2) A claim that a jury verdict is excessive or inadequate.
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> All other issues and grounds for appeal appropriately preserved during trial may be initially addressed in the appellate brief.

41. 653 N.E.2d 998 (Ind. Ct. App. 1995).

motion to correct error is not mandatory, "[a]n appeal is initiated by filing with the clerk of the trial court a praecipe designating what is to be included in the record of the proceedings."[42]

Even though a motion to correct error is generally not a mandatory prerequisite to an appeal, counsel should not overlook its value as a cost-effective alternative to appeal. This is especially true when counsel perceives that the trial court has made a blatant error—more in the nature of an oversight—that may prompt the court to revisit the logic of its decision. In the event that a motion to correct error is filed, do not overlook the impact of Trial Rule 53.3(A)[43] on the timing of initiating a subsequent appeal.[44]

B. A Timely Praecipe

In 1995, the Indiana Court of Appeals reheard the case of *Jennings v. Davis*.[45] With its decision on rehearing, the court of appeals emphasized the import of Appellate Rule 2(A)'s thirty day limitation for the filing of a praecipe to initiate an appeal.[46] In *Jennings*, the praecipe was filed one day late.[47] In its first opinion, the court of appeals dismissed Jennings' appeal, holding that "[t]imely filing of a praecipe is a jurisdictional prerequisite and when the praecipe has not been timely filed we *must* dismiss."[48]

On rehearing, Jennings argued that Trial Rule 6(E) extended the time for filing the praecipe by three (3) days. In the alternative, Jennings argued that no one was prejudiced by the one day delay in filing and cited prior decisions where the court of appeals asserted its inherent discretion to consider untimely appeals. The court of appeals rejected both arguments. With respect to the Trial Rule 6(E) argument, the court of appeals held that "[t]he trial court's entry of the judgment triggered the running of the thirty day rule, not service of the notice to the parties of the

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42. *Id.* at 1001 (quoting IND. APP. R. 2(A)).

43. Indiana Trial Rule 53.3(A) provides:

> In the event a court fails for forty-five (45) days to set a Motion to Correct Error for hearing, or fails to rule on a Motion to Correct Error within thirty (30) days after it was heard or forty-five (45) days after it was filed, if no hearing is required, the pending Motion to Correct Error shall be deemed denied. Any appeal shall be initiated by filing the praecipe under Appellate Rule 2(A) within thirty (30) days after the Motion to Correct Error is deemed denied.

44. *See, e.g.*, Trisler v. Executive Builders, Inc., 647 N.E.2d 390 (Ind. Ct. App. 1995); Moran v. Cook, 644 N.E.2d 179 (Ind. Ct. App. 1994). In both *Trisler* and *Moran*, the appeal was dismissed when the praecipe was not filed within thirty (30) days after a motion to correct error was deemed denied as a matter of law due to the failure of the trial court to rule within forty-five (45) days as required by Indiana Trial Rule 53.3.

45. 645 N.E.2d 23 (Ind. Ct. App. 1995).

46. *See* Harrington, *supra* note 9, at 988.

47. *Jennings*, 645 N.E.2d at 23.

48. Jennings v. Davis, 634 N.E.2d 810, 810 (Ind. Ct. App. 1994) (emphasis added) (citing CNA Ins. Cos. v. Vellucci, 596 N.E.2d 926, 928 (Ind. Ct. App. 1992)).

judgment. Thus, Jennings was not entitled to benefits of T.R. 6(E)."[49] With respect to Jennings' "no prejudice" argument, the court of appeals held that:

> [T]his court does have the inherent power to exercise jurisdiction of an appeal that has not been timely initiated or perfected. This inherent power is exercised in rare and exceptional cases, such as matters of great public interest or where extraordinary circumstances exist. Generic grounds such as lack of prejudice to the opposing party or lack of disadvantage to the review court are not enough. Counsel for Jennings did not mail his praecipe to the clerk by registered or certified mail. If he had done so, the praecipe would have been timely filed on September 13, 1993. We will not use our inherent power to exercise jurisdiction where an appeal has not been timely initiated due entirely to counsel's failure to properly file the praecipe by mail. In fact, we see no excuse for counsel's failure to mail the praecipe by registered or certified mail.[50]

Timing is critical when applying for the court of appeals' jurisdiction. Make sure that a praecipe is filed in person or by certified or registered mail within thirty days of the entry of final judgment.

