

# APPELLATE PROCEDURE

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## INTRODUCTION

During the year 2000, appellate practitioners prepared for a completely revised set of appellate rules that would go into effect January 1, 2001. The year 2001 was a time of transition from the old rules to the new. In 2002, the new appellate rules settled in and became the normal mode of operation.

This Article examines recent opinions, orders, and other developments in the area of state appellate procedure in Indiana.<sup>1</sup> In Part I of the Article, a brief history of the appellate rule revision process is recounted. Part II examines the most recent appellate rule amendments that were promulgated and previews possible future amendments. In Part III, the cases of significance are discussed. Miscellaneous matters of possible interest are highlighted in Part IV.

The new appellate rules themselves were not a particularly fruitful source of interpretive case law this past year. The fact that the new rules were not the cause of any significant procedural controversy suggests they are working well. Rather, as discussed in Part III, the most important cases resurrected or refined older and seldom seen procedural doctrines.

## I. A BRIEF VISIT TO THE PAST

Before looking at current developments, however, a quick review of an important preceding event is warranted. The completely rewritten Rules of Appellate Procedure that went into effect at the start of the year 2001 have been discussed at length elsewhere and there is no need to reexamine their origin or significance in detail.<sup>2</sup> However, a rudimentary overview why and how the new rules came into being may be helpful.<sup>3</sup>

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1. This Article covers the time period from November 1, 2001, until October 1, 2002.

2. See, e.g., Douglas E. Cressler, *A Year of Transition in Appellate Practice*, 35 IND. L. REV. 1133 (2002); Douglas E. Cressler & Paula F. Cardoza, *A New Era Dawns in Appellate Procedure*, 34 IND. L. REV. 741, 744-47 (2001); George T. Patton, Jr., *Recent Developments in Indiana Appellate Procedure: New Appellate Rules, a Constitutional Amendment, and a Proposal*, 33 IND. L. REV. 1275 (2000).

3. The complete rewriting of the Rules of Appellate Procedure can trace its genesis to a single point and place in time: the lunch hour, Monday, September 29, 1997 in the cafeteria of the Indiana South Government Center. The Appellate Practice Section of the Indiana State Bar Association was about to wrap up its inaugural year in operation under its first Section Chair, George T. Patton, Jr. On that date, Mr. Patton had lunch with the Honorable Edward W. Najam, Jr., judge of the Indiana Court of Appeals. Judge Najam was also the chair-elect and was about to assume leadership of the Section. As part of his vision for the future of the Section, Judge Najam expressed the idea of forming a large project team to rewrite all the appellate rules from beginning

Committees made up of members of the Indiana State Bar Association's Appellate Practice Section performed the initial analyses of the old rules and drafting of the new. Further redrafting was done by the Indiana Supreme Court Rules Committee and final revisions were made by the Indiana Supreme Court. The end product was a completely new set of Rules of Appellate Procedure.<sup>4</sup> The new rules went into effect beginning with any appeal initiated on or after January 1, 2001.<sup>5</sup>

The goals of the revision process included making the appellate process easier to understand, more streamlined, and more uniform in practice.<sup>6</sup> While much of the language carried over from the old rules to the new, there were many substantive changes. The rules governing appellate procedure were reorganized and renumbered. Changes and additions were made to the nomenclature of appeal work, in the timing for many aspects of taking an appeal, in motion practice, and in the procedures for seeking transfer of jurisdiction to the Indiana Supreme Court. The greatest changes brought about by the new rules, however, were in the process by which the record on appeal is prepared and presented to the appellate court.

Near the end of the first year the rules were in operation, the state high court adopted a few substantive amendments.<sup>7</sup> Those amendments were discussed extensively in last year's survey issue.<sup>8</sup>

With this background, we turn to more recent developments in Indiana appellate procedure.

