

# RECENT DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: NEW APPELLATE RULES, A CONSTITUTIONAL AMENDMENT, AND A PROPOSAL

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The big story in 1999 for appellate practitioners is the new Indiana Rules of Appellate Procedure ("Rules") that become effective on January 1, 2001. Also on the horizon is the November 7, 2000 vote on the proposed amendment to the Indiana Constitution changing the jurisdiction of the Indiana Supreme Court. Perhaps related to the constitutional amendment, Chief Justice Randall T. Shepard has publicly supported expanding the membership of the Indiana Supreme Court from the current contingent of five justices. These potential changes raise a question about whether the Indiana Supreme Court should continue to require that a majority of justices (currently three of five) vote to grant transfer before deciding to hear a case. This process contrasts with the practice in the U.S. Supreme Court where a minority of four Justices can require the nine Justice Court to hear a case on the merits.

In light of the practical impact of the new Rules on all appellate practitioners, this Article will begin by discussing the Rules with an organization that parallels the structure of the new Rules. Although this Article is not meant to be the definitive historical review of the new Rules with comparisons and case citation to the old rules,<sup>1</sup> it discusses or at least briefly mentions all of the new Rules. This Article will discuss the proposed amendment to the Indiana Constitution, which would change the jurisdiction of the Indiana Supreme Court, to be voted on November 7, 2000, and Chief Justice Shepard's call to expand the Indiana Supreme Court. Finally, this Article will argue that the Indiana Supreme Court should change its practice regarding the number of votes needed to grant transfer, so that one vote less than a majority—like in the U.S. Supreme Court—would result in review on the merits by the state's court of last resort. A published opinion on the legal issue that has generated some interest will then be published, albeit a minority view.

## I. THE NEW RULES

The Indiana State Bar Association's Appellate Practice Section proposed the

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1. For readers interested in such a study, see GEORGE T. PATTON, JR., 4A INDIANA PRACTICE: APPELLATE PROCEDURE (West Publishing Co., forthcoming Fall 2000).

new Rules to achieve a number of benefits such as: (1) reducing the expense of appeals; (2) shortening the time for processing an appeal; (3) decreasing the amount of paper lawyers produce and judges review; (4) improving access to the record for lawyers outside of Indianapolis; (5) codifying many of the unwritten practices that only some practitioners know; (6) developing rules in some areas where none now exist; (7) unifying deadlines for the benefit of the occasional appellate practitioners; (8) removing archaic language when possible; (9) making the rules easier to read and locate by separating the current rules into shorter rules with a comprehensive table of contents, a cross-reference table, definitions, and forms; and (10) saving time for all involved, including trial court clerks, court reporters, lawyers, and judges.<sup>2</sup> These goals drove the project to completion. Success in achieving these benefits, however, will depend upon lawyers across the state becoming familiar with the new Rules.

A summary of the Rules can be broken down into twelve general titles that track the organization of the new Rules: (1) scope, definitions, and forms; (2) jurisdiction; (3) initiation of appeal; (4) general provisions; (5) record on appeal; (6) motions; (7) briefs; (8) appendices; (9) oral argument; (10) petitions for rehearing; (11) supreme court proceedings; and (12) court procedures, powers, and decisions.

#### *A. Title I: Scope, Definitions, and Forms*

1. *Rule 1: Scope.*—The “Scope” of the new Rules is similar to the old rules, but contains an additional sentence that was not in the prior version: “The Court may, upon the motion of a party or the Court’s own motion, permit deviation from these Rules.”<sup>3</sup> The Indiana Supreme Court previously had the inherent authority to permit deviation from the Rules, but the prior version did not expressly provide this power. This is an example of taking an unwritten practice and codifying it into a rule so that all lawyers are aware of the court practice.

2. *Rule 2: Definitions.*—The new Rules contain “Definitions,”<sup>4</sup> which have no counterpart in the prior rules. The Definitions are intended to clarify terms used in the Rules that might be unfamiliar to the occasional appellate practitioner such as “Appellant’s Case Summary,”<sup>5</sup> “Appendix,”<sup>6</sup> “Clerk’s Record,”<sup>7</sup> “Criminal Appeals,”<sup>8</sup> and “Final Judgments,”<sup>9</sup> among others. The Definitions are also a source for identifying certain changes in the Rules. For example, “Notice of Appeal” is defined as the document that “initiates the appeal under Rule 9 and

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2. See generally George T. Patton, Jr., *Appellate Rules Proposal Before Rules Committee*, RES GESTAE, April 1999, at 10.

3. INDIANA APPELLATE Rule 1 (effective Jan. 1, 2001).

4. *Id.* at R. 2.

5. *Id.* at R. 2(B).

6. *Id.* at R. 2(C).

7. *Id.* at R. 2(E).

8. *Id.* at R. 2(G).

9. *Id.* at R. 2(H).

replaces the praecipe for appeal.”<sup>10</sup> “Petition” shall be used for rehearing, transfer, or review of a tax court decision, but “[a] request for any other relief shall be denominated a ‘motion.’”<sup>11</sup>

3. *Rule 3: Use of Forms.*—The new Rules encourage counsel, parties, court reporters, and trial court clerks to use the forms published in an Appendix to the Rules.<sup>12</sup> The forms were included to ease the transition to the new Rules for pro se litigants, trial court clerks, court reporters, and young lawyers, especially in relation to documents that are necessary in most, if not all, appeals.<sup>13</sup> Some examples include notice of appeal, notice of completion of clerk’s portion of record, transcript covers, notice of completion of transcript, appellant’s case summary, brief covers, appendix covers, and affidavit to proceed *in forma pauperis*.<sup>14</sup>

## II. TITLE II: JURISDICTION

In order to get the appeal in the correct Indiana appellate court it is first necessary to determine which of the appellate courts has jurisdiction over the appeal. For this reason, the jurisdictional rules were moved forward in the organizational structure of the Rules. Substantively, the jurisdictional rules have not been revised.

1. *Rule 4: Supreme Court Jurisdiction.*—The Indiana Supreme Court’s jurisdiction is broken down into “Appellate Jurisdiction”<sup>15</sup> and “Other Jurisdiction.”<sup>16</sup> As under the prior rules and the current version of the Indiana Constitution prior to the proposed amendment to be voted on November 7, 2000, the Indiana Supreme Court has mandatory and exclusive appellate jurisdiction over “Criminal Appeals” (defined earlier in the new Rules at Appellate Rule 2(G)) in which a sentence of death, life imprisonment, or a minimum term of greater than fifty years for a single offense is imposed.<sup>17</sup> A new additional sentence provides that the Indiana Supreme Court’s jurisdiction in cases denying post-conviction relief is limited to cases in which the sentence was death.<sup>18</sup> This codifies the long-standing practice in the Indiana Supreme Court that experienced criminal appellate practitioners knew but which needed to be made part of the Rules for the benefit of the occasional criminal appellate practitioner.

The rest of Indiana Supreme Court’s mandatory appellate jurisdiction

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10. *Id.* at R. 2(I).

11. *Id.* at R. 2(J).

12. *See id.* at R. 3.

13. *See, e.g.,* Patton, *supra* note 2, at 12 (“If any extension of time is needed to prepare the transcript, the court reporter files a forum motion in the appellate court.”).

14. *See id.* at app.

15. *Id.* at R. 4(A).

16. *Id.* at R. 4(B).

17. *Id.* at R. (A)(1)(a). This rule may be amended if the state constitutional amendment scheduled to be voted on November 7, 2000 is passed. *See infra* Part II.

18. *See* IND. APP. R. (A)(1)(a).

remains the same with some minor clarifications consistent with custom and practice. For example, appeals of "Final Judgments" (defined earlier in the new Rules at Appellate Rule 2(H)) "declaring a state or federal statute unconstitutional in whole or in part" go directly to the Indiana Supreme Court.<sup>19</sup> The prior version of this portion of the rule did not refer to Final Judgments, thus the new Rules clarify that a preliminary injunction tentatively enjoining a state or federal statute on the likelihood of unconstitutionality will not go directly to the Indiana Supreme Court as a mandatory matter (although it still might end up before the Indiana Supreme Court through discretionary avenues). A preliminary injunction is not a final ruling in any event, and the trial court might not declare the statute unconstitutional in its final judgment.

The other mandatory cases for the Indiana Supreme Court have been relocated to this jurisdictional section from other parts of the Rules with cross-references from the Indiana Trial Rules. The Indiana Supreme Court still has mandatory appellate jurisdiction over appeals involving the waiver of parental consent to abortion.<sup>20</sup> The court also still has mandatory jurisdiction of appeals involving the mandate of funds.<sup>21</sup>

The Indiana Supreme Court continues to have discretionary jurisdiction over cases from the Indiana Court of Appeals when it grants transfer and from the Indiana Tax Court when it grants review.<sup>22</sup> While this is a not a change, the placement of a subsection on the Indiana Supreme Court's discretionary jurisdiction in the front of the Rules provides clarity to practitioners.

The Indiana Supreme Court's "Other Jurisdiction" consists of its supervisory role over the bench and bar, which remains the same but reorganized.<sup>23</sup> The court has exclusive jurisdiction over the practice of law including "(a) [a]dmission to practice law; (b) [t]he discipline and disbarment of attorneys admitted to the practice of law"; and matters relating to the "unauthorized practice of law."<sup>24</sup> Additionally, the court has exclusive jurisdiction to supervise judges, including the "discipline, removal and retirement of justices and judges" in the state,<sup>25</sup> and it has exclusive jurisdiction to supervise the lower courts by issuing writs of mandate, prohibition, and any other writ "in aid of its jurisdiction."<sup>26</sup>

2. *Rule 5: Court of Appeals Jurisdiction.*—The jurisdiction of the Indiana Court of Appeals is set forth in a separate rule, although the substance is the same as before.<sup>27</sup> Except if the appeal is within the jurisdiction of the Indiana Supreme Court, the Indiana Court of Appeals has jurisdiction of all appeals of

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19. *Id.* at R. 4(A)(1)(b).

20. *See id.* at R. 4(A)(1)(c).

21. *See id.* at R. 4(A)(1)(d).

22. *See id.* at R. 4(A)(2).

23. *Id.* at R. 4(B).

24. *Id.* at R. 4(B)(1).

25. *Id.* at R. 4(B)(2).

26. *Id.* at R. 4(B)(3), (4).

27. *See id.* at R. 5.

