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

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INTRODUCTION

The Indiana Supreme Court promulgates the Indiana Rules of Appellate Procedure ("Appellate Rules" or "Rules"), and Indiana's appellate courts—the Indiana Supreme Court ("Supreme Court"), the Indiana Court of Appeals ("Court of Appeals"), and the Indiana Tax Court—interpret and apply the Rules. This Article summarizes amendments to the Rules, analyzes cases interpreting the Rules, and highlights potential pitfalls appellate practitioners should avoid. This Article does not cover every case interpreting the Rules occurred during the survey period.[1] Instead, it focuses on the most significant, recent decisions.

I. RULE AMENDMENTS

The Indiana Supreme Court amended the Appellate Rules, effective January 16, 2015.[2] The Indiana Supreme Court required practitioners to include three additional pieces of information in the notice of appeal, Appellate Rule 9(F).[3] First, an attorney must certify his or her contact information in the Indiana Supreme Court Roll of Attorneys is accurate "as of the date of the Notice of Appeal."[4] Second, an attorney must acknowledge that "all orders, opinions, and notices in the matter will be sent to the email" address on the Roll of Attorneys."[5] And finally, an attorney must "[a]cknowledg[e] that each attorney listed on the Notice of Appeal is solely responsible for keeping his/her Roll of Attorneys contact information accurate."[6]

The Indiana Supreme Court also amended Rule 16(B), Appearances, to require appellees to certify their contact information, to acknowledge all orders will be sent by email, and to acknowledge the attorney is responsible for keeping

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1. The survey period is between October 1, 2014, and September 30, 2015.

2. *See* Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1501-MS-22 (Ind. Jan. 16, 2015), *available at* http://www.in.gov/judiciary/files/order-rules-2015-0116-appellate.pdf [https://perma.cc/4EDU-45F9].

3. *Id.* at 1.

4. *Id.*

5. *Id.*

6. *Id.*

http://dx.doi.org/10.18060/4806.01116

his or her contact information up to date.[7] The Indiana Supreme Court amended the Appellate Rule 16-2 Form (Appearance in Interlocutory Appeals) to reflect the added categories of information, and attorneys no longer need to provide their contact information because the information is being supplied from the Roll of Attorneys.[8]

The Indiana Supreme Court issued a second order amending the Appellate Rules on August 17, 2015, effective January 1, 2016.[9] The Indiana Supreme Court amended Rules 9(F), 28(A), 33(B), 40(A)(3), 45(B)(1), and 50(A) in non-substantive ways, such as capitalizing record on appeal, italicizing *in forma pauperis*, changing "not-for-publication memorandum decision" to "memorandum decision," and more.[10]

The supreme court added a new subsection to Rule 23(C), requiring an original and one copy of an Indiana Administrative Rule 9(G)(5) notice to be filed with the Supreme Court Clerk: "Administrative Rule 9(G)(5) Notices. An original and one (1) copy of any Notice that must be filed per Administrative Rule 9(G)(5)."[11] Administrative Rule 9(G)(5) provides the procedure for excluding court records from public access.[12]

The supreme court also corrected an error contained in the Appellate Rule 9-1 Form (Notice of Appeal). Appellate Rule 14(C) provides the Indiana Court of Appeals has the discretion to accept an interlocutory appeal from an order granting or denying class action certification.[13] Despite this, the Appellate Rule 9-1 Form provided an appeal under Appellate Rule 14(C) was as of right: "Appeal from an interlocutory order, taken as of right pursuant to Appellate Rule 14(A),*(C),* or(D)."[14] The supreme court amended the Appellate Rule 9-1 Form (Notice of Appeal) to reflect appeals of orders under Appellate Rule 14(C) are discretionary interlocutory appeals.[15]

The supreme court added a new Appellate Rule 11-3 Form (Appellate Rule 28(A)(9)(c) Notice of Exclusion of Confidential Information from Public Access (Transcript on Appeal)).[16] The Appellate Rule 11-3 Form may be served on the court reporter before the transcript is transmitted to the court of appeals.[17] The form now provides that "[p]ursuant to Appellate Rule 28(A)(9)(c), [party name], provides this notice that the following confidential information contained in the

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7. *Id.* at 2.

8. *Id.* at 3-4.

9. *See* Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1501-MS-22 (Ind. Aug. 17, 2015) [hereinafter Order], *available at* http://www.in.gov/judiciary/files/order-rules-2015-0817-appellate.pdf [https://perma.cc/M2HV-JJ4S].

10. *Id.* at 1-5.

11. *Id.* at 2.

12. IND. ADMIN RULE 9(G)(5).

13. IND. R. APP. P. 14(C).

14. Order, *supra* note 9, at 4 (emphasis added).

15. *Id.*

16. *Id.* at 7.