## II. RULE AMENDMENTS

### A. *Adopted in 2002*

The supreme court adopted four amendments to the Rules of Appellate

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to end, an idea readily embraced by Mr. Patton. Ultimately, dozens of lawyers and judges would donate their energy and expertise to the Appellate Rules Project. Chief Justice Randall T. Shepard has expressly recognized the "enormous commitment of time and talent from practitioners . . . [to whom] we all owe a substantial debt." GEORGE T. PATTON, JR., *INDIANA APPELLATE PRACTICE*, at xiii-xiv (3d ed. 2001). To the Chief Justice's comment, this author would add only that the justices of the Indiana Supreme Court also spent many hours reviewing and making final revisions to the proposed rules. But let the record show that Judge Ted Najam is the original founding father of the modern appellate rules in Indiana.

4. See generally George T. Patton, Jr., *Appellate Rules Proposal Before Rules Committee*, RES GESTAE, Apr. 1999, at 10-11.

5. See Order Amending Indiana Rules of Appellate Procedure (Ind. Feb. 4, 2000) (No. 94S00-0002-MS-77).

6. Patton, *supra* note 2, at 1276.

7. See Order Amending Indiana Rules of Appellate Procedure (Ind. Dec. 21, 2001) (No. 94S00-0101-MS-67).

8. See Cressler, *supra* note 2, at 1134-40.

Procedure during the past year.<sup>9</sup> Three of those changes are discussed below. The fourth amendment, not discussed herein, was a change to the language of Indiana Appellate Rule 7(B) (Appellate Rule), which governs the scope of appellate review of criminal sentences. This particular amendment is better addressed in its possible impact on substantive criminal law than as a matter of appellate procedure.<sup>10</sup> These amendments went into effect January 1, 2003.<sup>11</sup>

The first of the three changes was to Appellate Rule 14(B)(1)(a). That rule was amended to require a trial court to make a finding of good cause if it grants a belated motion to certify an interlocutory appeal.<sup>12</sup>

The second and third changes codified informal practices of the supreme court. As amended, Appellate Rule 16(F) now provides that once an attorney has entered an appearance or been granted leave to appear *pro hac vice* before the Indiana Court of Appeals or Indiana Tax Court, that attorney need not again file a renewed appearance or seek further admission in any continuance of the case before the Indiana Supreme Court.<sup>13</sup> Similarly, Appellate Rule 41(B) was amended to state that once an entity is granted *amicus curiae* status before the court of appeals or tax court, it retains *amicus* status in any continuation of that case before the supreme court.<sup>14</sup>

In a rule-related development, the high court also issued an order establishing certain standards for record transcription in the state courts. Appellate Rule 30(A)(3) authorizes the Division of State Court Administration to determine standards for the software and media used in the creation and preservation of transcripts. The Division created such standards during the reporting period, and the supreme court approved those standards by order, effective April 1, 2002.<sup>15</sup> Four technical standards were approved, as follows:

**Standard 1.** The electronic Transcript must comply with all of the requirements set out in Appellate Rule 30.

**Standard 2.** The Transcript of the evidence may be prepared in any commercially available word processing software system.

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9. See Order Amending Indiana Rules of Appellate Procedure (Ind. July 19, 2002) (No. 94S00-0201-MS-61).

10. *Id.* Specifically, IND. APP. R. 7(B) was amended as follows: “The Court ~~shall not~~ may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate unless the sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.” *Id.* One commentator has observed, “only time will tell whether the seemingly relaxed language of the new rule will ease the road to sentence reduction.” Joel Schumm, *The Mounting Confusion Over Double Jeopardy in Indiana*, RES GESTAE, Oct. 2002, at 27, 29.

11. Order Amending Indiana Rules of Appellate Procedure, *supra* note 9, at 3.

12. *Id.*

13. *Id.*

14. *Id.*

15. See Order Approving Technical Standards for Digital Transcripts (Ind. Jan. 31, 2002) (No. 94S00-0201-MS-61).

**Standard 3.** Pursuant to Appellate Rule 30(A)(5), the court reporter shall transcribe the evidence on sequentially numbered disks in the event more than one disk is required for complete transcription. Multiple discs [sic] or sets of sequential numbered disks shall be prepared and designated as:

- a. "Official record"
- b. "Official working copy"
- c. "Court reporter's copy"
- d. "Party copy"

The court reporter must convert the "official record," the "official working copy" and the "party copy" into Adobe Portable Document Format (PDF) and transmit these copies in PDF format as set out in Appellate Rule 30.

