

DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: RULE AMENDMENTS, REMARKABLE CASE LAW, AND GUIDANCE FOR APPELLATE PRACTITIONERS

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INTRODUCTION

The Indiana Rules of Appellate Procedure (“Appellate Rules”) were adopted in 2000. Each year, the Appellate Rules are defined, refined, and enhanced by the Indiana Supreme Court (“supreme court”), the Indiana Court of Appeals (“court of appeals”), and the Indiana Tax Court (“tax court”) through rule amendments and appellate decisions. This article tracks developments in appellate procedure between October 1, 2008, and September 30, 2009, by summarizing rule amendments, examining court opinions affecting appellate procedure, and synthesizing case law to provide tips to practitioners hoping to improve their appellate practice.

I. RULE AMENDMENTS

Between October 1, 2008, and February 6, 2009, the Indiana Supreme Court made substantive amendments to Appellate Rules 4, 15, 16, 20, 26, 44, and 66.¹

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1. See *Order Amending Indiana Rules of Appellate Procedure*, No. 94S00-0901-MS-4 (Ind. Sept. 15, 2009), available at <http://www.in.gov/judiciary/orders/rule-amendments/2009/0909-appro.pdf> [hereinafter Sept. 15, 2009 Appellate Rules Order] (amending Appellate Rules 4, 5, 15,

These amendments all took effect on January 1, 2010. The court also amended Administrative Rules 5 and 9 and Attachment A to Administrative Rule 5, and the court added Administrative Rule 8.1.²

A. Appellate Rule 4—Supreme Court Jurisdiction over Death Penalty or Life Without Parole Appeals

Subsection (3) was added to Rule 4(A), which governs supreme court jurisdiction. It provides: “The Supreme Court shall have jurisdiction over interlocutory appeals authorized under Appellate Rule 14 in any case in which the State seeks the death penalty or in life without parole cases in which the interlocutory order raises a question of interpretation of [Indiana Code §] 35-50-2-9.”³ The addition of subsection (3) is consistent with subsection (1) of the same Rule, which gives the supreme court “mandatory and exclusive jurisdiction over . . . [c]riminal appeals in which a sentence of death or life imprisonment without parole is imposed under [Indiana] Code § 35-50-2-9.”⁴ The supreme court also amended Rule 5, which confers jurisdiction over interlocutory appeals to the Indiana Court of Appeals, by excepting interlocutory appeals described in Rule 4(A)(3) from the court of appeals’s jurisdiction.⁵

B. Appellate Rules 15, 16, and 20—Amendments Regarding Appellate Alternative Dispute Resolution

Over the past year, the supreme court has made a number of rule changes to encourage the use of appellate alternative dispute resolution (ADR). Under Appellate Rule 15(C)(4)(g), appellants were previously required to identify in the appellant’s case summary whether ADR had been used and whether “it should be used on appeal.”⁶ Now, appellants are required to identify whether ADR has been used and “whether appellant *is willing* to participate in Appellate ADR.”⁷

16, 20, 44, and 66); *Order Amending Indiana Rules of Appellate Procedure*, No. 94S00-0901-MS-4 (Ind. Oct. 2, 2009), available at <http://www.in.gov/judiciary/orders/rule-amendments/2009/0909-apppro2.pdf> [hereinafter Oct. 2, 2009 Appellate Rules Order] (amending Appellate Rules 15 and 26).

2. See *Order Amending Indiana Administrative Rules*, No. 94S00-0901-MS-4 (Ind. Sept. 15, 2009), available at <http://www.in.gov/judiciary/orders/rule-amendments/2009/0909-admin.pdf> [hereinafter Sept. 15, 2009 Administrative Rules Order].

3. IND. APP. R. 4(A)(3). Indiana Code § 35-50-2-9 (2008) provides that the state may seek either a death sentence or a sentence of life imprisonment without parole for murder if one of the listed aggravating circumstances is present.

4. IND. APP. R. 4(A)(1).

5. IND. APP. R. 5(B).

6. Sept. 15, 2009 Appellate Rules Order, *supra* note 1, at 2.

7. IND. APP. R. 15(C)(4)(g) (emphasis added). Appellate Form 15-1, the Appellant’s Case Summary (Appearance) Form, now includes a space for appellants to indicate whether they are willing to participate in appellate ADR; if so, the form instructs appellants to include a brief statement of the facts of the case. FORM APP. R. 15-1.

This change in the rule language appears to be a clarification of the court's intent, which was presumably to facilitate the use of appellate ADR. Similarly, the court added subsection (4) to Appellate Rule 16(B), requiring the appellee to identify in his or her appearance whether he or she "is willing to participate in Appellate ADR."⁸ The court also added a sentence to Appellate Rule 20, the appellate ADR rule, which states: "The parties in civil cases are encouraged to consider appellate mediation."⁹

C. Appellate Rule 26—E-mail Transmission of Appellate Orders

Appellate Rule 26 previously permitted fax transmission of appellate orders.¹⁰ The rule now provides for mandatory e-mail transmission of orders, opinions, and notices to all represented parties.¹¹ Unrepresented parties will receive orders, opinions, and notices by U.S. postal mail or personal delivery unless the party requests e-mail or fax transmission in a written, signed request.¹² But unrepresented parties may not request both e-mail and fax transmission.¹³ The different treatment of represented and unrepresented parties in Rule 26 implies that a party represented by an attorney cannot request fax or U.S. postal mail transmission.¹⁴ Furthermore, when one transmittal is made to either represented or unrepresented parties by e-mail or fax, no other transmission will occur.¹⁵

D. Appellate Rule 44—Page Limitations on Brief of Intervenor or Amicus Curiae on Transfer or Rehearing

Appellate Rule 44(D) provides page limitations for briefs and petitions where the party filing the brief does not provide a word count certificate in accordance with subsections (E) and (F) of Rule 44.¹⁶ The supreme court added a provision to subsection (D) requiring that briefs submitted by intervenors or amicus curiae on *transfer* or *rehearing* be limited to ten pages.¹⁷ Appellate Rule 44(D) also provides that other briefs filed by intervenors or amici curiae are limited to

8. IND. APP. R. 16(B)(4).

9. IND. APP. R. 20.

10. See Oct. 2, 2009 Appellate Rules Order, *supra* note 1, at 1.

11. IND. APP. R. 26(A).

12. IND. APP. R. 26(B). Appellate Rule 15-1, the Appellant's Case Summary (Appearance) Form, allows unrepresented parties to select the method by which they prefer to receive court orders, opinions, and notices. Represented parties do not have this choice. FORM APP. R. 15-1.

13. IND. APP. R. 26(B).

14. The court also amended Rule 15(C)(1) to delete subsection (c), which previously allowed attorneys to request transmission of appellate opinions by fax. IND. APP. R. 15(C)(1); Oct. 2, 2009 Appellate Rules Order, *supra* note 1, at 1.

15. IND. APP. R. 26(C).

16. IND. APP. R. 44(D).

17. *Id.* (emphasis added); Sept. 15, 2009 Appellate Rules Order, *supra* note 1, at 4.

fifteen pages.¹⁸

The court also added a provision to Rule 44(E) stating that when an intervenor or amicus curiae files a brief on transfer or rehearing that includes a word count certificate in compliance with subsections (E) and (F), the brief is limited to 4200 words.¹⁹ Finally, Rule 44(E) provides that other briefs filed by intervenors or amici curiae with word count certificates are limited to 7000 words.²⁰

E. Appellate Rule 66—Damages for Frivolous or Bad Faith Filings

Appellate Rule 66(E) provides in part that “[t]he court may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith.”²¹ Before its amendment, the Rule was titled “Damages Against Appellant for Frivolous or Bad Faith Filings.”²² After the amendment, the Rule is now titled “Damages for Frivolous or Bad Faith Filings.”²³ This deletion appears to reflect the court’s intent that damages for bad faith filings can be assessed against either appellants or appellees.

