

1993 DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: CHANGES IN ORIGINAL ACTIONS, REHEARING AND TRANSFER

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INTRODUCTION

During 1993, Indiana appellate procedure continued to develop. The changes are most recognizable in rule amendments effective January 1, 1994. The Indiana Supreme Court revamped the original action rules,¹ extended the time deadlines for petitioning for rehearing and transfer,² added a procedure for interlocutory appeals from the tax court,³ and narrowed the requirement to set forth the course of proceedings in the statement of case section of the brief of appellant.⁴ These changes will simplify and ease the burdens on lawyers applying the Indiana Rules of Appellate Procedure.

Changes in appellate procedure also occurred during 1993 as a result of court decisions applying the rules and common law in specific factual settings. Indiana's appellate courts handed down a number of important decisions on appellate procedure. The Indiana Supreme Court held that a party was procedurally entitled to obtain a trial court determination of unaddressed error specifications on remand after reversal on appeal,⁵ that the court of appeals retained jurisdiction to rule on a petition for rehearing until the high court granted a petition to transfer,⁶ and that a court reporter would be held in contempt for failing to complete a transcript in a timely manner.⁷ The court of appeals also decided a number of cases important to the appellate practitioner.⁸

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1. IND. ORIG. ACT. R. (effective Jan. 1, 1994).

2. IND. APP. R. 11 (effective Jan. 1, 1994).

3. IND. APP. R. 18(C) (effective Feb. 1, 1994).

4. IND. APP. R. 8.3(A)(4) (effective Jan. 1, 1994).

5. *Riggs v. Burell*, 619 N.E.2d 562 (Ind. 1993).

6. *Indiana Carpenters Cent. & Western Ind. Pension Fund v. Seaboard Sur. Co.*, 615 N.E.2d 892 (Ind. 1993).

7. *In re Hatfield*, 607 N.E.2d 384 (Ind. 1993).

8. *E.g.*, *Koch v. James*, 616 N.E.2d 759, 760-61 (Ind. Ct. App. 1993) (court order to sell stock interlocutorily appealable as of right under Indiana Appellate Rule 4(B)(1) as "delivery" of securities); *Mullis v. Martin*, 615 N.E.2d 498, 500 (Ind. Ct. App. 1993) (noncompliance with appellate rules waived issues raised on appeal); *Board of Comm'r of Lake County v. Foster*, 614 N.E.2d 949, 950 (Ind. Ct. App. 1993) (interlocutory appeal dismissed for failure to file the praecipe within ten days after court of appeals accepts jurisdiction); *Smith v. State*, 610 N.E.2d 265, 267 n.1

In addition to the changes in the rules of appellate procedure and recent decisions affecting the appellate practitioner, judges and lawyers should consider what lies on the horizon for Indiana's appellate courts. A new justice has joined the Indiana Supreme Court, new rules of evidence will be applied by the appellate courts, and rules may be refined in the future to improve appellate procedure in the state.

All lawyers who practice before Indiana's appellate courts should be familiar with the new rules, cases, and trends. Part I of this Article discusses the amendments to the rules of appellate procedure. Part II analyzes recent cases on Indiana appellate procedure. The final section reviews likely trends that will impact Indiana's appellate courts in the future.

I. AMENDMENTS TO THE INDIANA APPELLATE RULES

The Indiana Supreme Court made substantial changes to the procedural rules for original actions. The court also amended three rules of appellate procedure—one dealing with time deadlines for rehearing and transfer, another adding a procedure for interlocutory appeals from the tax court, and the third rule limiting the need to set forth the entire course of proceeding in the appellant's brief. These developments will be discussed in turn.

A. *Original Actions*

The Indiana Supreme Court has "exclusive, original jurisdiction to supervise the exercise of jurisdiction of all inferior state courts, including the Court of Appeals" by virtue of the state constitution and the appellate rules.⁹ When a party commences an original action in the Supreme Court seeking either a writ of mandamus or a writ of prohibition against an inferior state court and the judge or judges of the lower court, the action is "concerned solely with the question of jurisdiction . . . and shall be governed exclusively by" the original action rules.¹⁰ On October 29, 1993, the Indiana Supreme Court amended the original actions rules effective January 1, 1994. As the Supreme Court Administrator stated, "These are the most substantial amendments since the inception of [the present] original action [rules] in Indiana."¹¹

Prior to these amendments, a party applying for an original action (known as the relator) needed to meet personally with the Supreme Court Administrator

(Ind. Ct. App. 1993) (statement of facts inadequate); *Wenger v. Weldy*, 605 N.E.2d 796, 797 n.1 (Ind. Ct. App. 1993) ("Ind. Appellate Rule 8.2(B)(1) provides the method of citation to be used by counsel . . . in the preparation of briefs. When citing decision by the Court of Appeals, no reference should be made to individual districts.").

9. IND. ORIG. ACT. R. 1(A) (effective Jan. 1, 1994) (citing IND. CONST. art. 7 § 4 (1851); IND. APP. R. 4(A)(5)).

10. IND. ORIG. ACT. R. 1(B) (1993).

11. Greg Kueterman, *Court Procedures Eased for Attorneys in Amendments*, IND. LAW., Nov. 17, 1993, at 14, col. 3-4.

in Indianapolis who had limited authority by rule to set a hearing on the request “[i]f there [was] no question as to completeness or form of the application, or the appropriateness of the remedy.”¹² If the Supreme Court Administrator had “a question as to the appropriateness of the original action remedy, the Administrator [was required] to confer with the Chief Justice to determine if a hearing [would] be scheduled.”¹³ If set for a hearing before the full court, the relator would then personally serve the opposing party and the judge(s) below (known as the respondents) with the application papers and notice of the hearing.¹⁴ The former rule provided, “No application for a writ of mandamus or prohibition and no application papers shall be filed by any party with the Clerk of the Supreme Court until after the hearing on the application”¹⁵ If after the hearing, the Supreme Court denies the application the “relator may request the administrator to return the filing fee, . . . and the original action shall be terminated automatically and no papers shall be filed thereafter with the clerk.”¹⁶ In those instances, the Supreme Court would not have handed down a written ruling.