“Final Judgments” (defined earlier in Rule 2(H)) notwithstanding any law or statute providing for appeal directly to the Indiana Supreme Court.<sup>28</sup> The Indiana Court of Appeals has jurisdiction over interlocutory orders as before, on the same grounds.<sup>29</sup>

The Indiana Court of Appeals also has jurisdiction over appeals from agency decisions, including “jurisdiction to entertain actions in aid of its jurisdiction and to review final orders, rulings, decisions, and certified questions of an Administrative Agency” (as defined earlier in Rule 2(a)).<sup>30</sup> No assignment of error shall be filed in the court of appeals “notwithstanding any law, statute or rule to the contrary” because “[a]ll issues and grounds for appeal appropriately preserved before [the] Administrative Agency may be” raised first in the appellate brief.<sup>31</sup>

3. *Rule 6: Appeal or Original Action in Wrong Court; Rule 7: Review of Sentences; Rule 8: Acquisition of Jurisdiction.*—The new “Jurisdiction” section contains rules on “Appeal or Original Action in Wrong Court”<sup>32</sup> and “Review of Sentences”<sup>33</sup> that have been relocated for a better organizational flow. A separate rule entitled “Acquisition of Jurisdiction” states that “[t]he Court on Appeal acquires jurisdiction on the date the trial court clerk issues its Notice of Completion of Clerk’s Record.”<sup>34</sup> The “Notice of Completion of Clerk’s Record” is a new concept in the Rules that is part of the initiation of the appeal.<sup>35</sup>

### C. Title III: Initiation of Appeal

1. *Rule 9: Initiation of the Appeal.*—As in the prior rules, appeals from Final Judgments must be initiated within thirty days, unless a party files a timely motion to correct.<sup>36</sup> As foreshadowed in the Definitions, the document initiating the appeal is no longer the “Praecipe for Record of Proceedings,”<sup>37</sup> which has been expressly abolished,<sup>38</sup> but rather a “Notice of Appeal.”<sup>39</sup> Use of the descriptive phrase “Notice of Appeal” rather than “Praecipe for Record of Proceeding” was implemented to remove archaic language with which an occasional appellate practitioner might not be familiar.<sup>40</sup> Like the old praecipe,

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28. *Id.* at R. 5(A).

29. *See id.* at R. 5(B).

30. *Id.* at R. 5(C)(1).

31. *Id.* at R. 5(B)(2).

32. *Id.* at R. 6.

33. *Id.* at R. 7.

34. *Id.* at R. 8.

35. *Id.*

36. *See id.* at R. 9(A)(1).

37. IND. APP. R. 2(A) (West Sup. 1999).

38. *See* IND. APP. R. 9(A)(4) (effective Jan. 1, 2001).

39. *Id.* at R. 9(A)(1).

40. Patton, *supra* note 2, at 10 (“removing archaic language when possible”).

the notice "shall be served on all parties of record in the trial court."<sup>41</sup> Also, the notice shall be "served upon the Attorney General in all Criminal Appeals and in any appeals from a final judgment declaring a state statute unconstitutional in whole or in part."<sup>42</sup> A form for "Notice of Appeal" is provided,<sup>43</sup> and a separate provision provides for initiation of interlocutory appeals.<sup>44</sup>

Administrative appeals will now be initiated "by filing a Notice of Appeal with the Administrative Agency within thirty (30) days after the date of the order, ruling or decision, notwithstanding any statute to the contrary."<sup>45</sup> This is an important change for those practitioners who take administrative appeals as the myriad of statutory appellate schemes that vary from agency to agency that have now been unified in the Rules for the benefit of the occasional appellate practitioner. With all appeals—from final judgments, interlocutory orders, and administrative decisions—unless the Notice of Appeal is timely filed, the right to appeal is forfeited except as provided in Indiana Post-Conviction Rule 2.<sup>46</sup>

As in the current rules, when a trial court imposes a death sentence, it shall "order the court reporter and trial court clerk to begin immediate preparation of the Record on Appeal on the same day."<sup>47</sup> The Rules, like the prior version, have a provision for joint appeals.<sup>48</sup> A new rule on the initiation of cross-appeals provides, "[a]n appellee may cross-appeal without filing a Notice of Appeal by raising cross-appeal issues in the appellee's brief. A party must file a Notice of Appeal to preserve its right to appeal if no other party appeals."<sup>49</sup> The timing of the payment of the appellate filing fee has been changed from being paid simultaneously with the filing of the Record of Proceedings to being due to the Clerk of the Indiana Supreme Court, Indiana Court of Appeals and Indiana Tax Court (defined as the "Clerk" in the Rules, as distinct from the trial court clerk) when the Notice of Appeal is filed in the trial court.<sup>50</sup> "The filing fee shall be accompanied by a copy of the Notice of Appeal" and "[t]he Clerk shall not file any motion or other document in the proceeding until the filing fee has been paid."<sup>51</sup>

The contents of the Notice of Appeal shall: (1) designate the appealed judgment or order and whether it is a final judgment or interlocutory order; (2) denominate the appellate court to which the appeal is taken; (3) direct the trial court clerk to assemble the pleadings and other papers, defined as the Clerk's Record; and (4) request all portions of the transcript necessary to present fairly

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41. IND. APP. R. 9(A)(1)(a).

42. *Id.*

43. IND. APP. R. Form 9-1 (effective Jan. 1, 2001).

44. *See id.* at R. 9(A)(2), 14.

45. *Id.* at R. 9(A)(3).

46. *See id.* at R. 9(A)(5).

47. *Id.* at R. 9(B).

48. *See id.* at R. 9(C).

49. *Id.* at R. 9(D).

50. *See id.* at R. 9(E).

51. *Id.*

and decide the issues on appeal.<sup>52</sup> The new rule adds for the first time, that “[i]f the appellant intends to urge on appeal that a finding of fact or conclusion thereon is unsupported by the evidence or is contrary to the evidence, the Notice of Appeal shall request a Transcript of all the evidence.”<sup>53</sup> Also added is the provision that in criminal appeals, “the Notice of Appeal must request the Transcript of the entire trial or evidentiary hearing, unless the party intends to limit the appeal to an issue requiring no Transcript.”<sup>54</sup> Any party to the appeal may file with the trial court clerk or Administrative Agency, without leave of court, a request for additional portions of the Transcript.<sup>55</sup> When the “Transcript is requested, a party must make satisfactory arrangements with the court reporter for payment of the cost of the Transcript,” and “[u]nless a court order requires otherwise, each party shall be responsible to pay all transcription costs associated with the Transcript that party requests.”<sup>56</sup> As for Administrative Agency appeals, the Notice of Appeal is to include the same contents and is to be handled in the same manner as an appeal from a final judgment in a civil case, notwithstanding any statute to the contrary.<sup>57</sup> Additionally, assignments of error are not required.<sup>58</sup>

2. *Rule 10: Duties of Trial Court Clerk or Administrative Agency.*—Unlike the prior version, in the new Rules the duties of the trial court clerk or Administrative Agency, with respect to the initiation of an appeal, are set forth in a single rule.<sup>59</sup> If a Transcript is requested, the trial court clerk or Administrative Agency is to notify the court reporter immediately.<sup>60</sup> Within thirty days of the filing of the Notice of Appeal, the trial court clerk or Administrative Agency must assemble the Clerk’s Record without any obligation to index or marginally annotate the papers.<sup>61</sup> The Clerk’s Record is earlier defined as “the Record maintained by the clerk of the trial court or the Administrative Agency and shall consist of the Chronological Case Summary (CCS) and all papers, pleadings, documents, orders, judgments, and other materials filed in the trial court or Administrative Agency or listed in the CCS.”<sup>62</sup>

When the Clerk’s Record is assembled (note that the rule does not say copied, thereby saving the time and expense of copying unnecessary documents), the trial court clerk or Administrative Agency is to file a “Notice of Completion of Clerk’s Record” with the “Clerk,” defined as the Clerk of the Indiana Supreme

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52. See *id.* at R. 9(F).

53. *Id.* at R. 9(F)(4).

54. *Id.*

55. See *id.* at R. 9(G).

56. *Id.* at R. 9(H).

57. See *id.* at R. 9(I).

58. See *id.*

59. See *id.* at R. 10.

60. See *id.* at R. 10(C).

61. See *id.* at R. 10(B).

62. *Id.* at R. 2(E).

Court, Indiana Court of Appeals, and Indiana Tax Court,<sup>63</sup> as well as send notice to all parties in the trial court.<sup>64</sup> The notice of completion shall include a certified copy of the Chronological Case Summary and shall state whether the Transcript is (a) completed, (b) not completed, or (c) not requested.<sup>65</sup> A form Notice of Completion of Clerk's Record is provided.<sup>66</sup>

If the Transcript has not been filed when the trial court clerk or Administrative Agency issues the Notice of Completion of Clerk's Record, the trial court clerk or Administrative Agency shall file a Notice of Completion of Transcript with the Clerk and serve a copy on the parties.<sup>67</sup> A form, Notice of Completion of Transcript, is included.<sup>68</sup> The trial court clerk can move the appellate court designated in the Notice of Appeal for an extension of time to assemble the Clerk's Record, with a proposed form provided.<sup>69</sup> "Motions for extensions of time in interlocutory appeals, appeals involving worker's compensation, issues of child custody, support, visitation, paternity, determination that a child is in need of services, and termination of parental rights are disfavored and shall be granted only in extraordinary circumstances."<sup>70</sup> If the trial court clerk or Administrative Agency fails to timely issue a Notice of Completion of Clerk's Record, the appellant must seek an order from the appellate court compelling the trial court clerk to complete the Clerk's Record and issue its Notice of Completion.<sup>71</sup> If the appellant does not seek such an order within fifteen days after the Notice of Completion of Clerk's Record was due to have been issued, the appeal shall be subject to dismissal.<sup>72</sup> Under the prior rules, the filing of the Record of Proceedings was a jurisdictional deadline,<sup>73</sup> which has been removed in the new Rules, but the appellant still must monitor the appeal to ensure that the trial court clerk or Administrative Agency has issued the Notice of Completion of Clerk's Record in a timely fashion, and no later than fifteen days after the appointed time seek the aforementioned order from the appellate court.<sup>74</sup>

3. *Rule 11: Duties of Court Reporter.*—Just as the duties of the trial court clerk and Administrative Agency with respect to the initiation of an appeal have been set forth in a separate rule, so have the duties of the court reporter.<sup>75</sup> The court reporter shall prepare, certify, and file the Transcript designated in the

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63. *Id.* at R. 2(D).

64. *See id.* at R. 10(C).

65. *Id.*

66. *See* IND. APP. R. Form 10-1 (effective Jan. 1, 2001).

67. *See* IND. APP. R. 10(D).

68. *See* IND. APP. R. Form 10-2.

69. *See* IND. APP. R. 10(E); IND. APP. R. Form 10-3.

70. IND. APP. R. 10(E).

71. *See id.* at R. 10(F).

72. *See id.*

73. *See* IND. APP. R. 8.1(A) (West 1996).

74. *See* IND. APP. R. 10(F) (effective Jan. 1, 2001).

75. *See id.* at R. 11.