17. IND. R. APP. P. 28(A)(9)(c).

transcript on appeal should be filed on green paper and remain excluded from public access in accordance with the authority listed below."[18] The Form now provides that "[i]f 9(G)(a)(2) or (3) provides the basis for exclusion, you must also list the specific law, statute, or rule declaring the information confidential."[19]

Similarly, the Indiana Supreme Court added a new Appellate Rule 11-4 Form (Appellate Rule 28(A)(9)(d) and Administrative Rule 9(G)(5) Notice of Exclusion of Confidential Information from Public Access).[20] Under Appellate Rule 28(A)(9)(d), this form is filed with the court of appeals after the transcript has been transmitted to the court of appeals.[21] This form provides that "[p]ursuant to Appellate Rule 28(A)(9)(d), [party name], provides this notice that the following confidential information contained in the transcript on appeal should be filed on green paper and remain excluded from public access in accordance with the authority listed below."[22]

II. CASE LAW INTERPRETING APPELLATE RULES

The Indiana Court of Appeals and Indiana Supreme Court issued a number of decisions analyzing the Appellate Rules. Indiana's appellate courts have continued to build on a supreme court's landmark 2014 decision, which held that failure to file a notice of appeal timely did not deprive appellate courts of jurisdiction to hear the appeal.[23]

A. Appellate Court Jurisdiction

In 2014, in *In re Adoption of O.R.*, the Indiana Supreme Court held the failure to file the notice of appeal did not deprive Indiana's appellate courts of jurisdiction over the case.[24] Instead, failure to file the Notice of Appeal timely subjects the appeal to forfeiture.[25] "'Forfeiture' is . . . '[t]he loss of a right, privilege, or property because of a . . . breach of obligation, or neglect of duty.'"[26] A "party's forfeiture" of the right to appeal does not "mean the appellate courts somehow lose their authority to hear and determine the general class of cases to which a party's case belongs or over the party attempting to assert its right of appeal."[27] "Timely filing relates to neither the merits of the controversy nor to the competence of the courts on appeal to resolve the controversy."[28] The supreme

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18. Order, *supra* note 9, at 7.
19. *Id.*
20. *Id.* at 8.
21. IND. R. APP. P. 28(A)(9)(d).
22. Order, *supra* note 9, at 8.
23. *In re* Adoption of O.R., 16 N.E.3d 965, 971 (Ind. 2014).
24. *Id.*
25. IND. R. APP. P. 9(A)(1), (5) (emphasis added).
26. *In re O.R.*, 16 N.E.3d at 971 (quoting *Forfeiture*, BLACK'S LAW DICTIONARY (10th ed. 2014)).
27. *Id.*
28. *Id.*

court concluded an appeal could proceed, despite failure to file the notice of appeal timely, due to "extraordinary compelling reasons."[29]

The Indiana Court of Appeals has now begun to apply *In re Adoption of O.R.* In *Morales v. State*, Morales filed a pro-se petition for post-conviction relief, which the trial court denied.[30] Morales appealed.[31] But he filed his notice of appeal one day late.[32] The court of appeals noted that "in light of *In re Adoption of O.R.*, dismissal is not inevitable. [It did] not lack jurisdiction over Morales's appeal and [it] believe[d] that the 'extraordinary compelling reasons' for non-forfeiture recognized by our Indiana Supreme Court is not determined solely from the perspective of the litigant."[33] The court noted if it dismissed Morales's appeal, then he could file a petition for rehearing to demonstrate he had timely filed his notice of appeal based on the prison mailbox rule.[34] Because of this, the "Court has an interest in judicial economy and bringing finality to proceedings by post-conviction petitioners," so "[i]n light of the mere one-day delay and the preference of this Court to address the merits of claims in final disposition of controversies, [it] conclude[d] Morales ha[d] not forfeited his right to appeal."[35]

In *Strong v. State*, the Indiana Court of Appeals held Strong could bring a belated post-conviction appeal based on Indiana's Post-Conviction Rules.[36] But it also noted even if the Post-Conviction Rules did not permit Strong to bring his appeal, "*In re Adoption of O.R.* would offer him an opportunity to demonstrate 'extraordinary compelling reasons' justifying the filing of a belated notice of appeal."[37] "The trial court, in twice granting Strong's motions to file a belated notice of appeal, must have found compelling reasons to do so, and we give substantial deference to its decision."[38] Therefore, the court of appeals held that "the trial court's decision to grant Strong permission to file a belated notice of appeal was not an abuse of discretion."[39]

In *In re E.W.*, the trial court entered an order "that all contact between Mother and Child cease" until the child became an adult.[40] Citing *In re Adoption of O.R.*, the Indiana Court of Appeals held that "[w]hether or not this is technically a final judgment, it certainly operated as one." [41] Therefore it considered the mother's

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29. *Id.*

30. Morales v. State, 19 N.E.3d 292, 295 (Ind. Ct. App. 2014), *trans. denied*, 26 N.E.3d 613 (Ind. 2015).

31. *Id.* at 296.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Strong v. State, 29 N.E.3d 760, 765 (Ind. Ct. App. 2015).

37. *Id.* at 766.

38. *Id.*

39. *Id.*

40. *In re* E.W., 26 N.E.3d 1006, 1009 (Ind. Ct. App. 2015).

