DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: APPELLATE RULE AMENDMENTS, REMARKABLE CASE LAW, AND REFINING OUR INDIANA PRACTICE

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INTRODUCTION

This Article will briefly explain the 2007 amendments to the Indiana Rules of Appellate Procedure (the "Rules"). This Article will also undertake a retrospective look at remarkable cases from this past reporting period, which specifically address intricacies of the Rules as they are applied in everyday appellate practice. This Article will conclude by highlighting appellate orders that provide practitioners with tips on how to refine their appellate practices.

I. APPELLATE RULE AMENDMENTS

This past year the Indiana Supreme Court amended Rules 14, 15, 22, 23, 43, 57, and 63.[1] The new rules were effective as of January 1, 2008.[2]

A. Rules 14, 15, and 57(B) Jurisdiction over Interlocutory Order in Class Action Certification

Under new Rule 14, the court of appeals may, in its discretion, accept jurisdiction over an appeal from an interlocutory order granting or denying class action certification under Indiana Trial Rule 23.[3] A motion requesting the court

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1. *See* Order Amending Rules of Appellate Procedure (Ind. Sept. 10, 2007) (No. 94S00-0702-MS-49); Order Amending Rules of Appellate Procedure (Ind. Sept. 12, 2007) (No. 94S00-0702-MS-49); Order Amending Order Amending Rules of Appellate Procedure (Ind. Sept. 27, 2007) (No. 94S00-0702-MS-49).

2. *See* sources cited *supra* note 1.

3. Order Amending Rules of Appellate Procedure (Ind. Sept. 10, 2007) (No. 94S00-0702-MS-49), *available at* http://www.in.gov/judiciary/orders/rule-amendments/2007/appellate-091007.pdf.

of appeals to exercise this discretion must be filed within thirty days of the entry of the order and shall state (i) the date of the order granting or denying the class action certification, (ii) the facts necessary for consideration of the motion, and (iii) the reasons the court of appeals should accept the interlocutory appeal.[4] A copy of the trial court's order granting or denying the class action shall be attached to the motion requesting that the court of appeals accept jurisdiction over the interlocutory appeal, and any response to such a motion shall be filed within fifteen days after the motion was served.[5] If jurisdiction is accepted by the court of appeals, the appellant shall file a Notice of Appeal with the trial court clerk within fifteen days of the court of appeals's order and shall also comply with Rule 9(E).[6]

To comply with the Rule 14 amendment, Rules 15 and 57 were also amended. Rule 15 was amended to include a "Class Action Certification Interlocutory Appeal under Rule 14(C)" as an appeal that requires its Appellant's Case Summary to be filed at the time the motion requesting permission to file the interlocutory appeal is filed in the court of appeals—as opposed to the thirty days after the filing of the Notice of Appeal generally allotted to an appellant.[7] Likewise, Rule 57(B), which addresses "Decisions From Which Transfer May be Sought," was amended to include the newly formed 14(C) class action certification interlocutory appeal as the type that "shall not be considered an adverse decision for the purpose of petitioning to transfer, regardless of whether rehearing by the Court of Appeals was sought."[8]

B. Rule 22—Citation to County Local Rules

The amendment to Appellate Rule 22 provides practitioners with the proper citation form for County Local Rules. The amendment provides that "[c]itations to County Local Court Rules adopted pursuant to Ind[iana] Trial Rule 81 shall be cited by giving the county followed by the citation to the local rule, e.g. Adams LR01-TR3.1-1."[9]

C. Rule 23—Appellate Filing

Section E was added to Rule 23, which governs appellate filing, and provides as follows:

> **(E) Signature Required.** Every motion, petition, brief, appendix, acknowledgment, notice, response, reply, appearance, or appellant's case summary must be signed by at least one [1] attorney of record in the attorney's individual name, whose name, address, telephone number, and

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4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

attorney number shall also be typed or printed legibly below the signature. If a party or amicus is not represented by an attorney, then the party or amicus shall sign such documents and type or print legibly the party or amicus's name, address, and telephone number. The signing of the verification of accuracy required by Rule 50(A)(2)(i) or 50(B)(1)(f) satisfies this requirement for appendices.[10]

D. Rule 43—Acceptable Fonts and Digital Filing

Perhaps the change most anticipated by appellate practitioners came by way of an amendment to Rule 43. New Rule 43(D) adds Baskerville, Book Antiqua, Bookman, Bookman Old Style, Century, Century Schoolbook, Garamond, Georgia, New Baskerville, New Century Schoolbook, and Palatino to the list of acceptable fonts for appellate briefs and petitions to transfer.[11] Even more interesting was the amendment that changed section K of Rule 43 to require that a digital copy in Word or text-searchable PDF format, as opposed to simply an electronic format, of all documents accompany papers filed in the appellate courts. This amendment also provided that the digital filing may be received by the clerk's office on a floppy disk or CD along with the paper versions or by email to the clerk's office on the same day the hard paper copies are filed.[12] Section K excuses unrepresented parties from the digital requirement.[13] As exciting as this change was to appellate practitioners, who briefly envisioned the days of cleaner office desks and increased "Control F" searches, our supreme court soon thereafter retracted the 43(K) change, effective immediately, and tabled it for a later date.[14] Presumably, the Rule 43(K) amendment is on the horizon and may be revisited in the upcoming year. The change to 43(D) was not stricken[15] and is still in effect as of January 1, 2008.[16]

E. Rule 63: Review of Tax Court Decisions

Finally, the most dramatic amendments to the Rules were those to Rule 63

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10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *See* Order Amending Order Amending Rules of Appellate Procedure (Ind. Sept. 27, 2007) (No. 94S0-0702-MS-49) ("The amendment to Appellate Rule 43(K) was inadvertently included in the September 10 Order and was not intended to be issued in that form at that time. We find that the portion of our September 10, 2007 Order Amending Rule of Appellate Procedure purporting to amend Appellate Rule 43(K) should be stricken."), *available at* http://www.in.gov/judiciary/orders/rule-amendments/2007/rule43-092707.pdf.
15. *See id.*
16. *Id.*; *see also* Order Amending Rules of Appellate Procedure (Ind. Sept. 12, 2007) (No. 94S00-0702-MS-49), *available at* http://www.in.gov/judiciary/orders/rule-amendments/2007/rule63-091007.pdf.

that addressed the review of tax court decisions.[17] The amendment provides that final dispositions, as opposed to solely final judgments, of tax court decisions, can be petitioned to the supreme court for review.[18] Section B now provides, "Any party adversely affected by a Final Judgment or final disposition may file a Petition for Rehearing with the tax court, not a Motion to Correct Error. Rehearings from a Final Judgment or final disposition of the Tax Court shall be governed by Rule 54."[19] Section C now requires a Notice of Intent to review a Tax Court decision in accordance with the requirements of Rule 9.[20] Also new to Rule 63 are sections D, E, K, and L.[21] Section D provides that the clerk shall give notice of the Notice of Intent to Petition to the Court Reporter and shall assemble the Clerk's Record in accordance with Appellate Rule 10, that the Court Reporter is responsible for preparing and filing the transcript in accordance with Rule 11, and that the clerk is to maintain access to the Clerk's Record in accordance with Rule 12.[22] Section E establishes the time requirements for filing a petition for review.[23] Section K provides, "Extensions of time may be sought under Rule 35 except that no extension of the time for filing the Notice of Intent to Petition for Review shall be granted."[24] Finally, section L provides, "Appendices shall be filed in compliance with Rules 49, 50, and 51."[25] The rest

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17. *See* Order Amending Rules of Appellate Procedure (Ind. Sept. 12, 2007) (No. 94S00-0702-MS-49), *available at* http://www.in.gov/judiciary/orders/rule-amendments/2007/rule63-091007.pdf.

18. *See id.* Rule 63A also removed from this section the briefing requirements of a petition to transfer a tax court decision. A case reported during the reporting period highlighted that the court of appeals, like the trial courts of Indiana, lacks subject matter jurisdiction to consider cases that fall within the tax court's exclusive jurisdiction. *See* Wayne Twp. v. Ind. Dep't of Local Gov't Fin., 865 N.E.2d 625, 631 (Ind. Ct. App.) ("Decisions of the Tax Court must be appealed, if at all, directly to the Indiana Supreme Court. Thus, we do not have the luxury of considering the merits of the dispute here despite the trial court's lack of subject matter jurisdiction, although our Supreme Court can do so even if the trial court jurisdiction was lacking . . . . The Tax Court transferred this case and the trial court ruled on it because of the parties' joint request that the trial court consider the case. But the fact remains that parties to a case cannot, by mutual consent, confer subject matter jurisdiction upon a tribunal when the law otherwise does not confer such jurisdiction." (citations omitted)), *trans. denied*, 878 N.E.2d 217 (Ind. 2007).

19. *See* Order Amending Rules of Appellate Procedure (Ind. Sept. 12, 2007) (No. 94S00-0702-MS-49), *available at* http://www.in.gov/judiciary/orders/rule-amendments/2007/rule63-091007.pdf.

20. *See id.* (Rule 63(C), formerly "Time for Filing Petition," is now entitled "Notice of Intent to Petition for Review." This section also now provides that Rule 25(C)'s "three-day extension for service by mail or third-party commercial carrier, does not extend the due date for filing a Notice of Intent to Petition for Review, and no extension of time shall be granted.").

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

of Rule 63 is substantially the same.[26]

In sum, the amended Rules have significant and positive impacts for appellate practitioners. Any gray areas inadvertently created by these changes to the Rules will likely work themselves out in subsequent appellate opinions.