F. Attachment A to Administrative Rule 5—Payment Schedule for Senior Judges

The supreme court amended Attachment A to Administrative Rule 5 by adding subsections (E) and (F) to Part I.²⁴ Together these subsections provide that a senior judge cannot claim service time or per diem for traveling to and from a court where the judge serves or “for scheduled senior judge service which is canceled through no fault of the senior judge.”²⁵ Senior judges may claim credit only for actual time served in a court.²⁶ Part II of Attachment A was amended to provide that senior judges who serve as domestic relations mediators cannot receive a senior judge per diem as provided in Indiana Code § 33-23-3-5, but they can “receive compensation from the alternative dispute resolution fund under [Indiana Code provision] 33-23-6 in accordance with the county domestic relations alternative dispute resolution plan.”²⁷

G. Administrative Rule 8.1—Uniform Appellate Case Numbering System

By adding Administrative Rule 8.1, which became effective on January 1, 2010, the supreme court created a uniform appellate case numbering system for

18. IND. APP. R. 44(D).

19. IND. APP. R. 44(E).

20. *Id.*

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

22. See Sept. 15, 2009 Appellate Rules Order, *supra* note 1, at 5 (emphasis added).

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

24. See Sept. 15, 2009 Administrative Rules Order, *supra* note 2, at 3.

25. IND. ADMIN. R. 5, Attachment A, Part I(E)-(F).

26. *Id.*

27. *Id.* at Part II.

cases filed in the supreme court, court of appeals, and tax court.²⁸ The following is an example of the case numbering to be employed: 55S00-0804-SJ-001.²⁹ The first group of five characters represents the county and the court identifier.³⁰ The first and second characters in the group “represent the county of the court from which the case is being appealed or [from which] the original action arose.”³¹ The third character in the first group “represent[s] the court in which the proceeding is being filed.”³² The last two characters of the first group “distinguish between geographical districts set forth in [Indiana Code § 33-25-1-2] from which the case is being appealed or being assigned in the Court of Appeals, and additional cases and other matters handled by the Supreme Court and the Tax Court.”³³ The second group of four characters represents “the year and month of filing.”³⁴ The third group of two characters “designate[s] the type of proceeding.”³⁵ The fourth group consists of “any number of characters assigned sequentially to a case when it is filed.”³⁶ It begins with “1” at the “beginning of each year for each case classification and continue[s] sequentially until the end of the year.”³⁷

*H. Administrative Rule 9(G)(1.1)-(1.3)—Information
Excluded from Public Access*

Subsections 1.1, 1.2, and 1.3 were added to Administrative Rule 9(G), which governs court records excluded from public access.³⁸ These subsections provide:

(1.1) *Court Proceedings Closed to the Public.* During court proceedings that are closed to the public by statute or court order, when information in case records that is excluded from public access pursuant to this rule is admitted into evidence, the information shall remain excluded from public access.

(1.2) *Court Proceedings Open to the Public.* During court proceedings that are open to the public, when information in case records that is excluded from public access pursuant to this rule is admitted into evidence, the information shall remain excluded from public access only if a party or a person affected by the release of the information, prior to

28. IND. ADMIN. R. 8.1(A).

29. Administrative Rules 8 and 8.1 provide the universe of possible character combinations for each grouping.

30. IND. ADMIN. R. 8.1(B)(1).

31. *Id.*

32. *Id.*

33. *Id.*

34. IND. ADMIN. R. 8.1(B)(2).

35. IND. ADMIN. R. 8.1(B)(3).

36. IND. ADMIN. R. 8.1(B)(4).

37. *Id.*

38. See Sept. 15, 2009 Administrative Rules Order, *supra* note 2, at 12.

or contemporaneously with its introduction into evidence, affirmatively requests that the information remain excluded from public access.

(1.3) *Access to Excluded Information.* Access to information excluded from public access under subsections 1.1 and 1.2 may be granted after a hearing pursuant to Administrative Rule 9(I).³⁹

Additionally, the court amended Rule 9(G)(4)—which imposes certain obligations on the parties, counsel, courts of appeal, and the clerks of the supreme court, court of appeals, and tax court relating to records excluded from public access—to limit the scope of the rule to “appellate proceedings pending as of or commencing after January 1, 2009.”⁴⁰

II. CASE LAW INTERPRETING THE APPELLATE RULES

The majority of case law interpreting the Appellate Rules is handed down by the court of appeals. Although the supreme court and tax court occasionally have opportunities to construe and apply the Rules, the volume of cases the court of appeals decides each year presents it with more opportunities to construe the Appellate Rules and refine appellate procedure.

A. Appellate Jurisdiction

Determining when an appellate court has jurisdiction over an issue is not always as straightforward as it may seem. The appellate courts provided guidance on determining appellate jurisdiction in the cases profiled below.

1. *Issue Not Ripe for Appellate Review.*—In *T-3 Martinsville, LLC v. U.S. Holding, LLC*,⁴¹ the appellants brought an interlocutory appeal regarding rulings the trial court made against them on summary judgment, and the appellees cross-appealed rulings stemming from the same summary judgment order.⁴² The court of appeals affirmed the portion of the trial court’s order denying the appellants’ summary judgment motion and granting summary judgment against them on a related issue.⁴³ One of the issues the appellees presented on cross-appeal was whether the trial court erred by compounding late charges owed to the appellants for the six-month period between the trial court’s interlocutory order for the payment of money and the summary judgment order.⁴⁴ The appellants argued that because the trial court’s prior ruling was “an interlocutory order for the payment of money,” the appellees “had to bring such appeal within thirty days of the ruling” and “[h]aving failed to do so . . . [a]ppellees must wait until after the final judgment on damages [was] entered to present the matter of compound

39. *Id.*

40. *Id.*

41. 911 N.E.2d 100 (Ind. Ct. App.), *aff’d on reh’g*, 916 N.E.2d 205 (Ind. Ct. App. 2009), *trans. denied*, 2010 LEXIS 174 (Ind. Feb. 25, 2010).

42. *Id.* at 103.

43. *Id.* at 109-17.

44. *Id.* at 117.

charges for appellate review.”⁴⁵

The court of appeals noted that although an interlocutory order may be appealable as a matter of right, “there is no requirement that an interlocutory appeal be taken. A claimed error in an interlocutory order is not waived for failure to take an interlocutory appeal but may be raised on appeal *from the final judgment*.”⁴⁶ Ultimately, the court agreed with the appellants and held, “Having failed to appeal the [trial court’s prior ruling] within thirty days, [a]ppellees must now wait until the final judgment, i.e., the one that ‘leaves nothing for future determination,’ is entered.”⁴⁷ The court further held, “Simply put, we agree with [the appellants] that there has been no final determination of late charges for this Court to consider on appeal. . . . As such, the question of compound charges is not yet ripe for appellate review.”⁴⁸

The court of appeals observed in a footnote that “there may be instances in which a cross-appeal from a prior interlocutory order may be appropriate.”⁴⁹ The court relied on *Murray v. City of Lawrenceburg*⁵⁰ for this proposition, although the supreme court had already granted transfer in the case. *Murray* held that a cross-appellant had demonstrated good cause for the court to consider an issue regarding a prior interlocutory order because the court had already agreed to exercise interlocutory jurisdiction over a related issue; the issue raised by the cross-appellant was “potentially dispositive,” and “judicial economy [was] . . . served by consideration of both certified interlocutory orders simultaneously.”⁵¹ Considering that the *T-3 Martinsville* court held that it could *not* address the cross-appellant’s interlocutory appeal and acknowledged that the supreme court had already granted transfer in *Murray*, it is interesting that the *T-3 Martinsville* court still detailed *Murray*’s holding. Perhaps the *T-3 Martinsville* panel was signaling to the supreme court that it agreed with the *Murray* panel’s decision to address the cross-appellant’s interlocutory appeal.⁵²

2. *Pre-Appeal Conference Filing Helpful*.—In *Lake County Trust Co. v. Advisory Plan Commission*,⁵³ the supreme court addressed an appellant’s

45. *Id.* at 117-18 (citing IND. APP. R. 14(A), which provides that interlocutory orders for the payment of money are appealable “as a matter of right by filing a [n]otice of [a]ppeal with the trial court clerk within thirty . . . days of the entry of the interlocutory order”).