In summary, an attorney filing application papers for an original action under the previous rules would have to travel to the State House and present the papers to the Supreme Court Administrator, who could unilaterally set a hearing before the five justices of the Supreme Court. The attorney would then personally serve the application papers and hearing notice on the respondents. If the Supreme Court denied the application following the hearing, the relator could walk away without paying a filing fee.

While this process could be simple and inexpensive if counsel and the inferior court were in close proximity to Indianapolis, attorneys in the far northern or southern parts of the state could spend an entire day largely on travel. In order to relieve the inconvenience to lawyers and the court itself, the Supreme Court amended the original action rules to save lawyers’ time. The new rule provides:

(B) Submission of Applications to Supreme Court Administrator. Except for application for emergency writs, all applications for writs of mandamus or prohibition, along with the filing fee, shall be submitted in person or by mail to the Supreme Court Administrator, 313 State House, Indianapolis, Indiana 46204, telephone (317) 232-2540, TDD (317) 233-6110. Relator shall serve Respondents and all interested parties on the same day the Relator’s writ application is submitted in person or by mail to the Supreme Court. Delivering a copy of the papers to an interested party’s office is personal service on that party

12. IND. ORIG. ACT. R. 2(B) (1993).

13. *Id.*

14. *Id.*

15. *Id.*

16. IND. ORIG. ACT. R. 5(B) (1993).

within the meaning of these Rules. If emergency relief is requested, Relator must submit the application papers to the Administrator in person after personal service on Respondents and all interested parties. Otherwise, service on the Respondents and interested parties shall be accomplished in the same fashion as service on the Administrator, except that personal service shall always be acceptable.

(C) Filing of Applications. The Supreme Court Administrator shall arrange to have original action applications filed with the Clerk. At the time of filing Relator's filing fee will be deposited.

(D) [Submission to Chief Justice.] The Supreme Court Administrator shall submit all original action applications to the Chief Justice or Acting Chief Justice after filing. If the application is incomplete or in improper form or seeks an unquestionably inappropriate remedy, the Chief Justice or Acting Chief Justice shall enter an order dismissing the application without the intervention of the full Court. In all other cases, the Chief Justice or Acting Chief Justice shall determine whether the case should be immediately set for hearing or referred to the full Court.

If the Chief Justice or the full Court decides to set the case for hearing, the Supreme Court Administrator shall complete and file the notice of hearing. The Supreme Court Clerk shall send copies of the notice of the hearing to Relator, Respondents, and all interested parties, including the Attorney General as required by Ind. Original Action [R.] 6(D). However, the Court may decide to grant or deny the original action without hearing.¹⁷

The significant changes are: (1) application papers, except if applying for an emergency writ, can be submitted by mail rather than in person to the Supreme Court Administrator; (2) the Administrator no longer has the discretion to set a hearing on the application; (3) the Administrator forwards the application papers to the Clerk for immediate filing and depositing of the filing fee; and (4) the Clerk sends copies of the notice of hearing to the parties.

The Indiana Supreme Court has further specified what a lawyer must submit to initiate an original action. For example, the rule lists six allegations that need to be set forth in the verified petition for writ of mandamus or prohibition and "[o]riginal action applications which do not include all of the applicable allegations . . . shall be rejected by the Chief Justice or Acting Chief Justice."¹⁸ No longer is the Supreme Court Administrator required by rule to "inform the relator of each reason for rejecting the application."¹⁹

17. IND. ORIG. ACT. R. 2 (effective Jan. 1, 1994).

18. IND. ORIG. ACT. R. 3(A) (effective Jan. 1, 1994).

19. IND. ORIG. ACT. R. 2(B) (1993).

In addition to a verified petition, a supporting brief is necessary but need not be bound.²⁰ At the time the relator submits the original action petition and brief, the relator must also submit a certified record of proceeding from the lower court.²¹ “The record . . . shall include a current copy of the chronological case summary.”²² “The original action record need not be bound like an appellate record, but it should contain a table of contents at the beginning and be enumerated for purposes of citation to the record.”²³ The rules require the relator to submit both an alternative and permanent proposed writ. If an emergency writ is sought, an emergency writ form must also be submitted.²⁴ Form No. 4 is the new form for an emergency writ of mandamus or prohibition.²⁵

An emergency writ operates as a temporary stay of the trial court proceedings until the Indiana Supreme Court hears and rules upon the original action application.²⁶ An emergency writ is granted prior to a hearing before the Indiana Supreme Court, following the submission of the regular application papers plus a special petition for emergency writ which replaces the prior affidavit of emergency.²⁷ A relator requesting an emergency writ must present to the Administrator all original action application papers in person after personal service on the respondents and all other interested parties.²⁸ The Administrator then forwards the application for the emergency writ to the Chief Justice, if available, or the Acting Chief Justice, for a determination as to whether a sufficient emergency exists to require a stay.²⁹ “If the Chief Justice or the Acting Chief Justice grants the emergency writ, the writ shall be filed immediately and the original action set for hearing.”³⁰ The filing of a petition for emergency writ does not obviate the need to file the other application papers, including specifically the petition for a writ of mandamus or prohibition.³¹

20. IND. ORIG. ACT. R. 3(B) (effective Jan. 1, 1994).

21. IND. ORIG. ACT. R. 3(C) (effective Jan. 1, 1994).

22. *Id.*

23. *Id.*

24. IND. ORIG. ACT. R. 3(E) (effective Jan. 1, 1994).

25. IND. ORIG. ACT. FORM NO. 4 (effective Jan. 1, 1994).

26. IND. ORIG. ACT. R. 3(E)(1) (effective Jan. 1, 1994). One wonders why this amendment refers to the “trial court” when writs can be issued against any court inferior to the Supreme Court, such as the Indiana Court of Appeals or the Indiana Tax Court. IND. ORIG. ACT. R. 1(B) (1993).