II. Remarkable Case Law

A. Reaffirming the Importance of the "Magic Language"

Cincinnati Insurance Co. v. Davis,[27] articulated no new procedural rules, but reminded appellate practitioners and trial judges of an important appellate procedural point.[28]

Cincinnati Insurance Company and Indiana Insurers Company (collectively, the "Insurers") filed a negligence complaint against an office building tenant (the "Doctor"), a clinic (the "Clinic"), and a water filtration company ("Culligan") after a water leak damaged the insured property.[29] The Insurers had paid over $100,000 in claims and initially filed a negligence complaint against the Doctor and Culligan.[30] The trial court granted the Doctor's motion for summary judgment, finding that the Insurers had not designated evidence showing negligence or established the applicability of res ipsa loquitor.[31] The order granting the motion, however, did not indicate that it was a final appealable judgment.[32] Over a month before summary judgment was entered in favor of the Doctor, the Insurers filed an amended complaint adding the Clinic as a defendant, and the Clinic, without designating any evidence, responded with a motion for summary judgment of its own.[33] Subsequently, summary judgment for the Doctor had been entered, Culligan filed its motion for summary judgment, asserting that any claim of res ipsa loquitor must fail for the same reason it failed against the Doctor.[34]

After Culligan filed its motion, the Insurers designated evidence in opposition to the Clinic's motion and petitioned to certify the Doctor's summary judgment order for interlocutory appeal.[35] The Insurers then designated evidence

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26. It is worth noting that based on Rule 63(C)'s exclusion of Rule's 25(C)'s three-day extension, sections F and G, formerly D and E, have stricken the extension of Rule 25(C) to briefs in response and reply briefs, respectively. *Id.* Old sections L (Briefing After Petition Granted) and M (Record Review) have been stricken entirely. *Id.*

27. 860 N.E.2d 915 (Ind. Ct. App. 2007).

28. *Id.* at 921 (noting the importance of the *magic* words "no just reason for delay" and an express wrong directory entry at judgment).

29. *Id.* at 918.

30. *Id.*

31. *Id.* at 919.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

in opposition to Culligan's motion.[36] The Insurers later filed a motion to reconsider the summary judgment granted in favor of the Doctor on the grounds that, even though they only alleged res ipsa loquitor against the Doctor, their designated evidence clearly suggested that they were proceeding on an ordinary negligence theory as well.[37]

After a hearing, the trial court granted Culligan summary judgment "'for the same reasons'" it granted the Doctor's motion.[38] That order further stated, "'As there remain no pending issues, this shall be considered a final, appealable order.'"[39] The trial court also entered an order denying the Insurers' motion to reconsider the Doctor's summary judgment order.[40] That order stated, "'As the Court has simultaneously herewith granted [Culligan's] Motion for Summary Judgment, there are no issues remaining and the granting of the Motion For Summary Judgment and Order denying the Motion To Reconsider shall be considered final, appealable Orders. The Motion to Certify Interlocutory Appeal is, accordingly, deemed moot.'"[41]

A week later, the Insurers filed their notice of appeal as to the "final judgments" on the Doctor's and Culligan's summary judgments but did not request a transcript, and three days later, the court clerk issued a notice of completion of Clerk's Record.[42] The Insurers requested a ruling on the Clinic's summary judgment motion. The trial court ultimately granted summary judgment in favor of the Clinic "'for the same reasons that summary judgment [was] granted in favor of [Davis] and against the [the Insureds].'"[43] Once again, the order stated that "'as there now remain no pending issues, this shall be considered a final, appealable order.'"[44] This order spurred the Insurers to amend their notice of appeal to include the Clinic's summary judgment motion, and the next day, the trial court issued a notice of completion of the Clerk's Record.[45] Three weeks later, but after a minor mix-up regarding the request of transcript,[46] the Insurers requested an extension of time to file their brief, which the court

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36. *Id.*

37. *Id.*

38. *Id.* (quoting Appellants' App. at 6).

39. *Id.* (quoting Appellants' App. at 6).

40. *Id.* at 919-20.

41. *Id.* at 920 (alteration in original) (quoting Appellants' App. at 5).

42. *Id.*

43. *Id.* (alteration in original) (quoting Appellants' App. at 7).

44. *Id.* (quoting Appellants' App. at 7).

45. *Id.*

46. In the first notice of completion of transcript, which was filed by the trial court clerk before the amended notice of appeal was filed by the Insurers, the clerk stated that the transcript had not yet been completed. *Id.* This was, as the court of appeals put it, "a scrivener's error, since no transcript had been requested." *Id.* After the amended notice of appeal was filed, the trial court clerk made the same error but two days later issued an amended notice that no transcript had been requested. *Id.*

granted.[47] The insurers filed their brief within the extended time period, and Culligan and the Doctor subsequently filed their briefs.[48] The Clinic, however, did not file a brief.[49] The Insurers timely filed a reply brief.[50]

Culligan raised the question of whether the court of appeals had subject matter jurisdiction, arguing that the Insurers did not timely file their brief following the trial court's entry of summary judgment in Culligan's favor, and that brief filing timeline was tolled when the trial court issued the first notice of completion of Clerk's Record.[51] The court of appeals stated that "[t]he gist of Culligan's argument is that the trial court's . . . orders as to Culligan and Davis were final judgments."[52] The court of appeals disagreed that those orders were final despite their language to the contrary.[53]

Trial Rule 56(C) provides in pertinent part:

> A summary judgment upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory unless the court in writing expressly determines that there is not just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims or parties.[54]

It has been observed that Appellate Rule 2(H) must be read in conjunction with Trial Rule 56(C).[55] Rule 2H defines a "final judgment" as one which disposes of all claims as to all parties or where the trial court expressly determines that there is no just cause for delay and in writing expressly directs an entry of partial judgment under Trial Rule 56(C) or 54(B).[56]

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47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *See* IND. APP. R. 45(B), which provides:

> The appellant's brief shall be filed no later than thirty (30) days after: (a) the date the trial court clerk . . . issues its notice of completion of Clerk's Record if the notice reports that the Transcript is complete or that no Transcript has been requested; or (b) in all other cases, the date the trial court clerk . . . issues its notice of completion of the Transcript.

52. *Cincinnati Ins.*, 860 N.E.2d at 921.

53. *Id.*

54. IND. TRIAL R. 56(C) (in part); *see also* IND. TRIAL R. 54(B), which provides:

> A judgment as to one or more but fewer than all of the claims or parties is final when the court in writing expressly determines that there is no just reason for delay, and in writing expressly directs entry of judgment, and an appeal may be taken upon this or other issues resolved by the judgment; but in other cases a judgment, decision or order as to less than all the claims and parties is not final.

55. *See* Douglas E. Cressler, *Appellate Procedure*, 36 IND. L. REV. 935, 941 (2003).

56. IND. APP. R. 2(H); *see also* IND. APP. R. 9(A) ("A party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment."). Another case decided during this reporting period, while highlighting the importance

The court of appeals found that the order did not dispose of all pending issues and that the trial court did not "expressly determine" under either Trial Rule 54(B) or Trial Rule 56(C) "that 'there is not just reason for delay' and expressly direct entry of judgment 'as to less than all the issues, claims or parties.'"[57] The *Cincinnati Insurance* court quoted the Indiana Supreme Court's explanation of Trial Rule 54(B) that

> certification of an order that disposes of less than the entire case *must contain the magic language of the rule. This is intended to provide a bright line so that there is no mistaking whether an interim order is or is not appealable* . . . . [A]n order becomes final and appealable under Rule 54(B) "only by meeting the requirements of T.R. 54(B). These requirements are that the trial court, in writing, *expressly determine that there is no just reason for delay* and, in writing, expressly directs entry of judgment."[58]

Accordingly, the *Cincinnati Insurance* court concluded that even though the Culligan and Davis orders each stated they were "a final and appealable order,"[59] neither order contained the "magic language" of Trial Rule 54(B) or 56(C), and therefore neither were final judgments.[60] Thus, *Cincinnati Insurance* reminds practitioners of the "powerful appellate procedural mechanisms embodied in Trial Rules 54(B) and 56(C),"[61] which allow trial courts under certain conditions to craft a judgment that is final and appealable.[62]

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of the language of Trial Rule 56(C), noted that a trial court entered final judgment, and the court of appeals stressed that, in addition to Appellate Rule 2(H), it was using "final judgment" "in the context of Indiana Appellate Rule 5(A), which provides that the court 'shall have jurisdiction in all appeals from Final Judgments' of circuit and superior courts." Ins. Co. of N. Am. v. Home Loan Corp., 862 N.E.2d 1230, 1232 n.3 (Ind. Ct. App. 2007) (quoting IND. APP. R. 5(A)).

57. *Cincinnati Ins.*, 860 N.E.2d at 921.

58. *Id.* (quoting Georgos v. Jackson, 790 N.E.2d 448, 452 (Ind. 2003) (emphasis added)).

59. This language should be compared with the decision reported during this period in *State v. Young*, 855 N.E.2d 329 (Ind. Ct. App. 2006), which concluded that an order failed to discuss whether a party was

> owed back pay and what the amount of damages for improperly withheld back pay would be and whether the trial court or one of the agencies below would be responsible for making that determination. In sum, the order contains no remedy to the [party]. As such, it cannot be considered a final judgment [as it lacks the "magic language" of Trial Rule 54(B)].

Id. at 333 (citing *Georgos*, 790 N.E.2d at 452).

60. *Cincinnati Ins.*, 860 N.E.2d at 921.