**Standard 4.** Pursuant to Appellate Rule 30(B), the court reporter shall retain a signed, read only "court reporter's copy" of the electronic Transcript in the original word processing version used for the transcription.<sup>16</sup>

While these standards are directed to court reporters, the well-informed appellate lawyer should be aware of these standards governing the submission of electronic records.

### *B. Possibly On the Horizon*

During the reporting period, the Appellate Practice Section of the Indiana State Bar Association (Section) undertook a survey and review of the appellate rules. Survey forms were sent to the 330 members of the Section. Judges, trial court clerks, and court reporters were also notified of the survey and asked to respond with comments. Approximately one hundred responses were received from lawyers and court staff. The Section quickly took steps to act on the survey results.

An *ad hoc* committee of the Section performed an initial evaluation of the survey results and determined that there were two recommendations that were of particular value that could be addressed fairly straightforwardly. The Honorable Patricia Riley, judge of the Indiana Court of Appeals, was chair of the Section and spearheaded the survey project. On October 29, 2002, Judge Riley sent a letter to the Supreme Court Committee on Rules of Practice and Procedure (Committee)<sup>17</sup> explaining the survey process and identifying the two immediate recommendations for rule amendments.<sup>18</sup>

First, the letter asked that the Committee consider making a recommendation to the supreme court for an amendment that would eliminate a perceived

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16. *Id.*

17. The Committee is responsible for making recommendations to the Indiana Supreme Court for amendments to the rules governing trial and appellate practice in the Indiana state court system. See IND. TRIAL R. 80.

18. A copy of this letter is on file with the author.

redundancy found in Appellate Rules 11(A) and 10(D).

These rules currently provide as follows. When a transcript has been requested and ultimately completed, Appellate Rule 11(A) requires the court reporter to file the transcript with the trial court clerk. The court reporter is also required by that rule to “provide notice to all parties to the appeal that the transcript has been filed with the clerk of the trial court.”<sup>19</sup> Within five days after the transcript is filed, in accordance with Appellate Rule 10(D), the trial court clerk is then required to file and serve on all the parties a notice that the transcript has been completed. When a transcript has been requested, it is generally the filing of the Rule 10(D) notice of completion that serves as the trigger date for determining when the appellant’s brief must be filed.<sup>20</sup>

The Section suggested that the service of the Rule 11(A) notice of *filing* and the service of the Rule 10(D) notice of the *completion* of the transcript were redundant and confusing process and that the process should be simplified.

Second, the letter suggested the possibility of amending Appellate Rule 15(B) to clarify the time for filing the appellant’s case summary in interlocutory appeals.

Rule 15(B) currently provides

[t]he Appellant’s Case Summary shall be filed within thirty (30) days of the filing of the Notice of Appeal or, in the case of an interlocutory appeal under Rule 14, at the same time as the filing of either the Notice of Appeal with the trial court clerk or the motion to the court of appeals requesting permission to file an interlocutory appeal.<sup>21</sup>

The Section stated in its letter that this language is confusing because it arguably allows the appellant a choice about when to file the appellant’s case summary in an interlocutory appeal. The Section proposed that Rule 15(B) be amended by inserting the following underscored language:

The Appellant’s Case Summary shall be filed within thirty (30) days of the filing of the Notice of Appeal or, in the case of an interlocutory appeal under Rule 14, at the same time as the filing of either the Notice of Appeal with the trial court clerk under Rule 14(A) for Interlocutory Appeals of Right or the motion to the Court of Appeals requesting permission to file an interlocutory appeal under Rule 14(B)(2) for Discretionary Interlocutory Appeals.

The Section suggested that an amendment of this nature appears consistent with the case summary’s function as the appellant’s appearance<sup>22</sup> and with the

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

20. See IND. APP. R. 45(B)(1)(b). If no transcript is requested or if it has already been completed before the clerk has issued a notice of completion of the clerk’s record pursuant to Appellant Rule 10(C), then the Rule 10(C) filing date serves as the trigger date. See IND. APP. R. 45(B)(1).

21. IND. APP. R. 15(B).

22. See IND. APP. R. 16(A).

requirement for an appellant to file a case summary before being allowed to file any other papers or motions.<sup>23</sup>

The Committee will consider these suggestions in due course and may ultimately make recommendations to the supreme court in accordance with the timetables and procedures of Indiana Trial Rule 80.