27. IND. ORIG. ACT. R. 3(E)(1) (effective Jan. 1, 1994); *see also* IND. ORIG. ACT. R. 3(F) (1993) (“If relator desires an immediate hearing on the application, [the relator] shall submit with his petition a separate affidavit showing clearly that an extreme emergency exists which necessitates an immediate hearing.”).

28. IND. ORIG. ACT. R. 3(E)(1) (effective Jan. 1, 1994).

29. *Id.*

30. *Id.*

31. *Id.*

An alternative writ is an order that requires respondents to exercise jurisdiction (*mandamus*), to cease exercising jurisdiction (*prohibition*), or both.³² If the Supreme Court issues an alternative writ, respondents must file a "return" with the Supreme Court no later than twenty days after the filing of the writ.³³ A "return" is a pleading submitted by the lower court demonstrating compliance with the writ or stating why the writ should not be made permanent.³⁴

"A Permanent Writ is an order, issued after the application is made, which is immediately permanent."³⁵ A permanent writ dispenses with the general practice of allowing the respondents—generally, the opposing party and court below—to file a return.³⁶ "In rare instances, a court clerk may be an additional Respondent."³⁷

Each party requesting a writ shall submit an original and five copies of each application paper, instead of the original and six copies required by the former rule.³⁸ An amendment clarifies that an original and five copies of the record are also required.³⁹ Each justice needs a copy of the record of proceedings.

The Supreme Court Administrator, in conjunction with the chief justice sets the hearing usually not less than one week from submission.⁴⁰ An earlier hearing date may be granted if relator demonstrates in the petition or emergency petition that an extreme emergency necessitates an earlier hearing.⁴¹ At the hearing, an "[a]pppearance by the respondent judge or the judge's counsel is not necessary; the party opposing the Relator in the trial court may oppose the original action application."⁴² The new rule provides, "In the event the respondent judge or the judge's counsel appear, the respondent judge or the judge's counsel shall be given an opportunity to speak regardless of whether others opposing the original action have used the thirty minutes allotted to that side."⁴³

Upon completion of the oral argument in the Supreme Court Conference Room, the court asks the parties to leave the room and begins deliberation.⁴⁴ "When the Court concludes its deliberation, the parties [are] recalled . . . to learn

32. IND. ORIG. ACT. R. 3(E)(2) (effective Jan. 1, 1994).

33. *Id.*

34. *Id.*

35. IND. ORIG. ACT. R. 3(E)(3).

36. *Id.*

37. IND. ORIG. ACT. R. 1(C) (effective Jan. 1, 1994).

38. IND. ORIG. ACT. R. 3(I) (effective Jan. 1, 1994) (Although the former rule required an original and six copies of the application papers, the administrator, in practice, has been informally accepting an original and five copies for years.).

39. *Id.*

40. IND. ORIG. ACT. R. 4(A) (effective Jan. 1, 1994).

41. *Id.*

42. IND. ORIG. ACT. R. 4(C) (effective Jan. 1, 1994).

43. *Id.*

44. IND. ORIG. ACT. R. 4(E) (1993).

the Court's decision."⁴⁵ A 1993 amendment states, "In cases where the Court is unable to reach an immediate decision or where a Justice is absent, the Court may delay ruling until such time as agreement is reached or the absent Justice is able to consider the case."⁴⁶

If the Supreme Court issues an alternative writ, the respondent court has twenty days to file a return showing compliance with the writ or stating reasons why the writ should not be made permanent.⁴⁷ "If the return shows compliance with the alternative writ, the Supreme Court will enter an order dismissing the original action as moot."⁴⁸ If the Supreme Court denies the application, "an order of denial shall be entered expeditiously. The denial of the application will end the proceedings, regardless of whether the Court has conducted a hearing."⁴⁹ No party shall file a petition for rehearing or a motion to reconsider after final disposition of the original action.⁵⁰

B. Petitions for Rehearing and Transfer

The Supreme Court amended Indiana Appellate Rule 11 effective January 1, 1994, extending the time deadlines for petitioning for rehearing and transfer.⁵¹ The Supreme Court Committee on Rules of Practice and Procedure recommended the extension:

The Committee proposed a small increase to the time limits for filing petitions for rehearing and transfer after rendition of the Court of Appeals decision. The proposed amendment would increase the time for filing a petition for rehearing or transfer from the 20 days now provided to 30 days. Briefs in opposition under the proposed amendment would be due in 15 days rather than 10 days. The amendment was proposed to afford those in solo, small or largely appellate law practices slightly more flexibility with scheduling due to the fact that rehearing and transfer deadlines are non-extendable.⁵²

The Supreme Court agreed with the committee's proposal extending the deadline from twenty to thirty days for filing a petition for rehearing or transfer, and from ten to fifteen days for briefs in opposition.⁵³

45. IND. ORIG. ACT. R. 4(E) (effective Jan. 1, 1994).

46. *Id.*

47. IND. ORIG. ACT. R. 5(A) (effective Jan. 1, 1994).

48. *Id.*

49. IND. ORIG. ACT. R. 5(B) (effective Jan. 1, 1994).

50. IND. ORIG. ACT. R. 5(C) (effective Jan. 1, 1994).

51. IND. APP. R. 11 (effective Jan. 1, 1994).

52. *In the Supreme Court of Indiana*, 36 RES GESTAE 578, 580 (1993); *see also* IND. APP. R. 11(A) (1993) ("No extension of time shall be granted for a petition for rehearing or any brief in connection therewith."); IND. APP. R. 11(B)(8) (1993) ("No extension of time shall be granted for the filing of the petition to transfer or accompanying briefs.").