Notice of Appeal with the trial court clerk or Administrative Agency.<sup>76</sup> The court reporter shall provide notice to all parties to the appeal that the Transcript has been filed with the trial court clerk or Administrative Agency, and a sample form is provided.<sup>77</sup> The court reporter has ninety days after the appellant files the Notice of Appeal to file the Transcript with the trial court clerk or Administrative Agency.<sup>78</sup> The court reporter may move the appellate court designated in the Notice of Appeal for an extension of time to file the Transcript stating the factual basis for the inability to comply with the prescribed deadline despite the exercise of due diligence.<sup>79</sup> A sample form is offered.<sup>80</sup> Requests for extensions in certain cases involving children and other appeals are disfavored and will be granted only in extraordinary circumstances, similar motions for extensions filed by the trial court clerk.<sup>81</sup> If the court reporter fails to file the Transcript with the trial court clerk or Administrative Agency within the time allowed, the appellant must seek an order from the appellate court compelling the court reporter to do so.<sup>82</sup> “Failure of appellant to seek such an order not later than fifteen (15) days after the transcript was due to have been filed with the trial court clerk shall subject the appeal to dismissal.”<sup>83</sup> Under the new Rules, the appellant is obligated to monitor the court reporter or the appeal will be subject to dismissal.<sup>84</sup>

4. *Rule 12: Transmittal of the Record.*—The transmittal of the Record has been revised to assist practitioners outside of Indianapolis, where the Record of Proceedings are currently stored. “Unless the [appellate court] orders otherwise, the trial court clerk shall retain the Clerk’s Record throughout the appeal.”<sup>85</sup> A party may request a copy of all or portions of the Clerk’s Record from the trial court clerk, which shall be provided within thirty days.<sup>86</sup> The trial court clerk or Administrative Agency shall retain the Transcript until the Clerk gives notice that all briefing is complete, at which time the Transcript is transmitted to the Clerk.<sup>87</sup> Any party may withdraw the Transcript or a copy, at no extra cost, from the trial court clerk or Administrative Agency up to the time the party’s brief is to be filed.<sup>88</sup> “[A]ny party may copy any document from the Clerk’s Record and any portion or all of the Transcript.”<sup>89</sup>

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76. See *id.* at R. 11(A); see also *id.* at R. 28-29 (regarding form of transcript).

77. See *id.* at R. 11(A); IND. APP. R. Form 11-1.

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

79. See *id.* at R. 11(C).

80. See IND. APP. R. Form 11-2.

81. See IND. APP. R. 11(C).

82. See *id.* at R. 11(D).

83. *Id.*

84. See *id.*

85. *Id.* at R. 12(A).

86. See *id.*

87. See *id.* at R. 12(B).

88. See *id.*

89. *Id.* at R. 12(C).

5. *Rule 13: Preparation of the Record in Administrative Agency Cases.*—The preparation of the record in Administrative Agency cases is to follow, to the extent possible, the same procedure as civil cases.<sup>90</sup> The preparation, contents, and transmittal are governed by the same provisions applicable to appeals from Final Judgments in civil cases, including all applicable time periods, notwithstanding any statute to the contrary.<sup>91</sup> While the inexperienced appellate practitioner might still follow a statute setting forth an appeal procedure from an Administrative Agency, the hope is that any such existing statutes will be repealed by the Indiana General Assembly in the near future as they no longer have any effect.

6. *Rule 14: Interlocutory Appeals.*—The initiation of interlocutory appeals is an area where additional deadlines and more specific procedures have been set forth.<sup>92</sup> Interlocutory appeals of right shall be taken by filing a Notice of Appeal with the trial court clerk within thirty days of the entry of the following interlocutory orders (which are the same as in the prior rules, although some have been broken out or added to the list from other places to assist the occasional appellate practitioner).<sup>93</sup> The list includes appeals from the following interlocutory orders: (1) for the payment of money; (2) to compel the execution of any document; (3) to compel the delivery or assignment of any securities, evidence of debt, documents, or things in action; (4) for the sale or delivery of the possession of real property; (5) granting or refusing to grant, dissolving, or refusing to dissolve a preliminary injunction; (6) appointing or refusing to appoint a receiver, or revoking or refusing to revoke the appointment of a receiver; (7) for a writ of habeas corpus not otherwise authorized to be taken directly to the supreme court; (8) transferring or refusing to transfer a case under Trial Rule 75; and (9) issued by an Administrative Agency that by statute is expressly required to be appealed as mandatory interlocutory appeal.<sup>94</sup> If the appeal is not filed within thirty days, the issue is waived.<sup>95</sup>

The new procedures for discretionary interlocutory appeals contain new specifications and time deadlines. As before, an interlocutory appeal may be taken from any other interlocutory order if the trial court certifies it and the appellate court accepts jurisdiction over the appeal.<sup>96</sup> “The trial court, in its discretion, upon motion by a party, may certify an interlocutory order to allow an immediate appeal.”<sup>97</sup> The Rules contain a thirty-day deadline for seeking certification in the trial court unless the trial court permits a belated motion for good cause.<sup>98</sup> The Rules also specify for the first time what the motion should

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90. *See id.* at R. 13.

91. *See id.*

92. *See id.* at R. 14.

93. *See id.* at R. 14(A).

94. *See id.* at R. 14(A)(1)-(9).

95. *See id.*

96. *See id.* at R. 14(B).

97. *Id.* at R. 14(B)(1).

98. *See id.* at R. 14(B)(1)(a).

contain: “(i) [a]n identification of the interlocutory order sought to be certified; (ii) [a] concise statement of the issues to be addressed in the interlocutory appeal; and (iii) [t]he reasons why an interlocutory appeal should be permitted.”<sup>99</sup> The grounds for the trial court to grant a discretionary interlocutory appeal remain the same: (i) the appellant will suffer substantial expense, damage or injury if the order is erroneous and the determination of the error is withheld until after judgment; (ii) the order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case (the best ground for success); and (iii) the remedy by appeal is otherwise inadequate.<sup>100</sup> The Rules provide for the first time for a response to a motion for a trial court to certify an interlocutory order, which must be filed within fifteen days from service of the motion.<sup>101</sup> The new Rules also contain an automatic “deemed denied” provision if the trial court fails to set the motion for hearing within forty-five days or fails to rule on the motion within thirty days after the hearing.<sup>102</sup>

If the trial court certifies an order for interlocutory appeal, the court of appeals, upon motion by a party, *may* accept jurisdiction of the appeal.<sup>103</sup> The motion requesting the court of appeals accept jurisdiction over an interlocutory order must be filed within thirty days of the date of the trial court’s certification.<sup>104</sup> The motion requesting the court of appeals to accept jurisdiction over an interlocutory order shall state: (i) the date of the interlocutory order; (ii) the date the motion to certify was filed in the trial court; (iii) the date the trial court certified its interlocutory order; and (iv) the reason the court of appeals should accept the interlocutory appeal.<sup>105</sup> A new provision requires that a copy of the trial court’s certification and a copy of the interlocutory order on appeal be attached to the motion.<sup>106</sup> Any response to the motion requesting the court of appeals to accept jurisdiction shall be filed within fifteen days after service of the motion.<sup>107</sup> If the court of appeals accepts jurisdiction, the appellant shall file a Notice of Appeals with the trial court clerk within fifteen days of the court of appeals’ order and pay the appellate filing fee at that time.<sup>108</sup> All other interlocutory appeals may be taken only as provided by statute.<sup>109</sup>

The trial court clerk shall assemble the Clerk’s Record in the same fashion as an appeal from a final judgment, and the court shall do the same with respect

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99. *Id.* at R. 14(B)(1)(b).  
100. *See id.* at R. 14(B)(1)(c).  
101. *See id.* at R. 14(B)(1)(d).  
102. *Id.* at R. 14(B)(1)(e).  
103. *See id.* at R. 14(B)(2).  
104. *See id.* at R. 14(B)(2)(a).  
105. *See id.* at R. 14(B)(2)(b).  
106. *See id.* at R. 14(B)(2)(c).  
107. *See id.* at R. 14(B)(2)(d).  
108. *See id.* at R. 14(B)(3).  
109. *See id.* at R. 14(C).

to the Transcript.<sup>110</sup> The prior rules set a shorter deadline for filing the record in interlocutory appeals (thirty days versus ninety days) that no longer applies.<sup>111</sup> Briefing in interlocutory appeals will also have the same deadlines as briefing in an appeal from a final judgment.<sup>112</sup> However, the prior rules set a shorter briefing schedule for interlocutory appeals that no longer applies.<sup>113</sup> A party can seek to either shorten or extend the time deadlines.<sup>114</sup> Upon motion, and for good cause, the court of appeals may shorten any time period in an interlocutory appeal.<sup>115</sup> A motion to shorten time shall be filed within ten days of the filing of either the Notice of Appeal with the trial court clerk or the motion to the court of appeals requesting permission to file an interlocutory appeal.<sup>116</sup> Extensions of time to prepare the Transcript (and presumably the Clerk's Record) or to file any brief in an interlocutory appeal are disfavored and will be granted only upon a showing of good cause.<sup>117</sup>

As before, "[a]n interlocutory appeal shall not stay proceedings in the trial court unless the trial court or a judge of the Court of Appeals so orders."<sup>118</sup> Additionally, "[t]he order staying proceedings may be conditioned upon the furnishing of a bond or security protecting the appellee against loss incurred by the interlocutory appeal."<sup>119</sup>

7. *Rule 15: Appellant's Case Summary.*—The "Appellant's Case Summary" replaces what used to be known as the "Court of Appeals Notice of Appeal." The Committee felt that the title of the document described the function of the document and wanted to avoid confusion with the new Notice of Appeal that initiates an appeal. "Any party who has filed a Notice of Appeal shall file an Appellant's Case Summary with the Clerk,"<sup>120</sup> for which the Rules provide a form.<sup>121</sup> The filing of the Appellant's Case Summary satisfies the requirement for filing an appearance.<sup>122</sup> The Appellant's Case Summary must be filed within thirty days of the filing of the Notice of Appeal or, in the case of an interlocutory appeal, at the same time as the filing of either the Notice of Appeal with the trial court clerk or the motion to the court of appeals requesting permission to file an interlocutory appeal.<sup>123</sup>

The trial information is required to contain an Appellant's Case Summary,

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110. See *id.* at R. 14(D).

111. See IND. APP. R. 3(B) (West 1996).

112. See IND. APP. R. 14(E) (effective Jan. 1, 2001).

113. See IND. APP. R. 8.1(B) (West 1996).

114. See IND. APP. R. 14(F) (effective Jan. 1, 2001).

115. See *id.* at R. 14(F)(2).

116. See *id.*

117. See *id.* at R. 14(F)(1).

118. *Id.* at R. 14(G).

119. *Id.*

120. *Id.* at R. 15(A).

121. See IND. APP. R. Form 15-1 (effective Jan. 1, 2001).

122. See at IND. APP. R. 15(A) (effective Jan. 1, 2001).

123. See *id.* at R. 15(B).

the same as the current court of appeals Notice of Appeal, with one addition.<sup>124</sup> The trial information must contain the names of all parties.<sup>125</sup> The attachments are also the same with one new requirement that makes explicit what previously was implicit: in Administrative Agency cases, a copy of the order, ruling, or decision appealed from, including any order or ruling on any motion or request for rehearing must be attached.<sup>126</sup> As before, “[t]he Clerk shall not accept for filing any paper, motion, or other filing by an appellant until that appellant has filed its Appellant’s Case Summary,” however, “[t]he failure to file an Appellant’s Case Summary shall not forfeit the appeal.”<sup>127</sup>

8. *Rule 16: Appearances.*—The new Rule on Appearances is similar to old rule except in three respects. First, the new Rules expressly state as to initiating parties, “[t]he filing of an Appellant’s Case Summary . . . satisfies the requirement to file an appearance.”<sup>128</sup> The current rule on appearances for the initiating parties required information that was also required by the court of appeals Notice of Appeal.<sup>129</sup> Thus, the rule is redundant. In order to streamline the Rules and to avoid duplication, the new Rule on Appearances for the initiating party was shortened to the aforementioned single sentence. Second, the new rules clarify that duplicate appearance forms need not be filed if a party is seeking transfer to the Indiana Supreme Court from the court of appeals or review by the Indiana Supreme Court from a decision of a the tax court.<sup>130</sup> While this is the current practice, some occasional or infrequent appellate practitioners might not have been aware of the practice, and therefore have been filing unnecessary duplicate appearances. Third, a new Rule addresses the withdrawal of appearances.<sup>131</sup> While withdrawal of appearances occur under the current rules, no rule expressly set forth the procedures or the court’s desire to have the new attorney’s appearance with the motion to withdraw.