Judge Riley's letter on behalf of the section also stated that the Section will be forming committees to further study the survey responses. Most of the survey comments focused on record related issues, so additional recommendations in that area of appellate procedure may be forthcoming from the Section.

### III. DEVELOPMENTS IN THE CASE LAW

#### *A. Sometimes a Final Judgment Isn't*

Although the opinion in *Ramco Industries, Inc. v. C & E Corp.*<sup>24</sup> did not articulate any new procedural rules, it resuscitated some old law and reminded practitioners and trial judges about an important point of appellate procedure.

Ramco Industries was a defendant in a four-count suit. Count I alleged that certain amounts were due the plaintiffs as the result of an arbitration. Counts II and III were breach of contract claims. Alleged tortious interference with business dealings was the basis for Count IV.<sup>25</sup> The trial court granted the plaintiffs summary judgment on Count III, determining that Ramco had breached certain provisions of a contract. However, the court reserved the question of damages for trial.<sup>26</sup> Five months later, the plaintiffs filed another summary judgment motion, this time asking that a judgment be entered on Count III in the amount of damages incurred to-date. The trial court ultimately granted this motion as well, and entered judgment in the amount of \$71,017.41.<sup>27</sup> The summary judgment order noted that this judgment did not resolve all the disputes between the parties and that even the amounts due as a result of the breach of contract under Count III might not be final. Nevertheless, the trial court expressly found "no just reason for delay"<sup>28</sup> in awarding the contract damages and entered partial summary judgment in writing as to less than all the issues and claims.<sup>29</sup>

The question that then arose was whether the partial summary judgment order was a final judgment under the applicable procedural rules. The answer to this question was critical. If a judgment order is of the discretionary interlocutory variety, it remains subject to modification by the trial court and may

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23. See IND. APP. R. 16(E).

24. 773 N.E.2d 284 (Ind. Ct. App. 2002).

25. *Id.* at 286.

26. *Id.* at 287.

27. *Id.*

28. *Id.*

29. *Id.*

be appealed later once a final judgment is entered.<sup>30</sup> However, if a judgment order constitutes a final judgment, it must be appealed immediately in order to preserve the right to appeal.<sup>31</sup>

On its face, the order seemed to constitute a final judgment because the trial court had used the “magic language” of finality contained in Trial Rule 56(C), which provides in pertinent part:

[a] summary judgment upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory unless the court in writing expressly determines that there is not just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims or parties.<sup>32</sup>

This rule must also be read in conjunction with Appellate Rule 2(H), which defines a “final judgment”<sup>33</sup> to include, among other things, judgment orders wherein the trial court expressly determines that there is no just cause for delay and in writing expressly directs the entry of a partial judgment pursuant to Trial Rule 56(C) or 54(B).<sup>34</sup>

Faced with what appeared to be a final, appealable judgment order, Ramco initiated an appeal. However, in addition to addressing the merits, Ramco also argued that the trial court erred when it converted an otherwise interlocutory order into a final judgment by stating in writing that there is no just reason for delay. The court of appeals agreed and dismissed the appeal.<sup>35</sup>

In so doing, the court invoked a somewhat arcane aspect of appellate practice: a trial court’s authority to make judgments final pursuant to Trial Rules 54(B) and 56(C) is not unfettered. A partial judgment order containing the special language of finality issued under these rules must nevertheless “possess the requisite degree of finality, and must dispose of at least a single substantive claim” to be properly considered appealable.<sup>36</sup> The appellate court is not bound by the trial court’s determination of finality under Trial Rules 54(B) and 56(C), and the propriety of the trial court’s addition of the “magic language” of finality

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30. *Lutheran Hosp. of Ft. Wayne, Inc. v. Doe*, 639 N.E.2d 687, 689 n.5 (Ind. Ct. App. 1994); *Haskell v. Peterson Pontiac GMC Trucks*, 609 N.E.2d 1160, 1163 (Ind. Ct. App. 1993). Alternatively, a party could seek to immediately appeal a discretionary interlocutory order or judgment through the procedures described in Indiana Appellate Rule 14(B).