53. IND. APP. R. 11 (effective Jan. 1, 1994).

While the Supreme Court will still utilize the same time lengths for rehearing and transfer,⁵⁴ the court did clarify in 1993 that the court of appeals retains jurisdiction to rule on a petition for rehearing until the time that the Supreme Court *grants* a petition to transfer.⁵⁵ The question arose in a recent appeal where both parties were dissatisfied with the opinion of the court of appeals. One party petitioned the court of appeals for rehearing and the other party petitioned the Supreme Court to accept transfer on the same day, the last day of the twenty day non-extendable time deadline. In denying the petition for rehearing, the court of appeals held that effective at the time of *filing* the petition for transfer, the court of appeals was divested of jurisdiction.⁵⁶ In a *per curiam* opinion, the Supreme Court wrote:

From time to time a question arises regarding the jurisdiction of the Court of Appeals to rule on a petition for rehearing when a petition to transfer has been filed by another party in the same action. . . . To clarify this jurisdictional issue, we note here this Court's view that the Court of Appeals retains jurisdiction to rule on a petition for rehearing until the time that a petition to transfer is granted. While not compelled by rule, it has been the customary practice of this Court to delay ruling on a petition to transfer when a petition for rehearing is pending before the Court of Appeals, particularly since these delays generally are brief.⁵⁷

The court of appeals retains jurisdiction to rule on a petition for rehearing until the Supreme Court *grants* transfer, not simply until the filing of a petition for transfer.

Since 1988, a party no longer has a mandatory duty to petition the court of appeals to rehear an appeal in order to file a petition for transfer.⁵⁸ If a party does file a petition for rehearing, "the petition to transfer shall be limited to only those grounds set forth in the petition for rehearing in the Court of Appeals."⁵⁹

54. See George T. Patton, Jr., *1992 Developments in Indiana Appellate Procedure: Of Timely Praecipies, Interlocutory Appeals, and Civility*, 26 IND. L. REV. 799, 811-12 (1993) (proposing shorter deadline to petition for rehearing in court of appeals and longer period to petition for transfer to the Supreme Court such that if any party petitioned for rehearing in the court of appeals it would toll the time for any party to petition for transfer).

55. *Indiana Carpenters Cent. & W. Ind. Pension Fund v. Seaboard Sur. Co.*, 615 N.E.2d 892 (Ind. 1993).

56. *Indiana Carpenters Cent. & W. Ind. Pension Fund v. Seaboard Sur. Co.*, No. 49A02-9111-CV-510 (Ind. Ct. App. March 9, 1993).

57. *Indiana Carpenters*, 615 N.E.2d at 892.

58. IND. APP. R. 11(B) (1993). The 1988 amendment provided:

Provided further, the party seeking transfer shall have the right at his option, without first filing a petition for rehearing in the Court of Appeals and having it denied, to petition the Supreme Court directly within twenty (20) days from the date of the rendition of the decision of the Court of Appeals to transfer the cause to the Supreme Court for review.

59. IND. APP. R. 11(B) (1993).

While this rule made sense when rehearings were mandatory, it serves no purpose to require a party to present all issues originally presented in the briefs that the party knows the court of appeals is unlikely to reconsider. For example, assume the court of appeals misstated a fact in the record. A party should be able to file a petition for rehearing seeking correction of the misstated fact without having to raise other issues that both the party and the court of appeals knows will not be reconsidered. In other words, the rule should be amended to read, “[T]he petition to transfer shall be limited to those grounds set forth *in the briefs* and the petition for rehearing in the Court of Appeals.” This amendment would allow a party to file a shorter petition for rehearing without waiving other issues already argued in the briefs before the court of appeals.

The Supreme Court Committee on Rules of Practice and Procedure also recommended in 1993 that “[a]n opposition brief [to rehearing] may assert grounds which show that the decision should remain unchanged, or it may present other grounds which show that the party filing the brief is entitled to other relief.”⁶⁰ The Supreme Court accepted the recommendation but edited the language, so as of January 1, 1994, the rule reads, “An opposition brief [to rehearing] may assert grounds which show that the decision should remain unchanged, or it may present other grounds for rehearing.”⁶¹

With respect to petitions for transfer, the committee proposed similar language as well as a reply brief limited to new grounds asserted for transfer by the respondent:

A brief in opposition [to a petition for transfer] may assert grounds which show that transfer should be denied, or it may present other grounds which show that the party filing the brief in opposition is entitled to other relief. If the other relief requested is a transfer of the cause upon different grounds, subsection (B)(2) of the Rule must be complied with.⁶²

Where a respondent to a petition to transfer asserts grounds for transfer or asserts that respondent is entitled to other relief, the petitioner shall be entitled to file a reply brief within fifteen (15) days of the filing of the brief in opposition to the petition to transfer. In no other circumstances shall a party be entitled to file a reply brief on transfer and the reply brief shall only include argument on the new grounds for transfer raised by respondents.⁶³

60. *In the Supreme Court of Indiana*, 36 RES GESTAE 578, 580 (1993).

61. IND. APP. R. 11(A) (effective Jan. 1, 1994).

62. *In the Supreme Court of Indiana*, 36 RES GESTAE 578, 580 (1993).

63. IND. APP. R. 11(B)(6) (The Supreme Court Committee on Rules of Practice and Procedure added this paragraph to the proposal pursuant to comments received from the bar.).

The Supreme Court did not accept these proposals with respect to transfer and during the past year has stricken a reply brief in support of petition for transfer.