46. *Id.* at 118 (quoting *Bojrab v. Bojrab*, 810 N.E.2d 1008, 1014 (Ind. 2004)).

47. *Id.* (quoting *Georgos v. Jackson*, 790 N.E.2d 448, 451 (Ind. 2003)).

48. *Id.* at 118-19.

49. *Id.* at 118 n.14 (citing *Murray v. City of Lawrenceburg*, 903 N.E.2d 93, 100 (Ind. Ct. App. 2009), *trans. granted* 919 N.E.2d 545 (Ind. 2009), *vacated*, 2010 WL 1558608 (Ind. Apr. 20, 2010)).

50. 903 N.E.2d 93 (Ind. Ct. App.), *trans. granted*, 919 N.E.2d 545 (Ind. 2009), *opinion vacated*, 925 N.E.2d 728 (Ind. 2010).

51. *Id.* at 100.

52. Judge Mathias was the writing judge in *Murray*, with Judge Brown concurring and Chief Judge Baker concurring on that issue, while Judge Crone was the writing judge in *T-3 Martinsville*, with Judges Bradford and Brown concurring.

53. 904 N.E.2d 1274 (Ind. 2009).

procedural challenge to the cross-appellant's argument regarding a prior interlocutory order.⁵⁴ The appellant argued that the cross-appellant could not challenge the prior interlocutory order because it had not taken an interlocutory appeal from that order, and by complying with the order, the cross-appellant had "waived its right to challenge any alleged error in the trial court's [prior interlocutory order]."⁵⁵ The supreme court cited *Bojrab v. Bojrab*⁵⁶ and *Georgos v. Jackson*⁵⁷ for the proposition that the cross-appellant was not required to institute an interlocutory appeal from the prior order and "instead was entitled to challenge it as part of its appeal from the court's final judgment."⁵⁸ Although the supreme court recognized that the cross-appellant's notice of appeal⁵⁹ indicated that it was challenging a subsequent order as an interlocutory order, the cross-appellant "clarified that [it was] appealing [that order] as a final appealable order" in its reply supporting its motion for an Appellate Rule 19 pre-appeal conference.⁶⁰ The supreme court ultimately concluded that the cross-appellant had not waived its right to challenge the order.⁶¹

3. *Court Sua Sponte Considers Appellate Jurisdiction.*—In *In re T.B.*,⁶² the court of appeals analyzed its jurisdiction over the appeal because the appellant had "filed several notices of appeal from the juvenile court's various orders."⁶³ The court noted, "The lack of appellate jurisdiction may be raised at any time, and if, as here, the parties do not question subject matter jurisdiction, the appellate court may consider the issue sua sponte."⁶⁴ Although the appellant characterized one of the juvenile court's orders as a final appealable order, the court of appeals held, "This characterization was incorrect, in that the order did not dispose of all claims as to all parties."⁶⁵ The court observed that although the appellant had not requested the trial court to certify the interlocutory order for appeal, it still would have jurisdiction over the appeal if the order resulted in an interlocutory appeal as a matter of right.⁶⁶ Before concluding that the order did

54. *Id.* at 1278.

55. *Id.* at 1278 n.2.

56. 810 N.E.2d 1008, 1014 (Ind. 2004).

57. 790 N.E.2d 448, 452 (Ind. 2003).

58. *Lake County Trust Co.*, 904 N.E.2d at 1278 n.2.

59. Although the cross-appellant in *Lake County Trust Co.* filed a notice of appeal, it was not required to do so. IND. APP. R. 9(D) (providing that, "[a]n appellee may cross-appeal without filing a Notice of Appeal by raising cross-appeal issues in the appellee's brief"). Rule 9(D) cautions, however, "A party must file a Notice of Appeal to preserve its right to appeal if no other party appeals." *Id.*

60. *Lake County Trust Co.*, 904 N.E.2d at 1278 n.2. This appears to be the first time the supreme court has referenced an Appellate Rule 19 pre-appeal conference in an opinion.

61. *Id.*

62. 895 N.E.2d 321 (Ind. Ct. App. 2008).

63. *Id.* at 330.

64. *Id.* at 329 (citing *Georgos v. Jackson*, 790 N.E.2d 448, 451 (Ind. 2003)).

65. *Id.* at 330 (internal quotation omitted).

66. *Id.* at 330-31.

not meet the criteria outlined in Appellate Rule 14(A),⁶⁷ the court held, “To the extent one might argue that the juvenile court’s orders ‘compel the delivery of . . . documents’ pursuant to Appellate Rule 14(A)(3), we believe that the rule applies only to documents held by persons or entities other than trial courts.”⁶⁸ Because it is unnecessary for a trial court to compel surrender of its own documents, the court of appeals held that Appellate Rule 14(A)(3) did not apply to the order.⁶⁹ The court of appeals ultimately concluded that another appealed order was a final appealable order, which allowed the court to review the prior interlocutory order.⁷⁰

4. *Multiple Notices of Appeal Untangled.*—*In re Guardianship of L.R.*⁷¹ presented the court of appeals with a “tangled knot of multiple trial court orders and multiple notices of appeal.”⁷² The appellant filed her first notice of appeal more than three months after the interlocutory order at issue.⁷³ Although she had filed a motion to correct error targeting that order, the court deemed it improper to file a motion to correct error following an interlocutory order. Therefore, the motion did not extend the thirty-day deadline to file a notice of appeal.⁷⁴ The interlocutory order was for the payment of money and would have supported an interlocutory appeal as a matter of right pursuant to Appellate Rule 14(A)(1) if the appeal had been timely, but because the appellant’s notice of appeal was untimely, the court concluded that its motions panel properly dismissed that notice of appeal.⁷⁵

The court of appeals also concluded that it did not have jurisdiction over the appellant’s second notice of appeal because the underlying order was not appealable as a matter of right and the appellant did not seek to have the order certified for interlocutory appeal.⁷⁶ Although the second order permitted the guardian to hire paid co-counsel, the order “was not for the payment of money; in fact, the order explicitly directed the [g]uardian to submit any fee requests for trial court approval before disbursement.”⁷⁷

Turning to the appellant’s third notice of appeal, the court concluded that it “was timely filed and concerned an interlocutory order for the payment of

67. The court did not specify which language from the interlocutory order it was referencing, but portions of the order are cited later in the opinion. See *id.* at 339-40.

68. *Id.* at 330 n.11 (citing *Allstate Ins. Co. v. Scrogan*, 801 N.E.2d 191, 194 (Ind. Ct. App. 2004) (“Rule 14(A)(3) pertains to the delivery of documents where delivery imports a surrender. Surrender may occur with such items as securities, receipts, deeds, leases, or promissory notes.”)).

69. *Id.*

70. *Id.* at 331 (citing *Bojrab v. Bojrab*, 810 N.E.2d 1008, 1014 (Ind. 2004)).

71. 908 N.E.2d 360, 362 (Ind. Ct. App. 2009).

72. *Id.*

73. *Id.* at 364.

74. *Id.* (citing *Young v. Estate of Sweeney*, 808 N.E.2d 1217, 1221 n.6 (Ind. Ct. App. 2004)).

75. *Id.* at 364-65.