61. Cressler, *supra* note 55, at 942.

62. *See id.* Another case decided during this reporting period, but later vacated, clarified that not even the "magic language" can transform a denial of a summary judgment motion into a final, appealable order. *See* Ind. Dep't of Transp. v. Howard, 873 N.E.2d 72, 75 (Ind. Ct. App. 2007) ("An order *denying* summary judgment is not a final appealable order, and cannot be made into one via Trial Rules 54(B) or 56(C), because no issues have been irretrievably disposed of and no rights

B. The Supreme Court "Rules" in More Ways than One

The court of appeals's decision in *Owen County v. Indiana Department of Workforce Development*[63] addressed a question of law certified to it pursuant to Indiana Code section 22-4-17-13[64] from the Unemployment Insurance Review Board of the Indiana Department of Workforce Development ("Review Board"). The issue was whether the procedures described in Appellate Rule 9(A)(3) and 9(I) are the exclusive means to initiate an appeal from the Review Board or whether Indiana Code sections 22-4-17-11 and -12 govern the initiation and perfection of an appeal.[65]

On the same day the Review Board also affirmed an Administrative Law Judge's ("ALJ") finding that the evidence did not establish that a county employee was fired for just cause, the County filed its Notice of Intent to Appeal with the Review Board.[66] The Board responded that the County had thirty days to file the notice of appeal with the court of appeals.[67]

Over two months later, the County filed its Appellant's Case Summary with the clerk of the court of appeals.[68] The clerk informed the County that it had not properly initiated its appeal, which caused the County to file a Motion for Leave to File Appeal, alleging that their Notice of Intent to Appeal contained the same content required under Appellate Rule 9(F) and was filed in a timely manner.[69] The court of appeals agreed and granted the County's motion, conceding that, although unorthodox, the Notice of Intent to Appeal complied with Rule 9.[70]

The court of appeals gave the County seven days from the date of that order to file its Appellant's Case Summary.[71] Less than three months later, the Review Board filed its certified question to the court of appeals regarding the "proper and exclusive procedure for initiating an appeal" of a Review Board decision because the statutory procedure for appealing a Review Board decision differs from generally initiating an appeal outlined by the Appellate Rules.[72]

At issue was Indiana Code section 22-4-17-11(a):

> Any decision of the review board, in the absence of appeal as

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have been foreclosed by such an order," and therefore the only way to appeal such an order is via Appellate Rule 14(B). (emphasis added)), *vacated*, 879 N.E.2d 1119 (Ind. Ct. App. 2008).

63. 861 N.E.2d 1282 (Ind. Ct. App. 2007).

64. Indiana Code section 22-4-17-13 provides that "the review board, on its own motion, may certify questions of law to the supreme court or the court of appeals for a decision and determination." IND. CODE § 22-4-17-13 (2007).

65. *Owen County*, 861 N.E.2d at 1284.

66. *Id.* at 1285.

67. *Id.*

68. *Id.* at 1286.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

> provided in this section, shall become final fifteen (15) days after the date the decision is mailed to the interested parties. The review board shall mail with the decision a notice informing the interested parties of their right to appeal the decision to the court of appeals of Indiana. The notice shall inform the parties that they have fifteen (15) days from the date of mailing within which to file a notice of intention to appeal, and that in order to perfect the appeal they must request the preparation of a transcript in accordance with section 12 of this chapter.[73]

Section 12 provides:

> (a) Any decision of the review board shall be conclusive and binding as to all questions of fact. Either party to the dispute or the commissioner may, within thirty (30) days after notice of intention to appeal as provided in this section, appeal the decision to the court of appeals of Indiana for errors of law under the same terms and conditions as govern appeals in ordinary civil actions.[74]

> (e) The review board may, upon its own motion, or at the request of either party upon a showing of sufficient reason, extend the limit within which the appeal shall be taken, not to exceed fifteen (15) days. In every case in which an extension is granted, the extension shall appear in the record of the proceeding filed in the court of appeals.[75]

These sections conflict with Appellate Rule 9, which governs the initiation of an appeal and provides:

> (3) *Administrative Appeals.* A judicial review proceeding taken directly to the Court of Appeals from an order, ruling, or decision of an Administrative Agency is commenced 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.[76]

Citing precedent that the Indiana Supreme Court's procedural rules trump procedural statutes,[77] and after addressing a minor skirmish between the parties over whether there was in fact a conflict,[78] the *Owen County* court rejected the

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73. IND. CODE § 22-4-17-11(a) (2007).

74. *Id.* § 22-4-17-12(a).

75. *Id.* § 22-4-17-12(e).

76. IND. APP. R. 9(A)(3).

77. *See* Jackson v. City of Jeffersonville, 771 N.E.2d 703, 706 (Ind. Ct. App. 2002); *see also In re* J.L.V., Jr., 667 N.E.2d 186, 189 (Ind. Ct. App. 1996) (stating that conflict does not require that the rule and the statute be directly opposed but rather that they are "incompatible to the extent that both could not [be applied] in a given situation" (citing Spencer v. State, 520 N.E.2d 106, 109 (Ind. Ct. App. 1988)).

78. *Owen County*, 861 N.E.2d at 1288. The Review Board argued that there was not necessarily a conflict because Appellate Rule 9 does "not say 'no Notice of Intent to Appeal shall

idea that the statute and the Rule could work together.[79] The appellate court noted that if it were applying section 1 of Rule 9 to the appeal, then perhaps it could agree with a harmonization theory;[80] however, because section 3 of Rule 9 was being applied, there was a direct conflict because section 3 specifically states that the date of the decision is the operative date, and under the statute the decision is not final for fifteen days after it is made.[81] The court of appeals concluded that it had not been provided with any compelling reason to depart from established precedent that the Appellate Rules, created by Indiana's high court, must prevail.[82]

Also interesting was the *Owen County* court's response to the Review Board's request that the court clarify its obligations and timelines under the Rules if it found that the Appellate Rules were controlling.[83] Appellate Rule 9(A)(3), unlike 9(A)(1), contains no requirement that the Notice of Appeal be served on all parties of record and the clerk of the court of appeals.[84] Because of this, the Review Board argued that after the filing of a Notice of Appeal with the administrative agency, which causes the Review Board to prepare the case's transcript, the appellant may never serve the clerk or further pursue the appeal.[85] In the Review Board's eyes, this would cause it to jump through hoops (preparing transcripts and filing Rule 10(B) and 11(B) notices with the clerk) for no purpose.[86] Citing Appellate Rule 9(I), which provides that "[i]n Administrative Agency appeals, the Notice of Appeal shall include the same contents and be handled in the same manner as an appeal from a Final Judgment in a civil case,"[87]and—despite the fact that section 3 establishes when the Notice of (an administrative) Appeal must be filed—the court concluded that the "standard" rules for civil appeals cover everything else.[88] Rule 9(A)(1) requires an appellant to serve a copy of the Notice of Appeal on the clerk and pay the filing fee at that the time of filing the 9(A)(3) Notice of Appeal,[89] and 9(H) provides that "a party must make satisfactory arrangements . . . for payment of the cost of the Transcript."[90] The *Owen County* court therefore concluded that the Rules adequately addressed the Review Board's concerns.[91]

Earlier in the reporting period, *Citizens Industrial Group v. Heartland Gas*

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be filed'" and therefore could be harmonized with the statute. *Id.*

79. *Id.* at 1288-89.
80. *Id.*
81. *Id.* at 1289.
82. *Id.*
83. *Id.* at 1289-90.
84. *Id.* at 1289.
85. *Id.* at 1289-90.
86. *Id.*
87. IND. APP. R. 9(I).
88. *Owen County*, 861 N.E.2d at 1290.
89. IND. APP. R. 9(A)(1); *see also* IND. APP. R. 9(E).
90. IND. APP. R. 9(H).
91. *Owen County*, 861 N.E.2d at 1290.

Pipeline, LLC[92] reached the same conclusion on different facts.[93] Citizens Industrial Group ("CIG") had filed its notice of appeal three months after an order was issued by the Indiana Utility Regulatory Commission ("IURC")[94] in accordance with Indiana Code section 8-1-3-2(b), which provides that

> [t]he appeal shall not be submitted prior to [the] determination of the petition for rehearing, and the decision of the commission on the petition shall not be assigned as error unless the final decision, ruling or order of the commission is modified or amended as a result of the petition without further hearing ordered.[95]

The court of appeals acknowledged CIG's point that equity would seemingly "favor giving administrative agencies the same second chance to review their decisions" that is afforded to trial courts and would occasionally prevent "appellants from undertaking [a] cumbersome appeal process."[96] Nevertheless, the court concluded that it was constrained by the language of Rule 9(A)(3), which "unequivocally" states that a party appealing an administrative agency's order must file the notice of appeal "'within thirty (30) days after the date of the order, ruling or decision, *notwithstanding any statute to the contrary*.'"[97] The appellate court found the rule and the statute "clearly incompatible," concluded that the rule controlled, and therefore dismissed the notice of appeal as untimely under Rule 9(A)(3).[98] The court thus held that "to comply with the rules of appellate procedure, an appellant must file a notice of appeal within thirty days of the date when the agency's order is issued, regardless of whether the party has a petition to reconsider pending before the administrative agency."[99]

Another administrative appeal addressed the interplay between a statute and the appellate rules in a slightly different context. The Review Board had determined that a former employee of the company was entitled to unemployment compensation benefits.[100] The court of appeals clarified a small procedural point regarding the filing of the Clerk's Record.[101] The Review Board had filed its notice that the Clerk's Record had been completed, and the employer

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92. 856 N.E.2d 734 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 453 (Ind. 2007).

93. *Id.* at 738.

94. *Id.* at 736 (IURC issued its order on October 5, 2005, and IG filed its notice of appeal on January 20, 2006.).

95. IND. CODE § 8-1-3-2(b) (2004).

96. *Citizens*, 856 N.E.2d at 738.

97. *Id.* (quoting IND. APP. R. 9(A)(3) (emphasis added)).

98. *Id.* ("Where there is a direct conflict between the statute and the [appellate] rule[s . . .] in a purely procedural matter fixing a time limitation on appeals, the statutory provision must fall." (alterations in original)) (quoting McCormick v. Vigo County High Sch. Bldg. Corp., 226 N.E.2d 328, 331 (Ind. 1967)).