9. *Rule 17: Parties on Appeal.*—The new Rule relating to parties on appeal contains a couple of developments. The death or incompetence of any or all of the parties on appeal shall not cause the appeal to abate, but the death of a criminal defendant abates a Criminal Appeal.<sup>132</sup> Successor parties may be substituted for deceased or incompetent parties in civil proceedings.<sup>133</sup> A new subsection on “Substitution of Parties” provides, “[w]hen a public officer who is sued in an official capacity dies, resigns or otherwise no longer holds public office, the officer’s successor is automatically substituted as a party” by notice

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124. See *id.* at R. 15(C).

125. See *id.* at R. 15(C)(2)(b).

126. See *id.* at R. 15(D)(5).

127. *Id.* at R. 15(E).

128. *Id.* at R. 16(A).

129. See IND. APP. R. 2.1(A) (West 1996).

130. See IND. APP. R. 16(F) (effective Jan. 1, 2001).

131. See *id.* at R. 16(G).

132. See *id.* at R. 17(B).

133. See *id.*

filed with the Clerk.<sup>134</sup> The substitution of other parties is also achieved by notice to the Clerk advising the court of the substitution, but the failure of any party to file a notice shall not affect the party's substantive rights.<sup>135</sup>

10. *Rule 18: Appeal Bonds-Letters of Credit.*—There was only one significant development relating to appeal bonds. Under the new Rules, an irrevocable letter of credit may be used instead of a bond.<sup>136</sup> Thus, parties have greater flexibility because the expense of a letter of credit may be less than that of posting a bond.

11. *Rule 19: Court of Appeals Preappeal Conference.*—The new Rule on preappeal conferences is much shorter than the prior version, recognizing the limited number of cases that now go through the process.<sup>137</sup> Some of the internal operating aspects of the prior rule on preappeal conferences have been removed because they are for the court of appeals to decide and do not need to be a part of the rule's language. The court of appeals may still impose sanctions if an attorney is unprepared to participate in the conference.<sup>138</sup>

12. *Rule 20: Appellate Alternative Dispute Resolution.*—While the practice in the court of appeals was to conduct some appellate alternative dispute resolution, no rules specifically provided for it. The new Rule states, “[t]he Court on Appeal may, upon motion of any party or its own motion, conduct or order appellate alternative dispute resolution.”<sup>139</sup> This is another example of a rule being added to conform to practice.

#### D. Title IV: General Provisions

1. *Rule 21: Order in Which Appeals Are Considered.*—The Rules specify that Indiana appellate courts “give expedited consideration to interlocutory appeals and appeals involving issues of child custody, support, visitation, adoption, paternity, determination that a child is in need of services, termination of parental rights, and all other appeals entitled to priority by rule or statute.”<sup>140</sup> Any party may move for expedited consideration in any other appeal that involves the constitutionality of any law, the public revenue, public health, or any other case of general public concern with good cause.<sup>141</sup>

2. *Rule 22: Citation Form.*—The new rule on citation form contains some additions to the current rules and specific new requirements. First, the default provision, if no other provision provides differently, is that the most current edition of the Uniform System of Citation (Bluebook) shall be followed.<sup>142</sup>

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134. *Id.* at R. 17(C)(1).

135. *See id.* at R. 17(C)(2).

136. *See id.* at R. 18.

137. *See id.* at R. 19(A).

138. *See id.* at R. 19(B).

139. *Id.* at R. 20.

140. *Id.* at R. 21(A).

141. *See id.* at R. 21(B).

142. *See id.* at R. 22.

Second, as to all cases, the citation shall give the title of the case followed by the volume and page of the regional and official reporter, the court of disposition, and the year of the opinion.<sup>143</sup> For example, *Callender v. State*, 138 N.E. 817 (Ind. 1922), and *Moran v. State*, 644 N.E.2d 536 (Ind. 1994). However, “[i]f the case is not contained in the regional reporter, citation may be made to the official reporter.”<sup>144</sup> Although prior case decisions have required pinpoint citation for both reporters when applicable, the new rule states, “[p]inpoint citations to one of the reporters shall be provided.”<sup>145</sup> The rule provides “[d]esignations of petitions for transfer shall be included” giving examples.<sup>146</sup>

The form of citation to Indiana statutes, regulations, and court rules is largely the same with some additions:

<u>Initial</u>	<u>Subsequent</u>
IND. CODE § 34-1-1-1	I.C. § 34-1-1-1
Ind.Admin. Code 12-5-1	IAC 12-5-1 <sup>147</sup>

With regard to reference to the Record on Appeal, every factual statement must be supported by a citation first to the appendix, if contained there, and if not contained in the appendix, then to the page in the Transcript, such as: “Appellant’s App. p. 5; Answer, p. 10; Tr. P. 231-32.”<sup>148</sup> “Any record material cited in an appellate brief must be reproduced in an Appendix unless it is already before the Court on Appeal.”<sup>149</sup> As before, reference to parties by such designation as appellant or appellee must be avoided; rather, parties should instead be referred to by their names or by descriptive titles.<sup>150</sup> The Rules provide a new list of abbreviations that may be used in citations and reference without explanation, specifically: App. (appendix); Br. (brief), CCS (chronological case summary), Ct. (court), Def. (defendant), Hr. (hearing), Mem. (memorandum), Pet. (petition), Pl. (plaintiff), Supp. (supplemental), and Tr. (transcript).<sup>151</sup>

3. *Rule 23 Filing*.—The new Rule on filing contains instances of codifying existing practices and policy. Filing includes personal delivery to the Clerk “including rotunda filing with the guard of the State House.”<sup>152</sup> Filing also includes, in addition to U.S. mail, “deposit[ing] with any third-party commercial carrier [e.g., United Parcel Service, Fed-Ex] for delivery to the Clerk within three

143. *See id.*

144. IND. APP. R. 22(A) (effective Jan. 1, 2001).

145. *Id.*

146. *Id.* (citing *Smith v. State*, 717 N.E.2d 1277 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 316 (1999) (mem.); *State ex rel. Mass Transp. Auth. of Greater Indianapolis v. Indiana Revenue Bd.*, 242 N.E.2d 642 (1968), *trans. denied by an evenly divided court*, 244 N.E.2d 111 (1969).

147. *Id.* at R. 22(B).

148. *See id.* at R. 22(C).

149. *Id.*

150. *See id.* at R. 22(D).

151. *See id.* at R. 22(E).

152. *Id.* at R. 23(A)(1).

(3) calendar days, cost prepaid, properly addressed.”<sup>153</sup> If a paper is filed by any method other than personal delivery to the Clerk, the party shall retain proof of such delivery.<sup>154</sup> Given prior disputes between litigants, counsel, and the Clerk regarding filing, the new Rules codify a policy that has been in existence regarding the Clerk’s functions: “[a]ll functions performed by the Clerk are ministerial and not discretionary. The court retains the authority to determine compliance with these Rules.”<sup>155</sup>

The number of copies of paper filings has been relocated to this Rule on filing.<sup>156</sup> The new rules also clarify a difficult area that arises when the Clerk has received a document for filing but refuses to file it due to some non-compliance with the rules: “When the Clerk accepts any document as received but not filed, any time limit for response or reply to that document shall run from the date on which the document is [later accepted as] filed. The Clerk shall notify all parties of the date on which any received document is subsequently filed.”<sup>157</sup> This new provision avoids the Alice in Wonderland, topsy-turvy problem of having a reply or response due before the paper is even accepted for filing by the appellate court.

4. *Rule 24: Service of Documents.*—The new Rules clarify that parties to the appeal do not have to serve documents related to the appeal, other than the Appellant’s Case Summary and Appearances, upon all parties in the trial court or Administrative Agency unless that party has filed an appearance with the appellate court.<sup>158</sup> This avoids copying unnecessary papers, particularly when there are numerous parties below who are not interested enough in the appeal to even file an appearance form. The new Rule also provides for service by any third-party commercial carrier for delivery within three calendar days.<sup>159</sup> Finally, as to service, the new Rule states that “[t]he certificate of service shall be placed at the end of the document and shall not be separately filed,” but the failure to do so shall not be grounds for rejecting a document for filing.<sup>160</sup>

5. *Rule 25: Computation of Time.*—The new Rules contain some minor differences on the computation of time, specifically the shortening of some periods. “When the time allowed is less than seven (7) days, all non-business days shall be excluded from the computation.”<sup>161</sup> The prior rules had ten days in a similar provision.<sup>162</sup> Also, the automatic extension of time when served by mail or carrier has been reduced to three days rather than five days.<sup>163</sup> The shorter

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153. *Id.* at R. 23(A)(3).

154. *See id.* at R. 23(A).

155. *Id.* at R. 23(B).

156. *See id.* at R. 23(C).

157. *Id.* at R. 23(D).

158. *See id.* at R. 24(A).

159. *See id.* at R. 24(C)(3).

160. *Id.* at R. 24(D).

161. *Id.* at R. 25(B).

162. *See* IND. APP. R. 13 (West 1996).

163. *See* IND. APP. R. 25(C) (effective Jan. 1, 2001).

time period in the new Rule is consistent with the time period provided in the trial rules and more closely comports with the time actually necessary for documents to move through the mail.<sup>164</sup>

6. *Rule 26: FAX Transmission by Clerk.*—As before, any party may request facsimile transmission by the Clerk of any opinion or order, but when transmission is made in this manner there is no hard-copy sent by regular mail.<sup>165</sup> Any request for transmission must be in writing.<sup>166</sup> “The Clerk may, without notice, discontinue fax transmission if electronic transmission is not practicable.”<sup>167</sup>

### E. Title V: Record on Appeal

The changes in the Record on Appeal are some of the most significant in the new Rules. The goal was to reduce the time, paper, and expense for counsel or pro se litigants to prepare. Less paper should allow the appellate judges to review only those documents necessary to the appeal. Under the current system, many papers were copied at the beginning of the process never to be used as the issues were narrowed during the briefing. Many appeals contained long time deadlines to prepare records in which a motion to dismiss or summary judgment was granted and little, if any, transcription was necessary such that the record could be completed well short of the ninety day time deadline. The goal was to create a faster, simpler, cheaper, and easier record preparation system. Learning the new system will be an important educational challenge for lawyers across Indiana who practice in the state appellate courts as well as for trial court clerks and court reporters who have different duties.

