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 that occurred during the survey period.[1] Instead, it focuses on the most significant, recent decisions.

I. RULE AMENDMENTS

Beginning on July 1, 2016, "[e]lectronic filing of all pleadings to pending cases" became "mandatory for attorneys in all Indiana appellate courts."[2] This change led the Indiana Supreme Court to make significant amendments to the Appellate Rules, effective July 1, 2016.[3] The Indiana Supreme Court amended Rule 2 to add the following definitions: "Case Management System," "Conventional Filing," "Electronic Filing" ("E-Filing"), "E-Filing Manager," "E-Filing Service Provider," "Electronic Service," "Indiana E-Filing System," "Notice of Electronic Filing," "Public Access Terminal," "User Agreement," "User," and "Service Contracts."[4]

Rule 9(A)(1) was amended to specify that an appeal is initiated "by

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1. The survey period is between October 1, 2015, and September 30, 2016.

2. Press Release, Ind. Supreme Court, E-Filing Progress Continues with Certain Cases and Counties Requiring the Move Away from Paper (Apr. 12, 2016), http://www.in.gov/activecalendar/EventList.aspx?fromdate=1/1/2016&todate=12/31/2016&display=Month&type=public&eventidn=245063&view=EventDetails&information_id=241097 [https://perma.cc/4LLN-WTKF].

3. *See generally* Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1602-MS-86 (Ind. Apr. 12, 2016) [hereinafter Apr. 12, 2016 Order], http://www.in.gov/judiciary/files/order-rules-2016-0412-appellate.pdf [https://perma.cc/G9LT-3J6R].

4. *Id.* at 1-2.

http://doi.org/10.18060/4806.1165

conventionally filing a Notice of Appeal."[5] Similarly, Rule 9(A)(3) was amended to specify that an administrative appeal "is commenced by conventionally filing a Notice of Appeal with the Clerk."[6] Previously, Rule 9(A)(5) provided the following:

> Grace Period: Effective until January 1, 2014, if an appellant timely files the Notice of Appeal with the trial court clerk or the Administrative Agency, instead of the Clerk as required by App. R. 9(A)(1), the Notice of Appeal will be deemed timely filed and the appeal will not be forfeited.[7]

The Supreme Court amended Rule 9(A)(5) to remove this grace-period language.[8]

Appellate Rule 9(F)(5) now requires the notice of appeal to "include the email address of the Court Reporter" and that it be sent "by electronic transmission to the Court Reporter."[9] Rule 9(H) now provides that the "Court Reporter may require from the appellant a fifty percent (50%) deposit based on the estimated cost of the Transcript, except no deposit may be charged for state or county paid Transcript."[10] Rule 11(A) no longer requires that exhibits be prepared in "separately bound volumes," and it now provides that "[w]ith the exception of the preparation of documentary exhibits pursuant to Rule 29(A), the Court Reporter may engage the services of outside transcribers or transcription services to assist in all or part of the transcription."[11] Rule 11(A) used to permit transcript preparation in accordance with Rule 30 (electronic transcripts), but Rule 30 was deleted.[12] So, Rule 11(A) no longer refers to Rule 30.[13]

Rule 12(B) now provides that "[w]ithin five (5) days of the Court Reporter filing the Transcript, the trial court clerk shall transmit the Transcript to the Clerk in accordance with Rules 28 and 29."[14] Previously, in civil matters, the trial court clerk retained the transcript until briefing was completed.[15] In December 2016, the Supreme Court further amended Rule 12(B) (struck through language deleted; underlined language added):

> **B. Transcript.** ~~Within five (5) days of the Court Reporter filing the Transcript, the trial court clerk shall transmit the Transcript to the Clerk in accordance with Rules 28 and 29. Any party may move the Court on~~

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5. *Id.* at 2 (underscored language added by amendment).
6. *Id.* at 3 (underscored language added by amendment).
7. *Id.*
8. *Id.*
9. *Id.* at 4.
10. *Id.*
11. *Id.* at 4-5.
12. *Id.* at 23.
13. *Id.* at 4.
14. *Id.* at 5.
15. *Id.*

~~Appeal to order the trial court clerk to transmit the Transcript at a different time than provided for in this Rule.~~

(1) Except as otherwise provided below, the trial court clerk shall retain the Transcript until the Clerk notifies the trial court clerk that all briefing is completed, and the trial court clerk shall then transmit one (1) copy of the Transcript to the Clerk in accordance with Rules 28 and 29.

(a) In Criminal Appeals in which the appellant is not represented by the State Public Defender, the Clerk shall notify the trial court clerk when the Appellant's Brief has been filed, and the trial court clerk will then transmit one (1) copy of the Transcript to the Clerk in accordance with Rules 28 and 29.

(b) In Criminal Appeals in which the appellant is represented by the State Public Defender, the trial court clerk shall transmit one (1) copy of the Transcript to the Clerk in accordance with Rules 28 and 29 when the Court Reporter has completed the preparation, certification and filing in accordance with Rule 11(A).

(c) In juvenile termination of parental rights and juvenile child in need of services appeals, the Clerk shall notify the trial court clerk when the Appellant's Brief has been filed, and the trial court clerk will then transmit one (1) copy of the Transcript to the Clerk in accordance with Rules 28 and 29.

(d) Any party may move the Court on Appeal to order the trial court clerk to transmit the Transcript at a different time than provided for in this Rule.

(2) Any part may withdraw the Transcript, or, at the trial court clerk's option, a copy, at no extra cost, from the trial court clerk for a period not to exceed the period in which the party's brief is to be filed.[16]

Rule 14 now requires conventional, rather than electronic filing, for interlocutory appeals taken as a matter of right;[17] for discretionary interlocutory

16. *See generally* Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1602-MS-86 (Ind. Dec. 8, 2016) [hereinafter Dec. 8, 2016 Order], http://www.in.gov/judiciary/files/order-rules-2016-1208-appellate.pdf [https://perma.cc/EG4J-N783].

17. *See* Apr. 12, 2016 Order, *supra* note 3, at 6.

appeals;[18] for notice of appeals, if the Court of Appeals accepts jurisdiction over the discretionary interlocutory appeal;[19] and for motions requesting the Court of Appeals to accept jurisdiction over interlocutory appeals of class action certification decisions.[20]

Rule 14.1(B) now provides that the Department of Child Services shall "conventionally" file a Notice of Expedited Appeal relating to "the trial court's order of placement and/or services."[21] The following language has been deleted from Rule 14.1(D): "A party shall file its original Memorandum and eight (8) copies."[22] Rule 14.1(J) now provides that if service is done by mail or third-party carrier under newly added Rule 68(F)(2), then service shall also be done contemporaneously by fax or email to all known party fax numbers or email addresses.[23] Rule 16(E) now requires attorneys to "immediately update their contact information on the Indiana Supreme Court Roll of Attorneys using" the designated website.[24]

Rule 22(C) now requires citations to an appendix to include the appendix volume number.[25] Rule 23(A) now provides that "[d]ocuments exempted from E-Filing under Rule 68" will be deemed filed when personally delivered to the clerk, deposited in the U.S. mail, or deposited with a third-party carrier.[26] Rule 23(A) now provides that "[d]ocuments not exempted from E-Filing under Rule 68 will be deemed E-Filed with the Clerk, subject to payment of all applicable fees, on the date and time reflected in the Notice of Electronic Filing. *See* Appellate Rule 68(I)."[27]

Rule 23(C) now includes the following language: "**Documents Tendered with Motions Seeking Leave to File.** When a document tendered with a motion is ordered filed by the Court, any time limit for a response to that document shall run from the date on which the document is filed."[28] Rule 23(C) no longer requires that a certain number of copies of different filings be submitted.[29] And Rule 23(E) now provides that "E-Filed documents submitted through IEFS shall comply with Rule 68(H)."[30]

The following language was added to Rule 23(F)(3)-(4):

(3) Procedures for Excluding Court Records from Public Access on

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18. *Id.* at 7.
19. *Id.* at 8.
20. *Id.*
21. *Id.* at 9.
22. *Id.* at 10.
23. *Id.* at 11.
24. *Id.* at 12.
25. *Id.* at 13.
26. *Id.* at 14.
27. *Id.*
28. *Id.*
29. *Id.* at 14-15.
30. *Id.* at 15.

Appeal. . . .

(a) Notice to maintain exclusion from Public Access.

(i) In cases where the Court Record is excluded from Public Access pursuant to Administrative Rule 9(G)(2), 9(G)(3), or 9(G)(4), the party or person submitting the confidential record must provide the separate written notice required by Administrative Rule 9(G)(5)(a) identifying the specific 9(G)(2) or 9(G)(3) ground(s) upon which exclusion is based. (See Form # App.R. 11-5).

(ii) In cases where all Court Records are excluded from Public Access in accordance with Administrative Rule 9(G)(1), no notice of exclusion from Public Access is required.