41. *Id.*

arguments.[42]

Similarly, the Indiana Supreme Court emphasized appeals should be heard on the merits. In *Hollowell v. State*, a pro se petitioner appealed the denial of his petition for post-conviction relief.[43] Appellate Rules 9(F)(10) and 24(A)(1) required Hollowell to file his notice of appeal with the appellate court clerk and "serve copies of the Notice on the trial court clerk, the court reporter, and the parties."[44] Although the trial court clerk received a copy of the notice, neither the court reporter nor the trial court did.[45] In addition, under Appellate Rule 40(A)(2), Hollowell sought permission to proceed *in forma pauperis*, and if the motion had been granted, it "would have afforded Hollowell a copy of the post-conviction transcript at public expense."[46] The appellate court docket reflected that the motion to proceed *in forma pauperis* was pending at the trial court, but "it [did] not appear from the record that the trial court clerk ever received or filed such a motion. In addition, the trial court clerk did not immediately notify the court reporter that a transcript had been requested."[47]

The court reporter and trial court judge then "filed with the Court of Appeals a document titled 'Court Reporter's Emergency Verified Motion for Extension of Time to File Transcript.'"[48] The motion reflected no arrangement had yet to be made for payment for the transcript, apparently because the trial court had either not received Hollowell's motion to proceed *in forma pauperis*, or if the trial court had received it, the trial court had not ruled on it.[49] "In response to the emergency motion, the Court of Appeals issued an order declaring that the court reporter had no obligation to prepare the transcript unless she received further direction from the Court of Appeals."[50] The order also required Hollowell to show cause why his appeal should not be dismissed.[51]

Hollowell responded that "he had followed the rules of appellate procedure."[52] "Acknowledging Hollowell's response the Court of Appeals thereafter dismissed the appeal without further explanation."[53] The Indiana Supreme Court granted transfer.[54] The supreme court noted:

> [T]he Appellate Rules do not *require* dismissal of an appeal where the appellant has failed to serve the court reporter with a copy of the Notice

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42. *Id.*
43. Hollowell v. State, 19 N.E.3d 263, 265 (Ind. 2014).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 266.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*

> of Appeal, nor do the Rules *expressly* confer discretion on a reviewing court to dismiss an appeal where the appellant fails to serve the court reporter with a copy of the Notice of Appeal.[55]

The supreme court "elect[ed] to address the merits under the general heading of 'doing substantial justice.'"[56]

B. Trial Court Jurisdiction

In *LBLHA, LLC v. Town of Long Beach*, the parties cross-moved for summary judgment, and on December 26, 2013, the trial court entered summary judgment to the defendants on four counts of the complaint.[57] After a motion to correct error and various other motions were filed, on April 1, 2014, the plaintiffs filed a notice of appeal of the grant of summary judgment.[58] "On April 16, 2014, the notice of completion of clerk's record was noted in the CCS. On April 24, 2014, the [trial] court issued an order granting the [defendant's] motion for summary judgment on Count V."[59] The plaintiffs then filed a separate notice of appeal from the second grant of summary judgment.[60] The Indiana Court of Appeals consolidated the appeals.[61] Appellate Rule 8 provides the court of appeals "acquires jurisdiction on the date the Notice of Completion of Clerk's Record is noted in the Chronological Case Summary."[62] Therefore, the court of appeals held the trial court did not have jurisdiction to enter summary judgment on Count V because at the time the trial court entered judgment on that count, the notice of completion of the clerk's record had already been noted in the CCS.[63]

In *Snemis v. Mills*, the trial court ordered the BMV to vacate the suspension of Mills's driver's license.[64] The BMV filed a motion to correct error.[65] The motion was deemed denied on July 6, 2014.[66] After the motion to correct error was deemed denied, the trial court set the matter for a hearing on August 21, but the trial court clerk filed its notice of completion of the clerk's record on August 6.[67] Nevertheless, the trial court held the hearing on August 21.[68] The Indiana Court of Appeals, however, concluded under Appellate Rule 8, "the trial court no

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55. *Id.* at 266 n.2.
56. *Id.* at 265.
57. LBLHA, LLC v. Town of Long Beach, 28 N.E.3d 1077, 1083 (Ind. Ct. App. 2015).
58. *Id.* at 1086.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 1091.
63. *Id.*
64. Snemis v. Mills, 24 N.E.3d 468, 470 (Ind. Ct. App. 2014).
65. *Id.*
66. *Id.*
67. *Id.* at 470 n.2.
68. *Id.*

longer had jurisdiction over the motion to correct error."[69]

C. Timely Appealing a Magistrate's Order

In *T.H. v. State*, a magistrate issued his order in a civil juvenile proceeding and thirty-one days later T.H. filed his notice of appeal.[70] The State argued this was untimely.[71] The Indiana Court of Appeals, however, concluded T.H. did not file the notice of appeal late because the presiding judge approved the magistrate's order twenty-nine days before the notice of appeal was filed.[72] The court of appeals concluded that "[f]or the purpose of Indiana Appellate Rule 9, the date on which the clock begins ticking is the date of the final, appealable order."[73] Therefore, the court of appeals concluded T.H. timely filed the notice of appeal.[74]