76. *Id.*

77. *Id.* at 365.

money; consequently, it clear[ed] these rudimentary hurdles.”⁷⁸ The appellee challenged the appellant’s standing to raise arguments regarding prior appellate attorney fees and administrative fees, but the court concluded that the appellant had standing.⁷⁹ The court reiterated that “attorney fees may not be awarded for time spent preparing and defending fee petitions,” but because the fees at issue stemmed from time spent preparing an appellees’ brief, that general rule did not apply.⁸⁰ The appellant argued that the trial court had abused its discretion by awarding administrative fees when the guardian had not included a line item breakdown detailing how it calculated those fees.⁸¹ Although the court of appeals emphasized that it “would prefer that the [g]uardian include line item descriptions of how it amasses its fees in the future,” because there was evidence in the record supporting how the guardian had spent its time, the court could not “conclude that its requested fees were unreasonable or that the trial court abused its discretion.”⁸²

5. *Tax Court Explains Timeliness of Notice of Appeal After Bench Ruling.*—The tax court addressed the interaction between a motion for extension of time pursuant to Indiana Trial Rule 72(E) and the requirements for filing a notice of appeal in *Indiana Department of State Revenue v. Estate of Miller*.⁸³ The probate court held a hearing regarding the proper amount of inheritance tax owed by the estate on April 25, 2006.⁸⁴ The court noted, “At the conclusion of the hearing, the probate court stated that the [t]rust assets had been properly distributed and . . . requested that the [e]state prepare an entry reflecting its statement and submit that entry to the Department [of State Revenue] for its review.”⁸⁵ The clerk of court made a record of the hearing on the case’s chronological summary (CCS), and the parties submitted a proposed entry on May 1, 2006. Although the probate court signed the entry on May 3, 2006, the chronological case summary did not indicate whether a copy had been mailed to the parties. Counsel for the Department of State Revenue (“Department”) telephoned the probate court on June 20, 2006 regarding the status of the entry and was informed that the probate court had signed it on May 3, 2006. The next day, the Department “requested an extension of time from the probate court to file its notice of appeal because it never received a signed and dated copy of the probate court’s May 3, 2006 entry.”⁸⁶ The probate court granted the Department’s request over the estate’s objection. Both parties appealed to the tax court, which heard oral argument on

78. *Id.*

79. *Id.*

80. *Id.* at 366 (citing *In re Estate of Inlow*, 735 N.E.2d 240, 254-55 (Ind. Ct. App. 2000)).

81. *Id.*

82. *Id.*

83. 894 N.E.2d 286 (Ind. Tax Ct.), *aff’d on reh’g*, 897 N.E.2d 545, 546 (Ind. Tax Ct. 2008), *trans. denied*, 915 N.E.2d 989 (Ind. 2009).

84. *Id.* at 288.

85. *Id.*

86. *Id.*

the issue.⁸⁷

The tax court noted that a party seeking to appeal a probate court's final judgment of the amount of inheritance tax owed "must file 'a [n]otice of [a]ppeal with the [probate] court clerk within thirty (30) days after the entry of [the f]inal [j]udgment.'"⁸⁸ The court acknowledged that "[a] party's failure to timely file its notice of appeal . . . will not necessarily result in the forfeiture [of] its right to appeal"⁸⁹ because the probate court may "grant a party additional time to perfect its appeal pursuant to Trial Rule 72(E),"⁹⁰ which provides in relevant part:

When the mailing of a copy of the entry by the Clerk is not evidenced by a note made by the Clerk upon the Chronological Case Summary, the Court, upon application for good cause shown, may grant an extension of any time limitation within which to contest such ruling, order or judgment to any party who was without actual knowledge⁹¹

But "[a] party with actual knowledge of a ruling may not rely upon [Trial Rule 72(E)] for an extension of time."⁹² The appellee estate argued that the probate court had abused its discretion by granting the Department's motion for extension of time to file its notice of appeal because the Department "obtained actual knowledge of the judgment during the April 25, 2006 hearing when the probate court orally rendered the judgment."⁹³ The Department argued that it "did not obtain actual knowledge of the judgment until June 20, 2006, as the probate court only 'announced its *intention* to deny the Department's Petition' during the [April 25] hearing."⁹⁴

The tax court first analyzed the probate court's ruling at the April 2006 hearing to determine if that ruling was a final judgment pursuant to Appellate Rule 2(H).⁹⁵ An exchange between the probate court and the Department regarding the Department's right to appeal prompted the tax court to hold, "This exchange indicates that the probate court rendered a *final* judgment during the April 25, 2006 hearing"⁹⁶ Because the probate court rendered a final appealable judgment in the Department's presence at the hearing, the tax court held that the Department had actual knowledge of the judgment.⁹⁷ Consequently, the tax court concluded that the probate court had abused its discretion by

87. *Id.*

88. *Id.* (citing IND. CODE § 6-4.1-7-7; IND. APP. R. 9(A)(1)).

89. *Id.* at 288-89 (citing IND. TRIAL R. 72(E)).

90. *Id.*

91. IND. TRIAL R. 72(E).

92. *Estate of Miller*, 894 N.E.2d at 289 (quoting *Vaughn v. Schnitz*, 673 N.E.2d 501, 503 (Ind. Ct. App. 1996) (Hoffman, J., concurring)).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 290.

97. *Id.* at 290-91.

granting the Department an extension to file its notice of appeal “because the Department had actual knowledge of the final judgment prior to requesting an extension of time to perfect its appeal.”⁹⁸ Ultimately, the tax court reversed the probate court’s order granting the Department an extension of time to file its notice of appeal.⁹⁹

The tax court subsequently issued another published opinion “for the sole purpose of clarifying its [original] opinion” after the Department moved for rehearing.¹⁰⁰ On rehearing, the Department again asserted that it lacked actual knowledge of the probate court’s judgment because its oral ruling “was not a judgment, given that it was not reduced to writing or dated and signed by the judge” on the date of the hearing.¹⁰¹ The Department also argued that the tax court’s opinion “conflict[ed] with *Collins v. Covenant Mutual Insurance Company*”¹⁰² and “improperly alter[ed] the manner by which the appellate time clock commences.”¹⁰³

The tax court characterized the Department’s argument as “suggest[ing] that this Court either [was] unaware of, or ignored the import of, Indiana Appellate Rule 9(A)(1)[,] which controls when the period for filing an appeal commences.”¹⁰⁴ Appellate Rule 9(A)(1) provides in relevant part, “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.”¹⁰⁵ The tax court observed that the court of appeals has explained that the word “entry” in the rule “refers to the date that an order, ruling, or judgment is entered into the court’s Records of Judgments and Orders (RJO).”¹⁰⁶ Because the time to initiate an appeal commences when the ruling, order, or judgment is entered—and the tax court determined that the probate court’s judgment had been entered into the RJO on May 3, 2006—“the Department’s period for filing its notice of appeal commenced on May 3, 2006.”¹⁰⁷ The tax court noted, however, that the issue of when the Department’s period for filing its notice of appeal began

was not the issue that the Estate presented to this [c]ourt on cross-appeal. Rather, the issue the Estate presented to this [c]ourt on cross-appeal was

98. *Id.* at 291 (citing language in IND. TRIAL R. 72(E) that limits the grant of an extension of time to a “party who was without actual knowledge”); see also *Smith v. Deem*, 834 N.E.2d 1100, 1110 (Ind. Ct. App. 2005) (concluding that a party is not entitled to an extension when it has notice of the trial court’s ruling before entry into the record).

99. *Estate of Miller*, 894 N.E.2d at 291.

100. *Estate of Miller*, 897 N.E.2d 545, 546 (Ind. Tax Ct. 2008), *trans. denied*, 915 N.E.2d 989 (Ind. 2009).

101. *Id.* at 545-46.

102. *Id.* at 546 (citing *Collins v. Covenant Mut. Ins. Co.*, 644 N.E.2d 116 (Ind. 1994)).

103. *Id.*

104. *Id.*

105. IND. APP. R. 9(A)(1).

106. *Estate of Miller*, 897 N.E.2d at 546 (citing *Smith v. Deem*, 834 N.E.2d 1100, 1109-10 (Ind. Ct. App. 2005)).

