

# DEVELOPMENTS IN APPELLATE PRACTICE IN 1996

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## INTRODUCTION

Appellate practice developed on a steady course in 1996. There were no landmark cases<sup>1</sup> or radical rule changes that would substantially alter appellate practice for years to come. The rule changes that went into effect were predominantly aimed at mundane, but jurisdictionally important, issues. The amendments ordered in December 1996 for implementation in 1997 are more dramatic in substance and likely to breed their own litigation. All are discussed in Part I.

Developments in appellate procedure case law sometimes arise from discrete practices in particular appeals, but because appellate courts ordinarily do not elevate procedural issues to the same level as substantive issues in published opinions, this common-law style development actually is rare. Missteps of counsel tend to deprive an appellate court of jurisdiction, which therefore causes an appeal to be dismissed without comment.<sup>2</sup> Therefore, opinions that discuss elements of appellate practice tend to elucidate principles that underlie the resolution of substantive issues. Part II interprets some of these cases by discussing the interplay of principles and practices of appellate procedure.

Part III highlights events in Indiana's appellate courts in 1996, and Part IV outlines the creation of the Appellate Practice Section in the Indiana State Bar Association. Part V discusses personnel changes on the Indiana Supreme Court, followed by some concluding thoughts.

## I. RULE CHANGES

### A. *Rule Amendments Made Effective in 1996*

1. *Appellate Rule 4.*—The 1996 amendment altered section (C) to abolish the requirement that the appellant file a separate assignment of errors in the court of appeals in a direct appeal of an administrative action. This amendment removes an unnecessary formal step required of the appellate practitioner for the court of

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1. *E.g.*, *Rosi v. Business Furniture Corp.*, 615 N.E.2d 431 (Ind. 1993).

2. For example, in 1995 the supreme court was petitioned to grant transfer of 14 appeals that had been dismissed by the court of appeals. In many of these cases, a jurisdictional deadline was missed by just one day. Overall in 1995, the court of appeals ordered 167 dismissals sua sponte, 132 on the appellant's motion, and 79 summary affirmances or dismissals on the appellee's motion out of a total of 7788 dispositions. COURT OF APPEALS OF INDIANA, 1995 ANNUAL REPORT 12 (1996). Dismissals at the court of appeals are difficult to break down with any greater specificity because many result from the parties' settlement.

appeals to acquire jurisdiction in administrative cases, and it confirms the spirit of the final sentence of section (C), which states that it is appropriate in the appellate brief to assert an administrative body's final decision is contrary to law. Ideally, the rule's effect will result in less paper being filed at the court of appeals, thereby improving timeliness and lowering costs to the client for the prosecution of an appeal.

2. *Appellate Rule 7.2.*—The amendment to Appellate Rule 7.2 goes hand-in-hand with the amendment to Appellate Rule 4(C). Appellate Rule 7.2 subsection (A)(1) was amended to delete the requirement that the appellant include an assignment of errors in the record of proceedings in direct administrative appeals.

Appellate Rule 7.2 subsection (A)(3)(a) amended the rules governing the layout, formatting, and typefaces acceptable in producing the record of proceedings.<sup>3</sup> The changes are formal, and thus very important, because they are designed to reduce the physical size of the appellate record. Accordingly, margins have been reduced,<sup>4</sup> typeface made uniform,<sup>5</sup> and line spacing limited.<sup>6</sup> Responsibility for complying with the rule naturally is assigned to the attorney who files the record, not to the trial court reporter.

3. *Appellate Rule 8.2.*—Rule 8.2 was the first of four appellate rules dealing with filing and documentary form that were amended twice in the last year. The others were Appellate Rules 9, 11, and 18. The changes are thematically consistent with those of Rules 4 and 7.2 in that their intent is to yield uniformity and brevity to documents submitted to our appellate tribunals. The changes are formal: they address typeface,<sup>7</sup> page limits, and word counts.<sup>8</sup>

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3. IND. APP. R. 7.2(A)(3)(a).

4. Margins must be at least one inch, and all lines of text must begin no more than two inches from the left edge of the page.

5. Typeface is maximized at 12 point type, which is consistent with rules regulating other appellate documents.

6. Lines may no longer be more than double-spaced in the record.

7. The first amendments to Appellate Rules 8.2(A)(1) and 9(A), which went into effect on February 1, 1996, limited typeface to 11 points or characters per inch. The second amendment which became effective January 1, 1997, changed the rule by prohibiting any typeface less than 12 points in both text and footnotes. The court did not mandate use of monospaced typefaces (e.g., Courier or Pica), but did add a reasonableness standard ("read comfortably" to documents employing a proportional typeface (e.g., Times Roman or Arial).

All references to printing have been removed, which literally means that the Clerk may no longer accept handwritten documents. Presumably, in a case of hardship, leave to file non-complying documents will be granted upon petition showing cause.

8. Rule 8.2(A)(4) limits brief lengths to 30 pages or 14,000 words, including headings, footnotes, and quotations. Rule 11(B) limits motions for rehearing and petitions for transfer to three pages or 1400 words, and briefs in support thereof may not exceed nine pages or 4200 words. Finally, Appellate Rule 18, governing appeals from the tax court, limits petitions for review to three pages or 1400 words (section (C)), and preliminary briefs in support of the petition to six pages or 2800 words (subsection (E)(1)). Briefs in tax appeals in which the supreme court has assumed jurisdiction are limited to 30 pages and 14,000 words, with reply briefs limited to 15 pages or 7000

Exceptions to the formal requirements will be granted only upon petition to the court for leave to file a non-compliant brief. The petition must show cause and be timely filed. This rule is not new; the amended rule restates the prior rule. In light of the reduction in page limits and the requirement of verified statements attesting to word counts,<sup>9</sup> however, the supreme court's clear intent is to tighten up briefing practice by imposing personal demands on appellate lawyers. Accordingly, a petition for leave to file an oversized brief or for an extension of time ought not be filed the day before the brief is due, but instead should be filed well in advance of the deadline to assure the court that a statement of "good cause" is made in good faith.

The supreme court has made a subtle, but dramatic, shift in the way it now considers the form of briefs, by shifting from pure page limits to a combination of page limits, font sizes, and word counts. The court now looks at word limitations in an effort to compensate for technological advancements. Contemporary word processing programs are so powerful that document formatting may be manipulated to effectively circumvent the rules by enabling a lawyer to reformat a long document so that it "fits" within limits established for typewriters. Such conduct borders on sanctionable.<sup>10</sup> It is dishonest, makes a court's work more difficult, and might yield an unfair advantage. The supreme court's inclusion of a word count limitation is a bright-line rule and allows a party to objectively determine the "true length" and compliance of his own and his adversary's document.<sup>11</sup>

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

9. IND. APP. R. 8.2(A)(4)(b). "Any brief submitted which is longer than thirty (30) pages must be accompanied by a verified statement the attorney or unrepresented party responsible for preparing the brief stating the number of words in the brief (exclusive of the App.R. 8.3(A)(1) items) and the method by which the word count was obtained." *Id.*

10. The temptation to sandbag a court is strongest in cases where the stakes are highest. For a brief description of tense, harsh briefing practices in John Gotti's criminal appeal, see Gerald F. Uelmen, *Brief Encounters*, CAL. LAW., Jan. 1994, at 57.

11. Since the second Rule 8.2 amendments went into effect in January 1997, several attorneys have asked questions regarding the procedure of counting words. As a general principle, the supreme court employs a rule or reason in these matters; it is not the court's intent to turn appellate practice into a game of "gotcha" in which appeals are routinely dismissed on technicalities. The court expects attorneys to rely on the word counting features of their word processors to do the counting, hopefully not an attorney or law clerk on the clock.

That said, some ground rules must be stated. Footnotes and blocked-and-indented quotes are not one word, nor are they exempt from counting. Citations may be counted as a single word (e.g., 642 N.E.2d 49 (Ind. 1995)). Party names count individually, but "v." does not count (e.g., "Jones v. State" is two words). "*Id.*" counts, and so do numbers. Finally, captions, cause numbers, service lists, and certificates of service do not count.

Effectively, the responsibility for policing word counts resides with the appellate practitioner. Motions to strike a brief or dismiss an appeal therefore are tools for regulating an adversary's conduct. Insofar as the limitations on the page length established in the rules are set at approximately 65% of the word limitation, certification of word counts is expected to be an

Another important formal change contained in Appellate Rule 8.2 is subsection (B)(1)'s change in case citation form. Cases are now being cited in "Blue Book"<sup>12</sup> form in appellate documents. This change may have had its strongest advocates among the appellate judges' law clerks, but it should appeal to all members of the bar. Now, citation in Hoosier legal documents accords with the national standard, which should streamline research, writing, and cite-checking and make it easier to interface with electronic research resources to ultimately reduce the cost of litigation.