1. *Rule 27: The Record on Appeal.*—Instead of the “Record of Proceedings,” the new Rules provide for the “Record on Appeal” which consists of: (1) the Clerk’s Record; and (2) all proceedings before the trial court or Administrative Agency, whether or not transcribed or transmitted to the appellate court.<sup>168</sup> Any rule regarding the Record on Appeal may be enforced by order of the appellate court in which the appeal is pending.<sup>169</sup>

2. *Rule 28: Preparation of Transcript in Paper Format by Court Reporter.*—The key changes here relate to the court reporter more so than the party taking the appeal, appellate counsel, or the trial court judge. While many of the provisions relate to paper size, margins, and typing, there are some provisions regarding number, header notations, binding, title page and cover, and table of contents.<sup>170</sup> “The pages of the Transcript shall be numbered

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164. See Ind. Trial Rule 6(E) (effective Jan. 1, 2001).

165. See IND. APP. R. 26(A).

166. See *id.* at R. 26(B).

167. *Id.* at R. 26(C).

168. *Id.* at R. 27.

169. See *id.*

170. See *id.* at R. 28(A).

consecutively regardless of the number of volumes the Transcript requires.”<sup>171</sup> This will make for easier citation. The marginal notation that were the bane of lawyers now have been termed “Header Notations” in which “[t]he court reporter shall note in boldface capital letters at the top of each page where a witness’s direct, cross, or redirect examination begins. No other notations are required.”<sup>172</sup> The Transcript shall be bound at the left in such a fashion as to be easy to read while permitting easy disassembly for copying.<sup>173</sup> Each 250-page volume shall have a title page that conforms with a form and the cover shall be clear plastic.<sup>174</sup> As to the “Table of Contents,” the new provision reads,

[t]he court reporter shall prepare a table of contents listing each witness and the volume and page where that witness’ direct, cross, and redirect examination begins. The table of contents shall identify each exhibit offered and shall show the Transcript volumes and pages at which the exhibit was identified and at which a ruling was made on its admission in evidence. The table of contents shall be a separately bound volume.<sup>175</sup>

While these requirements are similar to those in the prior rules, the court reporter is to prepare this document rather than appellate counsel or the pro se litigants.

Another change is that the Transcript is only to be certified by the court reporter rather than both the court reporter and the trial court judge.<sup>176</sup> The sense was that trial court judges rarely have the time to read lengthy transcripts and trust their official court reporter, who would be responsible for any transcription problems in any event. Finally, when a paper Transcript is generated on a word processing system, an electronic format of the Transcript in whatever word processing format is used shall be included with the paper version.<sup>177</sup> While not mandating the use of any particular type of word processing system, this provision recognizes that many court reporters use them to prepare transcripts and thus are easily available to be copied onto to a disk for use by counsel and appellate judges in locating particular testimony in especially voluminous transcripts.

3. *Rule 29: Exhibits.*—In a change from the current rules, exhibits will no longer be incorporated into the Transcript where offered and admitted, but will be contained in separately-bound volumes.<sup>178</sup> In a continuation of a prior rule,

[n]ondocumentary and oversized exhibits shall not be sent to the Court, but shall remain in the custody of the trial court or Administrative Agency during the appeal. Such exhibits shall be briefly identified in the

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171. *Id.* at R. 28(A)(2).

172. *Id.* at R. 28(A)(4).

173. *See id.* at R. 28(A)(6).

174. *See id.* at R. 28(A)(7); IND. APP. R. Form 28-1.

175. IND. APP. R. 28(A)(8) (effective Jan. 1, 2001).

176. *See id.* at R. 28(B).

177. *See id.* at R. 28(C).

178. *See id.* at R. 29(A).

Transcript where they were admitted into evidence. Photographs of any exhibit may be included in the volume of documentary exhibits.<sup>179</sup>

4. *Rule 30: Preparation of Transcript in Electronic Format Only.*—This rule is unchanged from the prior version.<sup>180</sup> To date, no Transcripts have been submitted in electronic format only due to difficulties selecting a uniform computer, word-processing format. For this reason, when a paper Transcript is being generated on any word-processing system, the new Rules require the court reporter to submit a copy of the Transcript in an electronic format in case the appellate court is compatible with whatever format the court reporter happens to have used.

5. *Rule 31: Statement of Evidence When No Transcript Is Available.*—Although the trial court judge no longer has to file a “Judges Certificate” settling the Transcript when a paper Transcript prepared by the court reporter is available, the trial court judge remains involved under the new Rules when no Transcript is available, largely in the same manner as before.<sup>181</sup> That is, the trial court judge must determine what actually occurred after considering the parties’ or the attorneys’ recollection.

6. *Rule 32: Correction or Modification of Clerk’s Record or Transcript.*—The new Rules also contemplate disagreement about whether the Clerk’s Record or Transcript accurately discloses what occurred in the trial court or Administrative Agency. “The trial court retains jurisdiction to correct or modify the Clerk’s Record or Transcript at any time before the reply brief is due to be filed.”<sup>182</sup> This is a slight expansion of the trial court’s jurisdiction, which under the current rules ceased upon filing the old Record of Proceedings.

7. *Rule 33: Record on Agreed Statement.*—As before, the Rules provide for a Record on Agreed Statement. The new Rules do contain a limitation to issues presented by appeal that are capable of resolution without reference to the Clerk’s Record or Transcript.<sup>183</sup> The agreed statement is transmitted to the Court in the Clerk’s Record and must be included in the appendix to appellant’s brief.<sup>184</sup> Use of the procedure does not automatically extend any appellate deadline, but extensions of time may be sought under Rule 35 as in any other appeal.<sup>185</sup>

#### F. Title VI: Motions

Like the changes to the Record, the changes with respect to motions practice in Indiana appellate courts are substantial, hopefully filling the large void in the current rules. These voids cause numerous telephone calls to the administrative

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179. *Id.* at R. 29(B).

180. *See id.* at R. 30.

181. *Id.* at R. 31.

182. *Id.* at R. 32(A).

183. *See id.* at R. 33(A).

184. *See id.* at R. 33(D).

185. *See id.* at R. 33(E).

offices of both the Indiana Supreme Court and courts of appeal informing them that a response to a motion would be filed because the current rules do not provide for any response, deadline, or format. The section of the Rules on motions opens with a general Rule applying to all motions and then has specific Rules for commonly filed motions in an appeal.

1. *Rule 34: Motion Practice.*—This is the general Rule that applies to all motions. Initially, one should note that “[u]nless a statute or these Rules provide another form of application, a request for an order or for other relief shall be made by filing a motion in writing.”<sup>186</sup> Currently, some practitioners file a *petition* for extension of time or a *petition* for oral argument, so under the new Rules these should be entitled a *motion for extension of time* or a *motion for oral argument*.

The current practice in the appellate courts was routinely to rule on motions without a response, and some members of the bar were concerned about the opportunity to be heard. Thus, the new Rules identify those motions subject to decision without a response such as: to extend time; file an oversized document; withdraw appearance; substitute a party; and to withdraw a record.<sup>187</sup> The courts will consider any responses filed before it rules on these motions, and a response filed after a ruling on the motion will automatically be treated as a motion to reconsider.<sup>188</sup> Any such response, however, must be filed within ten days of the court’s ruling.<sup>189</sup> In general, a response to a motion is due within ten days, and the fact that no response is filed does not affect the court’s discretion in ruling on the motion.<sup>190</sup> The movant may not file a reply to the response without leave of the court, and any such reply must be filed with the motion for leave and tendered within five days of service of the response.<sup>191</sup>

The general content of a motion (excluding those that can be ruled on before receiving a response), response, or reply shall be: (1) statement of grounds; (2) statement of supporting facts; (3) statement of supporting law; (4) other required matters; and (5) request for relief.<sup>192</sup> When facts outside the Record on Appeal are presented in the motion, such facts shall be verified and/or accompanied by affidavits or certified copies of documents filed with the trial court or Administrative Agency.<sup>193</sup> Motions, responses, and replies shall conform with the requirements for citations and references in briefs, with the length being limited to ten pages or 4200 words for motions and response, and five pages or 2100 for replies.<sup>194</sup> Ordinarily, oral argument will not be heard on any motion.<sup>195</sup>

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186. *Id.* at R. 34(A).

187. *See id.* at R. 34(B).

188. *See id.*

189. *See id.*

190. *See id.* at R. 34(C).

191. *See id.* at R. 34(D).

192. *See id.* at R. 34(E).

193. *See id.* at R. 34(F).

194. *See id.* at R. 34(G).

195. *See id.* at R. 34(H).

2. *Rule 35: Motion for Extension of Time.*—The most common motion is for an extension of time and it is the first specific motion discussed after the general Rule. Any motion for extension of time under the Rules has to be filed at least seven days, rather than five days as provided in the current rules, before the expiration of time unless the movant was not then aware of the facts on which the motion is based.<sup>196</sup> No motion for an extension of time can be filed after the deadline has passed.<sup>197</sup>

The new Rule provides potential reasons why an extension of time, in spite of due diligence, may be necessary, such as: (1) engagement in other litigation, provided such litigation is identified by caption, number and court; (2) complexity of issues on appeal; or (3) hardship to counsel, provided the hardship is specifically set forth.<sup>198</sup> In some appellate proceedings, extensions of time are expressly forbidden, such as: Petition for Rehearing; Petition to Transfer to the Indiana Supreme Court; or Petition for Review of a tax court decision by the Indiana Supreme Court. The new Rules have grouped these together in a single section with the Rule on extensions of time.<sup>199</sup> In other appellate proceedings, there are restrictions on extensions such as in worker's compensation, child custody, support, visitation, Child in Need of Services ("CHINS"), or termination of parental rights proceedings, in which event extensions are only granted in extraordinary circumstances.<sup>200</sup>

Although not part of the new Rules, a new policy of the court of appeals, effective to appeals initiated by Praecipes/Notices of Appeals filed after January 1, 2001, relates to extensions of time for filing the record or briefs. In adopting the policy, the court of appeals noted that, while the average age of pending fully briefed cases has been reduced to under two months, the average time for record preparation and briefing continues to exceed the time limits provided for in the appellate rules due to extensions of time. The parties to the appeal are most concerned with the total time from the trial court decision to the final appellate decision. The court of appeals' goal in adopting the policy was to significantly reduce the time for record preparation and briefing, stating that "[i]deally, there would be no extensions of time."<sup>201</sup> The policy generally restricts extensions for preparing the record and briefs. The court of appeals realized that in some circumstances it will be necessary for people to change the way they have done business and allocated their time and resources, but the court felt that such changes are necessary if Indiana is to have an efficient and timely appellate process. "We think everyone recognizes the value of such a process," the court of appeals concluded in introducing the policy.<sup>202</sup> The policy is as follows:

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196. *See id.* at R. 35(A).

197. *See id.*

198. *See id.* at R. 35(B)(1)(g).

199. *See id.* at R. 35(C).

200. *See id.* at R. 35(D).

201. Letter from Chief Judge of Indiana Court of Appeals, John J. Sharpnack (Dec. 27, 1999) (on file with author).

202. *Id.*

## POLICIES REGARDING EXTENSIONS OF TIME

### I. Record preparation:

Because the time-limit for the filing of the record in Indiana is three times the American Bar Association Standard and that applicable in federal courts, extensions of time for filing of the record should not be necessary. In child-related cases, extensions for preparation of the record will be granted only upon a showing of extraordinary circumstances. In all other cases, extensions will be granted only upon a showing of good cause. Upon such a showing, no more than one extension not to exceed thirty days shall be granted.