107. *Id.*

whether the probate court properly granted the Department additional time to file its notice of appeal despite the fact that it had obtained actual knowledge of the judgment before it was entered into the RJO.¹⁰⁸

Because the tax court considered these issues to be distinct, “resolution of the latter did not automatically affect the former” and the court’s opinion “did not alter either the manner or the time frame by which appeals are commenced.”¹⁰⁹

Turning to the Department’s argument that the tax court’s opinion conflicted with the supreme court’s opinion in *Collins*, the court declared that

Collins does not stand for the proposition that relief under Indiana Trial Rule 72(E) only requires a showing that the CCS bore no indication that notice of the judgment had been sent to the complaining party. Rather, *Collins* established that Indiana Trial Rule 72(E) was the “sole vehicle” for pursuing an extension of time to file a notice of appeal.¹¹⁰

The court noted that *Collins* “implied that a party should not even *request* an extension of time to file a notice of appeal if the CCS indicates that a copy of the [c]ourt’s entry was sent to the parties.”¹¹¹ The tax court concluded that the Department’s interpretation of Indiana Trial Rule 72(E) “invite[d] the [c]ourt to ignore the portions of the Rule referring to good cause, lack of actual knowledge of the judgment, and reliance upon incorrect representations by Court personnel.”¹¹² Trial Rule 72(E) is intended to prevent “the ‘forfeiture of appellate rights due to expiration of time caused by [an] attorney’s *ignorance of the existence* of a ruling or order.’”¹¹³ Because the Department was present at the hearing when the probate court rendered its judgment, “it would have been illogical for the Court to conclude that the Department was unaware of the existence of the judgment.”¹¹⁴ Therefore, the tax court affirmed its original decision in its entirety.¹¹⁵

B. Indiana Does Not Recognize Horizontal Stare Decisis

In a published order, Chief Judge John G. Baker of the Indiana Court of Appeals noted that Indiana does not recognize horizontal stare decisis and that “each panel of this Court has coequal authority on an issue.”¹¹⁶ The appellant in the case at issue filed a motion to dismiss the appeal, asserting that the issue he raised was “moot because a panel of this Court issued an opinion on the issue [in

108. *Id.*

109. *Id.*

110. *Id.* at 547 (citing *Collins v. Covenant Mut. Ins. Co.*, 644 N.E.2d 116, 117 (Ind. 1994)).

111. *Id.* (citing *Collins*, 644 N.E.2d at 117-18).

112. *Id.*

113. *Id.* (quoting *Markle v. Ind. State Teachers Ass’n*, 514 N.E.2d 612, 613 (Ind. 1987)).

114. *Id.*

115. *Id.*

116. *In re J.J.*, 911 N.E.2d 659, 659 (Ind. Ct. App. 2009).

another case].”¹¹⁷ Chief Judge Baker cited *Lincoln Utilities, Inc. v. Office of Utility Consumer Counselor*¹¹⁸ for the proposition that “a court on appeal will follow its previous decisions unless provided with strong justification for departure.”¹¹⁹ Because “Indiana does not, however, recognize horizontal *stare decisis*[,]” each panel is not bound by previous decisions of other panels.¹²⁰ Additionally, Appellate Rule 57 specifically contemplates diverse holdings by various panels on the court of appeals as grounds supporting transfer to the supreme court.¹²¹ Because the appellant “failed to set forth whether the facts and circumstances of the underlying proceedings in the appeal it [sought] to dismiss [were] similar to those in the previous opinion such that a similar result would generally follow[,]” Chief Judge Baker denied the appellant’s motion to dismiss.¹²²

C. Calculating Due Date of Brief of Appellant

In *Cox v. Matthews*,¹²³ the court of appeals provided a detailed analysis of Appellate Rule 45 and the calculation of the due date of a brief of appellant.¹²⁴ The appellee moved to dismiss the brief of appellant, contending that the appellant had filed it four days late.¹²⁵ The appellant countered that the brief was “only one business day late,”¹²⁶ and the court should affirm the decision of the motions panel to allow it to file the brief late.¹²⁷

Indiana Appellate Rule 45(B)(1) provides, in relevant part, “The appellant’s brief shall be filed no later than thirty (30) days after . . . the date the trial court clerk or Administrative Agency issues its notice of completion of the Transcript.”¹²⁸ Appellate Rule 45(D) provides, “The appellant’s failure to file timely the appellant’s brief may subject the appeal to summary dismissal.”¹²⁹ But because the court of appeals prefers to decide appeals on their merits rather than summarily, “when violations are comparatively minor, are not a flagrant violation of the appellate rules, and there has not been a failure to make a good faith effort

117. *Id.* (internal quote omitted).

118. 661 N.E.2d 562 (Ind. Ct. App. 1996).

119. *In re J.J.*, 911 N.E.2d at 659 (citing *Lincoln Utilities*, 661 N.E.2d at 565).

120. *Id.* (citing *O’Casek v. Children’s Home & Aid Soc’y of Ill.*, 892 N.E.2d 994, 1014 n.4 (Ill. 2008) (noting that “horizontal *stare decisis* is not an inexorable command, whereas vertical *stare decisis* is an obligation to follow the decisions of superior tribunals”)).

121. *Id.* at 659-60.

122. *Id.* at 660.

123. 901 N.E.2d 14 (Ind. Ct. App.), *trans. dismissed*, 915 N.E.2d 995 (Ind. 2009).

124. *Id.* at 18-21.

125. *Id.* at 18.

126. *Id.*

127. *Id.* n.2 (citing *Cincinnati Ins. Co. v. Young*, 852 N.E.2d 8, 12 (Ind. Ct. App. 2006) (“It is well settled that this court has the inherent authority to reconsider any order of the motions panel while the appeal remains *in fieri*.”)).

128. IND. APP. R. 45(B)(1)(b).

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

to substantially comply with those rules, the appeal will be allowed.”¹³⁰

In *Cox*, the record indicated that the notice of completion of transcript was filed with the court of appeals on June 10, 2008. Thus, that date was “the date on which the trial court clerk ‘issued its notice of completion of the Transcript’ for purposes of Appellate Rules 10(D) and 45(B)(1).”¹³¹ The appellant, however, emphasized “that the trial court clerk’s online docket prove[d] that the clerk did not issue the notice of completion of the transcript until June 11, 2008” because of a motion on that docket reading, “06-11-2008 Issue: 6/11/2008 Service: Notice of Completion of Clerk’s Portion/Transcript . . .”¹³² Additionally, “the postmark on the clerk’s envelope containing the notice of completion of the transcript” indicated that it was mailed to the appellant on June 11, 2008.¹³³

The court of appeals noted that although the postmark on the envelope indicated when the parties were served with a copy of the notice of completion of transcript, “the language used in Appellate Rule 45(B)(1) is ‘issues,’ not ‘mails’ or ‘serves.’”¹³⁴ Appellate Rule 10(D) also orders the trial court clerk to “issue and file a Notice of Completion of Transcript” and “serve a copy on the parties within five (5) days after the court reporter files the Transcript.”¹³⁵ Consequently, the court of appeals held that trial court issued the notice of completion of transcript in *Cox* on the date it filed it with the court of appeals: June 10, 2008.¹³⁶

The appellant also argued that its brief was only one business day late and the court of appeals had previously allowed appeals to proceed when a brief was filed one day late.¹³⁷ After concluding that the brief was actually two business days late, the court of appeals observed that for purposes of the Appellate Rules, “due dates are primarily calculated by calendar days . . . not business days.”¹³⁸ Therefore, non-business days are still included in any computation of time unless the non-business day is the last day of the time period or the amount of allowable time is less than seven days.¹³⁹ The court also noted that an appellant does not get the benefit of three additional days based on service by mail pursuant to Appellate Rule 25(C) to file its brief because “the trial court clerk is not ‘a party’ and therefore Rule 25(C) does not apply to these circumstances.”¹⁴⁰ Based on these calculations, the court of appeals determined that the appellant’s brief in

130. *Cox*, 901 N.E.2d at 19 (citing *Haimbaugh Landscaping, Inc. v. Jegen*, 653 N.E.2d 95, 99 (Ind. Ct. App. 1995)).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 19-20 (citing IND. APP. R. 45(B)(1)).

135. *Id.* at 20 (quoting IND. APP. R. 10(D)).

136. *Id.*

137. *Id.* at 20-21 (citing *Howell v. State*, 684 N.E.2d 576, 577 (Ind. Ct. App. 1997); *Haimbaugh Landscaping, Inc. v. Jegen*, 653 N.E.2d 95, 99 (Ind. Ct. App. 1995)).

138. *Id.* at 20.