4. *Appellate Rule 8.3*.—Effective February 1, 1996, the amendment to Rule 8.3(A)(4) specified that the statement of the case must indicate briefly the lower court's disposition of *both* the case and the issues presented for review. Again, this is a rule change intended to simplify appellate practice by spotlighting a trial court's judgment and final rulings. Highlighting the lower court's acts allows the appellate court to focus more easily on the appellate remedy under consideration.

Appellate Rule 8.3's amendment also added the requirement in criminal appeals that a copy of the sentencing order be appended *to the brief* in all appeals raising sentencing issues. This rule should be a welcome relief to defendants whose sentences should be reduced due to a sentencing error because it enables appellate courts to shorten the time litigation takes. No longer will an appellate court have to wait while it remands the case to the trial court for the preparation of a written sentencing order to include in the record of proceedings.<sup>13</sup> It is simply amazing that sixteen years after *Judy v. State*,<sup>14</sup> the supreme court still remands cases to trial courts because the record does not contain a written sentencing order to review. It is not the responsibility of the appellate court to ensure that the record has a copy of the sentencing order; that responsibility lies with the appellant's attorney. How can an appellate attorney prepare an effective brief or intelligently argue sentencing error without reviewing a certified statement of the sentence? The question boggles the mind, and the amendment to Appellate Rule 8.3 should assure that it never be asked again. Now, failure to include a copy of the sentencing order in the brief deprives the appellate court of jurisdiction and may result in waiver of meritorious claims. Aside from the constitutional ramifications of this default, ethical sanctions may now await the appellate lawyer who fails to include the sentencing order in the brief (and, thus, in the appellate record, too).

5. *Appellate Rule 11(B)*.—The rule was amended twice in 1996, with the first amendment, effective February 1, 1996, substantively liberalizing a party's procedural options when making strategic appellate decisions after suffering an

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ordinary part of appellate practice and should provide a benchmark by which to judge an adversary's behavior.

12. HARVARD L. REV. ET AL., *THE BLUEBOOK A UNIFORM SYSTEM OF CITATION* (16th ed. 1996).

13. Of course, this rule has an impact on trial practice because it is now incumbent on the attorneys to make sure that the trial court reduces its sentencing determination to writing before certifying a judgment as final.

14. 416 N.E.2d 95, 108 (Ind. 1980).

adverse ruling in a trial court. (The second amendment, effective since January 1, 1997, concerns only the form of petitions and briefs.<sup>15</sup>) Since February 1, 1996, a party may raise in its petition for transfer to the supreme court any issue properly preserved for appeal. This change removes the former restriction that limited the justiciability of issues on transfer to those raised in a petition for rehearing in the court of appeals. This modification enables the parties to focus the court of appeals on specific allegations of error, which should speed the work of both lawyers and the court in disposing of petitions for rehearing.

The old rule had the effect of channeling the issues brought to the supreme court, which should have fostered promptness in the resolution of appeals as a theoretical matter. By deciding fewer appellate error claims in transfers from rehearings, the supreme court should have been able to adjudicate cases more quickly. This would benefit some litigants, but not all, because the court frequently found itself remanding cases to the court of appeals for resolution consistent with its order.<sup>16</sup> This would approximate the U.S. Supreme Court's practice with respect to writs of certiorari, which negates the advantages of transfer. Worse, it could allow some parties to avoid execution of judgment or to wear down an adversary by extending litigation ad infinitum.<sup>17</sup> To prevent this, under the old rule, the court would exercise the full extent of its jurisdiction and decide an appeal fully on the merits. Sometimes, this practice led to a party being "blind-sided" by the court's judgment.<sup>18</sup>

The rule change thus clarifies the jurisdiction of the supreme court on transfer. As it has been explained in this space in prior years, when the court grants transfer, it takes jurisdiction over the entire case and vacates the decision of the court of appeals.<sup>19</sup> Vacatur of that decision thus lays open the entire appeal, and this rule change concerning transfer after rehearing reinforces the supreme court's jurisdiction over the matter. A party is not restricted on transfer from arguing any

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15. IND. APP. R. 11(B) (introductory paragraph); IND. APP. R. 11(B)(6). *See supra* note 6.

16. Conceivably, the former rule could work unfairness by depriving the appellant of the opportunity to challenge reversible errors which had otherwise been preserved. For example, the appellant claims errors that are not addressed in the court of appeals because it found one issue to be dispositive. Rehearing is devoted to the appellee's exception to that judgment, and, on transfer, the supreme court decides in favor of the appellee, reversing on the one rehearing issue. Unless the supreme court remands, this result leaves the other errors which appellant had properly preserved and submitted to the court of appeals without review on the merits. The supreme court has two options to prevent this result: one, decide all issues on the merits, or two, decide the one issue and remand to the court of appeals for resolution of the undecided issues. In the past, the court has employed both approaches.

17. After the court of appeals adjudicated a case a second time, another petition for transfer would likely demand the attention of the supreme court. Appellate practice in this manner could unfairly tip the playing field by favoring the financially well-endowed litigant over a weaker one who lacks the resources to defend a just, but complex, claim.

18. *See, e.g., Savage v. State*, 655 N.E.2d 1223 (Ind. 1995).

19. George T. Patton, Jr., *Recent Development in Appellate Practice: Reforming the Procedural Path to the Indiana Supreme Court*, 25 IND. L. REV. 1105 (1992).

allegation of error that it properly presented to the court of appeals.

Indiana's constitution was drafted in a period of intense populism, and the spirit of populism still pervades much of Hoosier life. Consistent with this philosophy, the jurisdiction of the Indiana Supreme Court is constituted so that the court does not sit in an "ivory tower" dedicated to advising "lower courts." Rather, the supreme court resolves lawsuits. When the court grants transfer, the record briefs, motions, petitions, and other documents are legally transferred for final adjudication on the merits.<sup>20</sup> The court's transfer jurisdiction, though discretionary, affirms this power and responsibility by removing from the rule any semblance of issue channeling.

6. *General Remarks Concerning the 1996 Rules Changes.*—The majority of amendments to Indiana's appellate procedure were not substantive in a legal sense, but instead tweaked the forms of appellate filings. The result of these changes will simplify practice for the appellate bar and the appellate courts. Most important to citizens awaiting an end to litigation, a shorter wait for final judgments should result. Ideally, the formal changes also help to assure just results by leveling a playing field that can be tilted by disparities in resources, technological competence, and support.

The substantive change to Appellate Rule 11(B) that liberalized the scope of issues that can be argued in the supreme court after a rehearing in the court of appeals is a reaffirmation of the court's jurisdiction. In another important sense, it eliminates jurisdictional confusion in appellate practice caused by the supreme court's varying approach to transfers from rehearing when it sometimes decided only narrow, channeled issues or other times resolved all issues on the merits. Accordingly, the 1996 amendment to the Appellate Rules was a necessary step in clarifying supreme court practice on transfer.

### *B. Internal Administrative Rules Implemented in 1996*

In 1996, Indiana Supreme Court and Indiana Court of Appeals implemented internal rules that have immediately improved the Hoosier bar's appellate practice.

The first and most important internal procedural change was foreshadowed by Chief Justice Shepard in the State of the Judiciary Address.<sup>21</sup> Chief Justice Shepard announced that appeals involving the lives or rights of children would be specially noticed by the clerk, "moved to the top of the stack," and given expedited review by the court of appeals and the supreme court. The court of appeals has made a great impact in the adjudication of custody, CHINS,<sup>22</sup> and other cases involving children's interests, shortening to less than two months the length of time which children's lives are in limbo while an appeal is pending. The court has done this by not granting extensions of time in such cases and by imposing strict

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20. Of course, the court still remands cases for resolution of factual issues.

21. Randall T. Shepard, *State of the Judiciary: The Challenge of a Challenged Profession*, Address to the General Assembly and Governor (Jan. 17, 1996), in *RES GESTAE*, Feb. 1996, at 30:34-35.

22. "Child in need of services."

internal deadlines for issuing its decisions.<sup>23</sup>

The court of appeals has instituted an internal rule that should prevent the confusion that has sometimes arisen when a publication order has been entered for one of its opinions after the supreme court has denied transfer. Henceforth,

[N]o memorandum opinion (of the Court of Appeals) will be published after transfer has been denied or after the time to request transfer has expired and no request for transfer has been made. In the event that a case is pending on transfer when a petition for publication is received, the Supreme Court shall be notified that there is a possibility that the memorandum decision will be published.<sup>24</sup>

Winning parties or, more likely, their attorneys, often wish to have their victories memorialized in the North Eastern Reporter. No longer can one wait, however, until all the dust settles to make a motion for publication. It bears repeating: the supreme court's denial of transfer is not necessarily a stamp of approval. Admittedly, it means something, but what it means is not revealed. Transfer is denied for a variety of reasons, most often because the court of appeals is correct. Transfer may be denied, however, if a jurisdictional condition precedent was not satisfied or for some other reason. Thus, when a motion to publish a memorandum decision is not made prior to the expiration of the time in which the supreme court can exercise jurisdiction over the appeal, the opportunity is waived.<sup>25</sup>

### C. Brief Remarks About the 1997 Rule Amendments

On December 23, 1996, the supreme court issued orders amending Indiana Appellate Rules 7.1, 15, 16, 17.