(b) Public Access and Non-Public Access Versions. Where only a portion of the Court Record has been excluded from Public Access pursuant to Administrative Rule 9(G)(2) or 9(G)(3), the following requirements apply:

(i) Public Access Version.

a. If an appellate filing contains confidential Court Records to be excluded from Public Access, the confidential Court Record shall be omitted or redacted from this version.

b. The omission or redaction shall be indicated at the place it occurs in the Public Access version. If multiple pages are omitted, a separate place keeper insert must be inserted for each omitted page to keep PDF page numbering consistent throughout.

c. If the entire document is to be excluded from Public Access, the Administrative Rule 9(G)(5)(a) Notice filed with the document will serve as the Public Access Version.

(ii) Non-Public Access Version.

a. If the omitted or redacted Court Record is not necessary to the disposition of the case on appeal, the excluded Court Record need not be filed or tendered in any form and only the Public Access version is required. The Administrative Rule 9(G)(5)(a) Notice should indicate this fact. (See Form # App.R. 11-6).

b. If the omitted or redacted Court Record is necessary to the disposition of the case, the excluded Court Record must be separately filed or tendered as follows.

1. The first page of the Non-Public Access Version should be conspicuously marked “Not for Public Access” or “Confidential,” with the caption and number of the case clearly designated.

2. The separately filed Non-Public Access version shall consist of a complete, consecutively paginated replication including both the Public Access material and the Non-Public Access material.

3. Use of green paper is abolished for E-Filing.

> Pages in the Non-Public Access version containing Court Records that are excluded from Public Access shall instead be identified with a header, label, or stamp that states, "CONFIDENTIAL PER A.R. 9(G)" or "EXCLUDED FROM PUBLIC ACCESS PER A.R. 9(G)."
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> (iii) The requirements in Rule 23(F)(3)(b) do not apply to cases in which all Court Records are excluded from Public Access pursuant to Administrative Rule 9(G)(1).
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> (4) E-Filing document security codes settings.
>
> (a) Where only a portion of the Court Record has been excluded from Public Access pursuant to Administrative Rule 9(G)(2) or 9(G)(3), the E-Filing document security codes setting for the Public Access Version shall be "Public Document."
>
> (b) Where only a portion of the Court Record has been excluded from Public Access pursuant to Administrative Rule 9(G)(2) or 9(G)(3), the E-Filing document security codes setting for the Non-Public Access Version shall be "Confidential document under Admin. Rule 9."
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> (c) In cases in which all Court Records are excluded from Public Access pursuant to Administrative Rule 9(G)(1), the E-Filing document security codes setting shall be "Confidential document under Admin. Rule 9."[31]

Rule 24(A)(1)(c) now provides that the notice of appeal shall be served on "the Court Reporter by electronic transmission."[32] Rule 24(A)(4) does not require conventionally filed appendices in criminal appeals to be served on the state's attorney general.[33] In contrast, electronically filed appendices in criminal appeals "shall be served on [Indiana's] Attorney General."[34]

Rule 24(C) now provides that e-filed documents will be deemed served when they are "electronically served through the IEFS in accordance with Rule 68(F)(1)."[35] Rule 68(F)(1) is new and provides that "E-Service of a document through the IEFS is deemed complete upon transmission, as confirmed by the Notice of Electronic Filing associated with the document."[36] Rule 24(C) provides that "[d]ocuments exempted from E-Service will be deemed served when they are" personally delivered, deposited in the mail, or deposited with a third-party carrier.[37]

Critically, Rule 25(C) now provides that the three-day extension of time to

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31. *Id.* at 16-17.
32. *Id.* at 17.
33. *Id.* at 18.
34. *Id.*
35. *Id.*
36. *Id.* at 33.
37. *Id.* at 18.

file responses or replies, when a document is served by mail or third-party carrier, does *not* apply to e-filed documents: Rule 25(C) does not "extend any time period when service is made by E-Service pursuant to Rule 68(F)(1)."[38] This change is sure to be a trap for the unwary.

Rule 26(A) provides that the clerk will electronically transmit all orders, opinions, and notices "to all parties and attorneys of record who are not exempted pursuant to Rule 68(C)(2) from the requirement that they file electronically.[39] Rule 68(C)(2) now provides that "[a]ttorneys who wish to be exempted from the requirement that they file electronically may file a motion for electronic filing exemption," but the "motion will be granted only upon a showing of good cause."[40] Rule 26(B) provides that the clerk will send all orders, opinions, and notices by regular mail to "parties and attorneys exempted from the requirement that they file electronically," unless the party or attorney requests FAX transmission.[41] A request to receive FAX transmission no longer needs to include an electronic mail address, and Rule 26(B) no longer includes the following language: "A party requesting electronic mail or FAX transmission may request either, but not both."[42]

Rule 26(C) no longer requires the clerk to "retain a copy of the sent electronic mail as a record of transmission."[43] In addition, Rule 26(C) no longer includes the following language: "When transmittal is made by electronic mail or FAX, no other transmission will be made."[44]

Rule 28 has been substantially amended (struck through language deleted; underlined language added):

> **Rule 28. Preparation Of Transcript ~~In Paper Format~~By Court Reporter**
>
> **A. ~~Paper~~Transcript.** ~~Except as provided in Rule 30, t~~The ~~c~~Court ~~r~~Reporter shall prepare an electronic ~~paper t~~Transcript in accordance with Appendix A. ~~as follows:~~
>
> ~~(1) *Paper*. The Transcript shall be prepared upon 8 1/2 x 11 inch which paper.~~
>
> ~~(2) *Numbering*. The lines of each page shall be numbered and the pages shall be numbered at the bottom. Each page shall contain no less than twenty-five (25) lines unless it is a final page. The pages of the Transcript shall be numbered~~

38. *Id.* at 19.
39. *Id.*
40. *Id.* at 32.
41. *Id.* at 19.
42. *Id.*
43. *Id.*
44. *Id.* at 20.

consecutively regardless of the number of volumes the Transcript requires.

(3) *Margins*. The margins for the text shall be as follows:

Top margin: one (1) inch from the edge of the page.

Bottom margin: one (1) inch from the edge of the page.

Left margin: no more than one and one-half (1 1/2) inch from the edge of the binding.

Right margin: one (1) inch from the edge of the page.

Indented text: no more than two (2) inches from the left edge of the binding.

(4) *Header or Footer Notations*. The Court Reporter shall note in boldface capital letters at the top or bottom of each page where a witness' direct, cross, or redirect examination begins. No other notations are required.

(5) *Typing*. The typeface shall be no larger than 12 point type. Line spacing shall be no greater than double spacing.

(6) *Binding*. The Transcript shall have a front and back cover and shall be bound at the left no more than one=half (1/2) inch from the edge of the page. The Transcript shall be bound using any method which is easy to read and permits easy disassembly for copying. No more than two hundred fifty (250) pages shall be bound into any one volume.

(7) *Title Page and Cover*. The title page of each volume shall conform to Form #App.R. 28-1, and the cover shall be clear plastic.

(8) *Table of Contents*. The Court Reporter shall prepare a table of contents listing each witness and the volume and page where that witness' direct, cross, and redirect examination begins. The table of contents shall identify each exhibit offered and shall show the Transcript volumes and pages at which the exhibit was identified and at which a ruling was made on its admission in evidence. The table of contents shall be a separately bound volume.

(9) Court Records excluded by Administrative Rule 9(G).

~~(a) In cases where all of the Court Records are excluded from Public Access pursuant to Administrative Rule 9(G)(1), the Transcript shall be excluded from Public Access.~~

~~(b) If, during the hearing or trial a party or person identified any oral statement(s) to be excluded from Public Access, the Court Report must comply with the requirements of Administrative Rule 9(G)(5)(b) with regard to the statement(s) and must note in the Transcript the specific 9(G)(2) or 9(G)(3) ground(s) identified by the party or person.~~

~~(c) Additionally, until the time the Transcript is transmitted to the Court on Appeal, any party or person may file written notice with the Trial Court identifying:~~

~~(i) the transcript page and line number(s) containing any Court Record to be excluded from Public Access; and~~

~~(ii) the specific Administrative Rule 9(G)(2) or 9(G)(3) grounds upon which that exclusion is based. (See Form #App.R. 11-3.)~~

~~This written notice must be served on the Court Reporter and, upon receipt of the written notice, the Court Reporter must refile the Transcript in compliance with the requirements of Administrative Rule 9(G)((5)(b) and must note in the Transcript the specific 9(G)(2) or 9(G)(3) ground(s) identified by a party or person.~~

~~(d) After the transcript has been transmitted to the Court on Appeal, any request by a party or person to exclude a Court Record in the Transcript from Public Access must be made to the Court on Appeal and must contain the specific Administrative Rule 9(G)(2) or 9(G)(3) ground(s) upon which that exclusion is based. Upon receipt of an order from the Court on Appeal, the Court Reporter must re-file the Transcript in compliance with the requirements of Administrative Rue 9(G)(5)(b).~~

B. Certification. The Court Reporter shall certify the ~~t~~Transcript is correct.~~, and file the certificate with the trial court clerk or appropriate administrative officer.~~ The Court Reporter's certification shall be the last page of the last volume of the Transcript, signed by the Court Reporter in accordance with Appendix A.