C. *Interlocutory Appeals From Tax Court*

In 1992, the Indiana Supreme Court added a new procedure for appeals from the tax court.⁶⁴ The procedures provided for Supreme Court review of final decisions of the tax court, but provided no procedural mechanism to review interlocutory decisions of the tax court. On January 18, 1994, the Indiana Supreme Court amended Appellate Rule 18(C) as follows:

Any party adversely affected by a final decision of the Tax Court shall have a right to petition the Supreme Court for review of such decision. Such Petition shall be filed within thirty (30) days from the date of the decision and such petition shall not exceed five (5) pages in length. *Any party adversely affected by an interlocutory order of the Tax Court may petition the Supreme Court for review of such decision pursuant to the procedure enunciated in Ind. Appellate Rule 4(B)(6).*⁶⁵

A party would have to move the tax court to certify any interlocutory order for appeal, and, if the tax court certifies the interlocutory order, petition the Supreme Court within thirty days of the certification.⁶⁶ If the Supreme Court accepts jurisdiction, a praecipe would need to be filed no later than ten days after the Supreme Court grants the petition for interlocutory appeal.⁶⁷ The record of proceedings would be due no later than thirty days after the filing of the praecipe.⁶⁸ The appellant would have ten days after the filing of the record to submit a brief, the appellee would have ten days after the filing of the appellant's brief to submit an answer brief, and the appellant would have five days to submit a reply brief.⁶⁹

The only question raised by this amendment providing for interlocutory appeals from the tax court is whether the rule should provide any grounds for mandatory interlocutory appellate review such as provided in Appellate Rule 4(B)(1) through 4(B)(5). For example, if the tax court granted an injunction—a ground for a mandatory interlocutory appeal under Appellate Rule 4(B)(3)—the tax court and the Supreme Court both would have the discretion to deny interlocutory appellate review under the new rule. In limiting interlocutory review to orders in which both the tax court and the Supreme Court agree that interlocutory review is warranted, the Supreme Court is probably exercising control over its jurisdiction and docket. The Supreme Court will consider the

64. IND. APP. R. 18 (effective Jan. 1, 1992).

65. IND. APP. R. 18(C) (effective Feb. 1, 1994).

66. IND. APP. R. 2(A) (1993).

67. *Id.*

68. IND. APP. R. 3(B) (1993).

69. IND. APP. R. 8.1(B) (1993).

nature of the appeal in exercising its discretion but counsel seeking interlocutory appellate review of an order of the tax court should be sure to point out to the tax court and Supreme Court that a similar appeal from a trial court to the court of appeals would be a mandatory interlocutory appeal under Appellate Rule 4(B)(1) through 4(B)(5). Such arguments should make the tax court and Supreme Court more likely to allow the interlocutory appeal.

D. Shorter Statement of the Case

Finally, with respect to the 1993 amendments to the Indiana Rules of Appellate Procedure, the Supreme Court accepted the committee's recommended change in requirements in the course-of-proceedings subsection of the statement-of-the-case portion of the brief of the appellant: "(4) *A statement of the case.* The statement shall first indicate briefly the nature of the case, the course of proceedings *relevant to the issues presented for review*, and its disposition in the court below, including a verbatim statement of the judgment."⁷⁰

The committee noted that "a statement of the case is a *brief* chronological narrative of the events leading to the appeal. The purpose of this statement is to clarify the nature of the case, the course of proceedings, and its disposition in the court below."⁷¹ Irrelevant matter such as "routine motions for continuances, depositions, production of evidence and appearance/withdrawal of counsel" should not be part of the statement of the case.⁷² The committee proposed this amendment so that the rule would conform with the rule requiring "[a] statement of facts *relevant to the issues.*"⁷³

II. DECISIONS ON INDIANA APPELLATE PROCEDURE

The Indiana Supreme Court and the Indiana Court of Appeals have handed down a number of important decisions on appellate procedure. For ease of understanding in this Article, these cases have been broken down into the following four categories: first, two decisions addressing the need to remand a case to address unresolved issues following reversal on appeal; second, various opinions discussing dismissals of appeals; third, a decision deciding the propriety of an interlocutory appeal of a court order to sell stock; and finally, miscellaneous cases discussing non-compliance with the appellate rules.

70. IND. APP. R. 8.3(A)(4) (effective Jan. 1, 1994) (emphasis added).

71. *In the Supreme Court of Indiana*, 36 RES GESTAE 578, 579 (1993) (citing 4A KENNETH M. STROUD, INDIANA PRACTICE § 7.2, at 93 (2d ed. 1990)).

72. *Id.*

73. *Id.* (citing IND. APP. R. 8.3(A)(5)) (emphasis added).

A. *Remand To Address Unresolved Issues
Following Appellate Reversal*

In 1993, the Supreme Court addressed the issue of whether an appellate reversal of a trial court's grant of a new trial on only one of multiple grounds precludes judicial consideration of the unaddressed grounds on remand.⁷⁴ Following a trial and jury verdict in favor of defendants, the plaintiffs filed a motion to correct error which asserted seven separate grounds.⁷⁵ Addressing only two of these grounds, the trial court granted plaintiffs' motion to correct error and granted a new trial.⁷⁶ "[Defendants] appealed and the Court of Appeals reversed and remanded with instructions to reinstate the judgment entered upon the verdict."⁷⁷

Upon remand, the trial court refused to rule on the plaintiffs' five remaining grounds originally unaddressed in the motion to correct error.⁷⁸ The court of appeals affirmed the trial court's refusal.⁷⁹ The Supreme Court granted transfer.