31. IND. APP. R. 9(A).

32. IND. TRIAL R. 56(C) (in part). There is similar language in Trial Rule 54(B), which governs general judgments. Another case decided during the reporting period highlighted the importance of the express determination of no just reason for delay in judgments in establishing when appellate rights arise. *See Rayle v. Bolin*, 769 N.E.2d 636 (Ind. Ct. App. 2002) (dismissing appeal of a judgment that did not include the formalistic language requirements of Trial Rule 54(B)).

33. IND. APP. R. 2(H)(2).

34. *Id.*

35. *Ramco*, 773 N.E.2d at 289.

36. *Id.* at 288 (quoting *Legg v. O’Connor*, 557 N.E.2d 675, 676 (Ind. Ct. App. 1990)).

is reviewable under an abuse of discretion standard.<sup>37</sup>

In this particular circumstance, the court of appeals determined that the trial court had abused its discretion. The court noted that the first partial summary judgment order only established partial liability and reserved the damages assessment for later, and that the second partial summary judgment order determined only an interim amount of damages.<sup>38</sup> Concerned about the prospect of piecemeal litigation, the court of appeals concluded that the trial court's "order simply does not possess the requisite degree of finality to completely dispose of a single substantive claim" in order to be appealed as a final judgment under Trial Rule 56(C).<sup>39</sup>

The *Ramco* case serves as a reminder of the powerful appellate procedural mechanisms embodied in Trial Rules 54(B) and 56(C). Many or most partial judgment orders would generally only be appealable if the processes of Appellate Rule 14(B) are followed. That is, the trial court must first certify the order for interlocutory appeal and the appellate court must then accept the appeal, subject to a showing that the requisite grounds for allowing an early appeal have been demonstrated.<sup>40</sup> However, Trial Rules 54(B) and 56(C), when read in conjunction with Appellate Rule 2(H)(2), allow a trial court to unilaterally determine that a judgment order is immediately final and appealable. In the vast majority of cases, the determination of finality by the trial court will not be contested on appeal. However, *Ramco* illustrates that the trial court's authority to unilaterally create appellate rights under Trial Rules 54(B) and 56(C) has its limits.

When faced with a judgment order in which the "magic language" of Trial Rules 54(B) or 56(C) has been used, the party against whom judgment has been entered should presume that the judgment order is appealable and if not immediately appealed, that the right to appeal of that judgment order will be forfeited.<sup>41</sup> However, where the judgment order does not at least fully dispose of a single substantive claim, the appealing party could argue that the trial court abused its discretion in adding the words that turned an otherwise interlocutory order into a final judgment.

A novel twist in the *Ramco* case is that the appealing party successfully argued that its own appeal should be dismissed.

### *B. The Motion to Follow the Mandate*

*KeyBank National Ass'n v. Michael*<sup>42</sup> was another case that warrants notice in which the court of appeals applied a seldom-used procedural device. The

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37. *Id.* (citing *Troyer v. Troyer*, 686 N.E.2d 421, 425 (Ind. Ct. App. 1997)).

38. *Id.* at 289.

39. *Id.*

40. *See* IND. APP. R. 14(B)(1), (2).

41. IND. APP. R. 9(A).

42. 770 N.E.2d 369 (Ind. Ct. App. 2002).

court of appeals itself called the situation “out of the ordinary.”<sup>43</sup>

In an earlier appeal involving the same parties, the appellate court affirmed the trial court judgment in part and reversed in part, and remanded the case for further proceedings.<sup>44</sup> Back in the trial court, one of the parties requested and was granted relief by order that was, in the view of KeyBank, inconsistent with one of the several holdings of the earlier opinion of the court of appeals.