Indiana Appellate Rule 7.1 was amended, effective March 1, 1997, to permit the filing of the transcript of the evidence in an electronic format.<sup>26</sup> This is a remarkable technological step, one which the court has tested with successful results in three counties. As first promulgated, electronic submission of the record will only apply to the transcript of the evidence and proceedings,<sup>27</sup> but not the praecipe and "papers."<sup>28</sup> The Division of State Court Administration shall henceforth/has published technical standards to govern the electronic filings.<sup>29</sup>

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23. See John T. Sharpnack & James S. Kirsch, *Advancing the Interests of Children in Appellate Practice*, RES GESTAE, Mar. 1996, at 11.

24. Memorandum from John T. Sharpnack, Chief Judge, Indiana Court of Appeals, to Supreme Court of Indiana 1 (Apr. 3, 1996).

25. See *Mercantile Store Co. v. Swiger*, 673 N.E.2d 543 (Ind. Ct. App. 1996) (motion to publish denied by order Jan. 23, 1997).

26. IND. APP. R. 7.1(D).

27. IND. APP. R. 7.2(A)(3) (1996).

28. IND. APP. R. 7.2(A)(1, 2) (1996).

29. As of this Article's publication, the standards have not been issued.

*Marshall v. Reeves*<sup>30</sup> has been overruled in part by the amendment to Indiana Appellate Rule 15. The new rule now allows for the recovery of costs by the appellee when a judgment is affirmed in whole, and for recovery of both trial and appellate costs by the appellant when a judgment is reversed in whole.<sup>31</sup> Costs *shall* include the transfer fee whenever a party prevails in whole on transfer.<sup>32</sup> Included in the calculation of costs are the costs of record procurement, service, praecipe, and the transfer fee (when appropriate).<sup>33</sup> The rule does not indicate whether a denial of transfer will be treated as an affirmance, and such an outcome is unlikely. Nonetheless, litigants considering appealing an unsatisfactory decision must pause to objectively weigh its merits before filing an appeal or petitioning for transfer because the monetary risk attached with losing will be magnified. Whether or not the practical effect of this amendment has a chilling effect on appellate filings will be one of the more interesting developments in appellate practice in 1997.

The amendment to Indiana Appellate Rule 16 imposes on the trial court the obligation to certify its summary findings of fact and conclusions of law with the other required submissions when an appeal is taken in a proceeding to determine whether the consent of a minor's parents for the minor to receive an abortion shall be waived.<sup>34</sup> Otherwise, the amendment is not substantive, but merely a reflection of the recodification of Indiana's statute concerning the waiver of parental consent to a minor's abortion.<sup>35</sup>

A substantive amendment made to Appellate Rule 17 has the potential for tremendous impact in criminal appeals. The amendment eliminated the "no reasonable person" standard of review contained in subsection (2) of the old rule.<sup>36</sup> This gives the court of appeals and the supreme court wide latitude in the determination of "manifest unreasonableness." Accordingly, the moral and legal considerations that shape the meaning of "manifest unreasonableness" will be determined in the common law way: by the work of Indiana's appellate courts. This should prove to be a significant change to current criminal appellate practice.

In sum, the 1997 amendments portend an exciting year in appellate practice. The new amendments significantly alter the landscape in both civil and criminal appellate practice with the electronic filing of the transcript, the collection of appellate costs for "complete" judgments, and the elimination of "no reasonable person" standard, in sentencing review.

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30. 316 N.E.2d 828 (Ind. 1974).

31. IND. APP. R. 15(H).

32. *See id.*

33. *See id.*

34. IND. APP. R. 16.

35. IND. CODE § 16-34-2-4 (1993).

36. IND. APP. R. 17. The deleted subsection (2) read, "A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed."



## II. CASES ADDRESSING APPELLATE PROCEDURAL ISSUES

## A. Appellate Jurisdiction

1. *Rulemaking and Jurisdiction.*—A fundamental understanding of the separation of powers doctrine in constitutional law<sup>37</sup> is that the supreme court can neither enlarge nor reduce its jurisdiction; its jurisdiction is set out in the constitution. A jealously guarded aspect of the court's jurisdiction is its rulemaking power.<sup>38</sup> Indiana's constitution requires the court to prescribe rules by which its jurisdiction can be invoked and "to supervis[e] the exercise of jurisdiction by the other courts of the State."<sup>39</sup> Most specifically, the constitution commands the supreme court to promulgate rules specifying both the court of appeals' appellate jurisdiction and its original jurisdiction in administrative cases.<sup>40</sup> Accordingly, the court of appeals held in an administrative appeal, *Sneed v. Associated Group Insurance*,<sup>41</sup> that litigants must adhere to the procedures established in the appellate rules to invoke its jurisdiction because the rules take precedence over conflicting statutory procedures.<sup>42</sup>

The *Sneed* court reasoned that the supreme court acted on this principle when it amended Appellate Rules 4(C) and 7.2(A)(1) to eliminate the requirement of filing an assignment of errors in the court of appeals.<sup>43</sup> As a result, the court concluded that the supreme court "disapproved" of its holding in *Sheets v. Disabilities Services, Inc.*<sup>44</sup> even if it did not specifically overrule it. Rule 4(C) outlines the court of appeals' original jurisdiction in administrative cases and the addition in this rule of a specific statement that eliminated the requirement of filing an assignment of errors addresses the method by which a party invokes the court's jurisdiction. The amendment removed the barrier faced by the appellant in *Sheets*,<sup>45</sup> and thus enabled the court of appeals to exercise jurisdiction even though the appellant did not file an assignment of error.

The court of appeals also wrestled with another interesting issue in *Sneed*, namely whether to give the amendment to rule 4(C) retroactive effect. The court noted that there is not a hard and fast rule concerning the application of new rules to cases already on appeal. Rather, the court gleaned from its review of civil case law that a pragmatic approach "focusing upon notions of fairness and equity" has evolved.<sup>46</sup> Finding the amendment to rule 4(C) ameliorative, it extended the rule

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37. See IND. CONST. art. III, § 1.

38. See *id.* art. VII, § 4.

39. *Id.*

40. *Id.* § 6.

41. 663 N.E.2d 789 (Ind. Ct. App. 1996).

42. *Id.* at 794.

43. See *supra* Part I (1) and (2).

44. 602 N.E.2d 506 (Ind. 1992)

45. *Id.* at 507.

46. *Sneed*, 663 N.E.2d at 796.

to *Sneed* and entertained the appeal on the merits.<sup>47</sup>

2. *Interlocutory and Final Orders.*—A denial of summary judgment is not a final, appealable order.<sup>48</sup> It is interlocutory in nature because denial of the motion does not decide any material issues.<sup>49</sup> When a motion for summary judgment is denied, the case is set for trial and proceeds accordingly. The trial court possesses plenary jurisdiction over the case, and appeal from the motion's denial may be taken only as a matter of grace.<sup>50</sup> The trial court is not obligated to certify the issue for interlocutory appeal, and its refusal to do so will be reviewed only for an abuse of discretion.<sup>51</sup> To win on a claim that the trial judge abused her discretion by not certifying the issue for interlocutory appeal, the appellant most likely will have to show that he was entitled to relief on the merits in order to show prejudice. This makes sense because the movant is appealing a negative judgment. Of course, a party may appeal the denial of summary judgment and receive *de novo* review on the merits after final judgment is entered.<sup>52</sup>

A mistrial ordered after a jury has returned its verdict is a final, appealable order.<sup>53</sup> This result ensues because the jury has done its job and found the facts, presumably without the process having been infected. A party therefore is entitled to judgment because the verdict essentially completes the trial. The court's declaration of mistrial operates in lieu of a final order of judgment and thereby approximates a Trial Rule 60(B)(5) order granting relief. Thus, the mistrial judgment itself becomes the court's final order in the case. This situation contrasts with a mistrial declared before verdict, which does not terminate the trial court's jurisdiction over the case. This contrasts with the federal practice in which the trial court retains jurisdiction over the matter after declaring a mistrial post-judgment.<sup>54</sup>

3. *Settlement and Transfer.*—The supreme court's grant of transfer is a plenary exercise of jurisdiction. Accordingly, the litigants' settlement of their lawsuit after transfer does not alter the court's jurisdiction. The court's dismissal of an appeal upon settlement is a proper exercise of its discretion, and the dismissal has no effect on transfer's vacatur of the court of appeals decision.<sup>55</sup> The court usually will not continue its jurisdiction simply for the exercise of writing an advisory opinion, which sometimes results in publication of a court of appeals' opinion that is not law, and which should not be cited as authority, underscoring

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47. *Id.* at 797.