C. ~~Copy of Paper Transcript in Electronic Format~~ Submission of Electronic Transcript. Following certification of the Transcript, the Court Reporter shall seal the official record and official working copy in an envelope or package bearing the trial court case number and marked "Transcript." The Court Reporter shall retain the Court Reporter's copy of the electronic Transcript. The sealed electronic Transcript copies, separate Exhibit volume(s), and photographic reproductions of oversized exhibits (if included pursuant to Rule 29(C)) shall be filed with the trial court clerk in accordance with Rule 11. ~~All paper Transcripts generated on a word processing system shall be accompanied by a copy of the Transcript in electronic format.~~

D. ~~Electronic Transcripts in Mandate Cases.~~ ~~In cases arising under Ind. Rule Trial 60.5, the Transcript shall be in an electronic format as set out in Rule 30(A)(1), (6), and (B), or as otherwise ordered pursuant to Rule 61.~~ **Technical Standards.** The Court Reporter shall prepare the electronic Transcript pursuant to the technical standards set forth in Appendix A of these rules.

E. Processing and Transmission of Electronic Transcript by Clerk. Upon receipt of the electronic Transcript, the trial court clerk shall file stamp the envelope that will be used to store the electronic data storage device; the original envelope submitted by the Court Reporter may be used for this purpose, if appropriate. The trial court clerk shall then transmit the electronic Transcript to the clerk either through the IEFS or by personal delivery, U.S. mail, or third-party commercial carrier. The trial court clerk shall store the electronic records in conformity with Administrative Rule 6.[45]

Rule 28(C) was initially amended to permit the court reporter to either e-file the transcript or to submit it on physical media.[46] The rule was then substantially amended a second time (struck through language removed; underlined language added):

Rule 28. Preparation Of Transcript By Court Reporter

. . . .

C. Submission of Electronic Transcript.

(1) Following certification of the Transcript, the Court Reporter shall submit the electronic Transcript using one of the following methods:

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45. *Id.* at 20-22.

46. *See* Order Amending Indiana Rules of Appellate Procedure, No. 94S00-1602-MS-86 (Ind. June 20, 2016) [hereinafter Jun 20, 2016 Order], http://www.in.gov/judiciary/files/order-rules-2016-0620-appellate.pdf [https://perma.cc/3TYN-G23K].

(a) *Submission by E-Filing*. If e-filing is required in the trial court by Trial Rule 86(D)(1) and the documentary exhibits are in electronic formclerk is listed, individually or by organization, on the Public Service List, then the Court Reporter shall transmit the electronic Transcript to the trial court clerk through the IEFS using a "Serve" filing type under the Court on Appeal case number.

(b) *Submission on Physical Media*. If the trial court is not listed, individually or by organization, on the Public Service ListTranscript is not submitted by e-filing, then the Court Reporter shall seal two (2) copies of the Transcriptthe official record and official working copy in an envelope or package bearing the trial court case number and marked "Transcript." The envelope or package containing the electronic Transcript copies shall be filed with the trial court clerk in accordance with Rule 11. The Court Reporter shall also retainthe Court Reporter's a copy of the electronic Transcript. The sealed electronic Transcript copies shall be filed with the trial court clerk in accordance with Rule 11.

. . . .

E. Processing and Transmission of Electronic Transcript by Clerk.

(1) If the electronic Transcript is submitted by E-Filing, the trial court clerk shall enter the date of submission on the Chronological Case Summary and shall transmit the electronic Transcript to the clerk through the IEFS.
(2) If the electronic Transcript is submitted on Physical Media, Upon receipt of the electronic Transcript, the trial court clerk shall file stamp the envelope that will be used to store the electronic data storage device; the original envelope submitted by the Court Reporter may be used for this purpose, if appropriate. The trial court clerk shall then transmit one (1) copy of the electronic Transcript to the clerk either through the IEFS or by personal delivery, U.S. mail, or third-party commercial carrier.
(3) The trial court clerk shall retain the second copy of the electronic Transcript and store the electronic records in conformity with Administrative Rule 6.

F. Court Records Excluded by Administrative Rule 9(G).

(1) In cases where all of the Court Records are excluded from Public Access pursuant to Administrative Rule 9(G)(1), the Transcript shall be excluded from Public Access.

> (2) If, during the hearing or trial a party or person identified any exhibit or oral statement(s) to be excluded from Public Access, the Court Reporter must comply with the requirements of Appellate Rule 23(F) with regard to the exhibit or statement(s) and must note in the Transcript the specific Administrative 9(G)(2) or 9(G)(3) ground(s) identified by the party or person.
>
> (3) Additionally, until the time the Transcript is transmitted to the Court on Appeal, any party or person may file written notice with the Trial Court identifying:
>
> > (a) the exhibit or Transcript page and line number(s) containing any Court Record to be excluded from Public Access; and
> >
> > (b) the specific Administrative Rule 9(G)(2) or 9(G)(3) grounds upon which that exclusion is based. (See Form #App.R. 11-3).
> >
> > This written notice must be served on the Court Reporter and, upon receipt of the written notice, the Court Reporter must refile the Transcript in compliance with the requirements of Appellate Rule 23(F) and must note in the Transcript the specific Administrative Rule 9(G)(2) or 9(G)(3) ground(s) identified by a party or person.
>
> (4) After the Transcript has been transmitted to the Court on Appeal, any request by a party or person to exclude a Court Record in the Transcript from Public Access must be made to the Court on Appeal and must contain the specific Administrative Rule 9(G)(2) or 9(G)(3) ground(s) upon which that exclusion is based. Upon receipt of an order from the Court on Appeal, the Court Reporter must re-file the Transcript in compliance with the requirements of Appellate Rule 23(F).[47]

Previously, Rule 30 provided a procedure for the preparation of an electronic transcript "[w]ith the approval of all parties."[48] Rule 30 has been deleted.[49]

Rule 41 now provides that a proposed *amicus curiae* shall tender its brief in the following manner:

> by submitting it with its motion to appear as *amicus curiae*, except that if an entity has been granted leave to appear as *amicus curiae* in a case before the Court of Appeals or Tax Court, then that entity shall file any briefing pertaining to a petition to transfer jurisdiction or for review to the Supreme Court within the time allowed the party with whom the

47. Dec. 8, 2016 Order, *supra* note 16, at 4-5.

48. Apr. 12, 2016 Order, *supra* note 3, at 23.

49. *Id.* at 23-24.

proposed *amicus curiae* is substantively aligned.[50]

Rule 43(B) now provides that paper weight requirements apply only to "[c]onventionally filed documents."[51] The following language was deleted from Rule 43(C): "It may be copied by any copying process that produces a distinct black image on white paper."[52] That rule also now provides that conventionally filed documents may only have typing on one side of the paper.[53] Rule 43(F) now requires consecutive numbering beginning with the first page: "All pages of the brief, including the front page (see Rule 43(I)), table of contents, and table of authorities, shall be consecutively numbered at the bottom beginning with numeral one."[54]

Rule 43(H) now provides that a header must be included on each page, except page one:

> Each page, except for the front page, of the document shall contain a header that lists the name of the party(ies) filing the document and the document name (e.g., "Brief of Appellant Acme Co." or "Appellee John Doe's Brief in Response to Petition to Transfer"). The header shall be aligned at the left margin of the document.[55]

Rule 43(H) no longer requires that front and back covers be specified colors.[56] Rule 43(J) now provides that conventionally filed documents will "be bound with a single staple or binder clip. They shall not be bound in book or pamphlet form."[57] The following language was deleted from Rule 43(J): "Any binding process which permits the documents to lie flat when opened is preferred."[58] Rule 43(K) has been deleted: "All documents may be accompanied by a copy of the document in electronic format. Any electronic format used by the word processing system to generate the document is permissible."[59]

Rule 46(A)(10) no longer requires that a brief include a "written opinion, memorandum of decision or findings of fact."[60] Instead, Rule 46(A)(12) now provides the following: "Any appealed judgment or order (including any written opinion, memorandum of decision or findings of fact and conclusions thereon relating to the issues raised on appeal) shall be submitted with the brief as a separate attachment. These documents shall be contained within conventionally

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50. *Id.* at 25.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 26.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 28.

filed briefs."[61] Rule 46(F) now provides that appendices shall be separately submitted and no longer need to be bound, as the rule previously required.[62]

