

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

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## INTRODUCTION

In 2000, the Indiana Supreme Court adopted the Indiana Rules of Appellate Procedure (“Appellate Rules” or “Rules”). The Indiana Supreme Court (“supreme court”), the Indiana Court of Appeals (“court of appeals”), and the Indiana Tax Court (“tax court”) (collectively, “appellate courts”) are responsible for applying, interpreting, and updating the Appellate Rules through appellate decisions and amendment orders. This Article tracks the developments in appellate procedure between October 1, 2011, and September 30, 2012. In doing so, this Article purports to provide guidance and improve appellate practice by summarizing the rule amendments and examining and synthesizing court opinions affecting appellate procedure.

## I. RULE AMENDMENTS

The supreme court issued its Appellate Rule amendments on September 7, 2012.<sup>1</sup> The court substantively amended Appellate Rule 9 and made changes to Forms 16-1 and 16-2.<sup>2</sup> These amendments took effect on January 1, 2013.<sup>3</sup>

The only amendment to the Appellate Rules concerns the content of the Notice of Appeal. As described in last year’s Article, Rule 9 was significantly amended, effective January 1, 2012, to change the filing of the Notice of Appeal from the trial court clerk to the clerk of the appellate courts and to provide for additional content requirements.<sup>4</sup> This year’s amendment expands upon the Notice of Appeal’s content requirements, specifically the requirement concerning

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1. See Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1205-MS-275 (Ind. Sept. 7, 2012), available at <http://www.in.gov/judiciary/files/order-rules-2012-94s00-1205-ms-275a.pdf>.

2. *Id.* at 1-4.

3. *Id.* at 4.

4. Bryan H. Babb & Oni Harton, *Developments in Indiana Appellate Procedure: Rule Amendments, Remarkable Case Law, and Court Guidance for Appellate Practitioners*, 45 IND. L. REV. 959, 959-60 (2012).

certification. Now, under Appellate Rule 9(F)(9), parties must certify that the case does or does not involve an interlocutory appeal.<sup>5</sup>

## II. CASE LAW INTERPRETING THE APPELLATE RULES

The Indiana Court of Appeals authors the majority of the case law interpreting the Appellate Rules as the volume of cases that goes through the court allows it more opportunities to construe the Appellate Rules and refine appellate procedure. Occasionally, however, the supreme court and tax court also have the opportunity to construe and apply the Rules.

### A. *The Role of the Intermediate Court*

Under certain circumstances, judges on the court of appeals may criticize existing law or may ask the supreme court to reconsider its earlier decisions. However, as reflected in the following case, such circumstances are rare.

In *Continental Insurance Co. v. Wheelabrator Technologies, Inc.*,<sup>6</sup> the court of appeals tactfully noted its role as the intermediate state court in an appeal involving a claim for insurance coverage.<sup>7</sup> In that case, a purchaser of a blast machine and baghouse business sought coverage under insurance policies issued pre-1986 to the purchaser's predecessor after the purchaser was sued for injuries incurred pre-1986 by claimants who were working for the baghouse at the time.<sup>8</sup> *Wheelabrator*, however, was stayed at the trial court pending resolution of a case before the Indiana Supreme Court, *Travelers Casualty & Surety Co. v. United States Filter Corp.*<sup>9</sup> *U.S. Filter* involved the same purchaser seeking coverage under the same pre-1986 policies for claims related to its blast machine business.<sup>10</sup> In that case, the supreme court determined that the purchaser had no rights under the pre-1986 policies because they had not received the insurers' consent as required by the policies and because a "narrow 'post-loss exception'" did not apply.<sup>11</sup>

After the supreme court's resolution of *U.S. Filter*, the stay was lifted in *Wheelabrator*.<sup>12</sup> The trial court had found "that the 'post-loss' exception" applied to the facts in that case,<sup>13</sup> but the court of appeals reversed.<sup>14</sup> Perhaps necessitated by parties' briefs encouraging the court of appeals to reject *U.S. Filter*, the court of appeals in *Wheeabrator* first noted its role as an intermediate appellate court:

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5. IND. APP. R. 9(F)(9)(a).

6. 960 N.E.2d 157 (Ind. Ct. App. 2011), *trans. denied*, 974 N.E.2d 476 (Ind. 2012).

7. *Id.* at 162.

8. *Id.* at 159.

9. 895 N.E.2d 1172 (Ind. 2008). *See Wheelabrator*, 960 N.E.2d at 160-61 (noting baghouse case was stayed pending resolution of blast machine case on appeal).

10. *Wheelabrator*, 960 N.E.2d at 160.

11. *Id.* at 160-61, 163.

12. *Id.* at 161.

13. *Id.*

14. *Id.* at 165.

“It is not our role to reconsider or declare invalid decisions of the Indiana Supreme Court. In fact, we are bound by our supreme court’s decisions, and its precedent is binding on us until it is changed by our supreme court or legislative enactment.”<sup>15</sup> Nevertheless, the court of appeals recognized that it does have authority under Appellate Rule 65(A) “to criticize existing law[,]” and the parties or judges on the court of appeals may ask the supreme court to reconsider its earlier opinions, although the court of appeals rarely exercises that authority; the appellate court does so only when the request is “solely for the purpose of urging reconsideration of the particular issue.”<sup>16</sup> But the *Wheelabrator* court did not find it necessary to criticize the existing law.<sup>17</sup> Rather, the court of appeals concluded that *U.S. Filter* controlled, and the purchaser had not presented any argument that would lead to a different result.<sup>18</sup>

Appellate counsel should be aware that sometimes it is appropriate to argue for reconsideration of a certain issue, and the court of appeals may agree. That is, after all, the way new precedent is made.

#### *B. Reconsidering a Motions Panel’s Decision In the Face of Clear Error*

A motions panel of the court of appeals often makes decisions before the writing panel considers the merits of the case. The motions panel’s decision does not constrain the writing panel, but rather, it may reconsider such decisions where appropriate, especially when the writing panel believes that the motions panel erred.