139. *Id.*

140. *Id.* (citing IND. APP. R. 25(C)).

Cox was four days late.¹⁴¹

Despite the appellant's belated brief, the court of appeals concluded that "the record reflects that [appellant] made a good faith effort to substantially comply with the rules and that any violation was not flagrant."¹⁴² Because the appellee failed to show as a matter of law that the motions panel erred by granting the appellant's motion to file a belated brief, the court declined to dismiss the appeal and addressed the merits of the case.¹⁴³

*D. Court Considers New Facts on Rehearing in
"Extraordinarily Rare Event"*

In *Jallali v. National Board of Osteopathic Medical Examiners, Inc.*,¹⁴⁴ the court of appeals held that the trial court erred in refusing to dismiss the plaintiff's complaint because the trial court should have deferred to litigation already pending in Florida in the interest of comity.¹⁴⁵ The court of appeals specifically noted, "There is no indication that the Florida lawsuit is not proceeding normally."¹⁴⁶

On rehearing, the appellee informed the court of appeals that, in fact, the litigation in Florida had been dismissed.¹⁴⁷ Although the court recognized that it typically would not permit a party "to raise issues in petitions for rehearing that were not raised in the original briefs . . . [c]learly, this dismissal [was] vitally important to [its] consideration of the issues raised here, and renders our original opinion factually and legally incorrect."¹⁴⁸ The court expressed its frustration, saying it was "baffled, confused, and puzzled why [the appellee] did not advise [it] of that fact in its first brief."¹⁴⁹ But because "[t]here can be no comity discussion about a case that no longer exists," the court "fe[lt] compelled to take another view of these new facts and do so with the understanding that this is an extraordinarily rare event."¹⁵⁰ Ultimately, the court of appeals reversed the denial of the appellant-defendant's motion to dismiss and entered partial summary judgment in favor of the appellee-plaintiff with respect to certain claims.¹⁵¹

141. *Id.*

142. *Id.*

143. *Id.* at 21.

144. 902 N.E.2d 902 (Ind. Ct. App.), *rev'd and vacated on reh'g*, 908 N.E.2d 1168 (Ind. Ct. App.), *trans. denied* 919 N.E.2d 553 (Ind. 2009).

145. *Id.* at 907.

146. *Id.* at 906.

147. *Jallali*, 908 N.E.2d at 1172.

148. *Id.*

149. *Id.*

150. *Id.* at 1172-73.

151. *Id.* at 1175-76. In its final footnote, the court noted that although the appellant-defendant had filed a motion for costs pursuant to Appellate Rule 67, the motion was premature because "there is as yet no opinion certified as final in this case under Indiana Appellate Rule 65(E)." *Id.* at 1176 n.4.

E. Authority to Enter Judgment Under Appellate Rule 66(C)(4)

In *Gerstbauer v. Styers*,¹⁵² a split panel of the court of appeals reviewed a trial court order awarding attorney fees.¹⁵³ The court of appeals had previously addressed an appellate dispute between the parties, reversing the trial court and concluding that the defendant-appellants were entitled to costs and attorney fees pursuant to a contract between the parties.¹⁵⁴ On remand, the defendants presented evidence that they had incurred approximately \$143,000 in attorney fees over the course of the litigation, including trial and appellate work.¹⁵⁵ In response, the plaintiff argued that the defendants' fees were unreasonable and submitted evidence that \$79,577.89 would be a reasonable award.¹⁵⁶

The trial court held a hearing in which it awarded the defendants \$9500 in attorney fees.¹⁵⁷ In explaining its calculation, the trial court noted that the defendant "won a total judgment for rent of \$13,207.45" and "[i]n order to win this award, [he] . . . expended total attorney fees of" at least \$143,000.¹⁵⁸ The trial court referenced Indiana Rule of Professional Conduct 1.5 and concluded that a reasonable fee should not exceed one-third of the recovery.¹⁵⁹ Additionally, the trial court admitted:

Because of this Court's unfortunate earlier ruling and the need for appellate review for overturning it, the Court believes that there was an additional sum of \$4,250.00 earned as a further reasonable fee (in view of the amounts involved) earned on the direct appeal; ultimately this is where the Judgment amount for [defendants] was best earned and [they] received best value for [their] attorney fee award.¹⁶⁰

Finally, the trial court awarded an additional \$1000 because the defendant needed to defend the plaintiff's petition for rehearing on appeal, bringing the total attorney fee award to \$9500.¹⁶¹

The defendants appealed the trial court's attorney fee award because they believed the trial court had abused its discretion by only awarding \$9500.¹⁶² On appeal, the court of appeals first noted that the appellant-defendants' right to

152. 898 N.E.2d 369 (Ind. Ct. App. 2008).

153. *Id.* at 370-71.

154. *Id.* at 374 (summarizing *Capitol Speedway, Inc. v. Styers*, 837 N.E.2d 229 (Ind. Ct. App. 2005) (unpublished table decision)).

155. *Id.* at 375.

156. *Id.* at 376. The plaintiff also argued in the alternative that he should not owe any attorney fees. *Id.* at 375.

157. *Id.* at 377.

158. *Id.* The trial court wrote that the defendants expended \$161,280.00 in attorney fees, but as the court of appeals observed, this figure is approximately \$18,000 greater than what the defendants had alleged. *Id.* at 377 n.1.

159. *Id.* at 377.

160. *Id.*

161. *Id.*

162. *Id.* at 378.

attorney fees was based on a fee-shifting provision in the parties' lease and the "goal of contract interpretation is to ascertain and enforce the parties' intent as manifested in the contract."¹⁶³ The court of appeals also observed that the trial court had limited the appellants' attorney fees based on "recovery on [their] breach of contract counter-claim, stating that '[m]ost of the effort for [them had] been to defeat the claims of [the plaintiff], not to win [their] own claim."¹⁶⁴ But the court of appeals concluded that the trial court's interpretation of the fee-shifting provision that a party was only entitled to fees for enforcing a claim, not for defending it, was incorrect.¹⁶⁵ "Thus, having been successful both in [their] defense . . . and in [their] counter-claim, [defendants were], on all counts, the prevailing party" and "entitled to reasonable attorneys' fees incurred both in [their] defense and on [their] counter-claim."¹⁶⁶

The court of appeals further noted that Professional Conduct Rule 1.5(a) addresses how to bill a client and is not helpful in determining the objective reasonableness of charges.¹⁶⁷ Additionally, although the total fees may initially appear excessive given the amount at issue in the litigation, "an appearance on its face is a subjective impression, not an objective determination."¹⁶⁸ Because the trial court "misapplied the law," the court of appeals reversed the award of attorney fees.¹⁶⁹ But instead of remanding the "ten-year-old litigation to the trial court yet again[.]" the court of appeals cited Appellate Rule 66(C)(4) as authority to "order entry of judgment of damages in the amount supported by the evidence."¹⁷⁰ The court of appeals cited the plaintiff's concession to the trial court at the fee hearing that \$79,577.89 would be reasonable and awarded that amount to the defendant.¹⁷¹ The court noted,

Under most circumstances, we would remand the question of a reasonable sum of attorneys' fees to the trial court . . . [b]ut given our authority under Appellate Rule 66(C)(4) to enter judgment in the amount supported by the evidence, [plaintiff-appellee's] concession that \$79,577.89 is reasonable, and [defendants'] specific request for this court to "calculate its own award," we find this disposition appropriate.¹⁷²

Judge May dissented from the majority's opinion on the ground that she "would remand so the trial court could properly recalculate attorney fees based on its analysis of the evidence before it in light of the legal standards the majority

163. *Id.* at 378-79 (citing *Gregg v. Cooper*, 812 N.E.2d 210, 215 (Ind. Ct. App. 2004)).

164. *Id.* at 379 (quoting trial court order).

165. *Id.* at 380.

166. *Id.*

167. *Id.* at 381.

168. *Id.*

169. *Id.* at 382.

170. *Id.* (quoting IND. APP. R. 66(C)(4)).

171. *Id.* at 382 n.4.