### II. Briefing:

**A. Child-related cases.** Consistent with our publicly-announced policy and the proposed appellate rules, no extensions of time in child-related proceedings will be granted except upon a verified showing of extraordinary circumstances. No extension shall be granted for more than thirty days, and a time shorter than thirty days shall be the norm. Successive motions for extensions shall be denied.

**B. Other cases.** Extensions of time for filing of briefs will be granted only upon a showing of good cause. Extensions for more than thirty days and successive motions for extension will be granted only upon a verified showing of extraordinary circumstances.

### III. What constitutes extraordinary circumstances:

Extraordinary circumstances will be narrowly-construed. Examples of extraordinary circumstances include natural disasters, death or serious illness of the court reporter, primary attorney or member of the attorney's immediate family. Extraordinary circumstances do not include the press of other work.<sup>203</sup>

Extensions for more than thirty days and successive motions seem to be the target of the policy in most cases, with the standard being tighter and shorter for child-related cases. Lawyers and court reporters who generally seek more than thirty days total for an extension either in a single motion or successive motions, will need to change their ways. The court of appeals has indicated that the press of other work will not support an extension beyond thirty days.

3. *Rule 36: Motion to Dismiss.*—This new Rule is broken down into voluntary and involuntary dismissal. "An appeal may be dismissed on motion of the appellant upon the terms agreed upon by all the parties on appeal or fixed by

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203. IND. APP. R. 35(D).

the court.”<sup>204</sup> An appellee may at any time file a motion to dismiss an appeal for any reason provided by law, including lack of jurisdiction; the old motions to affirm are specifically abolished.<sup>205</sup> Although an appellee may file a motion to dismiss *at any time*, the appellee should move to dismiss an appeal as soon as possible, hopefully avoiding the fees for an unnecessary briefing.

4. *Rule 37: Motion to Remand.*—Codifying existing case law, this Rule provides the procedures to seek a remand to a trial court while an appeal is pending. For example, a party may be pursuing an interlocutory appeal regarding an injunction when new, potentially dispositive evidence is discovered. At any time after the appellate court obtains jurisdiction, any party may file a motion requesting that the appeal be dismissed without prejudice or temporarily stayed and the case remanded to the trial court or Administrative Agency for further proceedings.<sup>206</sup> “The motion must be verified and must demonstrate that remand will promote judicial economy or is otherwise necessary for the administration of justice.”<sup>207</sup> The appellate court may dismiss the appeal without prejudice and remand the case to the trial court, or remand the case while retaining jurisdiction, with or without limitation on the trial court’s authority.<sup>208</sup> “Unless the order specifically provides otherwise, the trial court or Administrative Agency shall obtain unlimited authority on remand.”<sup>209</sup>

5. *Rule 38: Motion to Consolidate Appeals.*—This Rule is largely the same as the current version with one addition: “[i]f any party believes that the appeal should not remain consolidated, that party may file a motion to sever the consolidated appeal within thirty (30) days after the first Notice of Appeal is filed.”<sup>210</sup>

6. *Rule 39: Motion to Stay.*—While the substance of the Rule on stays remains similar, some minor procedural changes were necessary to conform the Rule to current practice and help the occasional appellate practitioner. For example, a motion for stay pending appeal in the appellate court shall contain certified or verified copies of: (1) the judgment or order to be stayed; (2) the trial court’s order denying the motion for stay; and (3) other parts of the Clerk’s Record or Transcript that are relevant.<sup>211</sup> If an emergency stay without notice is requested, the moving party shall submit a proposed order outlining the remedy being requested.<sup>212</sup> As to the length of the stay, unless otherwise ordered, a stay shall remain in effect until the appeal is disposed of in the appellate court, with any party having the right to move for relief from the stay at any time.<sup>213</sup>

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204. IND. APP. R. 36(A) (effective Jan. 1, 2001).

205. *See id.* at R. 36(B).

206. *See id.* at R. 37(A).

207. *Id.*

208. *See id.* at R. 37(B).

209. *Id.*

210. *Id.* at R. 38(A).

211. *See id.* at R. 39(C).

212. *See id.* at R. 39(D).

213. *See id.* at R. 39(F).

7. *Rule 40: Motion to Proceed In Forma Pauperis.*—The new Rule provides extensive guidance on proceeding *in forma pauperis*, plugging a hole in the current rules, thereby benefitting pro se litigants. A party who has been permitted to proceed in the trial court *in forma pauperis* may proceed on appeal in the same manner without further authorization from the trial or appellate court, such as by not paying the filing fee.<sup>214</sup> Any other party who desires to proceed on appeal *in forma pauperis* shall file a Motion for Leave in the trial court on a form detailing the party's inability to pay fees, costs, or security.<sup>215</sup> If the trial court grants the motion, the party may proceed without further motion to the appellate court.<sup>216</sup> If the trial court denies the motion, the trial court shall state its reasons in a written order.<sup>217</sup> A trial court may later revoke authorization to proceed *in forma pauperis*.<sup>218</sup> If the trial court denies a party authorization to proceed *in forma pauperis*, the party may file a motion in the appellate court within thirty days of the trial court's order.<sup>219</sup> A party proceeding *in forma pauperis* is relieved of the obligation to prepay filing fees or costs in either the trial or appellate court or to give security, and may file legibly handwritten or typewritten briefs and other papers.<sup>220</sup>

8. *Rule 41. Motion to Appear as Amicus Curiae.*—The Rule on motions to appear *amicus curiae* is substantially similar to the prior version but has been relocated within the overall organization and structure of the Rules. The new Rule for the first time explicitly permits belated filing of amicus curiae papers, which is consistent with practice.<sup>221</sup>

9. *Rule 42: Motion to Strike.*—A new appellate Rule on motions to strike codifies the appellate court's inherent authority and conforms with a similar trial rule:

Upon motion made by a party within the time to respond to a document, or if there is no response permitted, within thirty (30) days after service of the document upon it, or at any time upon the court's own motion, the court may order stricken from any document any redundant, immaterial, scandalous or other inappropriate matter.<sup>222</sup>

### G. Title VII: Briefs

The changes in the new Rules on briefs are not as extensive as the changes for the record or motions. Nonetheless, there are changes that should be noted

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214. See *id.* at R. 40(A)(1).

215. See *id.* at R. 40(A)(2); see also IND. APP. R. Form 40-1 (effective Jan. 1, 2001).

216. See IND. APP. R. 40(A)(2) (effective Jan. 1, 2001).

217. See *id.*

218. See *id.* at R. 40(A)(3).

219. See *id.* at R. 40(A)(4).

220. See *id.* at R. 40(D).

221. See *id.* at R. 41(D).

222. *Id.* at R. 42.

by any practitioner or pro se litigant appearing in Indiana's appellate courts.

1. *Rule 43: Form of Briefs and Petitions.*—The new Rules bring more colors to covers of appellate briefs, such as white for a petition for rehearing or response, orange for a petition to transfer or review, yellow for a response to transfer or review, and tan for a reply in support of transfer or review.<sup>223</sup> As before, the document shall be bound in book or pamphlet form, but in the new Rules a preference is stated for the first time for “[a]ny binding process which permits the document to lie flat when opened” such as spiral-binding.<sup>224</sup> Also, “[a]ll documents *may* be accompanied by a copy of the document in electronic format. Any electronic format used by the word processing system to generate the document is permissible.”<sup>225</sup> The Rule will encourage lawyers to submit disks to assist the appellate courts in resolving the appeal without mandating a particular form of word processing system.

2. *Rule 44: Brief and Petition Length Limitations.*—The new developments on length limitations provide certain deadlines that did not exist previously or were in need of clarification. A motion requesting leave to file an oversized brief or Petition shall be filed at least fifteen days before the deadline.<sup>226</sup> Certain items will be expressly excluded from the length limitation, such as: cover information; table of contents; table of authorities; signature block; certificate of service; word count certificate; appealed judgment or order; and question presented on transfer.<sup>227</sup> The only change and addition to the page and word count is a shortening of reply briefs to fifteen pages or 7000 words, and a clarification related to cross-appeals—specifically a reply brief with cross-appellee's brief can be no more than thirty pages or 14,000 words.<sup>228</sup> An acceptable form of word count certification is included in the Rules.<sup>229</sup>

3. *Rule 45: Time for Filing Briefs.*—The time for filing briefs has been changed. The appellant's brief shall be filed no later than thirty days after: (a) the date the trial court clerk or Administrative Agency issues its notice of the Clerk's Record if the notice reports that the Transcript is complete or that no Transcript has been requested (resulting in a substantially expedited appeal that fits within this category); or (b) in all other cases, the date the trial court clerk or Administrative Agency issues its notice of completion of Transcript (the same time frame as in the current rules).<sup>230</sup> The appellee's brief shall be filed no later than thirty days after the appellant's brief has been served.<sup>231</sup> Any appellant's reply brief shall be filed no later than fifteen days after the appellee's brief has

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223. *See id.* at R. 43(H).

224. *Id.* at R. 43(J).

225. *Id.* at R. 43(K) (emphasis added).

226. *See id.* at R. 44(B).

227. *See id.* at R. 44(C).

228. *See id.* at R. 44(D), (E).

229. *See id.* at R. 44(F).

230. *See id.* at R. 45(B)(1).

231. *See id.* at R. 45(B)(2).

been served.<sup>232</sup> This thirty day-thirty day-fifteen day time frame was consistent with appeals from final judgments under the old rules, but is longer than the ten day-ten day-five day time frame briefing for interlocutory appeals under the current Rules, which would occasionally trip up the novice appellate litigator. Of course, under the new Rules, a party can move to shorten time in an interlocutory appeal if that is necessary.

Furthermore, the briefing in cross-appeals has been clarified. If the appellant's reply brief also serves as the cross-appellee's brief, it shall be filed no later than thirty days after the appellee's/cross-appellant's brief.<sup>233</sup> Any cross-appellant's reply brief shall be filed no later than fifteen days after service of the appellant's cross-appellee's reply brief.<sup>234</sup>

4. *Rule 46: Arrangement and Contents of Briefs.*—The new Rules provide more guidance for the arrangement and contents of appellate briefs, which should be of assistance to the occasional appellate practitioner. The table of contents, for example, "shall list each section of the brief, including the headings and subheadings of each section and the page on which they begin."<sup>235</sup> The table of authorities shall list each case, statute, rule, and other authority cited in the brief, with references to each page on which it is cited; such authorities shall be listed alphabetically or numerically, as applicable.<sup>236</sup> The statement of the case shall provide page references to the Record on Appeal or Appendix, if contained therein.<sup>237</sup> The statement of facts shall be presented in accordance with the standard of review appropriate for the judgment or order being appealed, and shall be in a narrative form rather than a witness by witness summary of the testimony.<sup>238</sup> In an appeal challenging a ruling of a post-conviction relief petition, the statement may focus on facts from the post-conviction relief proceedings rather than on facts relating to the criminal conviction.<sup>239</sup> The summary of argument "should not be a mere repetition of the argument headings."<sup>240</sup> The argument portion of the brief "must include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues."<sup>241</sup> When the admissibility of evidence is in dispute on appeal, citation shall be made to the pages of the Transcript where the evidence was identified, offered, and received or rejected.<sup>242</sup> After the conclusion, the brief shall contain a copy of the appealed judgment or order including any

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232. See *id.* at R. 45(B)(3).