D. Interlocutory Appeals

In *Decker v. State*, the trial court determined probable cause existed for Decker's arrest, but it did not address the admissibility of the evidence.[75] The Indiana Court of Appeals accepted jurisdiction to hear an interlocutory appeal of the order.[76] The State argued that "Decker's appeal asks only for a temporary ruling from this court which cannot, in any event, produce the suppression of his statement."[77] And, therefore, the State contended the court of appeals should not have accepted jurisdiction to hear Decker's interlocutory appeal.[78] Decker argued the only reason the trial court did not address the admissibility of the evidence was because it had concluded probable cause existed for the arrest.[79]

The court of appeals began its analysis by noting:

> Ind. Appellate Rule 14(B) governs discretionary interlocutory appeals. "An appeal may be taken from . . . interlocutory orders if the trial court certifies its order and the Court of Appeals accepts jurisdiction over the appeal." "The rule provides for a two-step process to initiate a discretionary interlocutory appeal: first the trial court must certify its order for interlocutory appeal; then, if the trial court does so, this court

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69. *Id.*

70. T.H. v. State, 33 N.E.3d 374, 375-76 (Ind. Ct. App. 2015).

71. *Id.* at 375.

72. *Id.* at 376.

73. *Id.*

74. *Id.*

75. Decker v. State, 19 N.E.3d 368, 374 (Ind. Ct. App. 2014), *trans. denied*, 24 N.E.3d 967 (Ind. 2015).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

> may accept interlocutory jurisdiction over the case."[80]

The court of appeals noted interlocutory appeals are appropriate if the "appellant will suffer substantial expense, damage or injury if the order is erroneous and the determination of the error is withheld until after judgment."[81] In addition, interlocutory appeals may be taken if the "order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case," or if the "remedy by appeal is otherwise inadequate."[82] The court of appeals concluded because the issue of suppression of the evidence had been fully briefed, it was appropriate for the court to take jurisdiction to hear the interlocutory appeal.[83]

In *Ball State University v. Irons*, Ball State refused to release a student's transcript because of outstanding tuition bills.[84] The trial court ordered Ball State to release the transcript.[85] Ball State sought an interlocutory appeal.[86] The Indiana Court of Appeals dismissed the appeal concluding it was not an interlocutory appeal as of right.[87] The Indiana Supreme Court granted transfer.[88] An appeal may be taken as of right from an order to "compel the delivery or assignment of any securities, evidence of debt, documents or things in action."[89] The supreme court noted:

> [T]his Rule is not "designed to create an appeal as of right from every order to produce documents during discovery." Nevertheless the Rule does involve court orders "which carry financial and legal consequences akin to those more typically found in final judgments: payment of money, issuance of a debt, delivery of securities, and so on."[90]

Ball State argued this rule applied because "it has a common law lien over Daughter's transcript and may not be compelled to release the transcript absent payment of the unpaid tuition balance."[91] The supreme court concluded Ball State had "a common law lien" and "common law liens are much like securities. And the trial court's order directing Ball State to release the transcript to daughter thereby forfeiting its liens carries 'financial and legal consequences akin to those more typically found in final judgments.'"[92] Therefore, the supreme court

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80. *Id.* (citations omitted).
81. *Id.* (quoting IND. R. APP. P. 14(B)(1)(c)(i)).
82. *Id.* (quoting IND. R. APP. P. 14(B)(1)(c)(ii)-(iii)).
83. *Id.*
84. Ball State Univ. v. Irons, 27 N.E.3d 717, 719 (Ind. 2015).
85. *Id.* at 720.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 721 (quoting IND. R. APP. P. 14(A)(3)).
90. *Id.* (quoting State v. Hogan, 582 N.E.2d 824, 825 (Ind. 1991)) (citations omitted).
91. *Id.*
92. *Id.* (quoting *Hogan*, 582 N.E.2d at 825).

concluded the order to release the transcript was "appealable as of right under Appellate Rule 14(A)(3)."[93]

In *Ferguson v. Estate of Ferguson*, a trial court order required the "deposit [of] a bond payment in excess of one million dollars with the trial court clerk."[94] If the money was not deposited, a family farm would have to be sold.[95] If the farm was sold, the sale "could not be undone if it occurred."[96] Appellate Rule 14(A)(1) permits an appeal of right "[f]or the payment of money."[97] The Indiana Court of Appeals concluded the order to post the bond was "akin to a final judgment" because "[e]ven if Charles's claim against the Estate [was] valid, it will do him little good if he cannot afford to pursue the litigation further because of the bond he has been ordered to post."[98] Therefore, the court of appeals concluded it had jurisdiction to hear Charles's interlocutory appeal under Appellate rule 14(A)(1).[99]

In *Whittington v. Magnante*, a trial court ordered the defendants did not have to pay for time the plaintiffs' expert spent preparing for a deposition.[100] The plaintiffs appealed.[101] The plaintiffs argued they could appeal as of right under Appellate Rule 14(A), (C), or (D).[102] "Indiana Appellate Rule 14(C) provides for interlocutory appeals from orders granting or denying class action certification."[103] The Indiana Court of Appeals concluded this rule had no application to the plaintiffs' appeal.[104] Appellate Rule 14(D) permits for appeals "as provided by statute."[105] That rule did not apply to plaintiffs' appeal either.[106]