C. Jurisdictional Considerations

In *Dailey Oil, Inc. v. Jet Star, Inc.*,[51] the Indiana Court of Appeals reiterated the fundamental principle of subject matter jurisdiction, stating that: "It is the duty of a court, including this court, to determine whether it has jurisdiction before it proceeds to determine the rights of the parties on the merits."[52] The court of appeals dismissed the appeal after a determination that it lacked jurisdiction to review final decisions of the Indiana Department of Revenue pursuant to Appellate Rule 4(C).[53]

A second jurisdictional issue that the court of appeals will examine is the question of mootness. "When the principal questions in issue have ceased to be matters of real controversy between the parties, the errors assigned become moot questions and the court will not retain jurisdiction to decide them."[54] In a pair of decisions,[55] the Indiana Supreme Court held that the filing of a voluntary bankruptcy petition in United States Bankruptcy Court while an appeal is pending before the Indiana Court of Appeals does *not* render the appeal moot.

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49. *Jennings*, 645 N.E.2d at 24.

50. *Id.* at 24-25 (citations omitted).

51. 650 N.E.2d 345 (Ind. Ct. App. 1995).

52. *Id.* at 346 (citation omitted).

53. *Id.* at 346-47.

54. Plumlee v. Monroe Guaranty Ins. Co., 655 N.E.2d 350, 358 (Ind. Ct. App. 1995) (citation omitted).

55. *See* Carpenter v. Farm Credit Serv. of Mid-America, 654 N.E.2d 1125 (Ind. 1995); Hoover v. Hearth & Home Design Center, Inc., 654 N.E.2d 744 (Ind. 1995).

In *Carpenter v. Farm Credit Services of Mid-America*,[56] the Carpenters and Carpenter Farms, Inc., executed a promissory note secured by a mortgage against certain real estate. After they defaulted on that obligation, Carpenter Farms, Inc., filed for bankruptcy under Chapter 12 of the Bankruptcy Code. Farm Credit Services of Mid-America then filed suit against the Carpenters to collect on the note plus interest and attorney fees. The trial court entered judgment against the Carpenters and they appealed. While their appeal was pending, the Carpenters filed their joint bankruptcy petition.[57]

The Indiana Court of Appeals issued an order characterizing the Carpenters' bankruptcy petition as an election of remedies and dismissed their appeal.[58] On transfer, the Indiana Supreme Court reasoned that:

> Before the Carpenters can reorganize their finances they must have a clear picture of their financial situation. Without an appeal they will simply be stuck with the resolution of issues imposed upon them by the judgment of the trial court. . . . We think it best that appellants be able to properly resolve their liability on the note, a matter of state law, in order to facilitate more accurate bankruptcy proceedings.[59]

Consequently, "the mere filing of a petition in bankruptcy does not moot a debtor's appeal from a trial court judgment on the debt."[60]

The Indiana Supreme Court applied the holding of *Carpenter* in *Hoover v. Hearth & Home Design Center, Inc.*[61]

D. The Scope of the Court of Appeals' Discretion

During 1995, the Indiana Court of Appeals continued to sculpt the parameters of its inherent authority to consider appeals over which, for one procedural reason or another, it would otherwise lack jurisdiction. In a series of reported decisions, the court of appeals asserted that it can choose to exercise jurisdiction under certain circumstances.

In *Ramirez v. American Family Mutual Insurance Co.*,[62] the Indiana Court of Appeals applied the express grant of discretion accorded to it by Appellate Rule 4(E).[63] In *Ramirez*, the plaintiffs sued their insurance carrier and insurance agent

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56. 654 N.E.2d 1125 (Ind. 1995).
57. *Id.* at 1126.
58. *Id.* at 1127.
59. *Id.* at 1128 (footnote and citations omitted).
60. *Id.*
61. 654 N.E.2d 744, 746-47 (Ind. 1995).
62. 652 N.E.2d 511 (Ind. Ct. App. 1995).
63. Indiana Appellate Rule 4(E) provides:

> No appeal will be dismissed as of right because the case was not finally disposed of in the court below as to all issues and parties, but upon suggestion or discovery of such a situation the appellate tribunal may, in its discretion, suspend consideration until disposition is made of such issues, or it may pass upon such adjudicated issues as are

for failure to provide coverage; fraud, bad faith, and a request of punitive damages. The trial court entered summary judgment in favor of the carrier and agent on the coverage question, and the plaintiffs appealed. The court of appeals first observed that there was no final appealable order because the trial court ruled upon less than all of the issues and made no express finding pursuant to Trial Rule 54(B).[64] Despite the absence of an appealable final order, the court of appeals relied upon Appellate Rule 4(E), holding:

> Ordinarily, an appeal from an interlocutory order must be pursued in compliance with Ind. Appellate Rule 4(B)(6), which the Ramirezes did not do. Nonetheless, we have the discretion to pass upon those adjudicated issues that are severable without prejudice to the parties.[65]

The court of appeals then found that the "coverage issue here may be severed from the fraud and bad faith claims without prejudice to the parties. Hence, we exercise our discretion to consider the merits of this appeal."[66]

In *Remington Freight Lines, Inc. v. Larkey*, [67] the jury returned a verdict in favor of the plaintiff. On December 9, 1992, the defendant timely filed a motion to correct error alleging, in part, that the verdict was excessive. On January 22, 1993, prior to the expiration of the forty-five-day limit under Trial Rule 53.3(A),[68] the trial court extended, pursuant to Trial Rule 53.3(D),[69] the time period in which it could rule on the motion to correct errors.[70] On March 1, 1993, the trial court issued an order, effective February 22, 1993, for a new trial upon the damages issue.[71] The defendant then appealed.

On appeal, the validity of the March 1, 1993 order was reviewed in light of the fact that it was issued beyond the date of the trial court's thirty-day extension for

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severable without prejudice to parties who may be aggrieved by subsequent proceedings in the court below.

64. *Ramirez*, 652 N.E.2d at 513-14. Indiana Trial Rule 54(B) provides, in relevant part, that "the court may direct the entry of a final judgment as to one or more but fewer than of all the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

65. *Ramirez*, 652 N.E.2d at 514 (citing IND. APP. R. 4(E); *In re* Kirkendall, 642 N.E.2d 548, 550 n.2 (Ind. Ct. App. 1994)).

66. *Id.*

67. 644 N.E.2d 931 (Ind. Ct. App. 1994).

68. *See supra* note 43.

69. Indiana Trial Rule 53.3(D) provides:

> The Judge before whom a Motion to Correct Error is pending may extend the time limitation for ruling for a period of no more than thirty (30) days by filing an entry in the cause advising all parties of the extension. Such entry must be in writing, must be filed before the expiration of the initial time period for ruling set forth under Section (A), and must be served on all parties. Additional extension of time may be granted only upon application to the Supreme Court as set forth in Trial Rule 53.1(D).

70. *Remington*, 644 N.E.2d at 935.

71. *Id.*

ruling on the motion to correct error. It was held that:

> [T]he consequences of a trial court's failure to rule upon a motion to correct error within an extension are identical to those which occur where no extension has been granted. Once outside the thirty-day extension, the trial court has no power to rule upon the motion and any ruling thereafter is a nullity. Applying this principle to the present case, we determine that the trial court's ruling upon the motion was, indeed, a nullity. . . . *Nevertheless, to merely reverse and remand because of the procedural irregularity without addressing the merits of the appeal would be counterproductive. Accordingly, we address the other issues presented.*[72]

The court of appeals in *Remington* found that such a dismissal would be "counterproductive" because the defendant/appellant's praecipe was filed within thirty days on February 22, 1993, the earliest date on which the motion to correct error may have been deemed denied pursuant to Trial Rule 53.3(A).[73]

The discretion exercised by the court of appeals in *Remington* is apparently grounded in the equitable judicial principle of "no harm, no foul." Because trial counsel had timely filed a praecipe in contemplation of the likelihood that the March 1, 1993 new trial order would be deemed a nullity, any contrary ruling by the court of appeals would have constituted a pure elevation of form over substance.

In *Haimbaugh Landscaping, Inc. v. Jegen*,[74] the Indiana Court of Appeals exercised its discretion to consider a late appellant's brief. Appellant filed its brief thirty-one (31) days after it filed the record.[75] On the same date that appellant filed its untimely brief, appellant filed a Motion for Leave to File a Belated Brief, which the court of appeals granted.[76] The court of appeals in rejecting appellee's argument that the late brief warranted dismissal, emphasized the impact of Appellate Rule 8.1(A),[77] and held that:

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72. *Id.* at 936 (emphasis added) (citations omitted).

73. *Id.* at 935 n.3 ("No issue exists as to the propriety of the praecipe, as February 22, 1993 was the earliest possible date which could be considered a 'ruling' upon the motion to correct error as per Ind. Appellate Rule 2(A).").

74. 653 N.E.2d 95 (Ind. Ct. App. 1995).