99. *Id.*

100. NOW Courier, Inc. v. Review Bd. of the Ind. Dep't of Workforce Dev., 871 N.E.2d 384 (Ind. Ct. App. 2007).

101. *Id.* at 389 n.3.

had filed with the Board a motion for correction of that record, "asserting that the record 'filed' was 'incomplete' because it failed to 'contain any filings or orders issued by the Review Board in connection with [the] matter, including the Final Order' appealed from."[102]

The Review Board responded that its notice of completion of the Clerk's Record was complete.[103] It included the certified copy of the CCS pursuant to Appellate Rule 10(C)[104] and consisted of the "[CCS] and all papers, pleadings, documents, orders, judgments, and other materials filed in the . . . Administrative Agency," according to Appellate Rule 2(E).[105] The Review Board contended that since the court of appeals had not ordered otherwise, the Review Board's clerk was "retain[ing] [the Clerk's Record] throughout the appeal"[106] under Appellate Rule 12(A).[107]

Of importance to appellate practitioners is that the appellant had apparently confused the language of Indiana Code section 22-4-17-12(b), which outlines the requirement for the filing of a *transcript*,[108] with the requirements for the completion of *Clerk's Record*.[109] The former requires that "rulings" and "documents and papers introduce into evidence or offered as evidence"[110] be filed with the court, while the latter is complete if it includes the CCS.[111]

The employer had filed a motion asking the court of appeals to order that the Clerk's Record filed by the Review Board be corrected.[112] Rule 12(C) provides that "any party may copy any document from the Clerk's Record,"[113] and Rule 12(A) allows the clerk of the administrative agency to retain the record.[114] The court of appeals cited these rules and concluded that the employer had been able to copy all the necessary material, as it was included in its appendix.[115] As such, the court found the material properly before it and concluded that the employer's motion was therefore moot.[116]

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102. *Id.* The employer's motion itemized various material not included with the notification of completion of the Clerk's Record filed with the court of appeals. *Id.*

103. *Id.*

104. *Id.* (citing IND. APP. R. 10(C)).

105. *Id.* (citing IND. APP. R. 2(E)).

106. *Id.*

107. IND. APP. R. 12(A).

108. IND. CODE § 22-4-17-12(b) (2007).

109. *See NOW Courier*, 871 N.E.2d at 389 n.3.

110. IND. CODE § 22-4-17-12(b) (2007).

111. *NOW Courier*, 871 N.E.2d at 389 n.3.

112. *Id.*

113. IND. APP. R. 12(C).

114. IND. APP. R. 12(A) (noting that "the trial court clerk shall retain the Clerk's Record throughout the appeal").

115. *NOW Courier*, 871 N.E.2d at 389 n.3.

116. *Id.*

C. A Brief Filed Thirty-Eight Days Late Is Untimely Enough to Justify Dismissal

The procedural backdrop to *Miller v. Hague Insurance Agency, Inc.*[117] is as follows: On January 11, 2006, Farmers Mutual Insurance Company filed a motion for partial summary judgment against the Millers.[118] On June 7, 2006, "[t]he trial court granted Farmers Mutual's request for partial summary judgment," and certified the "orders as final appealable judgments on June 7, 2006" at the request of the Millers.[119] On that same day, the Millers filed their notice of appeal, and then they filed their Appellants' Case Summary on June 22, 2006.[120] The notice of completion of Clerk's Record and completion of the transcript were filed on June 23, 2006."[121] The Millers did not file their brief by the July 24, 2006 deadline, and on July 31, 2006, the court of appeals indicated on the docket that the case would be transmitted for dismissal twenty days later.[122] Apparently, "the Millers' counsel . . . went on vacation from mid-June to July 5, 2006," and while he was on vacation, his staff received notice that the trial record and transcript were complete.[123]

"On August 29, 2006, the docket was transmitted for dismissal. On the same day, the Millers filed a verified motion to reinstate and for extension of time to file appellants' brief."[124] It was not until August 31, 2006, however, that the Millers filed their appellants' brief and appendix with a motion for leave to file a belated brief and appendix.[125]

On September 11, 2006, the court of appeals denied the Millers' motion to reinstate as moot but granted their motion to file belated papers.[126] That same day, "Farmers Mutual filed an objection to the Millers' motions."[127] The court of appeals treated the objection as "a motion to reconsider and a motion for dismissal."[128] A motions panel of the court of appeals denied the objection and "ordered the Millers to file an appendix in conformity with the [Rules]."[129]

On appeal, the *Miller* court noted that a party is not precluded from appealing a ruling by the motions panel.[130] The court relied on Rule 45(B), which states that "[t]he appellant's brief shall be filed no later than thirty (30) days after . . .

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117. 871 N.E.2d 406 (Ind. Ct. App. 2007).
118. *Id.*
119. *Id.* at 406-07.
120. *Id.* at 407.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*

the trial court clerk or Administrative Agency issues its notice of completion of the Transcript,"[131] and Rule 45(D), which provides that "[t]he appellant's failure to timely file the appellant's brief may subject the appeal to summary dismissal."[132] After acknowledging that it is within an appellate court's discretion to dismiss an appeal for the late filing of a brief,[133] the court, noted that "[a]lthough we will exercise our discretion to reach the merits when violations are comparatively minor, if the parties commit flagrant violations of the Rules of Appellate Procedure we will hold issues waived, or dismiss the appeal."[134]

Citing cases in which it had previously exercised its discretion to decide an appeal despite technical rule violations,[135] the court of appeals nevertheless dismissed the appeal, concluding that a brief filed thirty-eight days late was not a minor, excusable violation of Indiana's appellate rules.[136] The appellant's petition for rehearing was ultimately denied and transfer was not sought to the Indiana Supreme Court. As such, thirty-eight days will most likely be the benchmark for an untimely brief for quite some time.

Another important procedural point established by *Miller* was its rejection of the appellate attorney's claims that the failure to file the brief timely was due to mistake or excusable neglect.[137] The attorney had argued that he had been unaware of the transcript's completion "because the notice had arrived while he was on vacation."[138] Simply stated, "'[I]t is the duty of an attorney and his client to keep apprised of the status of matters before the court.'"[139] *Miller* reminds practitioners that there are limits to the court of appeals's kindness.

Miller can be contrasted with *Novatny v. Novatny*,[140] which involved the appeal of a trial court's child custody modification order in favor of the father.[141] The mother, appearing pro se, appealed the decision, arguing that the trial court

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131. IND. APP. R. 45(B).

132. IND. APP. R. 45(D).

133. *Miller*, 871 N.E.2d at 407 (citing Haimbaugh Landscaping, Inc. v. Jegen, 653 N.E.2d 95, 99 (Ind. Ct. App. 1995)).

134. *Id.* (citing Terpstra v. Farmers & Merch. Bank, 483 N.E.2d 749, 752 (Ind. Ct. App. 1985); Town of Rome City v. King, 450 N.E.2d 72, 76 (Ind. Ct. App. 1983)).

135. *See, e.g.*, Howell v. State, 684 N.E.2d 576, 577 (Ind. Ct. App. 1997) (opting to take appeal when appellant's brief was filed one day late); *Haimbaugh*, 653 N.E.2d at 99 (concluding that filing an appellant's brief one day late was not flagrant violation of appellate rules); Meyer v. N. Ind. Bank & Trust Co., 490 N.E.2d 400, 404 (Ind. Ct. App. 1986) (deciding to take appeal when appellant timely filed oversized brief, and court subsequently denied appellant's motion to file oversized brief).

136. *Miller*, 871 N.E.2d at 408.

137. *Id.*

138. *Id.*

139. *Id.* (alteration in original) (quoting Sanders v. Carson, 645 N.E.2d 1141, 1144 (Ind. Ct. App. 1995)).

140. 872 N.E.2d 673 (Ind. Ct. App. 2007).

141. *Id.* at 676.

lacked jurisdiction under the Uniform Child Custody Act.[142] The father cross-appealed, arguing for a dismissal of the appeal and asking for an award of appellate attorney fees.[143] The father's cross-appeal was based on the fact that the mother submitted to him her Appellant's Brief and Appendix, but neither document was actually filed, as they were returned to the mother by the clerk's office because of defects.[144] The mother later filed her Appellant's Brief, Appendix, and a Supplemental Authority, "[s]he did not, however, serve a copy of any of those documents on [the] [f]ather."[145]

The court of appeals granted the father's "Motion to Compel Service of Appellant's Brief, Appendix and Supplemental Authority and for an Extension of Time to File Appellee's Brief."[146] Because the mother had still not provided the father with any of the relevant documents as ordered by the time he submitted his Appellee's Brief, he asked that "her appeal be dismissed and that he be awarded appellate attorney's fees."[147] After the father's request, the mother "submitted numerous documents and pleadings including a late Reply Brief," which, as put by the court of appeals, "did not respond to either issue raised by Father on cross-appeal."[148]

In addressing the father's request for dismissal, the *Novatny* court reminded attorneys that a dismissal may be warranted where the appellant is in substantial noncompliance with the appellate rules, but acknowledged that the court would "prefer to resolve cases on the merits."[149] Moreover, the *Novatny* court observed that "'[i]f an appellant inexcusably fails to comply with an appellate court order, then more stringent measures, including dismissal of the appeal, would be available as the needs of justice might dictate.'"[150] Nevertheless, the appellate court concluded that "[t]he needs of justice dictate that this case, which involves the modification of physical custody, be decided on its merits."[151]

The court of appeals highlighted the mother's noncompliance with the appellate rules by filing untimely papers, attempting "to alter the record on appeal, and present[ing] issues on appeal that were not before the trial court."[152] Ultimately, the court clarified that its decision to review the case on the merits was not impacted by the mother appearing pro se, as "[i]t is well settled that *pro*

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142. *Id.*

143. *Id.* at 676-77.