172. *Id.*

[had] articulated.”¹⁷³ Although Judge May recognized that the court of appeals could “in certain situations direct final judgment without new factfinding, [] ‘this power is to be utilized only if the court is reviewing a pure question of law or a mixed question of law and fact.’”¹⁷⁴ The determination of appropriate attorney fees required the court to resolve an issue of disputed material fact and “[b]ecause the majority [had] reweighed the evidence, its award [was] not a proper application of [its] authority under App. Rule 66(C)(4).”¹⁷⁵ Judge May concluded, “I fully appreciate the majority’s reluctance to remand when doing so would undoubtedly extend this remarkably lengthy litigation. But our standard of review requires it, and I would not usurp the trial court’s factfinding authority for the sole purpose of bringing this action to an earlier resolution.”¹⁷⁶

IV. COURT GUIDANCE FOR APPELLATE PRACTITIONERS

A. Failure to Comply with Appellate Rules May Result in Dismissal

As discussed in last year’s appellate procedure Survey article, the court of appeals lowered the figurative “boom” on the appellant in *Galvan v. State*¹⁷⁷ and dismissed his appeal “[d]ue to flagrant violations of the appellate rules.”¹⁷⁸ During this reporting term, another panel of the court of appeals followed *Galvan* and dismissed an appeal in an unpublished memorandum decision “[g]iven the numerous and flagrant violations of the appellate rules.”¹⁷⁹ The *Bedree* appellant failed to provide the court with copies of any orders or pleadings, filed an untimely notice of appeal, and waived his claims by failing to present adequate “facts, authority, or argument” supporting his claims, among other violations.¹⁸⁰ Although these violations were an extreme instance of “blatant[] disregard[] [for] our appellate rules[,]”¹⁸¹ appellate practitioners should carefully abide by the Appellate Rules to avoid being “*Galvan-ized*”¹⁸² by an appellate court.

173. *Id.* at 384 (May, J., dissenting).

174. *Id.* (quoting *Rebel v. Nat’l City Bank of Evansville*, 598 N.E.2d 1108, 1111 (Ind. Ct. App. 1992)).

175. *Id.* at 384-85.

176. *Id.* at 385.

177. 877 N.E.2d 213 (Ind. Ct. App. 2007).

178. Bryan H. Babb & Kellie M. Barr, *Developments in Indiana Appellate Procedure: Rule Amendments, Notable Case Law, and Tips for Appellate Practitioners*, 42 IND. L. REV. 813, 833-34 (2009) (quoting *Galvan*, 877 N.E.2d at 216).

179. *Bedree v. Darling*, No. 02A05-0902-CV-112, 2009 Ind. App. Unpub. LEXIS 1041, at *7 (Ind. Ct. App. Aug. 14, 2009).

180. *Id.* at *1 n.2, *3, *5.

181. *Id.* at *5.

182. The definition of “galvanized” is “to stimulate or excite as if by an electric shock,” which captures the panic that would presumably ensue from an appellate court citing *Galvan* in your case. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 513 (11th ed. 2004).

B. Do Not Incorporate Filings By Reference in a Brief

Appellate Rule 46(A)(8)(a) provides, “The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning.”¹⁸³ Appellate Rule 46(B)(2) provides that an appellee’s argument “shall address the contentions raised in the appellant’s argument.”¹⁸⁴ The court of appeals held in *T-3 Martinsville* that an appellee’s brief “violate[d] these rules by attempting to ‘incorporate by reference’ more than a hundred pages from other documents, including [its] answer to the complaint, all three of its summary judgment motions, and its response to [the appellants’] motion for summary judgment.”¹⁸⁵ Accordingly, the court of appeals only considered the actual arguments presented in the appellee’s brief.¹⁸⁶

C. Appealed Judgment Must Appear in Appellant’s Brief and Appendix

Appellate Rule 46(A)(10) provides, “The [appellant’s] brief shall include any written opinion, memorandum of decision or findings of fact and conclusions thereon relating to the issues raised on appeal.”¹⁸⁷ Appellate Rule 50(A)(2)(b) provides that the appellant’s appendix shall include “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.”¹⁸⁸ The court of appeals reminded the appellant in *Highland Springs South Homeowners Ass’n v. Reinstatler*¹⁸⁹ that these rules both apply, which required the appellant to include the appealed judgment in both its brief and appendix, not just one or the other.¹⁹⁰

D. Learn Appellate Rules Governing Appendices

The court of appeals has also noted, “it is incumbent upon the parties to present [the court of appeals] with a complete appellate appendix.”¹⁹¹ During this reporting term, the court noted that it “has seen an increase in the filing of incomplete appendices” and “strongly caution[ed] counsel to familiarize themselves with the appellate rules governing the filing of appendices.”¹⁹²

183. IND. APP. R. 46(A)(8)(a).

184. IND. APP. R. 46(b)(2).

185. *T-3 Martinsville, LLC v. U.S. Holding, LLC*, 911 N.E.2d 100, 104 n.3 (Ind. Ct. App.), *aff’d on reh’g*, 916 N.E.2d 205 (Ind. Ct. App. 2009), *trans. denied*, 2010 Ind. LEXIS 174 (Ind. Feb. 25, 2010).

186. *Id.*

187. IND. APP. R. 46(A)(10).

188. IND. APP. R. 50(A)(2)(b).

189. 907 N.E.2d 1067 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 560 (Ind. 2009).

190. *Id.* at 1071 n.1.

191. *Paoli Mun. Light Dep’t v. Orange County Rural Elec. Membership Corp.*, 904 N.E.2d 1280, 1282 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 548 (Ind. 2009).

192. *Id.* (citing *Kovach v. AlphaPharma, Inc.*, 890 N.E.2d 55, 65 (Ind. Ct. App. 2008), *trans. granted*, 915 N.E.2d 983 (Ind.), *opinion vacated by* 913 N.E.2d 193 (Ind. 2009); *Motorists Mut.*

Because both parties failed to include sufficient materials in their appendices necessary for appellate review, the court ordered the appellant “to submit a supplemental appendix containing all documents necessary for resolution of the issue raised on appeal.”¹⁹³

In a different case, some parties included duplicative materials in their appendices, causing the court of appeals to remind them:

[W]e do not need two identical copies of the record in order to perform our review. As such, the provision of two copies is a waste of paper that merely bloats the record on appeal. We refer counsel to Indiana Appellate Rule 50, which describes the proper contents of an appendix, including, among other things, only those portions of the transcript and exhibits that are relevant to the issues on appeal.¹⁹⁴

E. Statement of Case and Statement of Facts

In *Ruse v. Bleeke*, the appellant cited his proposed findings of fact in his appendix as his Statement of Facts for his appellant’s brief.¹⁹⁵ The court of appeals reminded the appellant that

Appellate Rule 46(A)(6) provides that an appellant’s brief shall contain a Statement of the Facts section which shall describe the facts relevant to the issues presented for review. Furthermore, a Statement of Facts should be a concise narrative of the facts stated in the light most favorable to the judgment and should not be argumentative.¹⁹⁶

Although “several documents may be included in an Appellant’s Appendix, [] a section of the contents of the Appellant’s Brief [*i.e.*, a party’s proposed Statement of Facts] is not among those listed.”¹⁹⁷

In *Nealy v. American Family Mutual Insurance Co.*,¹⁹⁸ the court noted that the Statement of the Case and Statement of Facts in the appellee’s brief was “nearly devoid of references to the record required by Ind. Appellate Rules 22(C), 46(A)(5) and (6), and 46(B).”¹⁹⁹ As such, the court relied on the appellants’ brief for that information and reminded appellee’s counsel that “we will not search the record to find a basis for a party’s argument.”²⁰⁰

v. Wroblewski, 898 N.E.2d 1272, 1274-75 (Ind. Ct. App.), *trans. denied*, 915 N.E.2d 989 (Ind. 2009)).

193. *Id.*

194. *Lawson v. Hale*, 902 N.E.2d 267, 269 n.1 (Ind. Ct. App. 2009); *see also* *B.W. v. State*, 909 N.E.2d 471, 473 n.1 (Ind. Ct. App. 2009).