The court then noted that "the only subdivision of Indiana Appellate Rule 14(A) that is arguably applicable in this appeal is subsection '(1) For the payment of money[.]'"[107] Orders that fall within Rule 14(A)(1) include "orders which carry financial and legal consequences akin to those more typically found in final judgments," such as "[o]rders to pay death taxes," "orders to pay attorney's fees," "orders to pay child support," "orders to make a deposit of money into court," and "orders for the payment of attorney's fees as a sanction."[108] Because the trial court's order "did not directly order one of the parties to pay a sum to another

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93. *Id.* at 722.
94. Ferguson v. Estate of Ferguson, 40 N.E.3d 881, 885 (Ind. Ct. App. 2015).
95. *Id.*
96. *Id.*
97. *Id.* at 884.
98. *Id.* at 885.
99. *Id.*
100. Whittington v. Magnante, 30 N.E.3d 767, 768 (Ind. Ct. App. 2015).
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* (quoting IND. R. APP. P. 14(A)) (alteration in original).
108. *Id.* at 769 (internal quotation and citation omitted).

party or the court," the "order [did] not qualify as an order for the payment of money pursuant to Indiana Appellate Rule 14(A). As a result, the Plaintiffs [were] not entitled to interlocutory review as a matter of right."[109] And because the plaintiffs did not follow the procedure for a discretionary appeal under Appellate Rule 14(B), the court of appeals dismissed the appeal.[110]

E. Notice of Appeal Filed Before Final Judgment

In *Arflack v. Town of Chandler*, the trial court sustained a motion to dismiss, gave Arflack thirty days to replead, but before the expiration of the thirty days, he filed a notice of appeal.[111] That is, Arflack filed a notice of appeal before the entry of a final judgment.[112] The Town of Chandler argued this meant the Indiana Court of Appeals did not have jurisdiction to hear Arflack's appeal.[113] The court of appeals noted that "Appellate Rule 66(B) provides that appeals should not be dismissed as a matter of right merely because the case was not finally disposed of in the court below."[114] The court of appeals "may dismiss such an appeal, or in [its] discretion, [it] may suspend consideration until the necessary final disposition is made by the trial court, or [it] may decide the issues which have been adjudicated so long as they are properly severable."[115] The court of appeals noted under Appellate Rule 66(B) it could remand the case to the trial court to permit the plaintiff to replead, but "it appears that a remand would merely provide delay for the amount of time necessary to secure a procedurally correct entry."[116] Therefore, the court of appeals denied "Chandler's request to dismiss this appeal for lack of jurisdiction."[117]

F. Appellate Attorneys' Fees

In *In re Moeder*, the trial court awarded $106,001.28 in attorneys' fees because the plaintiff's claim was frivolous.[118] The Indiana Court of Appeals affirmed the award.[119] However, it did not award appellate attorneys' fees, under Appellate Rules 66(E), because it concluded the appeal of the award of attorneys' fees was not in bad faith and an "award of appellate attorney's fees in this case would likely create a 'chilling effect' on future litigants who also face personal liability for substantial attorney's fees awards made at the discretion of trial

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109. *Id.*
110. *Id.*
111. Arflack v. Town of Chandler, 27 N.E.3d 297, 301 (Ind. Ct. App. 2015).
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 301-02.
117. *Id.* at 302.
118. *In re* Moeder, 27 N.E.3d 1089, 1103 (Ind. Ct. App.), *trans. denied*, 37 N.E.3d 960 (Ind. 2015).
119. *Id.*

courts."[120]

III. REFINING OUR APPELLATE PROCEDURE

During the survey period, the Indiana Supreme Court and the Indiana Court of Appeals offered helpful advice to practitioners to help them avoid various appellate-rule pitfalls.

A. Place Citations in the Text, not in Footnotes

In *Crystal Valley Sales, Inc. v. Anderson*, the Indiana Court of Appeals reminded appellants that Appellate Rule 22 "requires that parties adhere to Bluebook rules concerning citation form."[121] The Bluebook provides in "non-academic legal documents, citations appear within the text of the documents as full sentences or as clauses within sentences directly after the propositions they support."[122] The court of appeals reminded the appellants to place citation in the text, not in footnotes.[123]

Indeed, in *Indiana Department of Transportation v. Sadler*, the Indiana Court of Appeals noted that "[a]ppellant's counsel use[d] footnotes rather than citation sentences as required under Indiana Appellate Rule 22."[124] The court of appeals noted that it had "previously admonished counsel for noncompliance with Appellate Rule 22 before," and it concluded that a "third violation of Appellate Rule 22 may be treated more seriously than merely identifying it in a footnote."[125]

B. Transcripts Must Be Consecutively Paginated

Appellate Rule 28(A)(2) requires transcript volumes be consecutively paginated.[126] In *McCauley v. State*, the Indiana Court of Appeals reminded the parties and court reporters that transcript volumes need to be consecutively paginated.[127]

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120. *Id.* at 1104.