The following language has been deleted from Rule 46(H): "Note that only one copy of the Appendix is filed (see Rule 23(C)(6)), but an original and eight copies of any Addendum to Brief must be filed, in accordance with Rule 23(C)(4)."[63] Rule 46(H) no longer requires an addendum to a brief be bound.[64] The rule now provides that the front page to a brief's addendum shall be of a similar style to the brief it accompanies, that the first document in the addendum shall be a table of contents, that all pages, including the front page, shall be consecutively numbered, but "the front page, table of contents, and certificate of service shall not be included in the fifty (50) page length limit of this rule."[65]

Rule 47 now provides that an amended brief or petition shall be "titled as such on the front page."[66] Previously, the rule had required an amendment to be submitted with sufficient copies, and it allowed for a request to retrieve the original briefs.[67] Rule 49 now requires an appendix to be filed "on or before the date on which the appellant's brief is filed."[68] Previously, the appendix needed to be filed with the brief.[69]

Rule 51(A) now provide that conventionally filed appendices "shall be on 8 ½ by 11 inch white paper."[70] The requirement that the "left margin shall be wide enough to permit the text to be read after binding" has been deleted.[71] Rule 51(C) provides that "[e]ach Appendix volume shall be independently and consecutively numbered at the bottom without obscuring the page numbers existing on the original documents. Each volume shall begin with the number one on its front page."[72]

Rule 51 has been substantially amended (struck through language removed; underlined language added):

> **D. Volumes.** All Appendices shall be submitted ~~bound~~ separately from the brief. An Appendix shall consist of a table of contents (see Rule 51(F)) and one or more additional volumes, and each Appendix volume must be limited in size to the lesser of ~~No more than~~ two hundred fifty (250) pages or 20 megabytes (20MB). The front page shall be included in the two hundred fifty (250) page limit of this rule. Conventionally

61. *Id.*
62. *Id.* at 29.
63. *Id.*
64. *Id.*
65. *Id.* at 29-30.
66. *Id.* at 30.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*

filed ~~Each~~ volumes shall be bound with a single staple or binder clip. They shall not ~~along the left margin. The document shall be bound~~ be bound in book or pamphlet form. ~~Each volume shall contain a table of contents for the entire Appendix.~~

E. Front Page~~Cover~~. Each volume of an ~~separately bound~~ Appendix shall have a front ~~and back cover. Each cover of a separately bound Appendix shall be the same color as the brief filed by that party, and the front cover shall state the name of the party submitting the appendix and the brief with which it is submitted, if any. The front cover~~ page that ~~shall~~ conforms substantially to Form #App.R. 51-1.

F. Table of Contents. An Appendix shall contain a single table of contents for the entire Appendix, which shall be submitted as Appendix Volume 1, regardless of the number of volumes.[73]

Rule 63(C) now requires conventional filing for petitions to the Supreme Court to review tax court decisions.[74] Rule 64(B) now specifies that a federal court does not need to electronically file certified questions.[75]

Rule 68 is an entirely new rule and provides the following:

Rule 68. Electronic Filing and Electronic Service

A. User Agreement Required. Every User must execute a User Agreement with one or more Electronic Filing Service Provider(s) before that User may utilize the IEFS.

B. [Reserved]

C. Electronic Filing of Documents.

(1) Unless otherwise permitted by these rules, all documents submitted for filing in the Indiana Supreme Court or Court of Appeals by an attorney must be filed electronically using the IEFS. The E-Filing of documents shall be controlled by the case number in the IEFS designated by the User.

(2) Attorneys who wish to be exempted from the requirement that they file electronically may file a motion for electronic filing exemption. The motion must be filed in each pending case to which these rules are applicable. The motion will be granted only upon a showing of good cause..

D. Proof of Filing. Users should print or otherwise save each Notice of Electronic Filing as proof of E-Filing. Confirmation of E-Filing may also

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73. *Id.* at 31.
74. *Id.*
75. *Id.* at 32.

be made by referring to the Chronological Case Summary of the court in which the case is pending through the Case Management System of that court.

E. Conventionally Filed Documents. Conventionally filed documents must be entered into the Case Management System by the Clerk. If the original documents cannot be converted into a legible electronic document, then the originals must be placed into the case file and that action must be noted in the Chronological Case Summary. The filer must also conventionally serve these documents in accordance with these Rules.

F. Service.

(1) Service on Public Service Contact. Registered Users must serve all documents in a case upon every other party who is a Public Service Contact through E-Service using the IEFS. E-Service has the same legal effect as service of an original paper document. E-Service of a document through the IEFS is deemed complete upon transmission, as confirmed by the Notice of Electronic Filing associated with the document. Exempt parties must serve all documents in a case as provided by these Rules.

(2) Service on Others. Service of documents on attorneys of record or on unrepresented parties who are not Public Service Contacts must be as provided by these Rules.

G. Format Requirements.

(1) Documents filed electronically must be formatted in conformity with these Rules and the requirements of the IEFS.

(2) All documents must be submitted in the manner required by the EFSP. The IEFS may be accessed via any Internet connection available to the Registered User and at Public Access Terminals located in the office of the Clerk or the office of a county clerk.

H. Signature.

(1) All documents electronically filed that require a signature must include a person's signature using one of the following methods:

(a) a graphic image of a handwritten signature, including an actual signature on a scanned document; or

(b) the indicator "/s/" followed by the person's name.

(2) A document that is signed and E-Filed must be subject to the terms and provisions of Appellate1 23(E). A Registered User may include the signature of other attorneys in documents E-Filed with the court but in doing so represents to the court that any such signature is authorized.

I. Time and Effect. Subject to payment of all applicable fees, a document is considered E-Filed on the date and time reflected in the

Notice of Electronic Filing associated with the document. E-Filing must be completed before midnight to be considered filed that day, and compliance with filing deadlines is determined in accordance with the time zone in the location of the court where the case is pending. E-Filing under these rules shall be available 24 hours a day, except for times of required maintenance.

J. Official Court Record. The electronic version of a document filed with or generated by the court under this rule is an official court record.

K. [Reserved]

L. Certain Court Records Excluded From Public Access. With respect to documents filed in electronic format, the court may, by rule, provide for compliance with this rule in a manner that separates and protects access to Court Records excluded from Public Access.

M. Inability to E-File.

(1) Indiana E-Filing System Failures.

(a) The rights of the parties shall not be affected by an IEFS failure.

(b) When E-Filing is prevented by an IEFS failure, a User or party may revert to conventional filing.

(c) When E-Filing is prevented by an IEFS failure, the time allowed for the filing of any document otherwise due at the time of the IEFS failure must be extended by one day for each day on which such failure occurs, unless otherwise ordered by the Court.

(d) Upon motion and a showing of an IEFS failure the Court must enter an order permitting the document to be considered timely filed and may modify responsive deadlines accordingly.

(2) Other Failures Not Caused by the User who was Adversely Affected. When E-Filing is prevented by any other circumstance not caused by the User who was adversely affected, the User may bring such circumstances to the attention of the Court and request relief as provided in Appellate Rule 35, or the User may revert to conventional filing.[76]

Sample Form 9-1 Notice of Appeal has been non-substantively amended to update references to the Administrative Rules and Appellate Rules.[77] Sample Forms 11-5 ("Notice of Exclusion of Confidential Information from Public Access") and 11-6 ("Notice of Exclusion of Confidential Information That Is Not

76. *Id.* at 32-34.

77. *Id.* at 34-38.

Necessary To The Disposition Of The Case") are new.[78] They require the party seeking to exclude documents to list the documents and to list the reasons under Administrative Rule 9(G) for the exclusion.[79] Sample Form 16-1 was non-substantively amended.[80]

Appendix A (Standards for Preparation of Electronic Transcripts) is new, and it provides instructions to court reporters for preparing electronic transcripts.[81] Appendix A was subsequently amended, effective January 1, 2017, to remove language relating to Administrative Rule 9.[82] Appendix B, which provided standards for court reporters to prepare electronic transcripts, was deleted and portions of it were incorporated into Appendix A.[83]

The Appellate Rules no longer conclude with a section entitled "Effective Dates," which provided cut-offs for when the Appellate Rules applied.[84] The sample forms table now reflects that Forms 11-5 and 11-6 had been added.[85] Sample Form 11-3 now provides that under "Administrative Rule 9(G), Appellate Rule 23, Appellate Rule 28 and Appendix A § 14," confidential information in the transcript can be excluded from public access.[86] The sample form now requires the party requesting that information be excluded to list the page number, line number, and reason for exclusion.[87] The form no longer requires that the information to be excluded be filed on green paper.[88] Sample Form 11-4 was amended in the same ways as Sample Form 11-3.[89] Sample Form 16-2 was non-substantively amended.[90]

Finally, on June 20, 2016, the Supreme Court clarified the effect of the Appellate Rule amendments.[91] The order provided that a "Clerk or Court Reporter shall prepare the Clerk's Record, Transcript, and any other materials filed with the Court on Appeal based upon on the rule in effect at the time the Notice of Appeal was filed."[92] In contrast, "Attorneys shall prepare their briefs, appendices, and other materials filed with the Court on Appeal based upon the rule in effect

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78. *Id.* at 39-42.