195. 914 N.E.2d 1, 5 n.1 (Ind. Ct. App. 2009).

196. *Id.*

197. *Id.* (citing IND. APP. R. 50(A)(2)); *see also* *Gulf Stream Coach, Inc. v. Cronin*, 903 N.E.2d 109, 111 n.1 (Ind. Ct. App. 2009) (noting that a one sentence statement of facts is inappropriate).

198. 910 N.E.2d 842 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 559 (Ind. 2009).

199. *Id.* at 845 n.2.

200. *Id.* (citing *Young v. Butts*, 685 N.E.2d 147, 151 (Ind. Ct. App. 1997)).

In *Indiana High School Athletic Ass'n v. Schafer*,²⁰¹ the court of appeals noted, "The statements of facts in both parties' briefs [were] rife with argument, which is inappropriate in that part of an appellate brief."²⁰² The court regarded both parties' statements of facts as "transparent attempts to discredit the opponents," and "plainly not intended to be a vehicle for informing this court."²⁰³ Likewise, an appellant's contention that its argumentative statement of facts is "simply explaining what it considers deficiencies with the ALJ's finding" is "not [] in accordance with the standard of review appropriate to the judgment or order being appealed."²⁰⁴

F. Keep Summary of Argument Succinct to Focus Court's Review

Appellate Rule 46(A)(7) provides that the summary of the argument "should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief."²⁰⁵ The Rule also provides, "It should not be a mere repetition of the argument headings,"²⁰⁶ which conveys that the summary of the argument should contain substantive material. Nevertheless, the court of appeals reminded a party that an overly detailed summary of the argument "does little to help focus our review."²⁰⁷ Although striking the appropriate balance between a basic summary and a bloated summary may be a challenge, the court's admonishment conveys its interest in using the summary of the argument to focus its review for the issues on appeal.

G. Disobeying Previous Order Runs Risk of Attorney Fee Award

In *Lemon v. Wishard Health Services*,²⁰⁸ the appellee filed a motion to strike the appellant's reply brief.²⁰⁹ The "same day" the appellant had filed her opening brief, she had also "filed a motion requesting leave to rely on an affidavit" from her attorney that was not part of the record and that supported an argument not made to the trial court, "notwithstanding the fact that [the appellant] had already cited the affidavit as evidence in her [appellant's] brief."²¹⁰ The appellee moved thereafter to strike her brief, and "the appellant filed a second motion, this time requesting to supplement the record with a deposition [from an] . . . unrelated case."²¹¹ The motions panel of the court of appeals denied the appellant's

201. 913 N.E.2d 789 (Ind. Ct. App. 2009).

202. *Id.* at 791-92 n.2 (citing IND. APP. R. 46(A)(6)).

203. *Id.*

204. *Beaty Constr., Inc. v. Bd. of Safety Review*, 912 N.E.2d 824, 826 n.1 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 556 (Ind. 2009) (citing IND. APP. R. 46(A)(6)(b)).

205. IND. APP. R. 46(A)(7).

206. *Id.*

207. *Dickerson v. Strand*, 904 N.E.2d 711, 714 n.3 (Ind. Ct. App. 2009).

208. 902 N.E.2d 297 (Ind. Ct. App.), *trans. denied*, 919 N.E.2d 551 (Ind. 2009).

209. *Id.* at 299 n.2.

210. *Id.*

211. *Id.*

motions and struck her brief, ordering her to file a new brief that did not reference the new argument or evidence outside the record.²¹²

Although the appellant complied and filed a modified opening brief, she returned to the new argument in her reply brief and again cited the unrelated deposition. The appellee filed another motion to strike, and the court of appeals held, “Even more indefensible are [the appellant’s] counsel’s decisions to assert an argument not made to the trial court and to rely on information not in the record—in direct violation of our previous order.”²¹³ The court of appeals granted the appellee’s motion to strike and noted,

[W]e considered awarding the appellee its attorney fees incurred in preparing the motion to strike. Inasmuch as that would require a remand to the trial court for a calculation of reasonable fees incurred, however, and given that the motion to strike was relatively brief, we concluded that [the appellee’s] attorneys would, in all likelihood, end up spending more preparing for a fee hearing than they would have been awarded at the end of that hearing. We caution [appellant’s] counsel, however, that if this type of behavior reoccurs in the future, we will not hesitate to exercise our authority pursuant to Appellate Rule 66(E) and make a *sua sponte* decision to award appellate attorney fees to the opposing party.²¹⁴

Although the court did not award attorney fees pursuant to its inherent power, counsel must be careful to follow the Appellate Rules and the court’s previous orders to avoid a *sua sponte* award as cautioned in *Lemon*.

V. INDIANA’S APPELLATE COURTS

A. Case Data from the Supreme Court

During the 2009 fiscal year,²¹⁵ the supreme court disposed of 1163 cases,²¹⁶ issuing 188 majority opinions and published dispositive orders.²¹⁷ Approximately fifty-two percent of these dispositions were criminal; thirty percent were civil; eleven percent were attorney discipline cases; three percent were original actions; and less than one percent each were tax or judicial discipline cases.²¹⁸ The supreme court heard oral argument in seventy-eight cases; forty-six of these cases were civil; thirty-one were criminal; and one was an attorney discipline case.²¹⁹

212. *Id.*

213. *Id.*

214. *Id.*

215. The supreme court’s 2009 fiscal year ran from July 1, 2008, through June 30, 2009. See INDIANA SUPREME COURT ANNUAL REPORT 2008-2009, at 1 (2009), available at <http://www.in.gov/judiciary/supremeadmin/docs/0809report.pdf>.

216. *Id.* at 43.

217. *Id.* at 44.

218. *Id.* at 43.

219. *Id.* at 45.

*B. The Court of Appeals Takes Important Steps to Protect the Environment*²²⁰

In 2009, the court of appeals became the first court in the country to be recognized by the American Bar Association (ABA) and the Environmental Protection Agency (EPA) as a “Law Office Climate Challenge Partner.”²²¹ This program is designed “to encourage law offices to take simple, practical steps to become better environmental and energy stewards. Law offices and organizations may participate by adopting best practices for office paper management or by joining at least one of three voluntary EPA partnership programs.”²²²

As part of this initiative,

the [Indiana Court of Appeals] has taken a number of steps to improve the environment, including implementing a paper recycling plan in all offices, changing purchasing practices such that all copier and printer paper is 100% recycled and other office supplies are 30-100% recycled content, and implementing a policy whereby opinions to be handed down are circulated electronically instead of making a hard copy for each office.²²³

Furthermore, “[i]n addition to becoming a Law Office Climate Challenge Partner, the Court of Appeals of Indiana has also been recognized by the [EPA] as a WasteWise Partner.”²²⁴ WasteWise is a voluntary program that targets the reduction of municipal solid waste and certain industrial wastes.²²⁵ Municipal solid waste includes materials that commonly end up in organizations’ trash, such as corrugated containers, paper, yard trimmings, packaging, and wood pallets.²²⁶

CONCLUSION

This survey term marked another productive year for Indiana’s appellate courts. Although the Appellate Rules were redrafted ten years ago, Indiana’s courts continue to interpret and apply these rules to refine appellate practice and enhance the efficiency of our judicial system. Indiana’s citizens, bench, and bar all benefit from the noble efforts of our appellate courts in this arena.

220. The court of appeals’ annual report for 2009 was not released in time to incorporate it into this survey.

221. See Press Release, Court of Appeals of Indiana Becomes Law Office Climate Challenge Partner, April 27, 2009, available at <http://www.in.gov/judiciary/press/2009/0427.html>.

222. The ABA-EPA Law Office Climate Challenge, <http://www.abanet.org/environ/climatechallenge/partners.shtml> (last visited May 9, 2010).

223. Press Release, *supra* note 221.

224. *Id.*

225. For more information about WasteWise, see WasteWise Program, <http://www.epa.gov/waste/partnerships/wastewise/index.htm> (last visited Aug. 5, 2010).

226. *Id.*