48. *See Keith v. Mendus*, 661 N.E.2d 26 (Ind. Ct. App. 1996), *trans. denied*.

49. *See In re J.L.V., Jr.*, 667 N.E.2d 186 (Ind. Ct. App. 1996) (final judgment disposes subject matter of litigation to the extent that the court has jurisdiction over it).

50. *See Dukes v. State*, 661 N.E.2d 1263 (Ind. Ct. App. 1996).

51. *See Keith*, 661 N.E.2d at 26; *Hollingsworth v. Key Benefit Adm'rs, Inc.*, 658 N.E.2d 653 (Ind. Ct. App. 1995), *trans. denied*.

52. *See id.*

53. *See Ward v. St. Mary Medical Ctr.*, 658 N.E.2d 893 (Ind. 1995).

54. *See, e.g., Bethel v. McAllister Bros.*, 81 F.3d 376, 382 (3d Cir. 1996); *Arenson v. Southern Univ. Law Cent.*, 963 F.2d 88, 89 (5th Cir. 1992).

55. *See Meyer v. Biedron*, 667 N.E.2d 752, 752-53 (Ind. 1996) (*per curiam*).

the importance of closely scrutinizing one's authority in briefing practice.<sup>56</sup>

The effect of this result on the litigants can be problematic. In *Meyer v. Biedron*, an appeal that grew out of a transaction involving several parties and several lawsuits. Subsequent to the court of appeals decision in this case,<sup>57</sup> summary judgment was entered in other related cases. After the supreme court dismissed the appeal, the plaintiff-appellant petitioned the court to issue an opinion because the negative judgments in related cases were grounded in the vacated court of appeals holding. The court declined. The plaintiff must therefore attack each of the adverse judgments either by seeking relief from judgment or via appeal.

Sound jurisprudential reasons undergird the court's decision not to render an advisory opinion. There are many reasons the supreme court may accept transfer of a case from the court of appeals, some of which may not be for the purpose of reversing the court of appeals' decision. The petitioner assumes too much if he or she believes transfer was granted because the supreme court agrees with the specific points he or she deems erroneous in their petition for transfer. Additionally, what the petitioner here seeks with an opinion by the supreme court is a tool, essentially a kind of "offensive collateral estoppel" weapon, to be used against other adversaries. This hardly seems fair to those parties, who are unrepresented in the appeal and whose interests may not be adequately represented in the settlement (if at all)—especially when the appellant has other procedural avenues for seeking relief. Finally, transfer is not a writ of certiorari. The court does not answer discrete questions of law in order to advise and direct lower courts, but rather to bring disputes to final resolution. Unless the question is one of great public import,<sup>58</sup> the court will not issue opinions as an exercise of abstract

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56. This result happened with *Old Town Development v. Langford*, 349 N.E.2d 744 (Ind. App. 1976), *trans. granted*, 369 N.E.2d 404 (Ind. 1977) (appeal dismissed upon parties' settlement). *Cf. L.W. v. Western Golf Ass'n*, 675 N.E.2d 760, 762 n.2 (Ind. Ct. App. 1997) (citing vacated case not as authority, but as "reflective of current state of the law, as drawn from authorities cited therein.")

Unfortunately, the publication of a vacated opinion may lead to substantial confusion. The Indiana Appellate Court Reports, the official reporter of the Indiana Court of Appeals in 1976, never published *Langford*, which underscored the fact that its holding (that there is an implied warranty of habitability in residential leaseholds) did not become part of the Indiana common law. However, this case has been cited as good law in the appellate courts of more than a dozen states and three federal circuit courts of appeal, and *Shepard's Indiana Citations* and the *American Law Reports* series indicate that it is good law in Indiana. *Langford's* holding is not law, and no court nor commentator should recognize it as such.

57. 647 N.E.2d 1153 (Ind. Ct. App. 1995), *vacated*, 667 N.E.2d 752 (Ind. 1996).

58. *See, e.g., In re Lawrance*, 579 N.E.2d 32 (Ind. 1991) (elucidation of decisional framework for resolving question of whether to continue life support for person in persistent vegetative state handed down after death of named party). The court of appeals employs the same basic standard. *See City of Evansville v. Zerkelbach*, 662 N.E.2d 651, 653 (Ind. Ct. App. 1996), *trans. denied* (minimum age for appointment to police force a "question of great public importance which is likely to recur").

analysis.

4. *Dispositive Procedural Matters.*—

a. *Record of proceedings.*—Naturally, the filing of a record of proceedings is jurisdictional in appellate practice—without it, there is nothing for the court to review. As basic as this sounds, each year yields cases where the form or filing of a record is itself litigated on appeal.

The appellate rules require the appellant to file just the parts of the record that are necessary to review the issues it identifies for appeal.<sup>59</sup> Generally, the record must contain a transcript of the evidence for it to be sufficient to sustain appellate jurisdiction, and failure to submit a transcript of the evidence waives any claims of error founded on evidentiary issues.<sup>60</sup> This result follows as matter of course from the longstanding rule that matters outside the record will not be considered on appeal.<sup>61</sup> An appeal taken from a motion to dismiss, however, does not require inclusion of a transcript of the evidence for the record to be sufficient for appellate review.<sup>62</sup> Indeed, evidence has not been admitted at this stage of litigation, so a sufficient record in an appeal from a motion to dismiss, whether from a final or interlocutory order, requires submission of just the pleadings, motions, and memoranda material to the validity of the plaintiff's claim and the trial court's jurisdiction.

When the record submitted by the appellant is incomplete, the appellee faces several options. First, the appellee may move to dismiss the appeal on the ground that the appellate court is not possessed of jurisdiction because there was no error presented for review. Second, he or she could point out the deficiency to the appellate court, which could then order to appellant to supplement the record.<sup>63</sup> Finally, the appellee could file a praecipe in the trial court, construct a supplemental record, and submit it to the appellate court. In the latter case, the appellate court may tax the costs of supplemental record preparation to the appellant.<sup>64</sup> Of course in a cross-appeal, these remedies are of little moment because the appellee/cross-appellant bears the burden of ensuring the submission of a proper record in their appeal.

Barriers to the construction of an adequate record shall not deprive a party of his constitutional right to one appeal.<sup>65</sup> Accordingly, the court of appeals vacated a support decree and remanded for a new hearing in a marital dissolution case

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59. See *In re Walker*, 665 N.E.2d 586, 588 (Ind. 1996) (citing with approval *Jackson v. Duckworth*, 79 F.3d 1150 (7th Cir. 1996)).

60. See *id.* (citing *Campbell v. Criterion Group*, 605 N.E.2d 150, 160 (Ind. 1992)).

61. See *Shafer v. Lambie*, 667 N.E.2d 226, 231 n.5 (Ind. Ct. App. 1996).

62. See *Ziobron v. Crawford*, 667 N.E.2d 202, 205 (Ind. Ct. App. 1996), *trans. denied*. This fact pattern could arise only in a case where some claims are dismissed and others are tried. In a "pure" dismissal, no evidence was taken because the trial court ordered judgment grounded only on the pleadings.

63. See *Owensby v. Lepper*, 666 N.E.2d 1251, 1257 (Ind. Ct. App. 1996).

64. See *id.* This is may be especially likely now in cases where the appellate court grants a "complete" affirmance. See *supra* discussion Part I.C.

65. See IND. CONST. art VII, § 6; *Campbell v. Criterion Group*, 605 N.E.2d 150 (Ind. 1992).

which the appellant demonstrated he or she could not reconstruct the record because a transcript was not made in the trial court and the trial judge had died while the appeal was pending.<sup>66</sup> The court based its decision on principles of due process to determine that it would be inequitable to deny a party their “absolute right” to one appeal because the party could not reconstruct the record. The court reached this decision despite the fact that all the evidence was stipulated, the hearing in question was essentially an oral argument to the trial court, and the parties agreed not to make a transcript of the hearing in order to save money.<sup>67</sup> It is likely that the deciding factor was the trial judge’s death, which created a hardship over which the appellant had no control. The important lesson of this case is its reminder of the constitutional underpinnings of rules of procedure. As the supreme court made clear in *Campbell v. Criterion*,<sup>68</sup> procedural rules that work a jurisdictional bar when a party cannot produce a record due to occurrences beyond his control will not deprive the party of the fundamental right to seek a just remedy.