The Supreme Court, as did the court of appeals, rejected the argument that the five unaddressed grounds were deemed denied pursuant to Indiana Trial Rule 53.3. "[O]nce the [trial] judge was satisfied that a new trial was merited, no reason existed to rule on the remaining specifications of error or to state additional reasons for ordering a new trial."⁸⁰ The Supreme Court noted that this "parallels the practice in courts of appeal, where rulings are not required on additional issues once reversible error is found."⁸¹

The Supreme Court, however, disagreed with the court of appeals' application of the law of the case doctrine.⁸² The Supreme Court found that the initial opinion of the court of appeals resolved two issues: "1) there was disputed evidence regarding the possible negligence of Rachel Riggs and 2) the trial court failed to make sufficient findings to support its determination that the verdict was against . . . the evidence."⁸³ In this appeal, plaintiffs sought a ruling on five alleged errors "not conclusively decided by the essential holding" in the prior court of appeals opinion.⁸⁴ The Supreme Court found that the law of the case doctrine did not preclude plaintiffs from obtaining a ruling on the five unaddressed grounds and remanded the case to the trial court for consideration.⁸⁵

74. *Riggs v. Burell*, 619 N.E.2d 562 (Ind. 1993).

75. *Id.* at 563.

76. *Id.*

77. *Id.* (citing *Burell v. Riggs*, 557 N.E.2d 698 (Ind. Ct. App. 1990)).

78. 619 N.E.2d at 563.

79. *Id.* (citing *Riggs v. Burell*, 596 N.E.2d 268 (Ind. Ct. App. 1992)).

80. 619 N.E.2d at 563.

81. *Id.*

82. *Id.* at 564-65.

83. *Id.* at 564.

84. *Id.* at 564-65.

85. *Id.* at 565.

The Supreme Court has recently followed the same practice with decisions of the court of appeals that reverse on one ground and leave other issues unaddressed on appeal. On transfer, if the Supreme Court determines that the sole ground cited for reversal is incorrect, the Supreme Court will remand the case to the court of appeals to address the additional arguments on appeal.⁸⁶ After being convicted of bribery, a criminal defendant brought an appeal raising the statute of limitations and other defenses.⁸⁷ The court of appeals reversed the bribery conviction on the grounds that the information failed to allege facts showing that the state filed the charges within the applicable statute of limitations.⁸⁸ The Supreme Court granted transfer concluding that the conviction should not have been reversed on these grounds: "Accordingly, we grant transfer, vacate the opinion of the Court of Appeals, and remand this case to the Court of Appeals for consideration of the other issues raised by Willner in his appeal."⁸⁹ Previously, the Supreme Court would have ordinarily addressed the other issues without remanding the case to the court of appeals.

B. Dismissals On Appeal

The court of appeals dismisses a number of appeals for various reasons. Although this Article does not attempt to discuss every appellate dismissal, the more noteworthy ones can be educational. They can teach lawyers how to avoid procedural traps. For example, the court of appeals dismissed an interlocutory appeal pursuant to Indiana Appellate Rule 4(B)(6) when the appealing party failed to file a praecipe with the clerk of the trial court within ten days of the order of the court of appeals accepting jurisdiction.⁹⁰ The court of appeals stated:

If one intends to appeal a judgment or order, he must follow the procedural mandates of the appellate rules. In this case, the Board was required to file its praecipe no later than ten days after this Court granted its petition for interlocutory appeal Therefore, since this appeal was untimely filed, the Board has forfeited its right to bring this interlocutory appeal.⁹¹

86. *Willner v. State*, 602 N.E.2d 507, 509 (Ind. 1992).

87. *Willner v. State*, 588 N.E.2d 581, 582 (Ind. Ct. App. 1992).

88. *Id.* at 584.

89. 602 N.E.2d at 509.

90. *Board of Comm'r of Lake County v. Foster*, 614 N.E.2d 949, 950 (Ind. Ct. App. 1993).

91. *Id.*; *see also* *Harkrider v. Lafayette Nat'l Bank*, 613 N.E.2d 36 (Ind. Ct. App. 1993) (appeal dismissed and appellate attorneys' fees awarded); *id.* at 45-46 (Conover, J., concurring in result) (suggesting civil penalty of \$150,000 in addition to appellate attorneys' fees).

The appellate rule specifying when to file the praecipe in permissive interlocutory appeals had been substantially clarified by amendments effective January 1, 1992.⁹²

In another case, this one an appeal from the Review Board of the Indiana Department of Employment and Training Services, the court of appeals dismissed the appeal for failing to include an assignment of errors in the record.⁹³ For appellate review of administrative decisions taken directly to the court of appeals, the record of proceedings must include an assignment of errors.⁹⁴ The timely filing of an assignment of errors with the court of appeals is jurisdictional.⁹⁵ In addition, a specific statute provides that when appealing a decision of this board, "the appellant shall attach to the transcript an assignment of errors."⁹⁶ "Although the assignment of errors is considered a part of the record of proceedings, it does not have to be filed with the record; it may be filed separately, as long as it is filed within the time permitted by the appellate rules."⁹⁷ The court of appeals continued, "[A]n extension of time to file the record of proceedings necessarily includes an extension of time to file an assignment of errors."⁹⁸ If the appellant files no assignment of errors, however, the court of appeals will dismiss the appeal for lack of jurisdiction.⁹⁹

In a third noteworthy appellate dismissal, the trial court appointed a guardian for an individual unable to care for himself or his estate.¹⁰⁰ The court approved payment of certain expenses and ordered the Indiana Family and Social Services Administration to pay. Upon receiving the trial court's order, the Agency initiated an appeal. The Agency argued that it had not been a party and had not received any notice; therefore, the order should be vacated. "Counsel for the guardianship moved to dismiss, asserting that . . . appeals from judgments rendered in the circuit and superior courts may be taken only by those who were parties to the proceeding."¹⁰¹ The court of appeals dismissed the case.¹⁰² On transfer, the agency argued that "where a trial court orders a state agency to

92. George T. Patton, Jr., *Recent Developments in Indiana Appellate Procedure: Reforming the Procedural Path to the Indiana Supreme Court*, 25 IND. L. REV. 1105, 1107-08 (1992).