In *Simon v. Simon*,<sup>19</sup> the court of appeals described its review of a motions panel decision and the authority to maintain an appeal. In that case, Bren Simon “was named Personal Representative of the Estate of Melvin Simon (‘the Estate’) and Trustee of the Melvin Simon Family Enterprises Trust Agreement (‘the Trust’).”<sup>20</sup> Bren requested that the trial judge recuse himself from the pending Estate and Trust dispute, and upon the trial judge’s entering an order refusing to do so, Bren requested that the trial judge certify his order for interlocutory appeal.<sup>21</sup> The trial judge certified his order<sup>22</sup> but simultaneously granted Melvin Simon’s daughter’s request “to remove Bren as Personal Representative and Trustee.”<sup>23</sup> Bren requested that the court of appeals accept the interlocutory appeal, and the daughter objected on “grounds that Bren no longer represented the Estate or the Trust and, therefore, . . . lacked standing to pursue her appeal.”<sup>24</sup>

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15. *Id.* at 162 (citation omitted).

16. *Id.*

17. *Id.*

18. *Id.*

19. 957 N.E.2d 980 (Ind. Ct. App. 2011).

20. *Id.* at 982.

21. *Id.* at 985.

22. *Id.* at 985-86.

23. *Id.* at 986-87.

24. *Id.*

The court of appeals's motions panel granted Bren's request to accept jurisdiction.<sup>25</sup>

On appeal, Bren contended that she had standing to pursue her appeal "because [the] motions panel accepted jurisdiction of th[e] discretionary interlocutory appeal."<sup>26</sup> The court of appeals, however, rejected this argument, noting that "it is well established that a writing panel may reconsider a ruling by the motions panel."<sup>27</sup> Although the writing panel is "reluctant to overrule" the motions panel's orders, the court of appeals noted that it "has [the] inherent authority to reconsider any decision while an appeal remains *in fieri*."<sup>28</sup> This is particularly true when faced with a more complete record than that considered by the motions panel and appellate briefs that provide "clear authority establishing that the motions panel erred."<sup>29</sup> Such was the case in *Simon*, as the court of appeals concluded that Bren had no authority to appeal in a representative capacity on behalf of the Estate or Trust.<sup>30</sup>

But that did not resolve whether Bren had the authority to appeal based on her individual capacity. To that argument, the court of appeals recounted Appellate Rule 17(A), which provides that "[a] party of record in the trial court . . . shall be a party on appeal."<sup>31</sup> The court of appeals then explained that "[t]he converse is also true: a person who is not a party of record in the trial court cannot become a party for the first time on appeal."<sup>32</sup> Because Bren had not moved to intervene in the trial court in her individual capacity, and because there are no appellate rules providing for intervention on appeal, she did not have the standing required to maintain an appeal.<sup>33</sup>

Thus, appellate counsel should make sure that they bring appeals on behalf of parties that actually have authority to maintain appeals. Such authority starts in the trial court.

### *C. Jurisdiction Exists Only Over Appeals from Final Judgments or Appealable Interlocutory Orders*

The court of appeals reiterated in several cases over the relevant term that it only has jurisdiction over appeals from final judgments or appealable interlocutory orders, and it will dismiss cases where neither is involved.<sup>34</sup> Moreover, in a few cases, both the court of appeals and supreme court provided

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25. *Id.* at 987.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 989 (alterations in original) (quoting IND. APP. R. 17(A)).

32. *Id.*

33. *Id.* at 988-89.

34. *See, e.g.,* Shuler v. Estate of Botkins (*In re* Estate of Botkins), 970 N.E.2d 164, 168 (Ind. Ct. App. 2012); S.J. v. G.C. (*In re* Adoption of S.J.), 967 N.E.2d 1063, 1066 (Ind. Ct. App. 2012).

even further guidance as to what is and is not an appealable final judgment under Appellate Rule 2(H) or an appealable interlocutory order under Appellate Rule 14, along with the procedures for perfecting those appeals. Appellate counsel should have a thorough understanding of the requirements for appellate jurisdiction and for perfecting appeals, or risk facing dismissal of their appeals.

1. *Preliminary Determination Under Indiana’s Medical Malpractice Act Denying Request to Dismiss Complaint Not a Final Appealable Judgment.*—In *Ramsey v. Moore*,<sup>35</sup> two defendants requested that a trial court make a preliminary determination that the plaintiff’s complaint pending before the medical review panel should be dismissed, and the trial court issued an order denying the request.<sup>36</sup> After the defendants appealed, the plaintiff argued that the portion of the order denying the request to dismiss the complaint was not “a final appealable judgment,” and, therefore, the appellate courts lacked jurisdiction.<sup>37</sup> The court of appeals found jurisdiction, but the supreme court disagreed.<sup>38</sup>

The supreme court first explained the bounds for appellate jurisdiction based on Appellate Rule 2(H), stating that “[t]he authority of the Indiana Supreme Court and Court of Appeals to exercise appellate jurisdiction is generally limited to appeals from final judgments.”<sup>39</sup> It then recited the definition of final judgment as it appears in Appellate Rule 2(H) and explained that “[t]o fall under Appellate Rule 2(H)(1), an order must dispose of all issues as to all parties, ending the particular case and leaving nothing for future determination.”<sup>40</sup> Because the preliminary-determination proceeding under Indiana’s Medical Malpractice Act was “inextricably linked to the larger medical malpractice case” which continued, the order was not a final judgment under Appellate Rule 2(H)(1).<sup>41</sup> With regard to Appellate Rule 2(H)(2), the supreme court noted that an order is a final appealable judgment pursuant to that provision “if ‘the trial court in writing expressly determines under [Indiana] Trial Rule 54(B) . . . there is no just reason for delay and in writing expressly directs the entry of judgment (i) under Trial Rule 54(B) as to fewer than all the claims or parties.’”<sup>42</sup> Such an order, however, “must contain the magic language of the [R]ule.”<sup>43</sup> Because the trial court’s order did not contain the magic language with regard to the portion of the order denying the request to dismiss plaintiff’s complaint, the order was not a final appealable judgment under Appellate Rule 2(H)(2).<sup>44</sup>

2. *Small Claims Court’s Refusal to Transfer Venue Not Appealable as a*

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35. 959 N.E.2d 246 (Ind. 2012). That case presented no issue as to whether the order was an appealable interlocutory order. *Id.* at 250 n.4.