79. *Id.*

80. *Id.* at 42-44.

81. *Id.* at 45-51.

82. Dec. 8, 2016 Order, *supra* note 16, at 5.

83. Apr. 12, 2016 Order, *supra* note 3, at 50-51.

84. June 20, 2016 Order, *supra* note 46, at 2.

85. *Id.*

86. *Id.* at 4.

87. *Id.*

88. *Id.*

89. *Id.* at 6-7.

90. *Id.* at 8-10.

91. *See* Order Clarifying Appellate Rule Amendments Effective July 1, 2016, No. 94S00-1602-MS-86 (Ind. June 20, 2016), http://www.in.gov/judiciary/files/order-rules-2016-0620-appellate-clarification.pdf [https://perma.cc/X3GV-YAYU].

92. *Id.*

at the time those items are filed with the Court on Appeal."[93]

II. CASE LAW INTERPRETING APPELLATE RULES

The Indiana Court of Appeals and Indiana Supreme Court issued a number of decisions analyzing appellate court jurisdiction, Supreme Court jurisdiction over the practice of law, appeals from agreed judgements, final judgments under Appellate Rule 2(H), and Appellate Rule 56(A).

A. Appellate Court Jurisdiction

In *Ackerman v. State*, in 1977, a toddler died and the autopsy revealed the death to be a homicide.[94] Thirty-six years later, the police received a tip that Ackerman may have killed the child.[95] "The trial court ultimately found Ackerman guilty of second degree murder," and he appealed.[96] "Ackerman then filed a verified motion for the Court of Appeals to determine, pursuant to Indiana Appellate Rule 6, that the Indiana Supreme Court had jurisdiction over the case and to stay briefing pending resolution of the jurisdictional issue."[97] "The Court of Appeals ordered that the appeal be transferred to [the Indiana Supreme Court] under Indiana Appellate Rule 6, and [the Indiana Supreme Court] accepted jurisdiction."[98] Appellate Rule 6 provides the following:

> If the Supreme Court or Court of Appeals determines that an appeal or original action pending before it is within the jurisdiction of the other Court, the Court before which the case is pending shall enter an order transferring the case to the Court with jurisdiction, where the case shall proceed as if it had been originally filed in the Court with jurisdiction.[99]

The Supreme Court noted that "[a]lthough Ackerman's appeal does not fall under this Court's mandatory and exclusive jurisdiction, as set out in Indiana Appellate Rule 4, the State did not oppose the motion to transfer to this Court and had no objection to the exercise of original jurisdiction by this Court."[100] "This Court may 'elect to accept jurisdiction outside the regular process' set out in the appellate rules."[101] The Supreme Court then affirmed the conviction.[102]

In *Pain Medicine & Rehabilitation Center v. State*, the State sought to "compel PMRC to comply with the subpoena" under Indiana Code section 4-6-

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93. *Id.*
94. 51 N.E.3d 171, 175-76 (Ind.), *cert. denied*, 137 S. Ct. 475 (2016).
95. *Id.* at 176.
96. *Id.* at 177.
97. *Id.*
98. *Id.* (footnote omitted).
99. IND. R. APP. P. 6.
100. *Ackerman*, 51 N.E.3d at 177 n.2.
101. *Id.* (quoting Tyson v. State, 593 N.E.2d 175, 181 (Ind. 1992)).
102. *Id.* at 177.

10-3 (2015), which permits the State to apply to a court to enforce a subpoena.[103] PMRC sought a preliminary injunction.[104] The trial court denied the motion, and PMRC appealed.[105] PMRC argued that it could appeal as of right under Appellate Rule 14(A)(5), which provides that an appeal from an order refusing to grant a preliminary injunction may be brought as of right.[106] The Court of Appeals noted that Indiana Criminal Rule 2 and Indiana Trial Rule 45 permit parties to quash subpoenas.[107] The Court of Appeals concluded that "while PMRC styled its motion in the trial court as a motion for a preliminary injunction, that was incorrect. Accordingly, PMRC is not entitled to appeal as of right under Indiana Appellate Rule 14(A)(5). Because there is no other basis for appellate jurisdiction, we dismiss."[108]

In 2014, in *In re Adoption of O.R.*, the Indiana Supreme Court held that Indiana's appellate courts had jurisdiction over an appeal, despite the failure to timely file the notice of appeal.[109] Further, the Court held that the case could proceed if the party demonstrated "extraordinarily compelling reasons."[110] The Court of Appeals continues to apply this precedent.

"Indiana Appellate Rule 9 provides that a party initiates an appeal from a final judgment by filing a Notice of Appeal with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court within thirty days after the entry of the final judgment is noted in the Chronological Case Summary."[111] In *Milbank Insurance Co. v. Indiana Insurance Co.*, "Milbank filed its notice of appeal with the trial court only. Although previously that was the proper procedure for initiating an appeal, *see* App. R. 9(A)(1) (2011), such has not been the case since January 1, 2012."[112] "Then, seventy-five days after the trial court's summary judgment order was entered on the CCS and approximately fifty days after filing an ineffective notice of appeal, Milbank filed a 'motion to clarify' . . . ."[113] But "Indiana does not recognize a 'motion to clarify,'" and the "fact that the trial court purported to rule on the motion to clarify is immaterial" because the trial court had lost jurisdiction over the matter after entry of a final judgment.[114]

Applying *In re Adoption of O.R.*, the Court of Appeals concluded that "Milbank's failure to timely file a notice of appeal from the trial court's final judgment forfeited its right to appeal absent 'extraordinarily compelling

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103. 52 N.E.3d 881, 882 (Ind. Ct. App.), *trans. denied*, 64 N.E.3d 1205 (Ind. 2016).
104. *Id.* at 882-83.
105. *Id.*
106. *Id.* at 883.
107. *Id.* at 884.
108. *Id.* at 884-85.
109. 16 N.E.3d 965, 971 (Ind. 2014).
110. *Id.*
111. Milbank Ins. Co. v. Ind. Ins. Co., 56 N.E.3d 1222, 1226 (Ind. Ct. App. 2016).
112. *Id*. at 1227.
113. *Id.*
114. *Id.* at 1227-28.

reasons.'"[115] "We do not find any *extraordinarily* compelling reasons to consider this untimely appeal and Milbank does not offer any."[116] Despite concluding that extraordinary reasons did not exist, the Court of Appeals addressed the merits of the appeal anyway: "However, given our long-standing preference for deciding cases on the merits, . . . and given that the motions panel denied the motion to dismiss and the parties thereafter fully briefed this case, we will proceed to consider the merits of the parties' arguments."[117]

In *Elliott v. Dyck O'Neal, Inc.*, a bank foreclosed on the Elliotts' home.[118] In 2009, the assignee of the foreclosure judgment sought to garnish the Elliotts' wages to satisfy the judgment.[119] Counsel did not represent the Elliotts at the hearing on the motion.[120] The trial court "entered a garnishment order," which the Elliotts did not appeal.[121] In 2014, the Elliotts, now represented by counsel, sought a refund of the garnishment payments because the foreclosure was an *in rem* judgment.[122] The trial court denied the motion, and the Elliotts appealed.[123] The Court of Appeals "acknowledge[d] that the Elliotts' motion for refund appears to be, in essence, a collateral attack of the trial court's September 2009 garnishment, which required the Elliotts to make the payments for which they now seek a refund."[124] Relying on *In re Adoption of O.R.*, the Court of Appeals concluded,

> Although they did not initiate an appeal from this garnishment order, we find that there are "extraordinarily compelling reasons" to address the merits of such an attack of that order, which improperly ordered the Elliotts to pay a deficiency judgment based on an *in rem* judgment in a foreclosure order.[125]

Judge Brown dissented, and he distinguished *In re Adoption of O.R.*[126]

> Even assuming that analysis in *O.R.* applied, I would find no such extraordinary compelling reasons exist in this case, especially given the long delay in the challenge to the propriety of the garnishment order. . . . The Elliotts waited over four and a half years to seek relief from the September 2009 garnishment order, and such period of time is not

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115. *Id.* at 1228 (quoting *In re Adoption of O.R.*, 16 N.E.3d at 971).
116. *Id.*
117. *Id.*
118. 46 N.E.3d 448, 451-52 (Ind. Ct. App. 2015), *trans. denied*, 46 N.E.3d 445 (Ind. 2016).
119. *Id.* at 452.
120. *Id.*
121. *Id.* at 453.
122. *Id.* at 454.
123. *Id.* at 455.
124. *Id.* at 459 n.7.
125. *Id.* (quoting *In re* Adoption of O.R., 16 N.E.3d 965, 971 (Ind. 2014)).
126. *Id.* at 460 (Brown, J., dissenting).