93. *South Madison Community Sch. Corp. v. Review Bd. of the Ind. Dept. of Employment & Training Serv.*, 622 N.E.2d 1042 (Ind Ct. App. 1993).

94. IND. APP. R. 7.2(A)(1) (1993).

95. *South Madison*, 622 N.E.2d at 1043 (citing *Lashley v. Centerville-Abington Community Sch.*, 293 N.E.2d 519 (Ind. App. 1973)).

96. *Id.* (quoting IND. CODE § 22-4-17-12(f)).

97. *Id.* (citing IND. APP. R. 7.2(A)(1); *Kentucky-Indiana Mun. Power Ass'n v. Public Serv. Co. of Ind., Inc.*, 393 N.E.2d 776 (Ind. App. 1979)).

98. *Id.* (citing *Overshiner v. Indiana State Highway Comm'n*, 448 N.E.2d 1245 (Ind. Ct. App. 1983)).

99. *Id.* (citing *Indiana Bell Tel. Co. v. T.A.S.I., Inc.*, 433 N.E.2d 1195 (Ind. Ct. App. 1982)).

100. *In the Matter of the Guardianship of Coffey*, 624 N.E.2d 465 (Ind. 1993) (per curiam).

101. *Id.* at 465 (citing IND. CODE § 34-1-47-1).

102. *In the Matter of the Guardianship of Coffey*, No. 33A04-9212-CV-401 (Ind. Ct. App. June 30, 1993).

assume financial responsibility for the care and maintenance of an individual without the agency having been a party, [the] order is voidable.”¹⁰³ In a *per curiam* opinion, the Supreme Court stated:

While this represent[ed] a colorable claim of error by the trial court, counsel for the guardianship is correct that one cannot appeal a judgment entered in a proceeding in which one was not a party. [The agency] should instead present its claim to the [trial court] by way of a motion to intervene and a request for relief from judgment. From decisions on those petitions, an appeal may lie.¹⁰⁴

The Supreme Court affirmed the dismissal of the appeal.¹⁰⁵

Finally, the court of appeals dismissed an appeal in a criminal case because a master commissioner had no authority to enter a final appealable judgment of conviction in a criminal prosecution.¹⁰⁶ Quoting from an earlier decision, the court of appeals stated, “[A] commissioner acts as an instrumentality to inform and assist the court; only the court has authority to make final orders or judgments, and the decision of a commissioner is a nullity from which no appeal can be taken.”¹⁰⁷ The court of appeals dismissed the appeal and ordered the defendant discharged from the custody of the Department of Corrections and remanded to the custody of the county sheriff.¹⁰⁸

C. *Interlocutory Appeal of Court Order To Sell Stock*

In addressing a question of first impression, one court of appeals held that a court’s order to sell stock is interlocutorily appealable as of right.¹⁰⁹ The rule provides that an “appeal from interlocutory orders shall be taken to the Court of Appeals in the following cases: (1) . . . the delivery or assignment of any securities.”¹¹⁰ Delivery is “the act by which the res or substance thereof is placed within the actual or constructive possession or control of another.”¹¹¹ The court of appeals stated, “An interlocutory appeal is permitted when there is a delivery of securities because a shift of control occurs which may result in material changes that could not be remedied by a later appeal.”¹¹² The court concluded its analysis of this issue, “A judicial sale shifts control of the

103. *Coffey*, 624 N.E.2d at 466 (citing *Commitment of T.J.*, 614 N.E.2d 559 (Ind. Ct. App. 1993)).

104. *Id.* (citing *Metzger v. Hamp*, 156 N.E. 582 (Ind. App. 1927)).

105. *Id.*

106. *Kirby v. State*, 619 N.E.2d 967 (Ind. Ct. App. 1993).

107. *Id.* at 967 (quoting *Rivera v. State*, 601 N.E.2d 445, 446 (Ind. Ct. App. 1992)).

108. *Id.* at 968; *see also* *Boushehry v. State*, 622 N.E.2d 212 (Ind. Ct. App. 1993).

109. *Koch v. James*, 616 N.E.2d 759, 760-61 (Ind. Ct. App. 1993).

110. IND. APP. R. 4(B) (1993).

111. 616 N.E.2d at 760 (quoting BLACK’S LAW DICTIONARY 385 (5th ed. 1979)).

112. *Id.*

securities and requires a change in possession. We find 'delivery' encompasses a judicial sale of securities and is grounds for an interlocutory appeal."¹¹³

D. Compliance With The Appellate Rules

As the appellate courts point out periodically, some parties fail to comply with the procedural rules to appeal. One party filed a brief which reflected his "subjective belief" that he should not have to pay a money judgment.¹¹⁴ The court of appeals found that that brief "substantially fail[ed] to comply with the appellate rules."¹¹⁵ The court recitation of the omissions reads like a primer on appellate procedure:

We find no table of contents. His statement of the case includes only one date and no verbatim statement of the judgment. His statement of the facts is disjointed, incomplete, and without citation to the record. Ind. Appellate Rule 8.3. His issues are almost indecipherable. His argument lacks cogency, and there is little or no citation to authority. While we prefer to decide cases on the merits rather than on technicalities, we will deem alleged trial errors waived where appellant's noncompliance with the rules of procedure is so substantial it impedes our appellate consideration of the errors.¹¹⁶

The court of appeals concluded that the purpose of the appellate rules is "to aid and expedite review and to relieve the appellate court of the burden of searching the record and briefing the case."¹¹⁷ The appellate court "will not become an advocate for a party nor will [it] address argument which is either inappropriate, too poorly developed, or improperly expressed to be understood."¹¹⁸ The court was compelled to find the issues waived because "non-compliance with the appellate rules substantially impede[d] [it] from reaching the merits of this appeal."¹¹⁹

In another case, the court of appeals stated, "We note the statement of facts in Smith's appellate brief consists primarily of his argument, essentially presents only evidence in his favor, and is not a narrative statement of the facts as required by Indiana Appellate Rule 8.3(A)(5). A statement of facts is not intended to be a portion of appellant's argument."¹²⁰ The court of appeals has

113. *Id.* at 760-61.