36. *Id.* at 248.

37. *Id.* at 250-51.

38. *Id.* at 249, 254.

39. *Id.* at 251 (quoting *Allstate Ins. Co. v. Fields*, 842 N.E.2d 804, 806 (Ind. 2006)).

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

41. *Id.* at 253.

42. *Id.* (second alteration in original).

43. *Id.* (quoting *Georgos*, 790 N.E.2d at 452).

44. *Id.*

*Matter of Right.*—In *Cerajewski v. Kieffner*,<sup>45</sup> the defendant had petitioned the small claims court to transfer venue to another county.<sup>46</sup> When the court denied the defendant's request, the defendant brought an interlocutory appeal seeking review of that decision.<sup>47</sup> The defendant did not request certification of the order from the trial court or request that the court of appeals accept jurisdiction.<sup>48</sup> Instead, the defendant proceeded as if the order was appealable as a matter of right under Appellate Rule 14(A).<sup>49</sup>

In rejecting this attempt, the court of appeals outlined Appellate Rule 14(A), which “sets forth the exclusive list of interlocutory orders that may be appealed as a matter of right by the filing of a notice of appeal within thirty days of the entry of the interlocutory order.”<sup>50</sup> Although Appellate Rule 14(A)(8) provides for interlocutory appeals as a matter of right from a trial court's transferring or refusing to transfer a case under Trial Rule 75, the court of appeals found that Trial Rule 75 was inapplicable because venue in small claims proceedings is governed by Indiana Small Claims Rule 12.<sup>51</sup> Given that the list of authorized interlocutory appeals as a matter of right is strictly construed, the court of appeals refused to hold that Appellate Rule 14(A)(8) applied to all venue determinations, whether under Trial Rule 75 or Small Claims Rule 12.<sup>52</sup> Thus, the small claims court's refusal to transfer venue was not an interlocutory order appealable as a matter of right.<sup>53</sup>

3. *An Order to Non-Party to Execute Release Would be Permitted as an Interlocutory Appeal as a Matter of Right.*—As mentioned above, Appellate Rule 14(A) provides an exhaustive list of interlocutory orders that are appealable as a matter of right. One of those orders is an order “[t]o compel the execution of any document.”<sup>54</sup> In *Johnson v. Dr. A*,<sup>55</sup> a medical malpractice case, the plaintiff retained a doctor as an expert witness.<sup>56</sup> The defendants attempted to obtain documents related to the doctor's education, background, and experience, along with other litigation-related documents from the doctor's former employer.<sup>57</sup> The doctor authorized his former employer to release those documents, but the former employer refused to do so because it “fear[ed] that [the doctor] [would] institute legal proceedings against the hospital for complying.”<sup>58</sup> The defendants

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45. 966 N.E.2d 173 (Ind. Ct. App. 2012).

46. *Id.* at 174-75.

47. *Id.* at 175.

48. *Id.*

49. *Id.*

50. *Id.* (quoting IND. APP. R. 14(A)).

51. *Id.* at 175-76.

52. *Id.* at 176.

53. *Id.* at 176-77.

54. IND. APP. R. 14(A)(2).

55. 973 N.E.2d 623 (Ind. Ct. App. 2012).

56. *Id.* at 625.

57. *Id.* at 625-26.

58. *Id.* at 626 (third alteration in original).

requested that the doctor sign a release that would release his former employer from such liability, and when he refused, the trial court ordered that he do so.<sup>59</sup> The plaintiff then brought an interlocutory appeal of that order under Appellate Rule 14(A)(2),<sup>60</sup> and the defendants filed a motion to dismiss on the basis that Appellate Rule 14(A)(2) does not contemplate discovery orders.<sup>61</sup>

The court of appeals rejected the defendant's argument, explaining that although the defendant's argument was consistent with past decisions, "th[o]se decisions have all addressed the case of a party seeking to avoid its own direct participation in discovery."<sup>62</sup> The current case differed because "a nonparty ha[d] been ordered by a trial court to execute a broad [r]elease with significant and unexplored legal consequences."<sup>63</sup> Thus, the court concluded that in such circumstances, Appellate Rule 14(A)(2) permitted an interlocutory appeal as a matter of right.<sup>64</sup> Nevertheless, the court went on to hold that the plaintiff had not properly perfected his appeal because there had been no "sanctioning action" by the trial court resulting from the failure to comply with its order to execute the release or a denial of a motion for a protective order.<sup>65</sup> Stated differently, the court of appeals held that "an appeal from an order compelling a nonparty's execution of a document is not properly perfected" unless there is "a clear showing of prejudice in a failed attempt to obtain a protective order, or the entry of an order making it clear that some sanction will be imposed upon a party or the nonparty subject to the order."<sup>66</sup>

4. *As a Matter of First Impression, Motion to Reconsider Does Not Toll Time Limit to Certify Order for Interlocutory Appeal.*—Appellate Rule 14(B) governs discretionary interlocutory appeals and provides that "[a] motion requesting certification of an interlocutory order must be filed in the trial court within thirty (30) days after the date the interlocutory order

is noted in the Chronological Case Summary unless the trial court, for good cause, permits a belated motion."<sup>67</sup> In *Nationwide Insurance Co. v. Parmer*, the court of appeals considered whether a motion to reconsider tolled this time limit.<sup>68</sup>

In that case, on January 4, 2010, the trial court granted defendant's motion for leave to amend their answer to name nonparties.<sup>69</sup> The plaintiffs did not file

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59. *Id.*

60. *Id.*

61. *Id.* at 627.

62. *Id.*

63. *Id.*

64. *Id.* at 627-28.

65. *Id.* at 628.