reasonable.[127]

In *Robertson v. Robertson*, Jessica Robinson ("Mother") did not timely file a notice of appeal.[128] Based on *In re Adoption of O.R.*, the Court of Appeals agreed to address the merits of the appeal for three reasons: (1) Appellate Rule 1 permits the Court of Appeals to deviate from the Appellate Rules; (2) Mother "attempt[ed] to perfect a timely appeal by filing the September 2015 Notice of Appeal, which the motions panel accepted as being sufficient; and (3) the constitutional dimensions of the parent-child relationship."[129]

In *Doctor v. State*, Doctor sought a discretionary interlocutory appeal.[130]

> For a discretionary interlocutory appeal, Indiana Appellate Rule 14(B) sets forth a specific procedure for initiating the appeal. First, within thirty days of the trial court's issuance of an interlocutory order, a party must file a motion requesting that the trial court certify the order for an interlocutory appeal. App. R. 14(B)(1)(a). Thereafter, within thirty days of a hearing on the matter or, if no hearing is set, within thirty days of the request for certification, the trial court must rule or the motion for certification will be deemed denied. App. R. 14(B)(1)(e). Upon the trial court's certification, the moving party must request that our court accept jurisdiction over the appeal within thirty days. App. R. 14(B)(2)(a). . . . Within fifteen days of our court's order accepting jurisdiction over the interlocutory appeal, "[t]he appellant shall conventionally file a Notice of Appeal with the Clerk."[131]

Doctor filed a notice of appeal *prior* to the Court of Appeals accepting jurisdiction over the appeal, and he then filed a second notice of appeal more than fifteen days *after* the Court of Appeals accepted jurisdiction.[132] That is, "Doctor filed both a premature and belated Notice of Appeal."[133] The Court of Appeals concluded

> that the premature Notice of Appeal did not adversely affect the State. Rather, the State received advanced notice that Doctor sought to appeal the Order, especially in light of the fact that Doctor filed a motion to certify the Order for interlocutory appeal and filed a motion with this court to accept jurisdiction. The defect was cured upon our court's acceptance of jurisdiction. Therefore, we conclude that Doctor's right to appeal should not be forfeited, and we uphold the order of our motions panel denying the State's motion to dismiss.[134]

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127. *Id.* at 461.

128. 60 N.E.3d 1085, 1089 (Ind. Ct. App. 2016).

129. *Id.* at 1090.

130. 57 N.E.3d 846, 851-52 (Ind. Ct. App. 2016).

131. *Id.* (quoting IND. R. APP. P. 14(B)(3)) (alteration in original).

132. *Id.*

133. *Id.*

134. *Id.*

B. Supreme Court Jurisdiction Over the Practice of Law

In *Consumer Attorney Services, P.A. v. State*, the Court of Appeals analyzed whether an attorney exemption to Indiana's Credit Services Organization Act ("CSOA"), Indiana Code Chapter 24-5-15, applied to law firms.[135] In concluding the exception did apply to law firms, despite the statute not expressly providing this, the court noted that under Appellate Rule 4(B) the Supreme Court has exclusive jurisdiction over the practice of law.[136] The Court of Appeals concluded, based on the Indiana Constitution "and the language of Appellate Rule 4(B), that any intrusions upon our supreme court's authority regulating the practice of law in this state must be expressed by our General Assembly in clear and unmistakable language. Such language is lacking under the CSOA."[137] As a result, the Court of Appeals concluded law firms are exempt from the CSOA.[138]

C. Appeal from an Agreed Judgment

In *Gallops v. Shambaugh Kast Beck & Williams*, the Court of Appeals addressed *sua sponte* whether a party can "appeal from an agreed judgment."[139] The Court of Appeals began by quoting Supreme Court precedent which held that a "consent decree is not a judicial determination of the rights of the parties. *It does not purport to represent the judgment of the court, but merely records the agreement of the parties with respect to the matters in litigation. Such decree cannot be reviewed by appeal*."[140] The Court of Appeals reasoned it has "followed this precedent in various appeals since then."[141] The Court of Appeals concluded the agreed judgment could not be appealed because "there is nothing explicit in the agreed judgment concerning an appeal of any issues after entry of the agreed judgment," and nothing indicated "that the trial court intended for the agreed judgment to be appealable."[142]

D. Final Judgments Under Appellate Rule 2(H)

Appellate Rule 2(H)(2) provides that a judgment is final if "the trial court in writing expressly determines under Trial Rule 54(B) . . . that there is no just reason for delay and in writing expressly directs entry of judgment . . . under Trial Rule 54(B) as to fewer than all claims or parties."[143] In *Dotlich v. Tucker Hester,*

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135. 53 N.E.3d 599, 604 (Ind. Ct. App.), *trans. denied*, 64 N.E.3d 1205 (Ind. 2016).
136. *Id.* at 606.
137. *Id.*
138. *Id.* at 606-07.
139. 56 N.E.3d 59, 62 (Ind. Ct. App.), *trans. denied*, 64 N.E.3d 1206 (Ind. 2016).
140. *Id.* at 62-63 (quoting State v. Huebner, 230 Ind. 461, 467 (1952)).
141. *Id.* at 63.
142. *Id.* at 64.
143. IND. R. APP. P. 2(H)(2).

LLC, Tucker moved for summary judgment.[144] During a hearing, Dotlich verbally cross-moved for summary judgment.[145] The Court of Appeals concluded Dotlich could not appeal the denial of the verbal cross-motion because the "trial court's order in this case contains the 'magic language' of Trial Rule 54(B) with respect to its entry of summary judgment 'in favor of Tucker,'" but it "does not include the language of Trial Rule 54(B) with respect to the denial of Dotlich's verbal cross-motion for summary judgment . . . . Accordingly, the portion of the court's order denying Dotlich's verbal cross-motion for summary judgment does not fall under Appellate Rule 2(H)(2)."[146]

In *In re D.W.*, the Court of Appeals analyzed whether a trial court order, which denied a motion to modify a permanency plan, discontinued visitation rights, and ordered counsel to coordinate regarding a hearing on a petition to terminate parental rights, was a final appealable order under Appellate Rule 2(H).[147] The Court of Appeals concluded it was not a final appealable order because it did not operate as a final order by essentially terminating the parent-child relationship.[148]

E. Appellate Rule 56(A)

Appellate Rule 56(A) provides that

> [i]n rare cases, the Supreme Court may, upon verified motion of a party, accept jurisdiction over an appeal that would otherwise be within the jurisdiction of the Court of Appeals upon a showing that the appeal involves a substantial question of law of great public importance and that an emergency exists requiring a speedy determination.[149]

In *Myers v. Crouse Hinds Division of Cooper Industries*, the Supreme Court granted transfer under that rule to determine the "constitutionality of the Indiana Product Liability Act statute of repose."[150] Justice Massa dissented.[151] He began by noting that "the case began with an act of defiance in the trial court," when it "refused to apply our clear and unmistakable precedent."[152] Had the Supreme Court not granted transfer under Appellate Rule 56(A), then Justice Massa concluded the "Court of Appeals would have been duty-bound to apply our law and reverse, with the question then coming to us on transfer in due course."[153]

> But we instead accelerated the process and rewarded this rogue order by

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144. 49 N.E.3d 571, 573 (Ind. Ct. App. 2015), *trans. denied*, 48 N.E.3d 316 (Ind. 2016).
145. *Id.* at 580.
146. *Id.*
147. 52 N.E.3d 839, 840 (Ind. Ct. App.), *trans. denied*, 54 N.E.3d 370 (Ind. 2016).
148. *Id.* at 841-42.
149. IND. R. APP. P. 56(A).
150. 53 N.E.3d 1160, 1162 (Ind. 2016).
151. *Id.* at 1169.
152. *Id.* at 1170 (Massa, J., dissenting).
153. *Id.*

> reaching down and taking the case away from the appellate court. We now compound the error, in my judgment, by affirming that order in a repudiation of settled law that offends stare decisis and may invite re-examination of other precedents to this Court as its membership evolves.[154]

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. Identifying Judicially Noticed Documents for the Record

In *Horton v. State*, the Supreme Court "provide[d] guidance on the importance of identifying judicially noticed documents for the record, both to apprise litigants of the evidentiary basis for the judgment and to facilitate appellate review."[155] In that case, the trial court took judicial notice of the contents of a case file, without "enter[ing] the judicially noticed case file's contents into the record."[156] Horton argued that insufficient evidence supported his conviction because the court records, which supported elevating his offense, were "never entered into the record."[157] The Supreme Court began by noting that Indiana Rule of Evidence 201 "permits courts to take judicial notice of 'records of a court of this state,'" but the rule "is silent on whether a court must enter that document into the record."[158] The court noted a tension between placing evidence in the record and efficient use of judicial notice: "On one hand, it is vital for the parties to know the exact evidentiary basis on which the judgment turned—and for appellate courts to know likewise to facilitate review. On the other hand, the ultimate purpose of judicial notice is *efficient* consideration of uncontroversial facts."[159]