144. *Id.*

145. *Id.* at 676.

146. *Id.* at 676-77.

147. *Id.* at 677.

148. *Id.* (explaining that the father's Appellee's Brief apparently responded to the brief submitted to the father on March 29, but which was not actually filed).

149. *Id.* (citing Hughes v. King, 808 N.E.2d 146, 147 (Ind. Ct. App. 2004)).

150. *Id.* (quoting Johnson v. State, 756 N.E.2d 965, 967 (Ind. 2001)).

151. *Id.* (referring to the mother's claim that the court had no jurisdiction under the Uniform Child Custody Jurisdiction Act because she, the children, and the father had all moved from Indiana).

152. *Id.*

se litigants are held to the same standard as licensed lawyers."[153] In the end, the court concluded that the mother's noncompliance could be dealt with by ignoring her inappropriate requests, pointing out that the father was able to "discern and address" the issues that were raised by the mother in the face of her noncompliance.[154]

D. Cases Deciding What Warrants an Award of Appellate Attorney's Fees

During the last period, the court of appeals addressed several requests for appellate attorneys' fees. Appellate Rule 66(E) provides that a court "may assess damages if an appeal . . . is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees."[155] The opinions from this reporting period confirm that such recoveries are rare and will only be awarded in unusual circumstances.

The court of appeals opinion in *In re Estate of Carnes*[156] reiterated the framework for when an appeal meets the standard for the award of appellate attorney fees:

> Indiana appellate courts have formally categorized claims for appellate attorney fees into "substantive" and "procedural" bad faith claims. To prevail on a substantive bad faith claim, the party must show that the appellant's contentions and arguments are utterly devoid of all plausibility. Procedural bad faith, on the other hand, occurs when a party flagrantly disregards the form and content requirements of the rules of appellate procedure, omits and misstates relevant facts appearing in the record, and files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. Even if the appellant's conduct falls short of that which is "deliberate or by design," procedural bad faith can still be found.[157]

In *Carnes*, the court found both procedural and substantive bad faith and therefore granted Rule 66(E) attorney's fees.[158] The procedural bad faith came by way of briefing. The *Carnes* court pointed out that (i) "Carnes's statement of the issues [was just] a list of the trial court's findings that he [was] contesting and [did] not 'concisely and particularly describe each issue presented for review;'"[159] (ii) his statement of the case was merely "a recitation of his contentions" and not a description of "'the nature of the case, the course of the proceedings relevant to the issue presented for review, and the disposition of

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153. *Id.* at 677 n.3 (citing Payday Today, Inc. v. McCullough, 841 N.E.2d 638, 644 (Ind. Ct. App. 2006)).

154. *Id.* at 679.

155. IND. APP. R. 66(E).

156. 866 N.E.2d 260 (Ind. Ct. App. 2007).

157. *Id.* at 267 (quoting Potter v. Houston, 847 N.E.2d 241, 249 (Ind. Ct. App. 2006)).

158. *Id.* at 267-69.

159. *Id.* at 267 (quoting IND. APP. R. 46(A)(4)).

these issues by the trial court;'"[160] and (iii) his statement of the facts, although in narrative form, was essentially a list of accusations.[161]

The court first noted that appellate courts "must use extreme restraint" when using their discretionary power to award appellate attorney's fees "because of the potential chilling effect upon the exercise of the right to appeal."[162] The court also explained that for a Rule 66(E) attorney fee award, "[a] strong showing is required . . . and the sanction is not imposed to punish mere lack of merit, but something more egregious."[163] In finding procedural bad faith for flagrant disregard of the form and content requirements of the appellate rules, the court thought "Carnes's arguments on appeal constitute[d] an incoherent and illogical tirade of accusations, repeated in every section of his brief, and which are completely unsubstantiated by the record."[164]

On the substantive side, Carnes's appendix did not contain "crucial documents regarding the previous disposition" made by an Arizona trial court as to issues on appeal, but rather he cited his own petition filed in an Indiana trial court to support his contention that a "will contest [was] still pending in the Arizona courts."[165] He also neglected to supply the court with a copy of the disposition from the Arizona court in violation of Appellate Rule 50(A)(2)(b).[166]

The Estate, however, provided the court of appeals with a copy of an Arizona order, which had concluded that Carnes's father's will, which excluded Carnes, was valid.[167] Carnes, however, seemingly ignored that order by arguing in his brief that his chances of inheriting from his father's estate "get better and better."[168] Based on the Arizona rulings and the fact that Carnes failed to supply the court of appeals with evidence that the appeal was still pending, the court found it difficult to understand how Carnes could have believed that the will contest was still pending.[169] Instead, the court thought that Carnes was "being less than candid with this court" and was ignoring the Arizona precedent in an

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160. *Id.* (quoting IND. APP. R. 46(A)(5)).

161. *Id.* at 267-68 (Carnes's statement of the facts was "woefully lacking and [did] not provide [the] court with any factual basis upon which to review the merits of his claims.").

162. *Id.* (citing Manous v. Manousogianakis, 824 N.E.2d 756, 767 (Ind. Ct. App. 2005)); *see also* Novatny v. Novatny, 872 N.E.2d 673, 682 (Ind. Ct. App. 2007) ("We temper our determination to allow appellate attorney's fees 'so as not to discourage innovation or periodic reevaluation of controlling precedent.'" (quoting *Potter*, 847 N.E.2d at 249)).

163. *Carnes*, 866 N.E.2d at 268 (citing *Manous*, 824 N.E.2d at 767-68).

164. *Id.*

165. *Id.*

166. *Id.* (citing IND. APP. R. 50(A)(2)(b), which provides that the Appellant's Appendix shall contain "the appealed judgment or order, including any written opinion, memorandum of decision, or findings of fact and conclusions thereon relating to the issues raised on appeal").

167. *Id.* (Carnes also ignored an Arizona court order, which concluded that Carnes's sister's power of attorney for her father while he was living was valid. A subsequent appeal of that order was dismissed as moot upon the death of the father.).

168. *Id.*

169. *Id.*

attempt to re-litigate his claims.[170] Carnes "'steadfastly ignored unfavorable factual determinations and rulings,'" and his litigation was found by the court of appeals to be merely for the purpose of delaying the probate of his father's will and to harass his sister.[171] Accordingly, the court remanded the case to determine the amount of appellate attorney's fees to award to the estate.[172]

The court of appeals issued another ruling on appellate fees in *Smith v. Lake County*.[173] Smith, a bail bondsman, had brought an action against Lake County and the county's superior court clerk, challenging the constitutionality of Indiana's bail scheme.[174] The court of appeals observed that another panel of the court had already affirmed summary judgment against Smith on claims that he raised against Hammond officials regarding several provisions of Indiana's bail scheme.[175] The court of appeals concluded that

> [t]here can be little doubt that Smith and his counsel are attempting to inflict the litigatory equivalent of death by a thousand cuts on the government officials and taxpayers of Lake County by mounting piecemeal challenges to the legislative scheme that allows criminal defendants to post a ten percent cash bond in lieu of patronizing Smith's bail bond establishment.[176]

The court of appeals determined that Lake County had incorrectly sought sanctions under Indiana Code section 34-13-3-21 because that statute provides for attorney's fees in a tort action against a governmental entity and was therefore inapplicable to the matter before it.[177] Still, the court, sua sponte, turned to Appellate Rule 66(E) and observed that it had previously stated that "'damages should be assessed under this rule when an appeal is replete with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.'"[178] Furthermore, the court stated that it "'must use extreme restraint when exercising [its] discretionary power to award damages on appeal because of the potential chilling effect upon the exercise of the right to appeal.'"[179]

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170. *Id.* at 268-69.

171. *Id.* at 269 (quoting *Potter*, 847 N.E.2d at 249).

172. *Id.* at 268.

173. 863 N.E.2d 464 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 209 (Ind. 2007).

174. *Id.* at 466, 471 n.8.

175. *Id.* at 471 (citing Smith v. City of Hammond, 848 N.E.2d 333, 336 (Ind. Ct. App. 2006) ("Smith III"), which in turn refers to the Seventh Circuit's warning to Smith in Smith v. City of Hammond, 388 F.3d 304, 308 (7th Cir. 2004) ("Smith IV"), that "[i]f Smith persists in this hopeless litigation—he and his lawyer—are courting sanctions").

176. *Id.* at 472.

177. *Id.*

178. *Id.* (quoting Montgomery v. Trisler, 814 N.E.2d 682, 685 (Ind. Ct. App. 2004)); *but see* Stillwell v. Deer Park Mgmt., 873 N.E.2d 647, 652 (Ind. Ct. App. 2007) (concluding that appellate attorney fees were not appropriate as the "appeal was not meritless, as proven by his claim that Deer Park should have been represented by counsel throughout its pursuit of the small claims action").

179. *Smith*, 863 N.E.2d at 472-73 (quoting Trost-Steffen v. Steffen, 772 N.E.2d 500, 514 (Ind.