233. See *id.*

234. See *id.* at R. 45(B)(4).

235. *Id.* at R. 46(A)(1).

236. See *id.* at R. 46(A)(2).

237. See *id.* at R. 46(A)(5).

238. See *id.* at R. 46(A)(6)(b), (c).

239. See *id.* at R. 46(A)(6)(d).

240. *Id.* at R. 46(A)(7).

241. *Id.* at R. 46(A)(8)(b).

242. See *id.* at R. 46(A)(8)(d).

written opinion, memorandum of decision, or findings of fact and conclusions of law, bound together and appearing before the word count certificate and certificate of service.<sup>243</sup>

Codifying case law, the new Rules expressly provide, “[n]o new issues shall be raised in the reply brief.”<sup>244</sup> Moreover, “[t]he reply brief shall contain a table of contents, table of authorities, summary of argument, argument, conclusion, word count certificate, if needed, and certificate of service.”<sup>245</sup>

As in other portions of the new Rules, briefing in the area of cross-appeal has been clarified and specified. As before, when both parties initiate an appeal, the plaintiff below is the initial appellant unless the parties otherwise agree or the court otherwise orders.<sup>246</sup> When only one party has initiated an appeal, that party is the appellant, even if another party raises issues on cross-appeal.<sup>247</sup> After opening appellant’s brief in a cross-appeal, the appellee’s brief is to contain any contentions on cross-appeal as to why the trial court or Administrative Agency has committed reversible error.<sup>248</sup> “The Appellant’s Reply Brief shall address the arguments raised on cross-appeal.”<sup>249</sup> The cross-appellant’s Reply Brief may only respond to that part of the appellant’s Reply Brief addressing the appellee’s cross-appeal with no new issues raised and it must contain all the Brief sections of a Reply Brief—table of contents, table of authorities, summary of argument, argument, conclusion, word count certificate, if needed, and certificate of service.<sup>250</sup>

The arrangement and contents of amicus curiae Briefs have been set forth more clearly in the new Rules, also. Such Briefs must contain a table of contents, table of authorities, a brief statement of interest of the amicus curiae, summary of argument, argument, conclusion, word count certificate, if needed, and certificate of service.<sup>251</sup> Before completing the preparation of an amicus curiae Brief, counsel shall attempt to ascertain the arguments that will be made in the brief of any party whose position the amicus curiae is supporting, to avoid repetition or restatement of those arguments.<sup>252</sup>

5. *Rule 47: Amendment of Briefs and Petitions.*—The new Rules contain more specifics regarding the amendment of Briefs and Petitions. The movant shall either tender sufficient copies of an Amended Brief or Petition (the cover of which shall indicate that it is amended) with its motion, or request permission to retrieve the original and all copies of the Brief or Petition filed with the Clerk

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243. See *id.* at R. 46(A)(10).

244. *Id.* at R. 46(C).

245. *Id.*

246. See *id.* at R. 46(D)(1).

247. See *id.*

248. See *id.* at R. 46(D)(2).

249. *Id.* at R. 46(D)(3).

250. See *id.* at R. 46(D)(4)&(5).

251. See *id.* at R. 46(E)(1).

252. See *id.* at R. 46(E)(2).

and substitute amended pages.<sup>253</sup> Except as the court otherwise provides, the amendment of a Brief or Petition has no effect on any filing deadlines.<sup>254</sup>

6. *Rule 48: Additional Authorities.*—The new Rule on additional authority is substantially similar to the prior rule with the new limitation of a single sentence explaining the authority.<sup>255</sup>

#### H. Title VIII: Appendices

1. *Rule 49: Filing of Appendices.*—As a corollary to the changes in the record, the new Rules now require Appendices which shall be filed with the appellant's Brief and, if necessary, with later Briefs.<sup>256</sup> Any party's failure to include any item in an Appendix shall not waive any issue or argument.<sup>257</sup>

2. *Rule 50: Contents of Appendices.*—In civil and administrative appeals, the purpose of an Appendix is to present the court with only those parts of the Record on Appeal that are necessary for the court to decide the issues presented.<sup>258</sup> An appellant's Appendix must contain, if they exist, a copy of: (1) the chronological case summary; (2) the appealed judgment or order; (3) the jury verdict; (4) portions of the Transcript containing any oral ruling or statement of decision; (5) any challenged instructions if not already included in the brief; (6) pleadings and other documents from the Clerk's Record, in chronological order, that are necessary for resolution of the issues on appeal; (7) short excerpts from the Record on Appeal or Transcript; (8) any record material relied on in the Brief; and (9) a verification of the accuracy of the documents.<sup>259</sup> An appellee's Appendix, if filed, should not contain any materials already contained in the appellant's Appendix but may contain additional items that are relevant to the issues raised on appeal or cross-appeal.<sup>260</sup>

In criminal appeals, the contents of the appellant's Appendix is significantly different than in civil and administrative appeals in one respect: the entire Clerk's Record must be included in appellant's Appendix.<sup>261</sup> In all other respects, the Appendix process is the same. Every Appendix must have a table of contents specifically identifying each item and its date.<sup>262</sup>

3. *Rule 51: Form and Assembly of Appendices.*—The Appendices should be on 8 ½ x 11 inch white paper, bound on the left, with the documents in the order set forth in the prior rule, and all pages consecutively numbered at the bottom, without obscuring the Transcript page numbers, regardless of the number

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253. See *id.* at R. 47.

254. See *id.*

255. See *id.* at R. 48.

256. See *id.* at R. 49(A).

257. See *id.* at R. 49(B).

258. See *id.* at R. 50(A)(1).

259. See *id.* at R. 50(A)(2)(a)-(i).

260. See *id.* at R. 50(A)(3).

261. See *id.* at R. 50(B)(1)(a).

262. See *id.* at R. 50(C).

of volumes required.<sup>263</sup> Volumes should be no more than 250 pages each, and any binding process which permits the document to lie flat when opened is preferred.<sup>264</sup> Each volume shall contain a table of contents for the entire Appendix which shall not be included in the page count for that volume.<sup>265</sup> Each volume must be separately bound with front and back covers of the same color as the Brief, with the front covers being consistent with a form provided in the Rules.<sup>266</sup>

### I. Title IX: Oral Argument

1. *Rule 52: Setting and Acknowledging Oral Argument.*—The Rules relating to oral argument have changed in minor respects. In criminal appeals, the Clerk shall send the order setting oral argument, not only to the parties, but also to the prosecuting attorney whose office represented the state at trial.<sup>267</sup> Counsel shall file with the Clerk an acknowledgment of the order, setting oral argument no later than fifteen days after service of the order.<sup>268</sup> The old rule had no time deadline.<sup>269</sup>

2. *Rule 53: Procedures for Oral Argument.*—The new Rules do not presume that oral arguments will be thirty minutes per side; the courts have the authority to order shorter or longer arguments. A party may, for good cause, request more or less time in its motion for oral argument or by a separate motion filed no later than fifteen days after the order setting oral argument.<sup>270</sup>

The appellant shall open the argument and may reserve time for rebuttal by informing the court at the beginning of the argument.<sup>271</sup> Failure to argue a particular point in an oral argument, if adequately briefed, will not constitute a waiver.<sup>272</sup> “Counsel shall not read at length from briefs, the Record on Appeal, or authorities.”<sup>273</sup> Some additional specifics are added when multiple counsel or parties are on the same side.<sup>274</sup> As in other parts of the Rules, a new provision on cross-appeals provides some clarification.<sup>275</sup> Amicus curiae participation in oral argument is also set forth in more detail.<sup>276</sup>

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263. See *id.* at R. 51(A, B, C).

264. See *id.* at R. 51(D).

265. See *id.*

266. See *id.* at R. 51(E); see also IND. APP. R. Form 51-1 (effective Jan. 1, 2001).

267. See IND. APP. R. 52(A) (effective Jan. 1, 2001).

268. See *id.* at R. 52(C).

269. See APP. R. 10 (West 1996).

270. See IND. APP. R. 53(A) (effective Jan. 1, 2001).

271. See *id.* at R. 53(B).

272. See *id.*

273. *Id.*

274. See *id.* at R. 53(C).

275. See *id.* at R. 53(D).

276. See *id.* at R. 53(E).

*J. Title X: Petitions for Rehearing*

1. *Rule 54: Rehearings.*—Although not as significant as the changes to the Record, Motions, and Appendices, there are some notable changes with respect to the Petition for Rehearing. For the first time, the Rules set forth exactly what decisions may be the subject of a Rehearing Petition: “(1) a published opinion; (2) a not-for-publication memorandum decision; (3) an order dismissing an appeal; and (4) an order declining to authorize the filing of a successive petition for post-conviction relief.”<sup>277</sup> Furthermore, “[a] party may not seek rehearing of an order denying transfer.”<sup>278</sup>

Under the current practice, both a Petition and Brief are filed, but under the new Rules, only a Petition is filed which must “state concisely the reasons the party believes rehearing is necessary.”<sup>279</sup> A Petition for Rehearing is limited to ten pages or 4200 words.<sup>280</sup> The form of the Petition for Rehearing should conform to that of briefs with respect to paper size, print size, spacing, numbering, margins, covers, binding, and a copy in electronic format.<sup>281</sup> The Petition for Rehearing must include a table of contents, table of authorities, statement of issues, argument, conclusion, word count certificate, if needed, and certificate of service.<sup>282</sup>

The new Rules also codify case law when transfer and rehearing have been sought by different parties:

When rehearing is sought by one party, and transfer is sought by another, briefing shall continue under Rule 54 for the Petition for Rehearing and under Rule 57 for the Petition to Transfer. Once the court of appeals disposes of the Petition for Rehearing, transfer may be sought from that disposition in accordance with Rule 57 governing Petitions to Transfer.<sup>283</sup>

*K. Title XI: Supreme Court Proceedings*

1. *Rule 56: Requests to Transfer to the Supreme Court.*—While the substance of the transfer rules will be familiar to practitioners, they have been reorganized. For example, the Rule on emergency transfers prior to the issuance of an opinion by the court of appeals has been moved forward, although such petitions must still show “that the appeal involves a substantial question of law of great public importance and that an emergency exists requiring a speedy determination.”<sup>284</sup> The more common avenue is still a Petition to Transfer after

277. *Id.* at R. 54(A).

278. *Id.*

279. *Id.* at R. 54(E).

280. *See id.* at R. 44(D), (E).

281. *See id.* at R. 43, 54(F).

282. *See id.* at R. 46(A), 54(F).

283. *Id.* at R. 55.