121. Crystal Valley Sales, Inc. v. Anderson, 22 N.E.3d 646, 652 n.3 (Ind. Ct. App. 2014), *trans. denied*, 30 N.E.3d 1229 (Ind. 2015).

122. *Id.* (quoting THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. B2, at 4 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010)).

123. *Id.*

124. Ind. Dep't of Transp. v. Sadler, 33 N.E.3d 1187, 1189 n.3 (Ind. Ct. App. 2015).

125. *Id.*

126. IND. APP. R. 28(A)(2).

127. McCauley v. State, 22 N.E.3d 743, 745 n.1 (Ind. Ct. App. 2014), *trans. denied*, 31 N.E.3d 976 (Ind. 2015); *see, e.g.*, Guffey v. State, 42 N.E.3d 152, 157 n.11 (Ind. Ct. App.), *trans. denied*, 43 N.E.3d 243 (Ind. 2015) (noting transcripts must be consecutively paginated).

C. Verified Statement when no Transcript Available

Appellate Rule 31 states:

> "If no Transcript of all or part of the evidence is available, a party . . . may prepare a verified statement of the evidence from the best available sources," a motion for certification of which statement must then be filed with [the] trial court. An opposing party may file a verified response, . . . and the trial court must certify a statement of the evidence with "any necessary modifications," . . . "once complete, the statement of the evidence becomes part of the Clerk's Record."[128]

In *Scott-LaRosa v. Lewis*, the parties followed this process, and the Indiana Court of Appeals took its "statement of facts . . . from a statement of the evidence entered pursuant to Appellate Rule 31."[129]

D. Word Count Certificate

Appellate Rule 44 provides an appellant's brief may not exceed thirty pages, unless it contains a word count certificate.[130] In *Ennik v. State*, the appellant's "forty-eight page brief exceed[ed] the thirty-page limit and [did] not include a certification that the word count [was] less than 14,000."[131] The Indiana Court of Appeals "remind[ed] the parties that compliance with the appellate rules is essential for our court's efficient review of cases."[132]

E. Parties Must Cite Pertinent Authority

In *Pierce v. State*, the Indiana Supreme Court interpreted Appellate 46(A)(8).[133] Appellate Rule 46(A)(8)(a) provides an appellate argument "must contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . . ."[134] And, "if the admissibility of evidence is in dispute, citation shall be made to pages of the Transcript where the evidence was identified, offered, and received or rejected."[135] Applying this rule, the Indiana Supreme Court noted that "Pierce's argument on this issue comprise[d] a single paragraph of his

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128. Scott-LaRosa v. Lewis, 44 N.E.3d 89, 92 n.1 (Ind. Ct. App. 2015) (quoting IND. R. APP. P. 31).

129. *Id.* at 92.

130. IND. R. APP. P. 44(D)-(E).

131. Ennik v. State, 40 N.E.3d 868, 875 n.3 (Ind. Ct. App.), *trans. denied*, 39 N.E.3d 380 (Ind. 2015).

132. *Id.*

133. Pierce v. State, 29 N.E.3d 1258, 1267 (Ind. 2015).

134. IND. R. APP. P. 46(A)(8)(a).

135. *Id.*

Appellant's Brief, and that paragraph [was] utterly devoid of citations to anything at all."[136] The Indiana Supreme Court continued that "Pierce spill[ed] slightly more ink on the subject in his Reply Brief and add[ed] citations to the record, but still cite[d] no legal authority in support of his claim of error."[137] The Indiana Supreme Court concluded Pierce's "non-compliance with Rule 46 hamper[ed its] review of that claim, and [it] could therefore find it waived if [it] chose. Nevertheless, in light of [its] preference for resolving cases on their merits, [it] elect[ed] to consider the substance of Pierce's argument."[138]

In *Grant v. Bank of New York Mellon Trust Co.*, the bank argued the Grants waived an issue on appeal by failing to raise it at the trial court.[139] "In support of its waiver argument, the Bank relie[d] on a number of cases applying Indiana Appellate Rule 46(C), which provides that no new issues shall be raised in a reply brief. This rule applies to appellate briefs and, of course, has no applicability to trial court filings."[140] The Indiana Court of Appeals noted it was "perplexed by the Bank's reliance on these cases with respect [to] the Grant's summary judgment filings."[141] The court of appeals found "the Bank's belated waiver argument disingenuous and without merit."[142]

F. Include the Complaint in the Appendix, but Do Not Include the Transcript

In *Krasnoff v. Educational Resources Institute*, the trial court granted judgment after a bench trial.[143] On appeal, the appellant failed to include the complaint in the appendix.[144] The Indiana Court of Appeals reminded the parties Appellate Rule 50(A)(1) requires parties to include information "necessary for the Court to decide the issues presented," and the "allegations in the complaint are frequently" needed to decide appeals.[145] The Indiana Court of Appeals reversed, and the trial court again entered judgment after a bench trial.[146] On appeal, the parties *again* failed to include the complaint in the appendix.[147] The court of appeals stated the following, "[w]e find the omission of the complaint particularly distressing because this is the *second* appeal from a second entry of judgment in this case" and "noncompliance with our Appellate Rules can result in waiver of

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136. *Pierce*, 29 N.E.3d. at 1268.