In deciding that Rule 66(E) appellate attorney fees were appropriate in *Smith*, the court stated,

> When viewed in isolation, perhaps Smith's appeal from his unsuccessful attempt to relitigate the enforcement of Indiana Code section 35-33-8.5-4 would not be considered sufficiently egregious to merit an award of damages pursuant to Appellate Rule 66(E). When viewed in the context of Smith's well-documented history of piecemeal attacks on Indiana's bail scheme, however, the instant appeal may fairly be characterized as harassing and vexatious.[180]

The court of appeals ultimately remanded the case for a calculation of damages including appellate attorney fees under Rule 66(E).[181]

The court of appeals decided yet another appellate fee issue in *Inland Steel Co. v. Pavlinac*.[182] A single hearing member of the Workers' Compensation Board ("Board") had concluded that a claimant with repetitive back trauma was permanently and totally disabled due to cumulative work-related injuries.[183] He was therefore entitled to workers' compensation benefits.[184] The court of appeals increased the Board's award to the claimant by ten percent pursuant to Indiana Code section 22-3-4-8(f), which provides that "'[a]n award of the full board affirmed on appeal, by the employer, shall be increased thereby five percent (5%), and by order of the court may be increased ten percent (10%).'"[185] The court noted that generally an order to increase the award by ten percent is only warranted when (i) the issues presented on appeal are frivolous, (ii) appellate review is thwarted by the actions of the employer, or (iii) the worker has been prevented from obtaining workers' compensation for an extended period of time.[186] The court of appeals increased the award by ten percent in part on the employer presenting issues, which "sought to have [the] court go against [its] standard of review or ultimately proved to be disingenuous or trivial."[187]

Interestingly, the court of appeals noted that despite the "'patent disingenuity'"[188] on record in the case, which warranted a ten percent increase

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Ct. App. 2002)).

180. *Id.* at 473.

181. *Id.*

182. 865 N.E.2d 690 (Ind. Ct. App. 2007); *see also* Nationwide Ins. Co. v. Heck, 873 N.E.2d 190, 197 n.3 (Ind. Ct. App. 2007) ("We deny Larry's request for appellate attorney's fees under Indiana Appellate Rule 66(E). While Nationwide's initial brief and appendix were deficient in numerous ways, those deficiencies do not warrant sanction, and Nationwide has filed a supplemental appendix.").

183. *Inland Steel*, 865 N.E.2d at 696.

184. *Id.*

185. *Id.* at 703-04 (alteration in original) (quoting IND. CODE § 22-3-4-8(f) (LexisNexis 1997)).

186. *Id.* at 703.

187. *Id.* at 704.

188. *Id.* (quoting Graycor Indus. v. Metz, 806 N.E.2d 791, 802 (Ind. Ct. App. 2004), in

in the board's award, "there [was] no allegation that [the employer] deliberately presented such issues so as to delay [the employee's] receipt of worker's compensation benefits."[189] Nor did it appear to the court of appeals "that [the employer's] brief upon appeal was written in a manner calculated to require the maximum expenditure of time by both [the employee] and this court."[190]

The *Inland Steel* court also observed that generally "attorney fees are awarded where procedural or substantive bad faith is shown" and that procedural bad faith "stems from flagrant violations of appellate procedure; substantive bad faith is found where appellate arguments are utterly devoid of all plausibility."[191] The appellate court eventually concluded that although "we have found it appropriate to order the Board's award to be increased by ten percent, we do not think Inland's actions upon appeal were so egregious or deliberate so as to warrant an additional award of damages, including attorney fees, pursuant to Appellate Rule 66."[192] In the end, the decision in *Inland Steel* is unique in that it discusses and applies a statutory penalty in the framework of language discussing the award of Rule 66(E) appellate attorney fees.[193]

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support of the court's determination that a ten percent increase in the award of the full board affirmed on appeal was warranted in this case).

189. *Id.*

190. *Id.* (citing Gabriel v. Windsor, Inc., 843 N.E.2d 29, 49-50 (Ind. Ct. App. 2006)).

191. *Id.* (citing *Metz*, 806 N.E.2d at 801).

192. *Id.*; *see also Metz*, 806 N.E.2d at 801 (noting that appellate court discretion to award attorney fees under Rule 66(E) is limited to situations when the appeal is "permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay").

193. Another case decided during this period briefly touched on the award of appellate attorney fees under Appellate Rule 67 in which the court of appeals affirmed summary judgment to a bank and concluded that the bank was entitled to the termination fee according to the terms of a lease between it and appellant. *See* O'Brien v. 1st Source Bank, 868 N.E.2d 903, 909 (Ind. Ct. App. 2007). Rule 67 provides in part:

> (A) Upon a motion by any party within sixty (60) days after the final decision of the Court of Appeals or Supreme Court, the Clerk shall tax costs under this Rule.
>
> (B) Costs shall include:
>
> (1) the filing fee, including any fee paid to seek transfer or review;
>
> (2) the cost of preparing the Record on Appeal; including the Transcript, and appendices; and
>
> (3) postage expenses for service of all documents filed with the Clerk.
>
> The Court, in its discretion, may include additional items permitted by law. Each party shall bear the costs of preparing its own briefs.

IND. APP. R. 67(A)-(b). The *O'Brien* court concluded that to the extent the bank sought litigation costs not contemplated by the rule, it could seek expenses pursuant to a contract provision, but found that the bank had submitted no evidence of the amount of attorney fees and litigation costs it incurred. *O'Brien*, 868 N.E.2d at 909-10. The court remanded the issue to the trial court for the determination of a reasonable amount of appellate attorney fees and litigation costs.

E. Out of Cite, Not out of Mind

During this reporting period, *Edwards v. State*[194] clarified an important distinction concerning unpublished opinions, which is stated in the rules but may be overlooked by appellate practitioners. Edwards had appealed numerous convictions, and after the trial court vacated two conspiracy to commit murder counts, Edwards was left with a 140-year prison sentence.[195] Arguing that the trial court had abused its discretion by admitting a taped conversation between a prosecuting witness and a police officer, Edwards contended that the issue had already been decided in his favor.[196] The court of appeals observed that its previous opinion[197] was unpublished and that under Appellate Rule 65(D), "unless later designated for publication, a not-for-publication memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case."[198]

The court of appeals stated that while a former adjudication will be conclusive in a subsequent action, even if the two actions are on different claims, it will only be so as to the issues that were actually litigated and decided, and not those only inferred by argument.[199] *Edwards* then set forth the two-part test for applying collateral estoppel: "'(1) whether the party in the prior action had a full and fair opportunity to litigate the issue, and (2) whether it is otherwise unfair to apply collateral estoppel given the facts of the particular case.'"[200]

Edwards concluded that both Edwards and the State were parties to the prior action and had fully and fairly litigated the issue.[201] Furthermore, "it would not be unfair to apply collateral estoppel to the facts of [the current] case," as the law regarding forfeiture by wrongdoing applied in its unpublished opinion had not changed and so guaranteed the same result if revisited.[202] Ultimately, the court of appeals concluded that the trial court's admission of the taped conversation was harmless error; it was cumulative of other evidence and did not affect the jury's decision.[203]

In keeping with the publishing theme, the court of appeals addressed motions

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194. 862 N.E.2d 1254 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 457 (Ind. 2007).

195. *Id.* at 1258-59.

196. *Id.* at 1259.

197. Edwards v. State, 855 N.E.2d 1079 (Ind. Ct. App. 2006) (unpublished table decision).

198. *Edwards*, 862 N.E.2d at 1259 (citing IND. APP. R. 65(D)). Another case decided during this reporting period also reminded appellate counsel of this rule. *See* Ashbaugh v. Horvath, 859 N.E.2d 1260, 1268 n.8 (Ind. Ct. App. 2007).

199. *Id.*

200. *Id.* (quoting Afolabi v. Atlantic Mortgage & Inv. Corp., 849 N.E.2d 1170, 1175-76 (Ind. Ct. App. 2006)).

201. *Id.* at 1260.

202. *Id.*

203. *Id.*

to publish in *M.S. ex rel. Newman v. K.R.*[204] In that case, a party had filed a motion to publish a memorandum decision, arguing that the decision was worthy of precedential value.[205] The party contended that her motion was timely because she had filed it within thirty days of the supreme court's order denying transfer.[206] The court of appeals disagreed and denied the motion, ruling that motions to publish must be filed within thirty days of the "handdown" date.[207] The court reasoned, "[S]o that our Supreme Court is aware whether the underlying decision is for publication or not for publication when it rules on a party's petition for transfer."[208]

F. "Decorum" in the Appellate Rules

In *Steve Silveus Insurance, Inc. v. Goshert*,[209] the court of appeals addressed Indiana appellate attorney decorum (or lack thereof). The court began by reminding attorneys that appellate judges ask for "two basic things from appellate practitioners in this state: compliance with the Indiana Rules of Appellate Procedure and adherence to fundamental standards of professionalism."[210] The court of appeals then concluded that the insurance company's counsel failed to comply with at least two rules of appellate procedure, namely Rules 50(A)(2) and 51(C).[211]

The attorney had included the entire approximate 1500-page transcript in the Appellants' Appendix, which as the court put it, "[a]side from being a waste of paper and unnecessarily bloating the record on appeal, . . . violates Indiana Rule of Appellate Procedure 50(A)(2)."[212] The court also reminded practitioners that "'[s]ubsection (d) compels inclusion of *the portion* of the Transcript that contains the rationale of the decision and any colloquy related thereto, if and to the extent the brief challenges any oral ruling or statement of decision.'"[213] Additionally subsection (g) contemplates including only "'*brief portions* of the Transcript . . . that are important to a consideration of the issues raised on appeal[.]'"[214] Accordingly, the court referenced the actual transcript pagination, as opposed to the transcript pagination in the Appellants' Appendix.[215]

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204. 871 N.E.2d 303 (Ind. Ct. App. 2007).

205. *Id.* at 306 n.1.

206. *Id.*

207. *Id.*

208. *Id.* (citing IND. APP. R. 65(B) ("Within thirty (30) days of the entry of the decision, a party may move the Court to publish any not-for-publication memorandum decision which meets the criteria for publication.")).

209. 873 N.E.2d 165 (Ind. Ct. App. 2007).

210. *Id.* at 172.

211. *Id.*

212. *Id.*

213. *Id.* (quoting IND. APP. R. 50(A)(2)).