The court emphasized that failure to enter judicially noticed documents into the record could impede judicial review.[160] But with the advent "of a unified statewide electronic case management system (CMS), . . . many court records will soon likewise be at the fingertips of any court, litigant, or member of the general public."[161] The court continued,

> In addition, Indiana Appellate Rule 27 provides that the Record on Appeal includes "all proceedings before the trial court . . . , whether or

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154. *Id.*
155. 51 N.E.3d 1154, 1160 (Ind. 2016).
156. *Id.* at 1157.
157. *Id.* at 1160.
158. *Id.* (quoting IND. R. EVID. 201).
159. *Id.* at 1160-61.
160. *Id.*
161. *Id.*

> not . . . transmitted to the Court on Appeal." Accordingly, even though the usual practice under Appellate Rule 12(A) is for the trial court clerks to "retain the Clerk's Record throughout the appeal," the judicially noticed case file in CM-195 is part of the record in this case. We therefore procured copies of several documents from the CM-195 file from the trial-court clerk—much as the parties could have done under Appellate Rule 32 to resolve disagreements as to the accuracy (including the completeness) of the Clerk's Record.[162] Having reviewed those documents for ourselves in furtherance of our review, we take our judicial notice under Indiana Evidence Rule 201(b)(5) . . . .[163]

The Supreme Court emphasized that while it undertook these efforts, and was permitted to do so under the Appellate Rules, it had no obligation to do so.[164] Instead, it did so "to illustrate the availability of procedures best employed *by the affected parties* when a court takes judicial notice without" entering the documents into the record "and before a unified statewide CMS largely moots these concerns."[165] The court concluded by stating "it is by far the preferable practice to enter into the record the particular documents of which the court is taking judicial notice."[166]

B. Contents of Appellate Briefs

During the survey period, the Court of Appeals offered guidance on the proper contents of appellate briefs.

In *Basic v. Amouri*, the Court of Appeals identified five deficiencies in the appellant's brief.[167]

> First, the statement of facts section includes arguments and conclusions, in violation of Appellate Rule 46(A)(6), which limits the statement of facts to a narrative description of the relevant facts stated in accordance with the appropriate standard of review. . . . [Second], Appellants' statement of the case does not lay out the relevant procedural posture of the case as required by Appellate Rule 46(A)(5), but instead includes allegations and argument. . . .
>
> [Third], Appellants' brief is also deficient with respect to the form of the appealed order. Appellate Rule 46(A)(12) requires an appellant to submit as an attachment to the appellant's brief a copy of the appealed order or judgment. Here, Appellants have submitted a copy of the appealed order, but it is no longer the order as issued by the court. Rather, they have

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162. *Id.* (quoting IND. R. APP. P. 12(A)).

163. *Id.*

164. *Id.* at 1162.

165. *Id.*

166. *Id.* at 1163.

167. 58 N.E.3d 980, 984 (Ind. Ct. App. 2016), *reh'g denied* (Oct. 13, 2016).

> submitted a copy of the order that includes their own handwritten negative commentary throughout. . . . In fact, the order is so heavily marked up with Appellants' scrawlings as to impede our review.
>
> [Fourth, and] [m]ost importantly, Appellants' arguments are not cogent. . . .
>
> . . . .
>
> [Finally,] Appellants have failed to include the appropriate standard of review as required by Appellate Rule 46(A)(8)(b).[168]

In *K.S. v. D.S.*, Birth Mother, who was represented by counsel, submitted an appellant's brief that violated the Appellate Rules in at least six ways, and as a result, the Court of Appeals awarded appellate attorneys' fees.[169] First, Birth Mother's table of authorities failed to include the title of the case she cited, as required by Appellate Rule 22(A).[170] Second, Birth Mother's table of authorities did not reference the page where the cited case appeared, as required by Appellate Rule 46(A)(2), "perhaps because Birth Mother fail[ed] to cite this case, or any case for that matter, anywhere in her Appellant's Brief."[171] Third, "Birth Mother's Statement of Case [wa]s essentially a description of every page appearing in the Appellant's Appendix, many of which [were] irrelevant to the issues presented," in violation of Appellate Rule 46(A)(5), which requires a brief description of relevant matters.[172] Fourth, "Birth Mother's Summary of Argument [wa]s a one-sentence restatement of the issue presented for review," in violation of Appellate Rule 46(A)(7), which requires a short, accurate statement of the arguments.[173] Fifth, Birth Mother's statement of the facts "contain[ed] numerous assertions that [were] unsupported by citation to the record," in violation of Appellate Rule 46(A)(6). Finally, Birth Mother's argument section "failed to cite any authority whatsoever in support of her arguments or to cite the applicable standards of review," in violation of Appellate Rule 46(A)(8).[174] As a result of these violations, the Court of Appeals awarded appellate attorneys' fees under Appellate Rule 66(E).[175]

In *Secura Supreme Insurance Co. v. Johnson*, the Court of Appeals reminded counsel that they "should not manipulate margins to reach or stay within page limits, giving the collegiate impression of quantity over quality."[176] This

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168. *Id.* at 984-85.
169. 64 N.E.3d 1209, 1216 (Ind. Ct. App. 2016).
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 1218.
176. 51 N.E.3d 356, 359 n.1 (Ind. Ct. App. 2016).

admonition was based on Appellate Rule 43(G), which provides that "[a]ll four margins for the text of the document shall be at least one (1) inch from the edge of the page."[177] In *Carpenter v. Lovell's Lounge & Grill, LLC*, the Court of Appeals reminded counsel that Appellate Rule 46(A)(8) requires an appellant to set forth the standard of review in his or her brief, and that Appellate Rule 46(A)(1) requires a table of contents to contain subheadings.[178] In *I.A.E., Inc. v. Hall*, the Court of Appeals reminded counsel that "incoherent and illogical tirades of accusations are out of place before an appellate tribunal. At times, the appellate briefs read like an incoherent stream of consciousness without any proper legal foundation."[179]

In *Brazier v. Maple Lane Apartments I, LLC*, Brazier filed a corrected brief that included a table of contents that was "*thirty-seven* pages long, followed by an eleven-page Table of Authorities."[180] Such lengthy tables were possible—"despite the substantive portion of the brief being only forty-three pages"—because they essentially contained entire argument sections.[181] "To the extent the Table of Contents makes sense at all, it represents, at best, an abject failure to understand the most basic requirements of appellate briefing. At worst, it is a blatant attempt to make additional argument without complying with the page and word limitations of a brief . . . ."[182] The Court of Appeals concluded that the table of authorities and table of contents violated Appellate Rule 46(A) and so it disregarded them.[183]

The argument section did not fare better.

> For instance, on two consecutive pages of the brief, essentially the same sentence appears four times. . . . The content of two pages of the brief are replicated in whole several pages later. . . . What has most hindered our review, however, is that there is no rhyme or reason to the manner in which Brazier has presented his argument. Rather than clearly stating an issue and discussing it to conclusion, discussion of all the issues is intermixed throughout.[184]

The Court of Appeals concluded that

> Counsel's failures to follow even the simplest rules regarding the content of an appellate brief have made our review of this case unnecessarily difficult. . . . Were it within our purview to do so, we would order Brazier's counsel to verify to this court her attendance at a continuing

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177. IND. R. APP. P. 43(G).

178. 59 N.E.3d 330, 335 n.1 (Ind. Ct. App. 2016).

179. I.A.E., Inc. v. Hall, 49 N.E.3d 138, 161 (Ind. Ct. App. 2015), *trans. denied*, 48 N.E.3d 316 (Ind. 2016).

180. 45 N.E.3d 442, 449 (Ind. Ct. App. 2015), *trans. denied*, 50 N.E.3d 146 (Ind. 2016).

181. *Id.*

182. *Id.*

183. *Id.* at 450.

184. *Id.* at 450-51.

> legal education program regarding appellate practice before submitting any further briefs to this court. . . . [W]e admonish counsel in the strongest terms to carefully review the appellate rules and fully conform her briefs to their requirements in the future.[185]

C. Contents of Appendices

On at least three occasions during the survey period, the Court of Appeals and Supreme Court have addressed the contents of appendices.