*b. Briefing matters (literally and figuratively).*—In the same way that filing a record is a jurisdictional matter for the appellant, appellate briefs also have a jurisdictional character. To the appellee, the same cannot be said. Rather, the appellee is not required to file a brief. Failure to do so usually results in a reversal of the appellee’s victory in the trial court, however, because failure to file a brief invites a low standard of review: the prima facie error rule.

The prima facie error rule allows an appellate court to reverse on a just a prima facie showing of error in the appellant’s brief.<sup>69</sup> The rule protects the appellate court by relieving it of the burden of conceiving appellee’s opposing arguments.<sup>70</sup> The prima facie error rule also has an obvious due process interest in maintaining the neutrality of the court, but it does not require reversal.<sup>71</sup> The appellate court may instead exercise discretion in deciding whether to look deeper than the face<sup>72</sup> of appellant’s argument and adjudicate the appeal on the merits.<sup>73</sup>

Briefing issues which merited attention in published opinions oftentimes reminded appellate lawyers of legal writing fundamentals. For example, presentation of questions for review must be supported by cogent argument and citations to authority,<sup>74</sup> and failure to cite authority waives any allegations of

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66. See *Flores v. Flores*, 658 N.E.2d 95, 96 (Ind. Ct. App. 1995).

67. See *id.* at 98 (Sullivan, J., dissenting).

68. 605 N.E.2d 150 (Ind. 1992).

69. See *Independence Hill Conservancy Dist. v. Sterley*, 666 N.E.2d 978, 980 (Ind. Ct. App. 1996).

70. See *Sills v. Irelan*, 663 N.E.2d 1210, 1213 (Ind. Ct. App. 1996).

71. See *Russell v. Russell*, 666 N.E.2d 943, 948 (Ind. Ct. App. 1996), *vacated*, No. 49S04-9611-CV-705, 1997 WL 356940 (Ind. June 30, 1997).

72. Prima facie error is “error appearing at first sight, on first appearance, or on the face of the argument.” *In re Holley*, 659 N.E.2d 581, 583 (Ind. Ct. App. 1995), *trans. denied*.

73. See *Sills*, 663 N.E.2d at 1213; *Russell*, 666 N.E.2d at 948.

74. See *Judge v. State*, 659 N.E.2d 608, 612 (Ind. Ct. App. 1996).

error.<sup>75</sup> Naturally, every appeal rises or falls on the prejudice to substantial rights owing to an alleged error; a party's argument therefore must explain the legal merits of its position with respect to particular facts and circumstances in the litigation. Accordingly, parties are not entitled to incorporate by reference the contents of briefs from other appeals, even when appeals concern same transaction or nexus of operative facts.<sup>76</sup> To allow such short-cutting would excuse an appellant from explaining how he or she was prejudiced by a trial court's alleged error.

An appellate litigant must devote herself to crafting sound, logical, legal argument when briefing an appeal. The best appellate practitioners do this from the beginning of the appellate process, not just when petitioning the supreme court to take transfer of the case. The appellate brief is what the supreme court reads once it takes jurisdiction. Substantive legal argument on the appeal's merits thus is made in the appellate brief, not a reply brief or petition for transfer. Reply briefs are for rebuttal; new theories may not be presented.<sup>77</sup>

Likewise, a petition to transfer is not for "rebriefing." Instead, it is used for stating grounds for vacating the judgment of the court of appeals.<sup>78</sup> A supporting brief is not required to invoke the supreme court's jurisdiction,<sup>79</sup> so a brief supporting a petition for transfer must argue why it is legally important for the supreme court to hear the case. It is not a platform for re-argument of an appeal's merits, but a stage for policy discussion of a holding's precedential effect on the rule of law, likely unintended consequences of the court of appeals' holding, or other broad jurisprudential concerns. Narrowly focusing and drafting a petition or brief is undoubtedly a difficult task, but the rules' shortened petition and brief lengths raise concise, cogent argument to yet a higher premium.

### *B. Standards of Review*

*1. General Principles.*—The baseline of due process and thus all rules of procedure is the integrity of the truth-seeking process. The rules are structured to ensure that the parties will receive a fair hearing and the court can correctly apply the law. Rules of evidence are designed to permit the admission of only relevant, material, and trustworthy evidence, and the rules of trial procedure are designed to identify the material legal issues, to structure the presentation of evidence, and to ensure that parties deal fairly with each other and the court. Cases generally are not generally won appeal—they are won at trial.

The duty of a trial judge is to ensure that the balance weighs true, which involves applying the law of evidence and the rules of procedure so that the process is fair. Trial judges typically are well-schooled and intellectually curious about the law, and their rulings are usually correct. Many stages comprise a trial,

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75. See *Quick v. State*, 660 N.E.2d 598 (Ind. Ct. App. 1996).

76. See *Johnson v. State*, 659 N.E.2d 194, 201 (Ind. Ct. App. 1995).

77. See *Alexander v. Dowell*, 669 N.E.2d 436, 441 (Ind. Ct. App. 1996).

78. See IND. APP. R. 11(B)(1).

79. See IND. APP. R. 11(B)(6).

and, when a trial judge actually errs, errors often is more formal than substantive. That is, errors tend not to be so significant as to deny a party a fair trial. For this reason, *inter alia*, trial courts are accorded substantial deference, especially in issues relating to a judge's discretion to admit or to weigh evidence.

An appeal is thus a forum for a litigant to challenge the trial court's application of the law. The burden an appellant carries is to demonstrate that he or she was denied a fair hearing in the trial court (or administrative agency) because of an incorrect understanding or application of law. Essentially, the appellant must show one of two things: 1) that the substantive law entitled the party, not the adversary, to judgment on facts properly found;<sup>80</sup> 2) or that the truth-seeking process was infected by erroneous application of the law of evidence or procedural rules. This explanation may oversimplify the appellate process somewhat, but appeals are not a forum for challenging the court's interpretation of evidence, however.<sup>81</sup> Many attorneys forget this principle when bringing an appeal. Standards of review thus illuminate whether the trial court indeed erred and whether an error denied the appellant a fair hearing. Generally, unless one of the two propositions described here are demonstrated, an appellate court will affirm a trial court's judgment.

2. *Administrative Appeals*.—The supreme court reaffirmed the longstanding principle that appellate courts do not substitute their judgment for that of an administrative body when adjudicating challenges to administrative acts.<sup>82</sup> Rather, appellate courts review the propriety of administrative decisions in view of the legislative grant of authority; it does not reweigh evidence or question credibility. Thus, appeals can raise five issues: whether the administrative body (1) had jurisdiction to take action, (2) complied with statutory procedure, (3) based its action on substantial evidence, (4) acted in an arbitrary and capricious manner, and (5) violated constitutional, statutory, or legal principles.<sup>83</sup> Consequently, the standard of review in administrative appeals remains quite deferential.

3. *Damages Awards*.—Trial courts are accorded substantial deference in challenges to both general judgments and judgments detailed by findings of fact and conclusions of law.<sup>84</sup> An award of damages thus receives deference because

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80. For example, interpretation of a statute is a question of substantive law and thus reviewed *de novo*, that is, without deference to the trial court because facts are not at issue.

81. Challenges to the sufficiency of evidence naturally involve appellate consideration of evidence, but with substantial deference to the trial court that presided over its presentation. Likewise, challenges to "weighing" issues in criminal sentencing also involve evidentiary consideration, but with substantial deference to the trial court. The reason for deferring to the trial court is simple: an appellate court cannot effectively judge the credibility of witnesses or evidence in a paper record, but a trial court, which observes witnesses and exhibits, is better situated to make a well-founded credibility judgment.