114. *Mullis v. Martin*, 615 N.E.2d 498, 500 (Ind. Ct. App. 1993).

115. *Id.*

116. *Id.* (citing *Nehi Beverage Co. of Indianapolis v. Petri*, 537 N.E.2d 78, 81 (Ind. Ct. App. 1989), *trans. denied.*).

117. *Id.*

118. *Id.* (quoting *Terpstra v. Farmers & Merchants Bank*, 483 N.E.2d 749, 754 (Ind. Ct. App. 1985), *trans. denied.*).

119. *Id.*

120. *Smith v. State*, 610 N.E.2d 265, 267 n.2 (Ind. Ct. App. 1993) (citing *Moore v. State*, 426

also reminded counsel that “[w]hen citing decision by the Court of Appeals, no reference should be made to the individual districts.”¹²¹

Perhaps the most flagrant non-compliance with the appellate rules, however, was not by a lawyer or a party, but by a court reporter. One *per curiam* opinion of the Indiana Supreme Court opened:

The Court today is faced with the task of determining whether to find a court reporter in contempt for violating a court-ordered deadline for preparing a transcript in a death penalty case. As she prepared other transcripts instead, we find she willfully disobeyed a court order and, accordingly, she is guilty of contempt.¹²²

During the summer of 1988, the death penalty case went to trial. The defendant filed a motion to correct errors in January, 1989, and later filed a belated motion to correct errors. The trial court “denied the belated motion to correct errors about two years later, on January 17, 1990, after the Supreme Court initiated inquiry concerning the delay.”¹²³

About two years later, March 1, 1992, the trial court appointed the defendant’s counsel, who filed a praecipe for the record on March 18, 1992. The record was due on June 16, 1992. However, the Supreme Court granted a belated extension of time to file the record on July 27, 1992. Concerned over the delay in the case, the Supreme Court set a status conference for September 10, 1992.¹²⁴

The court reporter and defendant’s counsel appeared. As a result of the conference, the Supreme Court issued an order on September 15, 1992, requiring the court reporter to complete the transcript by December 10, 1992. The order expressly provided that the court reporter would have to answer for contempt charges if she did not comply with the deadline.¹²⁵

The court reporter did not complete the transcript by the due date as ordered. She appeared before the Supreme Court on January 13, 1993, to offer her reasons for not being held in contempt. Unpersuaded by her arguments, four justices of the Supreme Court found her in contempt.¹²⁶ The Supreme Court ordered a \$500 fine and seven (7) days in jail without the benefit of good time. The order of incarceration was withheld until February 1, 1993, such that if she completed the transcript by that time the Supreme Court would consider suspending her jail sentence.¹²⁷

N.E.2d 86 (Ind. Ct. App. 1981)).

121. *Wenger v. Weldy*, 605 N.E.2d 796, 797 n.1 (Ind. Ct. App. 1993).

122. *Matter of Hatfield*, 607 N.E.2d 384, 384 (Ind. 1993).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 385.

127. *Id.* at 386.

The Supreme Court also noted that the trial court judge "must share the blame for the tardy transcript preparations in his court."¹²⁸ The documents reflected a one-year backlog and "[a]s the entire appeal process often takes less than one year in cases in other trial courts, [the] delay is untenable."¹²⁹ The Supreme Court ordered the trial court to submit a plan for expeditiously resolving the one-year backlog.¹³⁰

III. ON THE HORIZON FOR INDIANA'S APPELLATE COURTS

As the state's appellate courts move toward the twenty-first century, it is appropriate to look at the future impact of some changes made or attempted in 1993. The first forward-looking change is the retirement of Justice Krahulik on November 1, 1993, and his replacement by Justice Sullivan. Although all 3-2 decisions with Justice Krahulik in the majority will have the power of stare decisis, such decisions will probably be carefully considered by Justice Sullivan whose prior public service and agency experience may shape his view of what Indiana law should be. At his swearing-in ceremony, Justice Sullivan expressed a strong interest in addressing the needs of children. Justice Sullivan handed down his first opinion for the court on December 27, 1993 holding "a child support obligation is enforceable by contempt."¹³¹

Another change is the Indiana Rules of Evidence which go into effect January 1, 1994.¹³² One can anticipate that the appellate courts will adopt standards of review that give trial courts less discretion to move away from the written rules that were so carefully drafted over many months of review by professors, practitioners, and judges from all levels. The appellate courts may look to federal law for assistance in addressing the issues that the new Indiana Rules of Evidence will present in the coming years.

A third and final stirring for the future is the attempt to shift in the first instance appellate review of the Indiana Tax Court from the Indiana Supreme Court to the Indiana Court of Appeals. Although this effort failed, the desire to have a mandatory review of the tax court's decision by a multi-member appellate panel will probably persist. In summary, Indiana appellate procedure continued to develop in 1993. More changes are anticipated in 1994. The changes discussed here are only a beginning. The Indiana Supreme Court will continue to refine the rules of appellate procedure to make the process better, faster, and easier.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Pettit v. Pettit*, 626 N.E.2d 444, 444 (Ind. 1993).

132. The initial citation format for the new rules of evidence is, for example, "Ind. Evidence Rule 301" with subsequent citations as "EVID. R. 301." IND. APP. R. 8.2(B)(2) (effective Jan. 21, 1994).