KeyBank asked the trial court to certify the order for interlocutory appeal, but the trial court refused.<sup>45</sup> KeyBank then went directly back to the court of appeals and filed a motion under the cause number from the previous appeal. KeyBank referred to its motion as a “Petition for Writ in Aid of Appellate Jurisdiction and/or Writ of Mandate.”<sup>46</sup>

KeyBank argued in its motion that the trial court had failed to follow the mandate of the opinion of the court of appeals. It asked the court to issue an order requiring the trial court to follow the directives of the appellate court.<sup>47</sup> The opposing party urged the court of appeals to dismiss the motion on jurisdictional grounds, arguing that KeyBank should be required to do what any party aggrieved of a trial court decision ordinarily must do: appeal the trial court’s judgment at the appropriate time.<sup>48</sup> The court of appeals stated as follows:

We certainly agree that the traditional procedural path is the preferred route in the overwhelming majority of cases. We believe, however, that there are situations in which the extraordinary remedy of issuing a writ is appropriate. One such situation would involve cases where a trial court issues a ruling upon remand that is inconsistent with an appellate decision previously rendered in the same action.<sup>49</sup>

The court also cautioned that even under those circumstances, a writ would be appropriate only in those comparatively few instances where it would serve the interest of judicial economy or may serve to prevent an irreparable harm.<sup>50</sup> The court ultimately granted KeyBank’s motion with a published opinion instructing the trial court on the steps it needed to follow to comply with the court’s earlier opinion.<sup>51</sup>

Although the court of appeals cited no opinion directly authorizing the procedure that was followed in this case, the court was clearly on firm and ancient procedural footing. One hundred and thirty-two years ago, the Indiana

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43. *Id.* at 371.

44. *KeyBank Nat’l Ass’n v. Michael*, 737 N.E.2d 834, 854 (Ind. Ct. App. 2000), *with later opinion in aid of appellate jurisdiction*, 770 N.E.2d 369 (Ind. Ct. App. 2002).

45. 770 N.E.2d at 374.

46. *Id.* at 371.

47. *Id.* at 374.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 376.

Supreme Court issued an opinion directing a trial court to follow the mandate of the high court's earlier opinion.<sup>52</sup> The best-known "modern" case articulating and approving the procedures that were followed in the *KeyBank* case is *Skendzel v. Marshall*,<sup>53</sup> dating from 1975.

As the court of appeals indicated, it should be a rare case where a trial court would fail to follow the dictates of the appellate court on remand from an appeal. However, if that unusual circumstance should arise, the original *Skendzel* case, and now *KeyBank*, show that one need not perfect a whole new appeal to challenge the trial court's actions. Rather, the alleged error may be addressed with a motion filed with the appellate court that issued the opinion.

### C. *Limitations on the Davis Procedure*

As a general matter, once an appellate court acquires jurisdiction over a case, the trial court is limited in the actions it may take until the appeal ends.<sup>54</sup> Twenty-five years ago, the Indiana Supreme Court approved a procedure by which an appellant could request the appellate court to voluntarily terminate consideration of an active appeal and allow the appellant to return to the trial court for the purpose of filing a petition seeking post-conviction relief.<sup>55</sup> The eponymous "*Davis* procedure" thereby permits an appellant who can demonstrate a substantial likelihood of obtaining relief to return to the trial court for post-conviction proceedings.<sup>56</sup> If the petition seeking post-conviction relief is denied, the appellate court will generally then re-assume jurisdiction over the previously dismissed appeal and consolidate it with the appeal of the denial of post-conviction relief.<sup>57</sup>

The purpose of the *Davis* procedure is to promote judicial economy.<sup>58</sup> For example, if exculpatory evidence not available during trial is discovered while an appeal is pending, the *Davis* procedure creates an efficient mechanism for holding the appeal in abeyance while the trial court determines whether the petitioner is entitled to relief based on the new evidence. If so, the original appeal becomes moot and can be dismissed with prejudice.<sup>59</sup>

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52. *Julian v. Beal*, 34 Ind. 371 (1870).

53. 330 N.E.2d 747 (Ind. 1975).

54. *See, e.g.*, IND. APP. R. 8 (appellate court acquires jurisdiction once notice of completion of clerk's record is filed); IND. APP. R. 65(E) (trial court may not act in reliance on an opinion until final and certified); *Clark v. State*, 727 N.E.2d 18, 20 (Ind. Ct. App. 2000) ("[A]s a general rule, once an appeal is perfected the trial court loses subject matter jurisdiction over the case.")

55. *Davis v. State*, 368 N.E.2d 1149 (Ind. 1977). The court has also established a similar procedure for use in civil proceedings. *See Logal v. Cruse*, 368 N.E.2d 235 (Ind. 1977).