82. See *Rynerson v. City of Franklin*, 669 N.E.2d 964, 972 (Ind. 1996).

83. See *id.* at 971.

84. See *Tri-Profl Realty, Inc. v. Hillenberg*, 669 N.E.2d 1064, 1067 (Ind. Ct. App. 1996), *trans. denied* (two-tier standard of review employed when special findings are requested: 1) whether the evidence supports the findings and 2) whether the findings support the judgment.);

it is precisely the type of issue that involves the weighing of evidence and credibility of witnesses, without regard to whether the fact-finder is a judge or jury. An appellate court therefore reviews whether an award of damages is "so outrageous as to indicate the jury was motivated by passion, prejudice, partiality, or the consideration of improper evidence."<sup>85</sup> The court may also consider the instructions given a jury when considering whether the jury acted improperly.<sup>86</sup>

Punitive damages by their very nature involve a high standard of proof in the trial court, but the standard of review on appeal for an award of punitive damages is essentially the same as in any challenge to an award of damages. The supreme court reiterated that the proper standard is whether the probative evidence and reasonable inferences therefrom, without weighing evidence or judging witness credibility, allow a reasonable factfinder to find the material facts by the requisite standard of proof.<sup>87</sup> In essence, this standard of review follows a basic sufficiency of the evidence pattern.<sup>88</sup>

### C. Summary Judgment

Review of a summary judgment contrasts with review of a case decided by fully litigated fact-finding because an appellate court stands in the shoes of a trial court when reviewing a summary judgment, and thus owes no deference to the trial court.<sup>89</sup> There are some simple reasons underlying the *de novo* standard. Witness credibility is not an issue at the summary judgment stage of litigation, and therefore an appellate court does not interfere with the trial court with respect to the determination of genuine issues of fact. All issues are essentially legal: the court identifies the material legal issues in the case and then whether the evidence the parties intend to submit raises genuine issues of fact material to deciding those issues. If there is not an issue of fact necessitating a trial, an appellate court construes and applies the law to determine which party is entitled to judgment. Accordingly, the reviewing court may find the trial court's conclusions helpful,

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Brokaw v. Roe, 669 N.E.2d 1039 (Ind. Ct. App. 1996), *trans. denied* (general judgment may be affirmed on any theory supported by evidence); Scott v. Scott, 668 N.E.2d 691, 695 (Ind. Ct. App. 1996) (trial court judgment must be affirmed unless evidence points incontrovertibly to an opposite conclusion).

85. Landis v. Landis, 664 N.E.2d 754, 757 (Ind. Ct. App. 1996), *trans. denied*.

86. *See id.*

87. Budget Car Sales v. Stott, 662 N.E.2d 638, 639 (Ind. 1996) (Punitive damages standard is "whether, considering only the probative evidence and the reasonable inferences supporting it, without weighing evidence or assessing witness credibility, a reasonable trier of fact could find by clear and convincing evidence that the defendant acted with malice, fraud, gross negligence or oppressiveness which was not the mistake of law or fact, honest error of judgment, overzealousness, mere negligence, or other human failing.").

88. *See, e.g.,* Humbert v. Smith, 655 N.E.2d 602, 605 (Ind. Ct. App. 1995), *aff'd*, 664 N.E.2d 356 (Ind. 1996).

89. *See* Strodman v. Integrity Builders, Inc., 668 N.E.2d 279, 281 (Ind. Ct. App. 1996), *trans. denied*; Spears v. Blackwell, 666 N.E.2d 974, 976 (Ind. Ct. App. 1996), *trans. denied*.



but it owes no deference to the trial court.<sup>90</sup>

#### *D. Costs and Sanctions*

Although the 1997 amendment to Appellate Rule 15 alters the landscape and will likely breed its own body of caselaw, recent cases have embodied important principles underlying an appellate court's decision whether to shift fees, to award costs, or to sanction an appellate lawyer.

Bank fees assessed for an appeal bond to secure a stay of proceedings to execute a judgment pending appeal of the underlying claim are not compensable to the prevailing party.<sup>91</sup> The basic reason is that the taxing of costs is not a matter of common law, but of statute, and there is not a statute authorizing an appeal, or supersedeas, bond as a "cost" of litigation. Indiana formerly had such a statute, but it was repealed in 1984.<sup>92</sup> Moreover, the Appellate Rules establish that an appeal bond shall not be a condition precedent "to perfect an appeal."<sup>93</sup> Thus, when the appellant's choice of staying proceedings and its choice of security are matters of convenience, a trial court has no discretion to tax such fees as costs.

Generally, appellate sanctions are permissive, so appellate courts require a showing of bad faith before awarding sanctions on appeal.<sup>94</sup> As our constitution recognizes an absolute right to one appeal, the court of appeals uses "extreme restraint" when deciding to award appellate sanctions.<sup>95</sup> Bad faith may be shown by the lawyer's disregard of the appellate rules and omission or misstatement of facts,<sup>96</sup> that is, arguments must be devoid of plausibility and should indicate intentions to harass the appellee or to delay the litigation.<sup>97</sup>

#### *E. Conclusion*

If a single theme can be discerned from the cases discussing appellate procedure in 1996, it may be one of clarification and retrenchment. The court of appeals showed a willingness to give the rules a flexible application in order to reach the merits in *Sneed v. Associated Group Insurance*,<sup>98</sup> but it did so by relying on the supreme court's inflexible constitutional authority to promulgate rules of procedure. In this way, the court provided a guide to litigants faced with statutory rules which conflict with court rules, and contour was added to the landscape of justiciable orders with respect to motions for summary judgment and mistrial. The

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90. See *Strodtman*, 668 N.E.2d at 282.

91. See *AgMax, Inc. v. Countrymark Co-op., Inc.*, 661 N.E.2d 1259, 1262 (Ind. Ct. App. 1996).

92. See *id.*

93. IND. APP. R. 6(B).

94. See *Yin v. Society Nat'l Bank Ind.*, 665 N.E.2d 58, 66 (Ind. Ct. App. 1996), *trans. denied*; *Periquet-Febres v. Febres*, 659 N.E.2d 602, 607 (Ind. Ct. App. 1996), *trans. denied*.

95. *Yin*, 665 N.E.2d at 65.

96. See *Periquet-Febres*, 659 N.E.2d at 608.

97. See *id.*

98. 663 N.E.2d 789 (Ind. Ct. App. 1996).

supreme court acted in ways that reinforce the plenary scope of its transfer jurisdiction, but which indicate its unwillingness to address issues that are not "live."

In procedural matters, the court of appeals demonstrated restraint on several occasions by its willingness to be tough in response to poor appellate practice, even though it ordinarily seeks to resolve appeals on the merits. In particular, the prima facie error rule stood out as a tool for the expeditious resolution of unbriefed or poorly briefed appeals. With respect to standards of review, traditional deference to trial courts and administrative agencies in matters of discretion and fact-finding remains the watchword of appellate review. Finally, in view of the state constitutional right to an appeal, the court of appeals displayed restraint in application of its power at common law or by rule to shift costs or issue sanctions.

### III. REACHING OUT: CAMERAS AND COMMENTARY

#### A. *Reducing the Total Elapsed Time of Appeals Involving Children's Interests*

In January 1996, Chief Justice Shepard announced a plan to bring cases involving the interests of children "to the front of the line."<sup>99</sup> One year later, he proclaimed that Indiana's appellate courts, principally the Indiana Court of Appeals, have cut the total elapsed time between final judgment in a trial court to final decision in an appeal by five months.<sup>100</sup> When one considers that the average time after briefing is completed that the court of appeals issues its decisions is 2.6 months, this remarkable reduction in time mainly results from shrewd, strict case management. Essentially, the reduction in time comes from the period that attorneys spend putting together the record of proceedings and drafting motions and briefs. By requiring attorneys to move children's cases to the "top of the stack" in their own practices, Indiana's courts have made a dramatic improvement in settling the most important affairs in people's lives.

#### B. *Heralding Change at the Court of Appeals*

Chief Judge Sharpnack and Judge Kirsch collaborated on an article in *Res Gestae* in which they outlined the court of appeals findings from an eighteen month study.<sup>101</sup> They explained that the proposed ABA Standards on Appellate Practice were the motivating factor behind the study, which revealed that our court of appeals ranks among the nation's very best in many ways.<sup>102</sup> The authors noted that the appellate rules allow attorneys more than three times the amount of time proposed in the ABA standards to file and brief an appeal and that the time it takes an appellant to prepare a record of proceedings usually exceeds the time it takes

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99. Shepard, *supra* note 21, at 34-35.

100. Randall T. Shepard, State of the Judiciary: Trying Something New, Address to the General Assembly (Jan. 30, 1997), in *RES GESTAE*, Mar. 1997, at 12, 12.

101. John T. Sharpnack & James S. Kirsch, *Advancing the Interests of Children n in Appellate Practice*, *RES GESTAE*, Mar. 1996, at 11.