284. *Id.* at R. 56(A).

disposition by the court of appeals.<sup>285</sup>

2. *Rule 57: Petitions to Transfer and Briefs.*—Like rehearings, transfers will only consist of a Petition with no separate supporting brief.<sup>286</sup> As before, transfer may only be sought from an adverse decision of the court of appeals.<sup>287</sup> Transfer may be sought from an adverse: (1) published opinion; (2) not-for-publication memorandum decision; (3) amendment or modification of such opinion or decision; or (4) order dismissing an appeal.<sup>288</sup> Any other order or action by the court of appeals, including an order denying a motion for interlocutory appeal, shall not be considered an adverse decision for purposes of Petitioning to Transfer, regardless of whether rehearing was sought in the court of appeals.<sup>289</sup>

The new Rules now provide for a Reply Brief on transfer to be filed no later than ten days after a Brief in response is served.<sup>290</sup> The new Rules also dictate the contents and arrangement of a Petition to Transfer, Response or Reply for the first time:

(1) *Question Presented on Transfer.* A brief statement identifying the issue, question, or precedent warranting Transfer. The statement must not be argumentative or repetitive. The statement shall be set out by itself on the first page after the cover.

(2) *Table of Contents . . . .*

(3) *Background and Prior Treatment of Issues on Transfer.* A brief statement of the procedural and substantive facts necessary for consideration of the Petition to Transfer, including a statement of how the issues relevant to transfer were raised and resolved by any Administrative Agency, the trial court, and the Court of Appeals. To the extent extensive procedural or factual background is necessary, reference may be made to the appellate briefs.

(4) *Argument.* An argument section explaining the reasons why transfer should be granted.

(5) *Conclusion.* A short and plain statement of the relief requested.

(6) *Word Count Certificate, if necessary. . . .*

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285. See *id.* at R. 56(B).

286. See *id.* at R. 57(F).

287. See *id.* at R. 57(A).

288. See *id.* at R. 57(B).

289. See *id.*

290. See *id.* at R. 57(E).

(7) *Certificate of Service*. . . .<sup>291</sup>

The rule on "Considerations Governing the Grant of Transfer" has been amended to stress the discretion involved and the underlying theme that the legal issues must be important and significant to the entire State of Indiana:

The grant of transfer is a matter of judicial discretion. The following provisions articulate the principal considerations governing the Supreme Court's decision whether to grant transfer:

(1) *Conflict in Court of Appeals' Decisions*. The Court of Appeals has entered a decision in conflict with another decision of the Court of Appeals *on the same important issue*.

(2) *Conflict with Supreme Court Decision*. The Court of Appeals has entered a decision in conflict with a decision of the Supreme Court *on an important issue*.

(3) *Conflict with Federal Appellate Decision*. The Court of Appeals has decided *an important federal question* in a way that conflicts with a decision of the Supreme Court of the United States or a United States Court of Appeals [this is a new ground for transfer].

(4) *Undecided Question of Law*. The Court of Appeals has decided *an important question of law or a case of great public importance* that has not been, but should be, decided by the Supreme Court.

(5) *Precedent in Need of Reconsideration*. The Court of Appeals has correctly followed ruling precedent of the Supreme Court but such precedent is erroneous or in need of clarification or modification in some specific respect.

(6) *Significant Departure from Law or Practice*. The Court of Appeals has so significantly departed from accepted law or practice or has sanctioned such a departure by a trial court or Administrative Agency as to warrant the exercise of Supreme Court jurisdiction.<sup>292</sup>

While this new language looks similar to the old language, the addition of a few words give these provisions a different nuance that will be important for lawyers across the state to understand—they should stress the importance of the legal question.

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291. *Id.* at R. 57(G).

292. *Id.* at R. 57(H) (emphasis added).

3. *Rule 58: Effect of Supreme Court Ruling on Petition to Transfer.*—This Rule is substantially similar to the prior version. Upon the grant of transfer, the Indiana Supreme Court shall have jurisdiction over the appeal and all issues as if the case had been originally filed in the supreme court.<sup>293</sup> The denial of a Petition to Transfer shall have no legal effect other than to terminate the litigation between the parties in the supreme court.<sup>294</sup> When the supreme court is evenly divided on the question of whether to accept or deny transfer, transfer shall be deemed denied, and if the supreme court is evenly divided after transfer has been granted, the decision of the court of appeals shall be reinstated.<sup>295</sup>

4. *Rule 59: Mandatory Appellate Review and Direct Review.*—As before, when the supreme court exercises exclusive jurisdiction, or when the supreme court grants an emergency Petition to Transfer prior to the issuance of an opinion by the appellate court, the appeal shall be taken in the same manner as cases that are appealed to the court of appeals.<sup>296</sup> When the supreme court is equally divided in such cases, the trial court judgment is affirmed.<sup>297</sup>

5. *Rule 60: Original Actions.*—The Rule is the same: “[p]etitions for writ [sic] of mandamus or prohibition are governed by the Rules of Procedure for Original Actions.”<sup>298</sup>

6. *Rule 61: Mandate of Funds.*—The practice on Mandate of Funds did not change but a provision in the new Rules has been added to refer to them. The supreme court will review a case involving the Mandate of Funds commenced under Indiana Trial Rule 60.5(B), in accordance with such orders on briefing, argument, and procedure as the supreme court may issue in its discretion.<sup>299</sup>

7. *Rule 62: Appeals Involving Waiver of Parental Consent to Abortion.*—The Rule has not changed but has been broken down into sections such as Applicability, Permitted Parties, Appeal by Minor or Her Physician, Appeal by State or Other Party, Decision by the Supreme Court.<sup>300</sup>

8. *Rule 63: Review of Tax Court Decisions.*—The new Rule concerning reviews of tax court decisions is substantially similar to the prior version. The considerations governing the grant of review have been changed to parallel Rules regarding the consideration for granting transfer in Rule 57(H).<sup>301</sup> In other respects, the procedure has changed little.

9. *Rule 64: Certified Questions of State Law From Federal Courts.*—For Certified Questions, the Rule is substantially the same as before with some added specifics to assist the occasional appellate practitioner. A Certified Question of Indiana law can now come from any federal court, rather than just the federal

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293. See *id.* at R. 58(A).

294. See *id.* at R. 58(B).

295. See *id.* at R. 58(C).

296. See *id.* at R. 59(A).

297. See *id.* at R. 59(B).

298. *Id.* at R. 60.

299. See *id.* at R. 61.

300. See *id.* at R. 62.

301. See *id.* at R. 63(I).

appellate courts and district courts sitting in Indiana.<sup>302</sup> So, district courts that sit outside of Indiana that have a question of Indiana law can certify the matter to the Indiana Supreme Court. The procedures have also been clarified to help practitioners with this rarely used mechanism.<sup>303</sup>

*L. Title XII: Court Procedures, Powers, and Decisions*

1. *Rule 65: Opinions and Memorandum Decisions.*—The Rule now contains a time deadline that conforms to internal procedures of the court of appeals regarding the time for filing a motion to publish: “[w]ithin thirty (30) days of the entry of the decision, a party may move the Court to publish any not-for-publication memorandum decision . . . .”<sup>304</sup> With regard to the effective date of any appellate opinion, certification may occur earlier than after the expiration of all rehearing deadlines if all the parties request earlier certification.<sup>305</sup> A new provision has been added for clarification regarding the effective date: “[t]he trial court, Administrative Agency, and parties shall not take any action in reliance upon the opinion or memorandum decision until the opinion or memorandum decision is certified.”<sup>306</sup> This sentence was added to address the problem of a party acting based on an opinion of the court of appeals only to later learn that the supreme court did not see the same resolution.

2. *Rule 66: Relief Available on Appeal.*—The relief available on appeal remains largely the same. One provision that survived despite some debate was a provision allowing the appellate court to consider an appeal even though it did not have jurisdiction:

No appeal shall be dismissed as of right because the case was not finally disposed of in the trial court or Administrative Agency as to all issues and parties, but upon the suggestion or discovery of such a situation, the Court may, in its discretion, suspend consideration until disposition is made of such issues, or it may pass upon such adjudicated issues as are severable without prejudice to parties who may be aggrieved by subsequent proceedings in the trial court or Administrative Agency.<sup>307</sup>

3. *Rule 67: Costs.*—The Rule on costs contains additional specifics. For example, while the prior rule had no time period for filing a motion for costs, the new Rule sets a sixty day deadline for filing the motion after the final decision of the court of appeals or supreme court.<sup>308</sup> “When the Supreme Court justices participating in an appeal are equally divided, neither party shall be awarded

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302. *See id.* at R. 64(A).

303. *See id.* at R. 64(B).

304. *Id.* at R. 65(B).

305. *See id.* at R. 65(E).

306. *Id.*

307. *Id.* at R. 66(B).

308. *See id.* at R. 67(A).

costs."<sup>309</sup>

## II. CONSTITUTIONAL AMENDMENT AND SUPREME COURT EXPANSION

On November 7, 2000, the voters of Indiana will decide whether to amend the state constitution in a manner that would change the jurisdiction of the Indiana Supreme Court. Currently, the Indiana Supreme Court is constitutionally obligated to consider all criminal appeals with a sentence of fifty years or longer.<sup>310</sup> This constitutional provision was the result of an amendment in 1988 when the presumptive sentence was less than fifty years for murder. The Indiana General Assembly later increased the presumptive sentence to more than fifty years, causing almost every appeal of a murder sentence to go directly to the Indiana Supreme Court which has pushed out criminal matters with *substantial* legal questions with sentences of less than fifty years as well as all civil cases. The constitutional amendment will free up the Indiana Supreme Court to act like a court of last resort.

Perhaps related to the constitutional amendment, Chief Justice Randall T. Shepard has publicly supported expanding the Indiana Supreme Court from the current contingent of five justices.<sup>311</sup> Many state supreme courts have more than five justices, and the Indiana State Bar Association's Judicial Improvement Committee is considering the matter.<sup>312</sup>

## III. MODEST PROPOSAL

The constitutional amendment and potential expansion of the Indiana Supreme Court raise the question about whether the court should continue its practice that a majority of justices (currently three of five) must vote to grant transfer before deciding to hear a case—a process that contrasts with the practice in the U.S. Supreme Court in which a minority of four can require the nine justice court to hear a case on the merits.<sup>313</sup> If two votes were sufficient to grant transfer, in 1999 the Indiana Supreme Court would have granted transfer in about forty additional cases, and in 1998, about twenty. In light of the increase in the number of opinions dissenting to the denial of transfer (often leading the reader to wonder what response the majority would make), the Indiana Supreme Court should change its practice to permit one vote less than a majority to be sufficient to grant transfer.

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309. *Id.* at R. 67(D).

310. IND. CONST. art. 7, § 4.

311. See Scott Olson, *Supreme Court Expansion Advocates Organizing*, IND. LAW., Nov. 24-Dec. 7, 1999, at 21.

312. See *id.*

313. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 5.4, at 230 (BNA, 7th ed. 1993).

### CONCLUSION

The new Indiana Appellate Rules that are to be effective January 1, 2001 are very significant developments of which appellate practitioners should be aware. The constitutional amendment and expansion of the Indiana Supreme Court are important developments as well. Finally, the Indiana Supreme Court should change its practice to allow one vote less than a majority to be sufficient to grant transfer in order to provide the people of Indiana a greater insight into the justices' thoughts on a legal problem that has generated some interest on the court.