66. *Id.* (footnote omitted). The court also expressed uncertainty that the defendant's request for such an order and the trial court's issuance of the order was an acceptable discovery practice under the Indiana Trial Rules. *Id.* at 628-29.

67. *Nationwide Ins. Co. v. Parmer*, 958 N.E.2d 802, 805 (Ind. Ct. App. 2011) (quoting IND. APP. R. 14(B)(1)(a)).

68. *Id.* at 805-06.

69. *Id.* at 804.

a motion requesting certification of that Order within thirty days, but rather filed a motion to reconsider on February 17, 2010.<sup>70</sup> The trial court subsequently denied the plaintiffs' motion to reconsider on May 26, 2010, and the plaintiffs filed a motion requesting certification on June 16, 2010.<sup>71</sup>

In considering whether the motion to reconsider tolled the time in which to file a motion for certification, the court of appeals reasoned that a motion to reconsider does not toll the time period for which to file a notice of appeal.<sup>72</sup> Similarly, as a matter of first impression, the court held that a motion to reconsider does not toll the time limit to certify an order for interlocutory appeal, and, therefore, the request for certification was not timely in the case.<sup>73</sup> Moreover, because the trial court had not demonstrated good cause, its "grant [of] a 'belated motion'" was improper.<sup>74</sup>

#### *D. Reconsidering Motion to Publish Memorandum Decision*

Appellate Rule 65(A) sets forth the criteria governing publication of court of appeals opinions.<sup>75</sup> Specifically, "[a] Court of Appeals opinion shall be published if the case: (1) establishes, modifies, or clarifies a rule of law; (2) criticizes existing law; or (3) involves a legal or factual issue of unique interest or substantial public importance."<sup>76</sup> All other "cases shall be decided by not-for-publication memorandum decision[s,]"<sup>77</sup> which have no precedential effect.<sup>78</sup> Parties may, however, file a motion "to publish any not-for-publication memorandum decision" meeting the specific criteria by a certain deadline,<sup>79</sup> but their doing so under Rule 65(B) does not necessarily mean that their motion will be granted.

In *Dishman v. Community Hospitals of Indiana, Inc.*,<sup>80</sup> the court of appeals issued an Order providing an explanation of its policy on publishing memorandum decisions. In that case, the court of appeals handed down a memorandum decision on January 26, 2012.<sup>81</sup> The Appellees had deposited an original Motion to Publish Memorandum Decision in the mail on February 24, 2012, which was received by the court of appeals on February 27, 2012.<sup>82</sup> That

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70. *Id.* at 805.

71. *Id.*

72. *Id.* at 805-06.

73. *Id.*

74. *Id.* at 806.

75. *See* IND. APP. R. 65(A)(1)-(3).

76. *Id.*

77. *Id.*

78. *Id.* R. 65(D).

79. *Id.* R. 65(B).

80. 965 N.E.2d 161 (Ind. Ct. App. 2012) (mem.).

81. *Id.* at 161.

82. *Id.*



filing was defective, so the Appellees resubmitted the motion on March 1, 2012.<sup>83</sup> That resubmitted motion was also defective, but this time the Appellees promptly and correctly resubmitted the motion on March 9, 2012.<sup>84</sup> When the motion, file-stamped March 9, 2012, was finally considered, the court of appeals denied it because, under Appellate Rule 65(B), more than thirty days had passed since it had entered its memorandum decision.<sup>85</sup> The Appellees submitted a Motion to Reconsider, arguing that their motion should be deemed timely because their original motion was submitted within the thirty-day deadline.<sup>86</sup>

In considering their Motion to Reconsider, the court of appeals began by noting that “[t]he decision whether to seek transfer is sometimes influenced by a consideration of the possible impact of the decision on other cases in the future,”<sup>87</sup> and because unpublished memorandum decisions are non-precedential under Appellate Rule 65(D),

it has long been the policy of this Court that a motion to publish a memorandum decision will not be granted after the time for filing a petition for transfer has expired, as publication of the decision may have changed the calculus on whether to seek transfer in the first place.<sup>88</sup>

Accordingly, the court of appeals explained that it “considers two separate time constraints when deciding whether to grant a motion to publish a memorandum decision—(a) Appellate Rule 65(B) and (b) the expiration of the time for filing a petition for transfer in the action.”<sup>89</sup> Although those time constraints often result in the same deadline date, sometimes they do not.<sup>90</sup> And when those deadline dates are not the same, the court clarified that it “will not grant a motion to publish that arrives for decision after the expiration of the period for seeking transfer *and* where the non-movant did not petition for transfer, regardless of whether the motion is timely filed pursuant to Appellate Rule 65(B).”<sup>91</sup>

Thus, as applied in *Dishman*, even if the motion were timely for purposes of Appellate Rule 65(B), the deadline for the petition to transfer was not altered.<sup>92</sup> “By the time the original Motion to Publish arrived at this court for disposition [on] March 9, [2012,] the deadline . . . to seek transfer to the Supreme Court had

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83. *Id.*

84. *Id.* at 161-62.

85. *Id.* at 161 (noting that IND. APP. R. 65(B) requires that a party submit a motion to publish any not-for-publication memorandum decision within thirty days of the entry of the decision).

86. *Id.* at 162.

87. *Id.*

88. *Id.*

89. *Id.* IND. APP. R. 57(C) provides: “A Petition to Transfer shall be filed: (1) no later than thirty (30) days after the adverse decision if rehearing was not sought; or (2) if rehearing was sought, no later than thirty (30) days after the Court of Appeals’ disposition of the Petition for Rehearing.”

90. *Dishman*, 965 N.E.2d at 162.

91. *Id.*

92. *Id.*

expired, and the [Appellee] had chosen not to seek transfer.”<sup>93</sup> Therefore, the court denied Appellees’ Motion to Reconsider.<sup>94</sup>

*E. “Notes on Oral Argument” Disallowed*

A Notice of Additional Authorities is permitted by Appellate Rule 48 “when pertinent and significant authorities come to the attention of a party after oral argument, but comment about the citations is limited to a parenthetical or single sentence explaining the authority.”<sup>95</sup> The Indiana Supreme Court, in *Reed v. Reid*,<sup>96</sup> clarified this limitation to Appellate Rule 48.