214. *Id.* (omission and alteration in original) (quoting IND. APP. R. 50(A)(2)).

215. *Id.*

Next, the *Silveus* court discussed appellate counsel's failure to comply with Rule 51(C), "which provides, 'All pages of the Appendix shall be numbered at the bottom consecutively, without obscuring the Transcript page numbers, regardless of the number of volumes the Appendix requires.'"[216] Citing appellate counsel's "attempt to make it easier to locate and identify items," the court of appeals disapproved of counsel's more complicated numbering scheme and found the system "unnecessarily confusing."[217]

The court of appeals also focused on "the tenor" of appellate counsel's brief.[218] For example, one of the briefs described the opposing parties as "thieves and liars."[219] Another passage contended, "[t]he same lack of conscience, arrogance, and ingratitude that led to Goshert stealing Silveus' trade secrets and business, underlies Goshert's warped view that Silveus did not own anything and did not have any secrets so Goshert should be free to rip them all off for themselves."[220] Counsel also described opposing counsel's argument as "an insult to the English language."[221] The court of appeals admonished that "'[s]uch vitriol is inappropriate and not appreciated by this court, nor does it constitute effective appellate advocacy.'"[222]

III. Refining Our Appellate Practice

A. Don't Forget the "Script"[223]

In *Fields v. Conforti*[224] the court of appeals addressed issues surrounding the transcript. The appellants had not submitted a transcript of the bench trial upon

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216. *Id.* (quoting Ind. App. R. 51(C)).

217. *Id.* The court of appeals explains that the Appellant's Appendix was

> numbered from page 1 through page 27, then from page 1 (of the transcript) through page 1515 (of the transcript), then from page "27A-1" through page "27A-92," and finally from page 28 through page 970. As a result, there are, for example, two pages marked "45," two pages marked "139," two pages marked "802," etc. If counsel had simply assembled his 2587-page appendix in accordance with Rule 51(C), it would have been numbered consecutively from page 1 through 2587.

Id.

218. *Id.*

219. *Id.* (citing Appellants' Br. at 45).

220. *Id.* at 172-73 (citing Appellants' Reply Br. at 9).

221. *Id.* at 173 (citing Appellants' Reply Br. at 11).

222. *Id.* (quoting Hoosier Outdoor Adver. Corp. v. RBL Mgmt., Inc., 844 N.E.2d 157, 162 (Ind. Ct. App.), *trans. denied*, 860 N.E.2d 590 (Ind. 2006)).

223. Ind. App. R. 9(F)(4) provides as follows:

> The Notice of Appeal shall designate all portions of the Transcript necessary to present fairly and decide the issues on appeal. If 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.

224. 868 N.E.2d 507 (Ind. Ct. App. 2007).

which the trial court's findings of fact and conclusions were based.[225] Relying on two Indiana Supreme Court cases[226] which had approved of this omission,[227] the appellants similarly argued that the transcript was unnecessary because they were not contending that the trial court's findings of fact were unsupported by the evidence.[228] The court of appeals attempted to address the issues raised by the appellants without a copy of the transcript.[229] The court began by noting Appellate Rule 49(B),[230] "which provides that the failure to include an item in an appendix shall not waive any issue or argument,"[231] and Appellate Rule 9(G),[232] "which allows supplemental requests for transcripts to be filed."[233] The *Fields* court ultimately made clear that without a transcript any arguments that depend upon the evidence presented at the bench trial will be waived.[234]

B. Uncited Authority

In *Keeney v. State*[235] the court of appeals admonished defense counsel, whose brief contained uncited material in violation of Rule 46(A)(8)(a).[236] Early in *Keeney*, the court noted that "Keeney's brief . . . ignores relevant Indiana case law on" the constitutionality of Indiana Code section 10-13-6-10, which requires a convict to provide a DNA sample to the state in light of United States Supreme Court precedent.[237] The court then complained that Keeney's appellate counsel had "filled her brief with uncited material," such that "the brief's entire 'Argument' section is a near-verbatim replication of a recent Memorandum and Order from the United States District Court for the District of Massachusetts."[238] Citing 46(A)(8)(a), which provides that "[e]ach contention in an appellate brief 'must be supported by citations to authorities . . . relied on,'"[239] the court of appeals observed that "Keeney's attorney has not cited [the Massachusetts order],

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225. *Id.* at 510.

226. Pabey v. Pastrick, 816 N.E.2d 1138 (Ind. 2004); Walker v. West, 665 N.E.2d 586, 588 (Ind. 1996).

227. *Pabey*, 816 N.E.2d at 1141-42; *Walker*, 665 N.E.2d at 588.

228. *Fields*, 868 N.E.2d at 510-11.

229. *Id.* at 511.

230. IND. APP. R. 49(B).

231. *Fields*, 868 N.E.2d at 510.

232. IND. APP. R. 9(G).

233. *Fields*, 868 N.E.2d at 510. Both of these rules were relied upon in *Pabey*, 816 N.E.2d 1138 (Ind. 2004).

234. *Id.* ("[F]ailure to include a transcript works a waiver of any specifications of error which depend upon the evidence." (quoting Walker v. West, 665 N.E.2d 586, 588 (Ind. 1996)).

235. 873 N.E.2d 187 (Ind. Ct. App. 2007).

236. *Id.* at 189.

237. *Id.* at 188.

238. *Id.* at 189 (footnote omitted).

239. *Id.* (citing IND. APP. R. 46(A)(8)(a)).

nor has she otherwise indicated to this court that she is relying on that case."[240]

Specifically, the appellate attorney had (i) changed the defendant's name in the case she relied upon to her client's name, (ii) changed the case's "reference to the United States government to the State," (iii) "omitted a sentence on the federal DNA Act," (iv) dropped paragraphs from the case down into her brief's footnotes, and (v) "moved one paragraph up in the text."[241] "Other than those changes, . . . the two documents [were] identical, including the District Court's reference to there being no decisions from the Court of Appeals for the First Circuit 'directly on point.'"[242] The *Keeney* court noted that the Indiana Supreme Court had previously addressed this issue stating:

> To place all this conglomeration of uncited material in a Brief is an imposition on the Court. We do not mean to say that such material should not be used if properly identified. However, as we have said, "the great rule in drawing briefs consists in conciseness with perspicuity." A brief is not to be a document thrown together without either organized thought or intelligent editing on the part of the brief-writer. Inadequate briefing is not, as any thoughtful lawyer knows, helpful to either a lawyer's client or to the Court. We make this point so that when the compensation for Appellant['s] attorney is fixed some consideration may be given to the way in which the Brief in this case was prepared.[243]

This point was echoed by the *Keeney* court's observation that simply regurgitating authority without citation contributed to Keeney's failure to advance any "'argument . . . supported by cogent reasoning'" as required by Rule 46(A)(8)(a).[244] The appellate court reminded appellate practitioners of the importance of proper attribution, but more importantly cautioned attorneys of the court's authority to penalize an attorney for "merely transplant[ing] the District Court's order into her brief as if it were her own work."[245] Although the *Keeney* court only admonished appellate counsel the court did state that it could have (i) required Keeney's attorney to not collect a fee for her services and to return any already received fee to the payor with interest, (ii) stricken the brief entirely, (iii) referred the matter to the supreme court disciplinary commission for investigation of any violation of Indiana Professional Conduct Rule 1.1,[246] or (iv) ordered Keeney's attorney to show cause why she should not be held in contempt.[247]

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240. *Id.*

241. *Id.* at 189 n.1.

242. *Id.* (citing United States v. Stewart, 468 F. Supp. 2d 261, 268 (D. Mass. 2007)).

243. *Id.* at 189-90 (quoting Frith v. State, 325 N.E.2d 186, 188-89 (1975) (citation omitted)).

244. *Id.* at 190 (omission in original) (quoting IND. APP. R. 46(A)(8)(a)).

245. *Id.*

246. This Rule requires attorneys to represent their clients competently. IND. PROF'L CONDUCT R. 1.1.

247. *Keeney*, 873 N.E.2d at 190.

C. Other Briefing Issues

During this reporting period, the appellate courts documented other problems with briefing such as (i) failure to include the order being appealed;[248] (ii) lack of cogent argument;[249] (iii) improper margins;[250] (iv) failure to present proper statement of the issues,[251] statement of facts,[252] statement of the case,[253] and standard of review;[254] (v) improper filing of documents excluded from public access;[255] (vi) failure to cite facts in the record;[256] (vii) failure to include the challenged jury instruction in the argument section;[257] (viii) failure to file an

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248. Armstrong v. Keene, 861 N.E.2d 1198, 1200 n.1 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007); Shuger v. State, 859 N.E.2d 1226, 1230 n.1 (Ind. Ct. App. 2007); Bambi's Roofing, Inc. v. Moriarty, 859 N.E.2d 347, 350 n.1 (Ind. Ct. App. 2006); House v. First Am. Title Co., 858 N.E.2d 640, 642 n.1 (Ind. Ct. App. 2006); Knowledge A-Z, Inc. v. Sentry Ins., 857 N.E.2d 411, 414 n.1 (Ind. Ct. App. 2006). All cases cite to IND. APP. R. 46(A)(10).

249. *In re* Estate of Carnes, 866 N.E.2d 260, 265-66 (Ind. Ct. App. 2007); Carr v. Pearman, 860 N.E.2d 863, 866 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 462 (Ind. 2007); Leone v. Keesling, 858 N.E.2d 1009, 1014 (Ind. Ct. App. 2006), *trans. denied*, 869 N.E.2d 456 (Ind. 2007). All cases cite to IND. APP. R. 46(A)(8).