75. *Id.* at 98.

76. *Id.* The court of appeals was apparently impressed by the justifications offered by appellant's counsel:

> Haimbaugh's counsel indicated that during the week before the filing deadline, he was involved in rendering an emergency opinion letter. He also cited confusion from the consolidation order, as well as the complicated nature of this case as reasons why he failed to note that the brief was due on September 8 rather than on September 9.

Id. at 98 n.6.

77. Indiana Appellate Rule 8.1(A) provides, in relevant part:

> The appellant shall have thirty (30) days after filing the record in which to file his brief. . . . Failure to file appellant's brief within the time limited herein, or any extension of time granted therefor, shall *subject* the appeal to summary dismissal.

> Rule 8.1(A) does not mandate an automatic dismissal when an appellate has not timely filed its brief. Dismissal for the late filing of an appellant's brief is within the discretion of this court, rather than mandatory as it was under former rules. . . . We will hold issues waived, or dismiss appeals when parties commit flagrant violations of the Rules of Appellate Procedure. However, because we prefer to decide a case upon its merits, . . . we exercise our discretion to reach the merits when violations are comparatively minor. Here, Haimbaugh has not committed a flagrant violation of our appellate rules, nor has it failed to make a good faith effort to substantially comply with those rules.[78]

Out of apparent concern that its leniency might be misconstrued, the court dropped a footnote of caution to appellate practitioners generally: "This ruling does not excuse noncompliance with the appellate rules, and no one should interpret it as doing so. It remains within this court's discretion to dismiss appeals for failure to follow the rules."[79]

In *In re Train Collision at Gary*,[80] on rehearing, the Indiana Court of Appeals asserted its discretion to reinstate a previously dismissed appeal.[81] The appeal was originally dismissed for lack of subject matter jurisdiction when the appellant failed to timely file the record of proceedings.[82] The court of appeals explained its decision as follows:

> While this court has the power to revisit prior decisions of its own, it should only do so in the case of extraordinary circumstances. [The appellees] fail to set forth any reasons why we should set aside our order to reinstate this appeal. Accordingly, we decline their invitation to revisit our decision to grant appellant's petition for rehearing and reinstate this appeal, and we will address this appeal on its merits.[83]

There is no indication in *In re Train Collision at Gary* regarding what the court of appeals believed constituted "extraordinary circumstances" that would justify its reinstatement.

Given the numerous and varied opinions from the Indiana Court of Appeals in 1995, it is essential for practitioners to factor these discretionary issues into their appellate practice. In essence, there exists a body of uncodified rules regarding the

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(emphasis added).

78. *Haimbaugh*, 653 N.E.2d at 98-99 (citation omitted).

79. *Id.* at 99 n.10 (citations omitted).

80. 654 N.E.2d 1137 (Ind. Ct. App. 1995).

81. *Id.* at 1140 n.1.

82. *Id.*

83. *Id.* (citing Landowners v. City of Fort Wayne, 622 N.E.2d 548, 549 (Ind. Ct. App. 1993)). In *Landowners*, the court of appeals held that "[a] court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a result courts should be *loathe* to do so in the absence of extraordinary circumstances." *Landowners*, 622 N.E.2d at 549 (emphasis added) (citation omitted).

"if and when" of the court of appeals' exercise of jurisdiction. It is certainly important to be mindful of the potential application of these principles to any given case.

E. Waiver Issues

Appellate practice can be a minefield saturated with the risk of procedural waiver. This subpart summarizes some of the most common waiver issues addressed in 1995.

An argument cannot be raised for the first time on appeal.[84] Any such first-time argument is deemed waived on appeal. When an appellee petitions the court of appeals for an extension of time within which to file its brief, the appellee waives the right to file a motion to dismiss the appeal.[85] The court of appeals will only consider the evidence contained in the record of the proceedings.[86] If appellant's counsel fails to make a cogent argument on an issue, that issue is deemed waived.[87] The court of appeals has held that "[i]n determining whether a party has waived an issue upon appeal, we look to whether the brief is so deficient that the reviewing court is required to make a party's argument upon its behalf."[88] In addition, arguments are waived if they are not supported by citation to relevant or controlling authority.[89] "New arguments made in a reply brief are inappropriate and will not be considered on appeal."[90]

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84. City of Hobart Sewage Works v. McCullough, 656 N.E.2d 1185, 1189 (Ind. Ct. App. 1995); White v. White, 655 N.E.2d 523, 529 n.13 (Ind. Ct. App. 1995); Evans v. Tuttle by Tuttle, 645 N.E.2d 1119, 1121 (Ind. Ct. App. 1995). *But see* Transcontinental Technical Services, Inc. v. Allen, 642 N.E.2d 981, 983 n.1 (Ind. Ct. App. 1994) ("Generally, a party may not raise an issue on appeal which was not raised in the trial court. . . . However, where an opposing party has unequivocal notice of an issue, the issue may be considered on appeal." (citation omitted)).