56. 368 N.E.2d at 1151.

57. *See, e.g.*, *Wentz v. State*, 766 N.E.2d 351 (Ind. 2002); *Williams v. State*, 757 N.E.2d 1048 (Ind. Ct. App. 2001) (both cases in which the appeal had been terminated so that the appellant could litigate a post-conviction petition, and then the two appeals were consolidated).

58. 368 N.E.2d at 1151.

59. This has happened on occasion. *See, e.g.*, *Moler v. State*, Cause No. 39S00-9903-CR-179

In *Bellamy v. State*,<sup>60</sup> the Indiana Supreme Court established limits on appellate court discretion in permitting appellants to request a *Davis* remand.

Lamont Bellamy had been convicted of various crimes and those convictions and sentences had been affirmed on appeal.<sup>61</sup> Bellamy then sought and was denied post-conviction relief, and an appeal of that denial ensued.<sup>62</sup> While the appeal of the denial of post-conviction relief was pending, Bellamy filed a motion asking the court of appeals to dismiss the appeal and remand the case back to the post-conviction court so that he could file and litigate an *amended* petition for post-conviction relief. The court of appeals granted the motion and dismissed the appeal without prejudice.

The State petitioned to transfer jurisdiction, and the supreme court accepted the appeal. In its opinion, the high court noted that Bellamy's motion sought a remand for two purposes.

First, he wanted to return to the trial court to present additional unspecified evidence in support of the original post-conviction petition. The supreme court determined that this aspect of the motion was simply a request for a new trial without any showing of trial court error.<sup>63</sup> The high court determined that the court of appeals had erred in allowing the appellant to return to the post-conviction court to try the same issues again with the hope of a better result.<sup>64</sup>

Second, Bellamy wanted a remand to raise *new* issues in the post-conviction court. In this regard, Bellamy was attempting to invoke the *Davis* procedure. However, *Davis* involved a direct appeal from a judgment of conviction and sentence, whereas Bellamy was appealing from the denial of post-conviction relief.<sup>65</sup> There is no procedural impediment to filing one initial petition for post-conviction relief. However, if a person convicted of a crime has already once sought post-conviction relief, any future collateral attack on the judgment in the state system are procedurally governed by Post-Conviction Rule 1 § 12, which sets out the requirements for *successive* requests for post-conviction relief. The court concluded, "Among those requirements [of Post-Conviction Rule 1 § 12] is the necessity of tendering a proposed successive petition demonstrating a reasonable possibility of entitlement to post-conviction relief. In these regards, appellant's motion falls well short."<sup>66</sup>

The appeal was remanded to the court of appeals with instructions to vacate

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(appeal terminated and case remanded for a post-conviction proceeding in accordance with *Davis* procedure by order dated October 12, 1999; appealed dismissed as moot by order dated January 26, 2000 after relief obtained in post-conviction court in cause number 39C01-9801-CF-3).

60. 765 N.E.2d 520 (Ind. 2002).

61. *Bellamy v. State*, 676 N.E.2d 1110 (Ind. Ct. App. 1997) (table of unpublished memorandum decisions).

62. 765 N.E.2d at 520.

63. *Id.* at 521.

64. *Id.* at 521-22.

65. *Id.* at 521.

66. *Id.* at 522 (citation omitted).

its previous order and to enter an order denying the motion to dismiss.<sup>67</sup> The high court also suggested that it would be “unlikely” that a *Davis* proceeding would ever be warranted during an appeal from the denial of post-conviction relief.<sup>68</sup>

One of the purposes for the complete revision of the appellate rules discussed in Part I of this Article was to codify some of the procedures previously only made known in case law. The *Davis* procedure provides an example of how that purpose was given effect. The procedures discussed in *Davis* and now limited by *Bellamy* are expressly authorized in Appellate Rule 37, adopted January 1, 2001.

#### D. Access to the Record in Civil Appeals

In *Theobald v. Hartford Casualty Ins. Co.*,<sup>69</sup> the court of appeals published an order addressing a point of appellate procedure *prior* to issuing its opinion on the merits. The court wanted to provide procedural guidance concerning access to the appendix during the briefing period in civil cases.