In *Reed*, after the case had been fully briefed on transfer and argued before the supreme court, the Appellees filed a multi-page document titled “Appellees’ Notes on Oral Argument” containing comments on the oral argument, citations, and legal argument on the issues in the case.<sup>97</sup> They had not requested permission nor been asked by the supreme court for this filing.<sup>98</sup> In considering whether such a filing was allowed, the *Reid* court noted that no opinions had referenced “notes on oral argument” in the previous fifty years, and such a reference was discussed but later deleted in the Indiana Practice Series.<sup>99</sup> The court then stated, “To whatever extent the filing of ‘notes on oral argument’ without leave of court was once part of Indiana’s appellate practice, it no longer is, and this order is being published to so inform attorneys.”<sup>100</sup> Thus, because “Appellees’ Notes on Oral Argument” did not conform to Appellate Rule 48, the Indiana Supreme Court struck the document.<sup>101</sup>

III. COURT GUIDANCE FOR APPELLATE PRACTITIONERS

Appellate counsel should strive to comply with the Appellate Rules for many reasons. First, a strict understanding of the Appellate Rules ensures good standing with the appellate courts. Second, appellate counsel’s work product is a direct reflection of that individual’s standards and practices. And finally, failure to comply with the Rules can, and often does, result in a waiver of issues or arguments on appeal, or a stern reminder from the bench at the very least.<sup>102</sup>

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93. *Id.*

94. *Id.*

95. *Reed v. Reid*, 969 N.E.2d 589, 589 (Ind. 2012) (mem.).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 589-90.

102. The court of appeals has even reproached both parties when necessary. See *Omni Ins. Grp. v. Poage*, 966 N.E.2d 750, 752 n.1, 755 (Ind. Ct. App.), *trans. denied*, 974 N.E.2d 475 (Ind. 2012); *Ostrowski v. Everest Healthcare Ind., Inc.*, 956 N.E.2d 1144, 1146 n.4 (Ind. Ct. App. 2011).

*A. Arguments Made Without Support May Be Waived*

Appellate Rule 46(A)(8)(a) requires parties on appeal to support the arguments in their briefs with “cogent reasoning and legal authority.”<sup>103</sup> Specifically, an “argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning.”<sup>104</sup> In addition, “[e]ach contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on.”<sup>105</sup> The court of appeals has long been reluctant to consider an unsupported argument, it risks being “forced to search . . . for evidence in support” of the argument and being converted into an advocate for one of the parties.<sup>106</sup> Thus, the court refuses to become such an advocate; arguments that are not cogent or are not “supported by authority and references to the record[] consistent with the requirements of the appellate rules” will be considered waived.<sup>107</sup> The rules permit the court of appeals to proceed on the merits of the case at its own discretion, but the court often declines to invoke this option.<sup>108</sup>

Time and again, the appellate court’s strong stance in support of Appellate Rule 46(A)(8)(c) results in a waived argument when the advocating party fails to cite relevant authority. For example, in *D.L. v. Pioneer School Corp.*,<sup>109</sup> the court found that “[n]one of [appellant’s] arguments contain[ed] citation to relevant case law. Instead they [were] bald assertions of error without legal reasoning therefor.”<sup>110</sup> Consequently, the court held that the appellant waived their arguments.<sup>111</sup>

Similarly, in *Ostrowski v. Everest Healthcare Indiana, Inc.*,<sup>112</sup> the Appellant

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103. Appellate Rule 46(B), governing Appellee’s Briefs, provides that those briefs shall conform to Appellate Rule 46(A), governing Appellant’s Briefs; this includes Rule 46(A)(8)(a)’s requirement that “cogent reasoning” and citation to authority support the legal arguments made by litigants. *See Schrader Trust v. Gilbert*, 974 N.E.2d 516, 521 (Ind. Ct. App.) (noting that Appellee’s Brief shall conform to requirements of Appellant’s Brief), *clarified on reh’g*, 978 N.E.2d 519 (Ind. Ct. App. 2012) (mem.).

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

105. *Id.*

106. *Schrader Trust*, 974 N.E.2d at 52. *See also State ex. rel. FSSA v. Estate of Roy*, 963 N.E.2d 78, 82 (Ind. Ct. App.) (holding that when the appellee does not respond to an argument, the court “do[es] not undertake the burden of developing an argument for the appellee”), *trans. denied*, 947 N.E.2d 475 (Ind. 2012).

107. *Holland v. Steele*, 961 N.E.2d 516, 524 (Ind. Ct. App.) (citing *Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind. Ct. App. 2004)), *trans. denied*, 974 N.E.2d 476 (Ind. 2012).

108. *See, e.g., McCarter v. State*, 961 N.E.2d 43, 45 n.1 (Ind. Ct. App.) (“Although we proceed to consider the merits of McCarter’s contentions, we could have held that they were waived . . .”), *trans. denied*, 967 N.E.2d 1034 (Ind. 2012).

109. 958 N.E.2d 1151 (Ind. Ct. App. 2011).

110. *Id.* at 1155.