85. General Motors Corp. v. Indianapolis Power & Light Co., 654 N.E.2d 750, 751 (Ind. Ct. App. 1995).

86. Hyundai Motor Co. v. Stamper, 651 N.E.2d 803, 807 n.3 (Ind. Ct. App. 1995) ("[O]n appeal we are confronted with the issue as of the time it was presented to the trial court. Reference to matters outside of that time period, i.e., as subsequent trial, is inappropriate.") *See also* Chesterfield Management, Inc. v. Cook, 655 N.E.2d 98, 101 (Ind. Ct. App. 1995) ("Factual material which was not part of the record in the trial court cannot be made part of a case on appeal merely by including it in an appendix to a party's brief.").

87. Budget Car Sales v. Stott, 656 N.E.2d 261, 265 (Ind. Ct. App. 1995); Huff v. Langman, 646 N.E.2d 730, 732 (Ind. Ct. App. 1995); Remington Freight Lines, Inc. v. Larkey, 644 N.E.2d 931, 935 n.4 (Ind. Ct. App. 1994).

88. Shewmaker v. Etter, 644 N.E.2d 922, 930 (Ind. Ct. App. 1994) (citation omitted).

89. Lucre Corp. v. County of Gibson, 657 N.E.2d 150, 154 (Ind. Ct. App. 1995) (citation omitted); Calumet Nat'l Bank v. American Tel. & Tel. Co., 654 N.E.2d 816, 821 (Ind. Ct. App. 1995); Hines v. Caston Sch. Corp., 651 N.E.2d 330, 332 n.1 (Ind. Ct. App. 1995).

90. Crist v. K-Mart Corp., 653 N.E.2d 140, 144 (Ind. Ct. App. 1995) (citation omitted). *See also* Mileusnich v. Novogroder Co., 643 N.E.2d 937, 940 n.3 (Ind. Ct. App. 1994).

F. Prima Facie Error Rule

The "prima facie error" rule[91] continued to develop in 1995.[92] Pursuant to the rule, "[a] less stringent standard of review applies and an appellant need only establish prima facie error to win a reversal when the appellee fails to file a brief."[93] The court of appeals has defined prima facie error as "error appearing at first sight, on first appearance, or on the face of the argument."[94] In *Medical Specialists, Inc. v. Sleweon*,[95] the Indiana Court of Appeals explained the purpose of the prima facie error rule and its discretionary character as follows:

> The prima facie error rule protects this court and relieves it from the burden of controverting arguments advanced for reversal, a duty which properly remains with counsel for the appellee. This court is not bound by this rule, however and in the exercise of our discretion we may consider the questions properly presented and decide the case on its merits.[96]

The failure of appellee to file a brief invites a cursory review of the issues by the court of appeals. It does not often make sense to leave a favorable judgment at the trial level vulnerable to superficial appellate scrutiny. Appellees who fail to file a brief do so at their peril.

G. Summary Judgment Practice

In *Stryczek v. Methodist Hospitals, Inc.*,[97] the Indiana Court of Appeals offered further guidance regarding the new designation requirement of Trial Rule 56(C):[98]

> In the present case, neither party complied with the designation requirement contemplated by T.R. 56. Parties may no longer designate entire portions of the record, such as depositions, but must instead specifically identify relevant portions of pleadings, depositions and other evidentiary material upon which the parties relies.
>
> Here, the Hospital designated entire documents including the complaint, the answer, affidavits, the opinion of the medical review panel,

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91. Harrington, *supra* note 9, at 990.

92. Trotter v. Nelson, 657 N.E.2d 426 (Ind. Ct. App. 1995); Ferrell v. State, 656 N.E.2d 839 (Ind. Ct. App. 1995); Medical Specialists, Inc. v. Sleweon, 652 N.E.2d 517 (Ind. Ct. App. 1995); Hazuga v. Hazuga, 648 N.E.2d 391 (Ind. Ct. App. 1995); Stephens v. Stephens, 646 N.E.2d 682 (Ind. Ct. App. 1995); McKay v. McKay, 644 N.E.2d 164 (Ind. Ct. App. 1994).