102. *Id.*

for the court to render an opinion.<sup>103</sup> Finally, the court learned that it granted extensions over and above the generous allotment of time afforded by the appellate rules in about half of all cases.<sup>104</sup>

Between the appellate study and the experiment with cases involving children's interests, the court of appeals corroborated much of what it believed. That is, deadlines work. The greatest impact on the reduction of time it takes from judgment in the trial court to final resolution of an appeal is made by managing the time appellate attorneys take to prepare their clients' appeals. Expect the court to begin experiments in 1997 with differentiated case management, appellate ADR, and strict limitation of motions to enlarge time or page limits in addition to the electronic transcript filing permitted by Appellate Rule 7.1.<sup>105</sup>

### C. Justice Sullivan Explains Transfer

Justice Sullivan authored a "must read" article<sup>106</sup> for any attorney considering whether to petition the Indiana Supreme Court to grant transfer of an appeal. Justice Sullivan pulls back the veil of mystery enshrouding much of the supreme court's work by explaining the timeline of case disposition from the moment it is fully briefed and filed with the clerk.<sup>107</sup> He provides an example of effective petition drafting for appellate practitioners to model.<sup>108</sup> Additionally, Justice Sullivan emphatically reminds the reader that the court occasionally reverses on an issue that the petitioner did not raise in her petition for transfer.<sup>109</sup> All issues are squarely before the supreme court on transfer because the court of appeals decision is vacated at the moment that transfer is granted.<sup>110</sup> Justice Sullivan underscores this fact of appellate procedure by announcing that beginning in 1996, the supreme court began publishing notice of its orders granting or denying transfer in West's North Eastern Reporter.<sup>111</sup> Publication of these orders is a service to the litigants in individual cases more than anything else, but it also serves to notify the federal courts and the appellate bar whether a recent court of appeals decision has been vacated or is still a good law. Thus, attorneys are reminded to double-check their research when citing new court of appeals decisions as controlling authority.<sup>112</sup>

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103. *Id.*

104. *Id.*

105. IND. APP. R. 7.1.

106. Frank Sullivan, Jr., *Petitions to Transfer: New Rules, New Procedures*, RES GESTAE, Feb. 1996, at 8.

107. *Id.* at 10.

108. *Id.* at 9.

109. *Id.* at 10 n.9.

110. *See* Chandler v. Board of Zoning Appeals, 658 N.E.2d 80 n.1 (Ind. 1995).

111. Sullivan, *supra* note 106, at 10.

112. It is always a bit bold to cite a new court of appeals decision within 120 days of it being handed down because the window for petitioning for transfer does not close for 60 days. If a petition is filed, then the time it takes for the Indiana Supreme Court Administrator's office to

#### *D. The Appellate Courts Hit the Road*

The year 1996 was an unprecedented one for the Indiana's appellate courts as the supreme court and courts of appeals made their proceedings available to more Hoosiers than at any time in recent memory. The supreme court held oral argument in Evansville, West Lafayette, Fort Wayne, South Bend, and Crown Point in addition to its regular schedule of hearings in its Indianapolis courtroom, and the court of appeals heard arguments at eleven locations in 1996. The courts attempted to match the arguments geographically to the cities they visit, but such harmonious planning is not always possible. Local bar associations have graciously welcomed the courts by hosting receptions where the judges can exchange ideas with practicing attorneys, trial judges, and students in relaxed settings.

#### *E. Cameras in the Supreme Court*

Indiana became the forty-eighth state to allow the news media to use television cameras or other electronic recording equipment to record proceedings in some of its courts. Indiana's experiment with cameras was initiated with oral arguments in the supreme court. The supreme court chose to experiment on itself in order to gain a firsthand understanding of the "look and feel" of having the new activity in the courtroom and the rapport that would develop between court and media prior to announcing a rule for all the trial courts.

Thus far, the experiment with cameras has proven successful. Reporters have taken advantage of the opportunity to record the proceedings in about half of the arguments in which cameras have been permitted, and the court has functioned with little or no distraction. Media interest was very high initially due to the novelty, but interest has since moderated according to the news value of the case. The rules have been crafted in such a way that they encourage reporters to work out the details of optimizing pooled coverage. Generally, pool operation is determined on a first-come-first-served basis, with requests due at least twenty-four hours prior to the argument, but in one case the local news crews agreed ahead of time which organization would be "the pool."

Not everyone has been happy with the experiment, however. Locally infamous murder cases were argued in two cities, Evansville and South Bend, which led to the court being criticized by the victims' families for sensationalizing the murders.

Overall, the experiment with cameras has yielded a very cooperative relationship between the court and news organizations. Having built a solid

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prepare the case for conference and for the court to confer and vote could take up to another 60 days. Even then, the court may decide to order oral argument for the purpose of deciding whether to grant transfer, which could delay the transfer decision up to another 60 days. Thus, neither checking the advance sheets nor Shepardizing cases will be enough research in some cases; rather, a call to the Clerk's office to determine the pendency of a petition for transfer might be required to accurately determine if a recent court of appeals decision may be relied on as binding authority.

foundation with cooperative effort, extension of the experiment should be expected in 1997 and 1998.

#### IV. CREATION OF APPELLATE PRACTICE SECTION IN INDIANA STATE BAR ASSOCIATION

##### *A. History and Mission*

The Indiana State Bar Association had for some time devoted a measure of its energy to scrutiny of appellate practice in Indiana. To this end an Appellate Issues Study Committee was formed in 1995. The committee was chaired by George T. Patton, Jr., of Indianapolis' Bose, McKinney, & Evans and a former contributor to the *Indiana Law Review* in this space. With the firm backing of many judges from our court of appeals, Patton undertook an aggressive plan of action.

The committee met in Indianapolis in March 1996 and again during the Bench and Bar conference in April. The committee discussed "redesigning" itself in a way that it could become either a permanent committee of the Litigation Section or section of its own. Subcommittees were organized and reorganized to meet the breadth of the section's needs.

These early efforts were the catalyst for the study committee achieving full recognition as a section of the Indiana State Bar Association in 1996 at its October 3 convention in French Lick. Patton outlined the Section's mission as one of fostering dialogue between bench and bar to continually improve the law and assist both the regular and occasional appellate practitioner through the production of texts and manuals and continuing legal education.

##### *B. Getting Down to Business*

A slate of officers was approved by acclamation.<sup>113</sup> A Section Council would also be established to mirror the geographic districts of the court of appeals. To date, approximately 170 attorneys have joined the Appellate Practice Section.

Karl Mulvaney, former Indiana Supreme Court Administrator and now a partner at Bingham, Summers, Welsh & Spilman, chairs the Appellate Rules and Initiatives Subcommittee. He presented the results of a survey he conducted of his subcommittee's members. The survey's questions probed complex issues, and discussion of the issues raised was lively. Opinions were mixed on the topics of appellate alternative dispute resolution and the importance of oral argument. General consensus was reached that the Section should be pro-actively involved in rulemaking, that page limitations for transfer petitions are good, that the Section may want to work with the Indiana Judges Association to help resolve the

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113. The Appellate Practice Section officers are:

Chair: George T. Patton, Jr.;  
Chair-Elect: Hon. Edward W. Najam, Jr.;  
Vice-Chair: Nana M. Quay-Smith;  
Secretary: Douglas E. Cressler;  
Treasurer: James A. Joven.

problems causing delays in record preparation, and that a docketing statement that replaces the notice of appearance could be a very useful tool for case management. The last of these, a docketing statement, may provide the Section with its first substantive contribution to Indiana's Appellate Practice in 1997.

A Publications Committee was established. Nana M. Quay-Smith, also of Bingham, Summers, Welsh & Spilman, chairs the committee, which plans to publish a quarterly newsletter beginning in 1997. The newsletter will likely include rule amendments, case annotations, a letter from the Chair, CLE schedule, and other events of interest to the appellate practitioner.<sup>114</sup>

### *C. A Proposed Docketing Statement and the Advent of Appellate Case Management*

Following the discussion at the Appellate Practice Section's October meeting in French Lick, the Appellate Rules and Initiatives Committee has undertaken the project of drafting a new docketing statement that would amend Appellate Rule 2.

The intention driving the creation of a docketing statement is to streamline the appellate process by providing the court of appeals with more information so that it may better manage cases. A docketing statement would enable the court to make better reasoned decisions concerning enlargements of time and it may enable the court to divert some appeals to alternative dispute resolution or to hold pre-appeal conferences in appropriate cases. By tracking cases, the court also may learn when it can effectively consolidate appeals raising identical legal issues.

Substantial issues still must be resolved before a docketing statement can be instituted. For example, should filing the docketing statement be jurisdictional or simply a notice? What information should the appellee be expected to file in response to a docketing statement? What should a docketing statement be titled? These issues are scheduled for resolution in 1997, and are providing the Appellate Practice Section with substantial, meaningful work from the start.

Judge Kirsch spearheads the project and has drafted proposed language.<sup>115</sup>

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114. The first newsletter was published in early 1997. Copies may be obtained from the Indiana State Bar Association.

115. The proposed text of the amendment to Appellate Rule 2, as of June 1997, is as follows:

(A) [No change from present rule]

(B) [No change from present rule]

(C) Notice of Appeal. Any party seeking an appeal or review by the Court of Appeals shall file a notice of appeal with the Clerk of the Supreme Court, Court of Appeals and Tax Court.