111. *Id.*

112. 956 N.E.2d 1144, 1147 (Ind. Ct. App. 2011).

failed to submit relevant portions of the trial transcript related to his argument that the court had erred in giving the jury a certain instruction.<sup>113</sup> Moreover, the Appellant's Appendix failed to contain the instruction at issue.<sup>114</sup> As the record was insufficient, the court could not determine the propriety of the jury instruction and, thus, considered the issue waived.<sup>115</sup>

Finally, offering only broad or general supporting citations does not avoid the requirement to support an argument. In *Schrader Trust v. Gilbert*,<sup>116</sup> in response to the appellant's arguments, the appellees relied "on broad statements with general citations to over 200 pages of transcript."<sup>117</sup> The court of appeals noted that this practice was "inefficient and caution[ed] against [doing the same] in the future."<sup>118</sup>

### *B. Incomplete or Absent Arguments Are Waived or Not Considered*

A lacking or unsubstantiated argument may also result in waiver. For example, in *Weinberger v. Boyer*,<sup>119</sup> the court of appeals held that an "off-hand, one-sentence comment" was not a sufficient argument to comply with Appellate Rule 46(A)(8) and was waived.<sup>120</sup>

Further, an argument may be effectively waived if one party makes an argument and the opposing party does not respond to that argument. In *State ex. rel. FSSA v. Estate of Roy*,<sup>121</sup> the court of appeals held that a failure to respond to the issues raised by the opposing party was "akin to failing to file a brief" on the issue[,] and it "[refused to] undertake the burden of developing an argument for the [party]."<sup>122</sup>

Finally, a party that previously made an argument must properly make the argument again on appeal, or the court of appeals will not consider it. In *Dave's Excavating, Inc. v. City of New Castle*,<sup>123</sup> the court held that the appellant could not incorporate by reference an argument made in an earlier brief into its appellate arguments.<sup>124</sup> In that case, the appellant contended that genuine issues of material fact existed to bar summary judgment and, in support, directed the court to a detailed discussion of the disputed material facts contained in a prior

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113. *Id.* at 1147-48.

114. *Id.*

115. *Id.*

116. 974 N.E.2d 516 (Ind. Ct. App.), *clarified on reh'g*, 978 N.E.2d 519 (Ind. Ct. App. 2012) (mem.).

117. *Id.* at 521.

118. *Id.*

119. 956 N.E.2d 1095 (Ind. Ct. App. 2011), *trans. denied*, 963 N.E.2d 1122 (Ind. 2012).

120. *Id.* at 1110.

121. 963 N.E.2d 78, 82 (Ind. Ct. App.), *trans. denied*, 974 N.E.2d 475 (Ind. 2012).

122. *Id.* (quoting *Tisdial v. Young*, 925 N.E.2d 783, 784-85 (Ind. Ct. App. 2010)).

123. 959 N.E.2d 369 (Ind. Ct. App.), *trans. denied*, 969 N.E.2d 606 (Ind. 2012).

124. *Id.* at 375-76.

brief that had been provided in the Appendix.<sup>125</sup> The court rejected this attempt and considered only the arguments actually set out in the appellant's brief.<sup>126</sup>

*C. Failure to Comply With Rules Will Result in a Reminder from the Court*

The court of appeals will remind or admonish parties to follow the Appellate Rules even when a party's failure to follow a Rule is not fatal to an argument. For example, in *Wortkoetter v. Wortkoetter*,<sup>127</sup> the court reminded a party that, under Appellate Rule 65(D), "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."<sup>128</sup> But the court's reminders may not stop with the parties. Rather, in *Berryhill v. Parkview Hospital*,<sup>129</sup> the court not only reminded appellant's counsel not to include a copy of the trial transcript in the appendix,<sup>130</sup> but also reminded the *court reporter* of the proper format of the transcript.<sup>131</sup>

Appellate practitioners should pay close attention to the Rules to avoid such a reminder from the court of appeals, or worse, waiver of one of their arguments.

#### IV. COURT OF APPEALS OF INDIANA

*A. Case Data from the Court of Appeals*

In total, during the 2012 fiscal year,<sup>132</sup> the court of appeals disposed of 3510 cases, 1863 of which were criminal appeals and 1034 of which were civil appeals.<sup>133</sup> This is a decrease from the 3950 cases disposed of in 2011.<sup>134</sup> In total, the court of appeals issued 2143 Majority Opinions, and in 79.7% of the cases affirmed the trial court; 19.2% of the cases reversed the trial court; and 1.1% remanded to the trial court.<sup>135</sup> Finally, the court of appeals held oral argument in only seventy-eight cases.<sup>136</sup>

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125. *Id.*

126. *Id.* at 376.

127. 971 N.E.2d 685 (Ind. Ct. App. 2012).

128. *Id.* at 689 n.1 (quoting IND. APP. R. 65(D)).

129. 962 N.E.2d 685 (Ind. Ct. App. 2012).

130. *Id.* at 687 n.1 (citing IND. APP. R. 50(F)).

131. *Id.*

132. The court of appeals's fiscal year ran from January 1, 2012, through December 31, 2012. COURT OF APPEALS OF INDIANA: 2012 ANNUAL REPORT 1 (2012), available at <http://www.in.gov/judiciary/appeals/files/annual-report-2012.pdf>.

133. *Id.*

134. *Id.*

135. *Id.* at 2.

136. *Id.*

*B. The Departure of Judge Darden Welcomes Judge Pyle*

In 2012, Judge Carr L. Darden retired from the court of appeals after nearly eighteen years of service.<sup>137</sup> Prior to joining the court of appeals, Judge Darden was a Marion Superior Court judge and a Marion Municipal Court judge.<sup>138</sup> He also served as a Marion County public defender and chief deputy state public defender.<sup>139</sup> He is a graduate of Indiana University Robert H. McKinney School of Law and a U.S. Air Force veteran.<sup>140</sup> We have all benefited from Judge Darden's numerous contributions to the development of Indiana's common law, as well as to the legal community, and are fortunate that he will continue his distinguished career as a Senior Judge on the court of appeals.<sup>141</sup>

In August 2012, Judge Rudolph R. Pyle III was selected to succeed Judge Darden, for whom Judge Pyle had served as a law clerk some decade earlier.<sup>142</sup> Before joining the court, Judge Pyle served as judge of the Madison Circuit Court, as Madison County deputy prosecutor, and as a privately practicing attorney.<sup>143</sup> He is a graduate of Anderson University, the College of William and Mary, and Indiana University Maurer School of Law.<sup>144</sup>