250. Tompa v. Tompa, 867 N.E.2d 158, 161 n.1 (Ind. Ct. App. 2007) (citing IND. APP. R. 43(G)).

251. State Farm Mut. Auto. Ins. Co. v. Cox, 873 N.E.2d 124, 125 n.1 (Ind. Ct. App. 2007); *Carnes*, 866 N.E.2d at 265-66; Nolan v. Taylor, 864 N.E.2d 419, 420 n.1 (Ind. Ct. App. 2007). All cases cite to IND. APP. R. 46(A)(4).

252. *In re* Kay L., 867 N.E.2d 236, 238 n.1 (Ind. Ct. App. 2007); *Carnes*, 866 N.E.2d at 265-66; First Nat'l Bank & Trust v. Indianapolis Pub. Hous. Agency, 864 N.E.2d 340, 342 n.1 (Ind. Ct. App. 2007); Stumpf v. Hagerman Constr. Corp., 863 N.E.2d 871, 877 n.3 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007); Perez v. Bakel, 862 N.E.2d 289, 291 n.1 (Ind. Ct. App. 2007); *Armstrong*, 861 N.E.2d at 1200 n.1; Espinoza v. State, 859 N.E.2d 375, 379 n.2 (Ind. Ct. App. 2006); Keesling v. Winstead, 858 N.E.2d 996, 997 n.1 (Ind. Ct. App. 2006). All cases cite to IND. APP. R. 46(A)(6).

253. *Nolan*, 864 N.E.2d at 420 n.2.; Lightcap v. State, 863 N.E.2d 907, 909 n.1 (Ind. Ct. App. 2007).

254. Tucker v. Duke, 873 N.E.2d 664, 668 n.6 (Ind. Ct. App. 2007); Estate of Dyer v. Doyle, 870 N.E.2d 573, 582-83 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 221 (Ind. 2007); *Carnes*, 866 N.E.2d at 265-66; Marks v. State, 864 N.E.2d 408, 409 n.1 (Ind. Ct. App. 2007); Hodges v. Swafford, 863 N.E.2d 881, 885 n.6 (Ind. Ct. App.), *amended on reh'g*, 868 N.E.2d 1179 (Ind. Ct. App. 2007); *Armstrong*, 861 N.E.2d at 1200 n.1; *Carr*, 860 N.E.2d at 867 n.2.; *Leone*, 858 N.E.2d at 1014. All cases cite to IND. APP. R. 46(A)(8)(b).

255. Bumbalough v. State, 873 N.E.2d 1099, 1100 n.1 (Ind. Ct. App. 2007); *Espinoza*, 859 N.E.2d at 379 n.2.

256. *Carnes*, 866 N.E.2d at 265-66; Lang v. Starke County Office of Family & Children, 861 N.E.2d 366, 374 n.4 (Ind. Ct. App.), *trans. denied*, 869 N.E.2d 456 (Ind. 2007).

257. *Dyer*, 870 N.E.2d at 582; Snell v. State, 866 N.E.2d 392, 395 n.1 (Ind. Ct. App. 2007).

appendix,[258] including necessary documents in the appendix,[259] or other appendix problems;[260] and (ix) generally defective briefing.[261]

D. In Other News

1. Interesting Orders.—The court of appeals in *Thomison v. IK Indy, Inc.*[262] applied Rule 42, which provides that the court "'may order stricken from any document any redundant, immaterial, impertinent, scandalous or other inappropriate matter.'"[263] The court used the rule to strike portions of an appellant's brief that requested relief for another party because the other party had not filed a timely notice of appeal under Rule 9(A)(5)[264] or a joint notice of appeal under Rule 9(C)[265] and had consequently forfeited his right to appeal.[266]

In *Challenge Realty, Inc. v. Leisentritt*,[267] the court of appeals issued an order upholding the timing requirements of the Rules.[268] Four days before that order, the court of appeals had entered an order allowing the appellant's counsel to withdraw but that the appellant's brief remain due on the scheduled

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258. *Nolan*, 864 N.E.2d at 421 n.8.

259. Adams v. Adams, 873 N.E.2d 1094, 1096 (Ind. Ct. App. 2007); Wolfe v. Estate of Custer, 867 N.E.2d 589, 597 n.8 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 212 (Ind. 2007); *Carnes*, 866 N.E.2d at 265, 268; Niemeyer v. State, 865 N.E.2d 674, 676 (Ind. Ct. App. 2007); Shuger v. State, 859 N.E.2d 1226, 1230 n.1 (Ind. Ct. App. 2007).

260. Tamko Roofing Prods., Inc. v. Dilloway, 865 N.E.2d 1074, 1079 n.1 (Ind. Ct. App. 2007) (no page numbers in appendix); City of Crown Point v. Misty Woods Props., LLC, 864 N.E.2d 1069, 1074 n.2 (Ind. Ct. App. 2007) (appellee included material already in appellant's appendix); Perez v. Bakel, 862 N.E.2d 289, 295 (Ind. Ct. App. 2007) (failure to include table of contents in appendix); Finke v. N. Ind. Pub. Serv. Co., 862 N.E.2d 266, 273 n.5 (Ind. Ct. App. 2006) (failure to cite to motion included in appendix), *trans. denied*, 869 N.E.2d 458 (Ind. 2007); McGuire v. Century Sur. Co., 861 N.E.2d 357, 359 n.1 (Ind. Ct. App. 2007) (noting several deficiencies including: (1) failure to paginate; (2) failure to include pleadings; (3) failure to include summary judgment; and (4) failure to include designated evidence); *Shuger*, 859 N.E.2d at 1230 n.1 (failure to include CCS); Estate of Owen v. Lyke, 855 N.E.2d 603, 607 n.2 (Ind. Ct. App. 2006) (failure to consecutively number pages in appendix).

261. *Carnes*, 866 N.E.2d at 265-67; Armstrong v. Keene, 861 N.E.2d 1198, 1200 n.1 (Ind. Ct. App.), *trans. denied*, 878 N.E.2d 205 (Ind. 2007); Bambi's Roofing, Inc. v. Moriarty, 859 N.E.2d 347, 352 (Ind. Ct. App. 2006).

262. 858 N.E.2d 1052 (Ind. Ct. App. 2006).

263. *Id.* at 1053 n.1 (quoting IND. APP. R. 42).

264. IND. APP. R. 9(A)(5) ("Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited . . . .").

265. IND. APP. R. 9(C) ("If two (2) or more persons are entitled to appeal from a single judgment or order, they may proceed jointly by filing a joint Notice of Appeal. The joined parties may, thereafter, proceed on appeal as a single appellant.").

266. *Thomison*, 858 N.E.2d at 1053 n.1.

267. 867 N.E.2d 711 (Ind. Ct. App. 2007).

268. *Id.* at 711-12.

deadline—eleven days after the first order.[269] On the date of the first order, the appellees had filed their Limited Objection Regarding Motion to Withdraw Appearance, noting that the appellant had obtained three previous extensions of time to file its opening brief.[270] The appellees also alleged that further delay in the briefing schedule would prejudice their efforts to obtain a prompt resolution of the appeal.[271]

Explaining that they had already set aside a significant amount of time to prepare a response brief, the appellees requested that the original court order, with regard to the withdrawal of appellant's counsel, explicitly state that the appellant's brief remain due on the date already established "*and* that no further extensions . . . be granted."[272] The court of appeals agreed that significant financial and temporal strains had been placed upon the appellees by the requests for extensions of time.[273] The court also recognized the under the Rules the appellant's opening brief "'shall be filed no later than thirty (30) days after . . . the date the trial court clerk . . . issues its notice of completion of the transcript.'"[274] The court therefore modified its order that the brief remain due on a certain date to also state that the appellant "shall not request or be granted any additional extensions of time" regardless of whether he retains new counsel.[275]

2. At a Glance.—Over this past year, "the [Indiana Supreme] Court's civil transfer docket grew over the proceeding [sic] year, both in total amount and as a percentage of total transfer cases."[276] Up from last year's 348 (thirty percent of that year's transfer docket), this year the court disposed of 367 civil transfer petitions (forty percent of its transfer docket).[277] During the fiscal year ending June 30, 2007, the Indiana Supreme Court issued forty-three opinions where jurisdiction arose from the granting of a petition to transfer in a civil or tax case.[278] This number marked a decrease from sixty-one the year before.[279]

During the 2006-2007 fiscal year, the Indiana Supreme Court disposed of 1096 total cases, 925 (eighty-four percent) of which involved appeals that originated in the court of appeals.[280] What has remained consistent is the remarkably high percentage (ninety-two percent in 2006-07) of cases in which the court of appeals's decision was final, leaving only eight percent of the 925

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269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 712.

273. *Id.*

274. *Id.* (omissions in original) (quoting IND. APP. R. 45(B)(1)(b)).

275. *Id.* (emphasis omitted).

276. *See* DIV. OF SUPREME COURT ADMIN., INDIANA SUPREME COURT, ANNUAL REPORT 2006-07, at 3, 39 (2007), *available at* http://www.in.gov/judiciary/supremeadmin/docs/0607report.pdf.

277. *Id.*

278. *See id.* at 2.

279. *Id.*

280. *Id.*

petitions to transfer addressed by the supreme court resulting in an opinion or published dispositive order.[281] The Indiana Supreme Court specifically commended the court of appeals and judges from the approximately 300 Indiana trial courts for their "high-quality work."[282]

CONCLUSION

It was another good year with plenty of opinions addressing various issues arising under the Indiana Rules of Appellate Procedure. If anything is clear, it is that the Indiana Court of Appeals is primarily responsible for interpreting and enforcing these Rules, given the sheer number of opinions that court issues every reporting period. The changes to the Rules, effective January 1, 2008, are intended—as they are every year—to clarify and improve the procedural aspects of practicing under the Rules. Only time will tell, but the new Rules seem geared to accomplish their intended mission.

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281. *Id.*

282. *Id.*