137. *Id.*

138. *Id.*

139. Grant v. Bank of N.Y. Mellon Trust Co., 30 N.E.3d 733, 738 (Ind. Ct. App.), *trans. denied*, 39 N.E.3d 380 (Ind. 2015).

140. *Id.* at 738 n.3.

141. *Id.*

142. *Id.* at 738.

143. Krasnoff v. Educ. Res. Inst., 44 N.E.3d 781, 782 (Ind. Ct. App.), *aff'd on reh'g*, 015 WL 9598287 (Ind. Ct. App. 2015).

144. *Id.* at 783.

145. *Id.* (quoting IND. R. APP. P. 50(A)(1)).

146. *Id.* at 782.

147. *Id.* at 783.

an appeal."[148]

In *FLM, LLC v. Cincinnati Insurance Co.*, the Indiana Court of Appeals reminded parties Appellate Rule 50(F) provides that parties should not include transcripts in the appellant's appendix "[b]ecause the Transcript is transmitted to the Court on Appeal pursuant to Rule 12(B)."[149] Likewise, in *Zeller v. AAA Insurance Co.*, the court of appeals again reminded parties not to include portions of the transcript in the appendix.[150] And the court of appeals came to the same conclusion in *Bah v. Mac's Convenience Stores, LLC*.[151]

IV. INDIANA'S APPELLATE COURTS

A. Case Data from the Indiana Supreme Court

During the 2015 fiscal year,[152] the Indiana Supreme Court disposed of 977 cases, including 486 criminal cases, 338 civil cases, 6 tax cases, 27 original actions, 114 attorney discipline cases, 2 judicial discipline cases, and 4 board of law examiners cases.[153] The court heard sixty-two oral arguments during the fiscal year, 29% of which were heard before the court decided to grant transfer.[154] The court issued 100 majority opinions and sixteen non-majority opinions.[155] Justice Dickson issued sixteen majority opinions, Justice Rucker issued fourteen majority opinions, Justice David issued twenty-one majority opinions, Justice Massa issued thirteen majority opinions, and Chief Justice Rush issued sixteen majority opinions.[156] The court issued unanimous decisions 77.5% of the time.[157]

B. Justice Dickson Announces Retirement

In November 2015, Justice Dickson announced he was stepping down from the bench in Spring 2016, after thirty years as a "judicial branch leader."[158] Justice

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148. *Id.*

149. FLM, LLC v. Cincinnati Ins. Co., 24 N.E.3d 444, 449 n.2 (Ind. Ct. App. 2014*), trans. denied*, 34 N.E.3d 251 (Ind. 2015).

150. Zeller v. AAA Ins. Co., 40 N.E.3d 958, 960 n.1 (Ind. Ct. App. 2015).

151. 37 N.E.3d 539, 545 n.4 (Ind. Ct. App. 2015), *trans. denied*, 43 N.E.3d 1279 (Ind. 2016) (reminding parties not to include portions of the transcript in the appendix).

152. The Indiana Supreme Court 2015 fiscal year ran from July 1, 2014 to June 30, 2015. *See* IND. SUPREME COURT, INDIANA SUPREME COURT ANNUAL REPORT 2014-15 (2015), *available at* http://www.in.gov/judiciary/supreme/files/1415report.pdf [https://perma.cc/YK8A-BEY5].

153. *Id.* at 9.

154. *Id.* at 14.

155. *Id.* at 16.

156. *Id.*

157. *Id.* at 17.

158. Press Release, Ind. Supreme Court, Justice Dickson Announces Spring 2016 Retirement (Nov. 9, 2015), *available at* http://www.in.gov/activecalendar/EventList.aspx? fromdate=1/1/2015 &todate=12/31/2015&display=Month&type=public&eventidn=238851&view=EventDetails&information_id=233536 [https://perma.cc/XZ8F-FDED].

Dickson "is Indiana's 100th Supreme Court justice and the second-longest-serving justice in state history."[159] Justice Dickson stated:

> During my 17 years of general and trial practice as a lawyer in Lafayette, it had never occurred to me to seek appellate judicial service. But at the suggesting and urging of others, I applied. Three decades later I am immensely gratified to have been able to serve the citizens of Indiana for so many years. I sincerely hope Indiana attorneys and judges will take a moment to reflect on the possibility that my upcoming vacancy is meant for them or someone they know.[160]

"During his judicial career, he has authored 884 civil and criminal opinions (718 majority and 166 non-majority) and several law review articles."[161] Justice Dickson's leadership, professionalism, and knowledge of Indiana constitutional law will be missed.