V. INDIANA SUPREME COURT

*A. Case Data from the Indiana Supreme Court*

In total, during the 2012 fiscal year,<sup>145</sup> the supreme court disposed of 1095 cases and issued 163 majority opinions and published dispositive orders.<sup>146</sup> "The [supreme] [c]ourt accepted jurisdiction and issued opinions in approximately 7.8% of all transfer cases (9.0% in civil cases and 7.1% in criminal cases)."<sup>147</sup> In the remaining 92.2%, the supreme court declined review, and the decision of the

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137. Press Release, Ind. Ct. of Appeals, Court of Appeals Honors Judge Darden at July 25 Retirement Ceremony (July 19, 2012), [http://www.in.gov/activecalendar/EventList.aspx?fromdate=7/19/2012&todate=7/19/2012&display=Day&type=public&eventidn=57527&view=EventDetails&information\\_id=115528&print=print/](http://www.in.gov/activecalendar/EventList.aspx?fromdate=7/19/2012&todate=7/19/2012&display=Day&type=public&eventidn=57527&view=EventDetails&information_id=115528&print=print/).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Press Release, Ind. Ct. of Appeals, Daniels Selects Pyle as New Indiana Court of Appeals Judge (Aug. 7, 2012), [http://www.in.gov/activecalendar/EventList.aspx?view=EventDetails&eventidn=62155&information\\_id=125385&type=&syndicate=syndicate](http://www.in.gov/activecalendar/EventList.aspx?view=EventDetails&eventidn=62155&information_id=125385&type=&syndicate=syndicate).

143. *Id.*

144. *Id.*

145. The supreme court's 2012 fiscal year ran from July 1, 2011, through June 30, 2012. See INDIANA SUPREME COURT: 2011-2012 ANNUAL REPORT, (2012), available at <http://www.in.gov/judiciary/supreme/files/1112report.pdf>.

146. *Id.* at 50.

147. *Id.* at 5.

court of appeals became final.<sup>148</sup>

This fiscal year, the largest percentage of the disposed of cases were criminal cases, totaling 50.1%.<sup>149</sup> Approximately 31.4% of the disposed cases were civil; 12.1% were attorney discipline cases; 3.7% were original actions; 0.5% were certified questions; 0.4% were tax; and the remainder of cases consisted of judicial discipline cases, Indiana Board of Law Examiners cases, and rehearings.<sup>150</sup> The court held oral argument in eighty-one cases; with thirty-four coming from criminal cases; forty-four coming from civil or tax cases; and three from certified questions.<sup>151</sup>

*B. The Departures of Chief Justice Shepard and Justice Sullivan Welcomes Justices Massa and Rush*

*1. Justice Massa Replaces Chief Justice Shepard as the 107th Supreme Court Justice.*—As discussed in last year's Article, long-time Chief Justice of Indiana, Randall T. Shepard, announced in December 2011 that he would be leaving the supreme court in March 2012.<sup>152</sup> Chief Justice Shepard now serves as a Senior Judge on the court of appeals.<sup>153</sup> Justice Brent E. Dickson was selected as the new Chief Justice of Indiana in May 2012.<sup>154</sup>

In April 2012, Mark Massa became Indiana's 107th Supreme Court Justice, succeeding Chief Justice Shepard for whom Massa had served as a law clerk some two decades earlier.<sup>155</sup> Justice Massa's career prior to his appointment to the supreme court included time spent as a speechwriter and deputy press secretary to Governor Robert Orr, as General Counsel to Governor Daniels, as Deputy Prosecuting Attorney for Marion County, and as Assistant U.S. Attorney for the Southern District of Indiana.<sup>156</sup> Most recently, Justice Massa served as the

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148. *Id.*

149. *Id.* at 50.

150. *Id.*

151. *Id.* at 51.

152. Babb & Harton, *supra* note 4, at 974.

153. Press Release, Ind. Sup. Ct., Retired Chief Justice Shepard Steps into Senior Judge Role at Court of Appeals (Mar. 30, 2012), [http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2012&todate=12/31/2012&display=Month&type=public&eventidn=54899&view=EventDetails&information\\_id=110182](http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2012&todate=12/31/2012&display=Month&type=public&eventidn=54899&view=EventDetails&information_id=110182).

154. Press Release, Ind. Sup. Ct., Commission Selects Brent E. Dickson as Chief Justice of Indiana (May 15, 2012), [http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2012&todate=12/31/2012&display=Month&type=public&eventidn=55981&view=EventDetails&information\\_id=112401](http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2012&todate=12/31/2012&display=Month&type=public&eventidn=55981&view=EventDetails&information_id=112401).

155. Press Release, Ind. Sup. Ct., Mark Massa to Be Sworn-In as 107th Indiana Supreme Court Justice (Mar. 28, 2012), [http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2012&todate=12/31/2012&display=Month&type=public&eventidn=54849&view=EventDetails&information\\_id=110078](http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2012&todate=12/31/2012&display=Month&type=public&eventidn=54849&view=EventDetails&information_id=110078).

156. James F. Maguire, *Supreme Stories: Profiles of Indiana's Newest Supreme Court*

Chairman of the Indiana Alcohol and Tobacco Commission and was named Executive Director of the Indiana Criminal Justice Institute in May 2011.<sup>157</sup> Justice Massa is a graduate of Indiana University and earned his law degree from the Indiana University Robert H. McKinney School of Law.<sup>158</sup>

2. *Justice Rush Replaces Justice Sullivan as the 108th Supreme Court Justice.*—Chief Justice Shepard’s departure from the supreme court was not the only one in 2012. Rather, in April 2012, Justice Frank Sullivan, Jr. announced his intentions of stepping down from the supreme court to begin a full-time teaching position at Indiana University Robert H. McKinney School of Law.<sup>159</sup> Justice Sullivan’s departure created the third opening on the supreme court since 2010.<sup>160</sup>

During his time on the bench, Justice Sullivan authored approximately 500 civil and criminal opinions.<sup>161</sup> But another significant accomplishment of Justice Sullivan’s was his chairing the Court’s Judicial Technology and Automation Committee from its inception in 1999 and “champion[ing] the implementation of the Odyssey system,” which purports to equip all Indiana courts with modern technology to manage their caseloads and share data with those who need court information.<sup>162</sup> Justice Sullivan has served as chair of the Appellate Judges Conference of the American Bar Association and as chair of the Board of Directors of the Appellate Judges Education Institute.<sup>163</sup> Finally, prior to his appointment to the supreme court, he was Indiana State Budget Director, an Executive Assistant for Fiscal Policy to Governor Evan Bayh, and a privately practicing attorney.<sup>164</sup> To be certain, Justice Sullivan’s intellect, drive, and spirit will be greatly missed in Indiana’s judiciary.