(1) The notice of appeal shall be filed within fourteen days of the filing of the praecipe and shall set forth the following information, as applicable:

Party information

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

(b) Name, address, attorney number, FAX number, and computer address, if any,

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- of the attorneys representing the parties initiating the appeal or review,
- (c) The name of the appellate or reviewing court with jurisdiction over the case; and
  - (d) Whether the attorney is requesting service of orders and opinions by FAX pursuant to Appellate Rule 12(F).

**Trial information**

- (a) Title of case;
- (b) Trial court or other tribunal;
- (c) Case number;
- (d) Name of trial judge;
- (e) Date case initially commenced;
- (f) Date of judgment or order;
- (g) Whether trial was by judge or jury;
- (h) Synopsis of judgment and sentence, if applicable; and
- (i) Case type using classification in Administrative Rule 8(B)(3).

**Record information**

- (a) Date praecipe was filed;
- (b) Date record is due to be filed; and
- (c) The following transcript information:
  - 1) Name, address and telephone number of court reporter responsible for preparing transcript.
  - 2) Date ordered (or reason it has not been ordered);
  - 3) Payment arrangements;
  - 4) Estimated length of transcript;
  - 5) Estimated time required for preparation; and
  - 6) Estimated completion date.

**Appeal information**

- (a) A short and plain statement of the anticipated issues on appeal; provided, however, that the statement of anticipated issues shall not prevent the raising of any issue on appeal;
- (b) Prior appeals in same case;
- (c) Related appeals (prior, pending or potential) known to the party;
- (d) Indication whether a request for oral argument is anticipated;
- (e) Pre-appeal conference request; if desired, include purpose of proposed conference;
- (f) Criminal cases—status of defendant (i.e., on bond, incarcerated and, if so, where);
- (g) Civil cases—whether Alternative Dispute Resolution has been used and whether it should be used on appeal; and
- (h) Certification that case does or does not involve issues relating to custody, support, visitation or parental relationship of a child.

**Attachments.** The following documents shall be attached to the appearance:

- (a) In civil cases, a copy of the judgment or order appealed from, to include findings of fact and conclusions, where made;
- (b) In criminal cases, a copy of the judgment or order appealed from, to include

Judge Kirsch's proposal has been presented to the Court Committee of the Court of Appeals, which is working jointly with the Appellate Practice Section's Rules and Initiatives Committee on the project. Comments and suggestions should be directed to Judge Kirsch or Karl Mulvaney.

## V. PERSONNEL CHANGES AT THE SUPREME COURT

### A. *Departure of Roger O. DeBruler*

Roger O. DeBruler retired on August 7, 1996, before a packed supreme courtroom. Justice DeBruler was Indiana's last justice elected on a partisan ticket (Democrat) and second only to Isaac Blackford as the high court's longest serving justice. To emphasize the enormity of Justice DeBruler's career on the court, a ninety page list of his 886 majority, 590 dissenting, and 273 concurring opinions lined the walls of the courtroom at his retirement ceremony. Much has already been written about the profound work of Justice DeBruler in service to Indiana,<sup>116</sup> and therefore this author will not attempt to reduce that commentary to a sentence or two. Rather, as important as it is to remember Justice DeBruler as a stalwart of fairness, it is just as important to think of Roger DeBruler as a wonderful person who "was also a judge." He embodies the qualities of kindness, compassion, humility, and integrity, and all who have known the judge will hold these memories closest when remembering Justice DeBruler.

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any sentencing order;

- (c) A copy of any motion to correct errors filed in the trial court; and
- (d) A copy of the praecipe.

#### 2. Sanctions

- (a) If any party responsible for filing a notice of appeal fails to file the notice as provided herein, such party or party's attorney shall pay to the Clerk of the Supreme Court and Court of Appeals a sanction of One Hundred Dollars (\$100.00) if the notice is filed within twenty-eight days of the filing of the praecipe and Two Hundred Fifty Dollars (\$250.00) if filed thereafter.
- (b) The Clerk of the Supreme Court and Court of Appeals shall not accept for filing any Record of the Proceedings.

(D) [Present 2(C)]

Note: Language must be drafted for App. R. 2.1 stating that the filing of a Notice of Appeal satisfies the appearance requirement. It may be advisable to cross-reference this in the amendments to 2(C).

IND. APP. R. 2(C) (proposed draft May 19, 1997) (Appellate Practice Section, Rules and Initiatives Comm., Indiana State Bar Ass'n & Indiana Court of Appeals Case Management Comm.)

116. Chief Justice Randall T. Shepard, *On the Retirement of Justice Roger O. DeBruler*, 30 IND. L. REV. 7 (1997); Justice Frank Sullivan, Jr., *A Tribute to Justice Roger O. DeBruler*, 30 IND. L. REV. 11 (1997); Kenneth M. Stroud, *Justice DeBruler and the Dissenting Opinion*, 30 IND. L. REV. 15 (1997).



*B. Appointment of Theodore R. Boehm to Indiana Supreme Court*

Theodore R., “Ted,” Boehm took the oath as Indiana’s 104th supreme court justice on the day of Roger DeBruler’s retirement. Justice Boehm comes to the Indiana Supreme Court from the Indianapolis law firm of Baker & Daniels, where he had served for several years as managing partner before leaving for corporate work at General Electric and Eli Lilly and, finally, a return to the firm. A graduate of Harvard Law School, Justice Boehm began his career as a law clerk to Chief Justice of the United States, Earl Warren during the October 1964 Term, when the Court issued its famous opinions in *Escobedo v. Illinois*<sup>117</sup> and *Malloy v. Hogan*,<sup>118</sup> and civil rights<sup>119</sup> cases were filling the docket. Emblematic of the idealism at the core of that experience, Justice Boehm made a stirring speech, in which he illuminated a positive judicial vision upon taking the bench.

As we approach the 21st Century, our courts remain as they were intended by the founders of our union in the 18th Century and of our state in the 19th—the ultimate bulwark of individual rights against abuse of power, and the safety valve for peaceful resolution of disputes, even those arising from earnestly held clashes of fundamental beliefs, values and interests.

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The genius of our system is that we have devised processes to resolve these differences short of bloodshed, revolution or anarchy. This works only because the vast majority of Americans realize that the preservation of this system of government is far more important than the resolution of any given issue.

With all our false steps, injustices, even a civil war along the way, we have achieved over two centuries of more or less continuous progress towards the goals of life, liberty and the pursuit of happiness for all citizens that were framed so long ago.

The stability in form of government that permits this at bottom turns on widespread respect for the process, including the rule of law, and widespread acceptance of the results that we do not like as well as those we do. The ultimate resolution of issues at the polls, in the courts, or if necessary by constitutional amendment has worked well for us.<sup>120</sup>

Reflective of that dedication to justice, Justice Boehm has already begun to

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117. 368 U.S. 478 (1964) (Sixth Amendment violated by custodial interrogation of suspect when suspect is not warned of right to remain silent and suspect’s request for lawyer is denied; remedy is suppression of incriminating statements).

118. 378 U.S. 1 (1964) (Due Process Clause of Fourteenth Amendment incorporates Fifth Amendment prohibition of compulsory self-incrimination against states).

119. See, e.g., *Bell v. Maryland*, 378 U.S. 226 (1964) (racial segregation in places of public accommodation; trespassing convictions of African-American protesters vacated).

120. Theodore R. Boehm, Remarks upon Swearing in as Justice of Supreme Court of Indiana (Aug. 7, 1997).

make important contributions to the jurisprudence of our supreme court in his first five months on the bench. His opinion in *Van Cleave v. State*<sup>121</sup> is one of the most important criminal law decisions the court has handed down in years. In a question of first impression, *Van Cleave* examines the *Strickland*<sup>122</sup> standard for constitutionally effective counsel in the context of guilty pleas. *Van Cleave*'s analysis exhibits an intellectual rigor in its survey of the law, and its sound reasoning may be extended in other criminal cases. In short, Justice Boehm's early jurisprudence adds to the strength of our supreme court and promises Hoosiers continued, well-reasoned development of the law for many years to come.

### CONCLUSION

The year 1996 was a productive one for Indiana's appellate courts. Many small steps were taken in rulemaking and adjudication to set the stage for significant reforms aimed at streamlining the appellate process in coming years. Overall, the most important development in appellate practice in 1996 was the creation by the Indiana State Bar Association of the Appellate Practice Section. The Section will chart the course of change in the way appeals are prosecuted in Indiana, and every attorney who considers appellate work an important component of his or her practice must pay heed to its work. Better yet, appellate lawyers are encouraged to join the Section and lend a hand for the betterment of appellate practice.

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121. 674 N.E.2d 1293 (Ind. 1996).

122. *Strickland v. Washington*, 466 U.S. 668 (1984).