C. Case Data from the Indiana Court of Appeals

During 2014,[162] the court of appeals disposed of 3383 cases.[163] This continued a multi-year trend of declining case loads, with the court's case load dropping from 3901 in 2009.[164] The court disposed of 1823 criminal cases, 1002 civil cases, and 558 other cases.[165] The court affirmed the trial court 82.2% of the time, with the court affirming 87.6% of criminal cases, 91.9% of post-conviction relief cases, and 68.6% of civil cases.[166] The average age of cases pending before the court of appeals at the end of 2014 was one and a half months.[167] In addition to deciding cases, the court decided 6829 other motions and miscellaneous orders.[168]

D. Court of Appeals Adopts New Opinion Format

Effective January 26, 2015, the Indiana Court of Appeals adopted a new opinion format.[169] "The format employs a new, larger typeface (Calisto MT);

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159. *Id.*

160. *Id.*

161. *Id.*

162. The Indiana Court of Appeals 2014 annual report covers January 1, 2014 through December 31, 2014. *See* IND. COURT OF APPEALS, INDIANA COURT OF APPEALS 2014 ANNUAL REPORT, *available at* http://www.in.gov/judiciary/appeals/files/2014_Annual_Report.pdf [https://perma.cc/8QK7-5GEM].

163. *Id.* at 1.

164. *Id.*

165. *Id.*

166. *Id.* at 2.

167. *Id.*

168. *Id.*

169. Press Release, Ind. Court of Appeals, Court of Appeals Adopts New Opinion Format (Jan. 22, 2015), *available at* http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2015&todate=12/31/2015&display=Month&type=public&eventidn=205010&view=EventDetails&in

paragraph numbering for easy reference; ragged-right copy justification; and line spaces instead of indents to mark new paragraphs."[170] The changes "are meant to optimize both print and online reading experiences. The new format is also more useful for optical character recognition, which is used to make scanned documents searchable."[171]

E. Judge Friedlander Retires

In February 2015, Judge Friedlander announced he would retire in August 2015.[172] "Judge Friedlander will have served on the Court for more than 22 years and practiced law for 50 years."[173] Judge Friedlander said he "thought 50 years was a good time . . . When you've done something for 50 years, it's a good milestone."[174]

> He has written 3,000 majority opinions and voted on more than 6,000 other cases. He said his career highlights include the opportunity to work with the court's outstanding members past and present, and with the Indiana Supreme Court. He is especially proud of having started the Conference for Legal Education Opportunity summer internship program, or CLEO.[175]

We have all benefitted from Judge Friedlander's many years of dedicated service to this state, from his many contributions to the development of Indiana law, and he will be missed.

F. Judge Robert Altice Selected for Court of Appeals

In July 2015, Governor Pence appointed Marion Superior Court Judge Robert Altice to the Indiana Court of Appeals to replace Judge Friedlander.[176] Before joining the court of appeals, Judge Altice served for fifteen years as a trial court judge.[177] Governor Pence said, "Judge Robert Altice's extensive work in the Marion County judicial system and experience presiding over civil and criminal

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formation_id=210450 [https://perma.cc/T5DD-YKWB].

170. *Id.*

171. *Id.*

172. Press Release, Ind. Court of Appeals, Judge Friedlander to Retire in August (Feb. 23, 2015), *available at* http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2015&todate=12/31/2015&display=Month&type=public&eventidn=209921&view=EventDetails&information_id=211377 [https://perma.cc/E8FG-YJL5].

173. *Id.*

174. *Id.*

175. *Id.*

176. Dan Carden, *Pence Selects Indianapolis Judge for State Appeals Court*, NW. IND. TIMES (July 17, 2015), http://www.nwitimes.com/news/local/govt-and-politics/pence-selects-indianapolis-judge-for-state-appeals-court/article_7ba5ff44-c2b7-5b22-aca3-336f3eb042e2.html [https://perma.cc/83ZB-JLWQ].

177. *Id.*

cases make him a uniquely qualified candidate to serve on the Court of Appeals."[178] Judge Altice was Governor Pence's first appellate-level judicial appointment.[179]

G. All Appellate Courts Accept E-Filings Beginning in 2016

> All appellate courts will accept electronically filed documents in January 2016. The Indiana Supreme Court and Court of Appeals recently began accepting e-filings, and the Tax Court will join the initiative in January 2016.Chief Justice Loretta Rush announced the implementation of e-filing in all appellate courts, . . . [calling the project] a modern and efficient approach to handling cases.
>
> In 2014 the Indiana Supreme Court announced the implementation of statewide e-filing to reduce paper copies, postage, and trips to the clerk's office, . . . [and the goal is] statewide implementation by the end of 2018.[180]

"In November 2015 the Supreme Court and Court of Appeals began accepting electronic cases and within the first month 600 documents were filed electronically."[181] Justice David said, "The Indiana Supreme Court is committed to the most effective use of technology to ensure that courts operate with efficiency and fairness. E-filing is a key component of our modernization plans."[182]

CONCLUSION

During the survey period, the Indiana appellate courts analyzed, interpreted, and applied the Appellate Rules. Justice Dickson and Judge Friedlander announced their retirements, and Judge Altice was named to the Indiana Court of Appeals.

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178. *Id.*

179. *Id.*

180. Press Release, Ind. Supreme Court, Major Reduction in Paper as All Three Courts Accept E-Filings (December 9, 2015), *available at* http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2015&todate=12/31/2015&display=Month&type=public&eventidn=239911&view=EventDetails&information_id=234611 [https://perma.cc/8XR8-PTSK].

181. *Id.*

182. *Id.*