On September 14, 2012, Governor Daniels chose Tippecanoe Superior Court Judge Loretta Rush to replace Justice Sullivan, and she became Indiana’s 108th Supreme Court Justice.<sup>165</sup> Prior to her supreme court appointment, Justice Rush’s

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*Justices*, IND. CT. TIMES, Dec. 20, 2012, available at <http://indianacourts.us/times/2012/12/supreme-stories-profiles-of-indianas-newest-supreme-court-justices/>.

157. *Id.*

158. *Id.*

159. Press Release, Ind. Sup. Ct., Applications Available for Position on State’s Highest Court (May 30, 2012), [http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2012&todate=12/31/2012&display=Month&type=public&eventidn=56265&view=EventDetails&information\\_id=112977](http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2012&todate=12/31/2012&display=Month&type=public&eventidn=56265&view=EventDetails&information_id=112977).

160. *Id.*

161. Gary R. Roberts, *Tribute to Justice (Now Professor) Frank Sullivan, Jr.*, 46 IND. L. REV. 169, 169 (2013).

162. *Id.* at 170.

163. *Id.*

164. *Id.* at 169.

165. Press Release, Ind. Sup. Ct., Loretta Rush to Be Sworn-In as 108th Indiana Supreme Court Justice (Nov. 2, 2012), [http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2012&todate=12/31/2012&display=Month&type=public&eventidn=60017&view=EventDetails&information\\_id=121110](http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2012&todate=12/31/2012&display=Month&type=public&eventidn=60017&view=EventDetails&information_id=121110).



career included time spent as a privately practicing attorney, as West Lafayette Assistant City Attorney, and as an attorney for the West Lafayette Economic Development Commission and the Board of Zoning Appeals.<sup>166</sup> Most recently, Justice Rush served for fourteen years as a Tippecanoe Superior Court Judge, during which time she focused on “cases involving Children in Need of Services (CHINS), delinquency, criminal and status offenses, paternity, dissolutions, guardianships, adoptions, and protective order hearings.”<sup>167</sup> Justice Rush has also served as the President of the Indiana Council of Juvenile and Family Court Judges and as Chair of the Juvenile Justice Improvement Committee.<sup>168</sup> She is a graduate of Purdue University and received her law degree from Indiana University Maurer School of Law.<sup>169</sup>

*C. Establishment of Indiana Court Reporting Pilot Project for Exploring the Use of an Audio/Visual Record on Appeal*

On September 18, 2012, the supreme court issued an “Order Establishing the Indiana Court Reporting Pilot Project for Exploring the Use of an Audio/Visual Record on Appeal.”<sup>170</sup> As explained by the court, trial courts use recording equipment to record proceedings in their courts and employ county-paid court reporters to “create a transcript of these proceedings for submission and use by the Courts on Appeal.”<sup>171</sup> The preparation of these court transcripts is costly. Specifically, a 2011 report provided that approximately \$1,862,000 was received from the preparation of transcripts, \$968,000 of which was for transcripts in indigent cases paid of out of public funds.<sup>172</sup> Moreover, the preparation of these transcripts is also time-consuming, as “the average number of days between the filing of a Notice of Appeal and the filing of the transcript [is 151] days.”<sup>173</sup>

Accordingly, the Indiana Supreme Court directed the Division of State Court Administration (the “Division”) “to conduct a study and report to the court on what other court systems are doing to provide more efficient, more timely and less costly court reporting and transcribing services.”<sup>174</sup> For example, Kentucky has utilized audio/visual recording as the record on appeal for more than twenty-five years in an effort “to expedite the appellate process.”<sup>175</sup> The court also directed the Division to establish a pilot program to explore various methods for presenting the record on appeal in “a more timely, efficient, and cost-effective

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166. Maguire, *supra* note 156.

167. *Id.*

168. *Id.*

169. *Id.*

170. *In re* Pilot Project for Audio/Visual Recordings, 976 N.E.2d 1218, 1218 (Ind. 2012) (mem.).

171. *Id.*

172. *Id.*

173. *Id.* at 1219.

174. *Id.* at 1218.

175. *Id.*

manner.”<sup>176</sup>

These efforts resulted in the current Order, which is one of three Orders concerning the pilot project.<sup>177</sup> In this Order, the court authorized a “pilot project utilizing audio/visual recordings” for preparation of the record on appeal.<sup>178</sup> As part of the pilot project, certain courts in Marion County, Tippecanoe County, and Allen County will each select fifteen cases being appealed from their courts as pilot project cases.<sup>179</sup> Cases chosen for the project shall comply with the alternative procedures set forth in the court’s Order instead of the Appellate Rules that would otherwise govern.<sup>180</sup> This project is sure to be just one of many undertaken in an effort to streamline Indiana’s appellate procedures and practice.

#### CONCLUSION

This past year evidenced yet another chance for the Indiana Supreme Court and Indiana appellate courts to mold Indiana’s appellate procedure practice. Through rule amendments and judicial decisions, retirements, and appointments, the supreme court and appellate courts have altered the look and adjusted the judicial system for the benefit of Indiana’s citizens, bench, and bar. As a final note, the authors of this Survey Article would personally like to thank Justice Sullivan for his friendship, guidance, and mentorship during their clerkships and wish him continued success in the future.

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176. *Id.* at 1219.

177. *Id.*

178. *Id.*

179. *Id.* at 1219-20.

180. *Id.* at 1219-23.