First, in *Lorenz v. Anonymous Physician #1*, the appellees

> include[d] documents that were included in Appellant's Appendix. Indiana Appellate Rule 50(A)(3) specifically states that an appellee's appendix "shall not contain any materials already included in appellant's Appendix . . . ." [T]here was no reason . . . to include documents the Appellant included in its appendix. . . . In all cases, but especially in a case such as this with three separate appendices, the omission of documents already available to the court is important to facilitating our review.[186]

Second, in *Jordan v. State*, "Jordan's counsel, in an attempt to be helpful, has reproduced the entire transcript from Jordan's probation revocation hearing and included it in his appendix."[187] The Court of Appeals noted that

> [a]side from this reproduction being "a waste of paper and unnecessarily bloating the record on appeal," *see Steve Silveus Ins. v. Goshert*, 873 N.E.2d 165, 172 (Ind. Ct. App. 2007), it also violates Appellate Rule 50(F), which explicitly instructs that "parties should *not* reproduce any portion of the Transcript in the Appendix" because the "Transcript is transmitted to our Court pursuant to Appellate Rule 12(B)."[188]

Third, in *In re Marriage of Gertiser*, the husband filed a motion to modify spousal maintenance.[189] The Supreme Court noted that

> [w]e know nothing about the contents of that motion, because it was not included in the Appendix. In civil cases, an Appendix "shall contain . . . pleadings and other documents from the Clerk's Record . . . that are necessary for resolution of all issues raised on appeal." . . . An Appendix should include *only* the necessary parts of the record on appeal, see App. R. 50(A)(1)—but because the Clerks' Record is not routinely transmitted on appeal, see App. R. 12(A), we also depend on the parties not to

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185. *Id.* at 451 n.4.

186. 51 N.E.3d 391, 394 n.1 (Ind. Ct. App. 2016).

187. 60 N.E.3d 1062, 1064 (Ind. Ct. App. 2016).

188. *Id.* (quoting IND. R. APP. P. 50(F)).

189. 45 N.E.3d 363, 365 (Ind. 2015).

exclude necessary material, either.[190]

The Supreme Court concluded that "when the ruling on a written motion is appealed, a copy of the motion is necessary to resolving the appeal and should therefore be included in the Appendix."[191]

D. Transcript for Indigent Parties

In *Myers v. Maxson*, "Myers argue[d] that his status as indigent entitles him to a free transcript of the May 23, 2011 evidentiary hearing during his post-conviction relief proceedings . . . ."[192] The Court of Appeals concluded that Myers "had available to him the mechanism set forth in Appellate Rule 31(A)."[193] That rule provides that 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, which may include the party's or the attorney's recollection."[194] Because Myers did not avail himself of Appellate Rule 31(A), the Court of Appeals could not conclude "that Myers [was] entitled to a copy of the transcript . . . at public expense."[195]

IV. INDIANA'S APPELLATE COURTS

A. Case Data from the Indiana Supreme Court

During the 2016 fiscal year,[196] the Indiana Supreme Court disposed of 900 cases, including 503 criminal cases, 225 civil cases, 10 tax cases, 29 original actions, 99 attorney discipline cases, and 3 board of law examiners cases.[197] The court heard sixty-five oral arguments during the fiscal year, thirty-four percent of which were heard before the court decided to grant transfer.[198] The court issued eighty-five majority opinions and fourteen non-majority opinions.[199] Justice Dickson issued fourteen majority opinions, Justice Rucker issued ten majority opinions, Justice David issued eighteen majority opinions, Justice Massa issued sixteen majority opinions, and Chief Justice Rush issued fourteen majority opinions.[200] The court issued unanimous decisions eighty-three percent of the

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190. *Id.* at n.2 (quoting IND. R. APP. P. 50(A)(2)(f)) (alteration in original).

191. *Id.*

192. 51 N.E.3d 1267, 1274 (Ind. Ct. App.), *trans. denied*, 54 N.E.3d 371 (Ind. 2016).

193. *Id.* at 1275.

194. IND. R. APP. P. 31(A).

195. *Myers*, 51 N.E.3d at 1275.

196. The Indiana Supreme Court 2016 fiscal year ran from July 1, 2015 to June 30, 2016. *See* IND. SUPREME COURT, INDIANA SUPREME COURT ANNUAL REPORT 2015-16 (2016), http://www.in.gov/judiciary/supreme/files/1516report.pdf [https://perma.cc/V7DY-FTPX].

197. *Id.* at 9.

198. *Id.* at 14.

199. *Id.* at 16.

200. *Id.*

time.[201]

B. Justice Dickson Retires

On April 29, 2016, Justice Brent Dickson retired.[202] He

> served as a justice on the court longer than any other person since 1853. He was Chief Justice of Indiana from May 15, 2012 to August 18, 2014. During his service as Chief Justice, he was selected to serve on the Board of Directors of the national Conference of Chief Justices and chaired the Conference's Committee on Professionalism and Competence of the Bar."[203] "During his judicial career, he has been chair of the Supreme Court Records Management Committee, Judicial Data Processing Oversight Committee, Task Force on Access to Court Records, various other committees, and has been a liaison to its Disciplinary Commission and Board of Law Examiners."[204]

Justice Dickson's service to the State of Indiana and to its judiciary is greatly appreciated and will be missed.

C. Justice Slaughter Joins the Indiana Supreme Court

In May 2016, "Geoffrey G. Slaughter was appointed to the Indiana Supreme Court by Governor Mike Pence. He took the oath of office as Indiana's 109th Supreme Court Justice on June 13, 2016."[205] Justice Slaughter attended Indiana University in Bloomington,

> where he was elected to *Phi Beta Kappa* and in 1985 received a bachelor of arts in economics, graduating with high honors. In 1989, he received an M.B.A. in finance from the Kelley School of Business and his juris doctor *cum laude* from IU's Maurer School of Law.
>
> After law school, Justice Slaughter served for two years as a law clerk to Chief Judge Allen Sharp, United States District Court for the Northern District of Indiana in South Bend[,][206]

and he then worked in private practice in Chicago.[207] "From 1995 to 2001, he served as special counsel to the Attorney General of Indiana," and he then

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201. *Id.* at 17.

202. *Justice Biographies: Justice Brent E. Dickson*, IND. SUPREME COURT, http://www.in.gov/judiciary/citc/2829.htm [https://perma.cc/UY9N-VG7M] (last visited Apr. 29, 2017).

203. *Id.*

204. *Id.*

205. *Justice Biographies: Hon. Geoffrey G. Slaughter*, IND. SUPREME COURT, http://www.in.gov/judiciary/citc/3760.htm [https://perma.cc/TWU7-EZ8Z] (last visited Apr. 29, 2017).

206. *Id.*

207. *Id.*

returned to private practice until his appointment to the Supreme Court.[208] We look forward to Justice Slaughter serving on the Supreme Court for many years to come.

D. Case Data from the Indiana Court of Appeals

During 2015,[209] the Court of Appeals disposed of 2920 cases.[210] This continued a multi-year trend of declining case loads, with the court's case load dropping from 3950 in 2011.[211] The court disposed of 1637 criminal cases, 1048 civil cases, and 307 other cases.[212] The court affirmed the trial court 79.2% of the time, with the court affirming 86.3% of criminal cases, 94.7% of post-conviction relief cases, and 60.5% of civil cases.[213] The average age of cases pending before the Court of Appeals at the end of 2015 was 1.2 months.[214] In addition to deciding cases, the court decided 6375 other motions and miscellaneous orders.[215]

E. Judge Patrick D. Sullivan Passes Away

On October 1, 2015, Judge Patrick D. Sullivan passed away.[216] "Judge Sullivan was the longest-serving judge in Court of the Appeals history and the last sitting member to be popularly elected to the Court prior to the advent of the retention selection system."[217] "He retired on July 31, 2007" and served as a senior judge until his death. Judge Sullivan served "on the Supreme Court Advisory Committee on Rules of Practice & Procedure (1975-1980), as an Adjunct Professor at the Indiana University School of Law at Indianapolis, as a Lecturer on law and social policy at Indiana University Purdue University at Indianapolis, and on American diplomatic history at Indiana University."[218] Judge Sullivan will be missed.

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208. *Id.*

209. The Indiana Court of Appeals 2015 annual report covers July 1, 2014 through June 30, 2015. *See* IND. COURT OF APPEALS, INDIANA COURT OF APPEALS 2014 ANNUAL REPORT, http://www.in.gov/judiciary/appeals/files/court-of-appeals-annual-report-2015-online.pdf [https://perma.cc/RM38-293Z] (last visited Apr. 29, 2017).

210. *Id.* at 1.

211. *Id.*

212. *Id.*

213. *Id.* at 2.

214. *Id.*

215. *Id.*

216. *Judges of the Court of Appeals: Judge Patrick D. Sullivan*, IND. COURT OF APPEALS, http://www.in.gov/judiciary/appeals/2443.htm [https://perma.cc/F5UU-RDTN] (last visited Apr. 29, 2017).

217. *Id.*

218. *Id.*

CONCLUSION

During the survey period, the Indiana appellate courts analyzed, interpreted, and applied the Appellate Rules. Justice Dickson retired from the Supreme Court, and Justice Slaughter was sworn in as the newest justice on the court.