93. *Ferrell*, 656 N.E.2d at 840 (citations omitted).

94. *Hazuga*, 648 N.E.2d at 393 (citations omitted).

95. 652 N.E.2d 517 (Ind. Ct. App. 1995).

96. *Id.* at 522 n.4 (citations omitted).

97. 656 N.E.2d 553 (Ind. Ct. App. 1995).

98. Harrington, *supra* note 9, at 991.

> and the proposed complaint before the Commissioner of Insurance. Although some of the documents were one page, no attempt was made to specifically identify the relevant portions of the documents which would support a finding that the Hospital was entitled to summary judgment.
>
> . . . .
>
> The failure to identify specific portions of documents upon which the parties relied to support and to refute summary judgment requires reversal of the trial court's judgment. The Hospital did not carry its initial burden to adequately demonstrate that it was entitled to summary judgment. . . . The designation errors have thwarted the purpose of the rule change which mandates designation. Besides decreasing the amount of material through which a court must sift to make rulings on summary judgment, advantages such as narrowing the issues and judicial economy have been lost.[99]

The designation standard under Trial Rule 56(C) is relatively well-defined at this point. With so many summary judgments on file, and reviewed essentially de novo on appeal, counsel must protect against the denial of a motion for summary judgment based solely upon the absence of a proper designation.

H. Judicial Notice on Appeal

In *Pigman v. Ameritech Publishing, Inc.*,[100] the court of appeals took judicial notice of certain facts regarding the ubiquity of the telephone as a necessary means of communication in our society.[101] The court of appeals acknowledged that "This court should exercise extreme caution in taking judicial notice of facts subject to proof."[102] The court of appeals then justified its actions, observing:

> At the same time, not every circumstance related to the case presents a fact requiring evidentiary proof or judicial notice. Here, implicit in our holding was an awareness that in our society the telephone is ubiquitous and is the primary means of remote interactive communication. Such an awareness comes from life's experience, which forms the background and frame of reference for every judicial opinion.[103]

I. Appellate Briefs

In *Town of Merrillville v. Merrillville Conservancy District*,[104] the Indiana

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99. *Stryczek*, 656 N.E.2d at 555 (citations omitted).
100. 650 N.E.2d 67 (Ind. Ct. App. 1995).
101. *Id.* at 69.
102. *Id.* (citing Ritz v. Indiana & Ohio R.R., 632 N.E.2d 769, 775 (Ind. Ct. App. 1994)).
103. *Id.* (citations omitted).
104. 649 N.E.2d 645 (Ind. Ct. App. 1995).

Court of Appeals offered some sagacious advice to all authors of appellate briefs:

> The appellate brief should be prepared so that each judge, considering the brief alone and independent of the transcript, can intelligently consider each question presented. The brief must be prepared so that all questions can be determined by the court from an examination of the brief without having to examine the record, because there is only one transcript to be shared among all the judges.[105]

CONCLUSION

Every year, Indiana's appellate courts offer renewed insight into the procedures that practitioners must employ to perfect and prevail on an appeal. Nineteen ninety-five was a particularly fruitful year in that regard.

Some of the evolving practices of the court of appeals are not necessarily apparent from the Rule amendments or published decisions. According to the grapevine, a request for oral argument should not be overlooked by appellate counsel.[106] If requested, it will more often than not be granted.

Nineteen ninety-six will mark the retirement of Justice Roger DeBruler from the Supreme Court of Indiana, giving Governor Evan Bayh one last opportunity to leave his imprimatur upon the composition of Indiana's court of last resort. It will certainly take several years to begin to appreciate the full influence of Justice Debruler's retirement upon the practices and procedures of our appellate courts. Nineteen ninety-six will offer the earliest of insights regarding what may lie ahead.

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105. *Id.* at 648-49 (citations omitted).

106. Indiana Appellate Rule 10(A) provides that:

> A party may request oral argument by filing a petition in writing therefor at any time after the transcript is filed, but not later than seven (7) days after the filing of the final reply brief. In the event that no reply brief is filed, the petition for oral argument shall be filed not later than seven (7) days after the expiration of the time when the reply brief was required to be filed under Appellate Rule 8.1(A). However, oral argument will not be granted except at the Court's discretion. The Court will order, without application, oral argument in such cases as it deems proper. When a cause is set down for oral argument the clerk shall notify at once the representative counsel by mail, who shall acknowledge such notice by return mail.