After the appellant in *Theobald* filed its brief and appendix, the appellee requested a copy of the appendix from the appellant and was refused.<sup>70</sup> Being required to reference the appendix in its brief, the appellee sought to have access to the appendix by borrowing it from the clerk of the appellate courts. This request was also refused by the clerk.<sup>71</sup> The appellee filed a motion with the court of appeals to either require counsel for the appellant to provide a copy of the appendix or to compel the clerk to allow the appellee access to the appendix during its briefing period.

The court of appeals granted the latter request in the published order. In so doing the court held that “in all other civil cases in which counsel for the appellee requests the Appendix for use in preparing the brief of the appellee, the Clerk of this Court is directed to release the Appendix to counsel for the appellee for that purpose.”<sup>72</sup>

The *Theobald* interlocutory opinion simply gave early effect to a clarifying rule change that had already been adopted by the Indiana Supreme Court. On December 21, 2001, about five weeks before the published opinion in *Theobald*, the high court issued an order amending Appellate Rule 12(C).<sup>73</sup> As amended effective April 1, 2002, that rule expressly states that the clerk of the appellate court is to allow the parties to an appeal access to all transcripts and appendices during the period they are working on their briefs.<sup>74</sup>

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67. *Id.*

68. *Id.*

69. 762 N.E.2d 785 (Ind. Ct. App. 2002).

70. *Id.* at 786.

71. *Id.*

72. *Id.* at 787.

73. See Order Amending Indiana Rules of Appellate Procedure, *supra* note 7.

74. *Id.*

*E. Late Appeals from the Denial of a Motion to Correct  
Erroneous Sentence Disallowed*

Indiana Code § 35-38-1-15 states that if a person convicted of a crime is erroneously sentenced, the person may file a written motion in the sentencing court asking that sentence be corrected.<sup>75</sup> Richard Lee Davis filed a motion to correct the allegedly erroneous sentence entered on his conviction for conspiracy to commit robbery.<sup>76</sup> The trial court denied the motion, and Davis attempted an appeal.

However, Davis was late in filing a notice of appeal. The State moved to dismiss the appeal asserting the late notice was a jurisdictional defect, but a panel of the court of appeals denied the motion.<sup>77</sup> The State raised the jurisdictional issue relating to the late notice of appeal again in its briefing on the merits and again on rehearing, but to no avail.<sup>78</sup> The supreme court granted the state's petition to transfer jurisdiction.

In its opinion, the court noted the language of Appellate Rule 9: "Unless the Notice of Appeal is timely filed, the right to appeal shall be forfeited except as provided by [Post-Conviction Rule] 2."<sup>79</sup> Post-Conviction Rule 2 provides a procedure for seeking permission for belated direct appeals, but does not permit belated consideration of appeals of post-conviction judgments.<sup>80</sup> A motion to correct erroneous sentence is a form of petition for post-conviction relief.<sup>81</sup>

In other words, because a motion to correct erroneous sentence is treated as a form of post-conviction proceeding, a late appeal pursuant to Post-Conviction Rule 2 is not authorized. Appellate Rule 9 therefore controls and an appellant, like Davis, who fails to file a timely notice of appeal has forfeited his right to an appeal.<sup>82</sup>

Thus, when taking an appeal from the denial of a motion to correct erroneous sentence, counsel must be mindful that the forgiveness provided to direct appeals by Post-Conviction Rule 2 is not available. The failure to timely file a notice of appeal will be fatal to the appeal.

*F. Constitutionality of Appellate Procedures Upheld*

*Wright v. State*<sup>83</sup> required the court of appeals to address a constitutional

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75. IND. CODE § 35-38-1-15 (2002).

76. *Davis v. State*, 771 N.E.2d 647, 647-48 (Ind. 2002).

77. *Id.* at 648.

78. *Id.*

79. *Id.* (citing IND. APP. R. 9).

80. 771 N.E.2d at 649 (citing *Greer v. State*, 685 N.E.2d 700, 702 (Ind. 1997); *Howard v. State*, 653 N.E.2d 1389, 1390 (Ind. 1995)).

81. *Id.* (citing *State ex rel. Gordon v. Vanderburgh Cir. Ct.*, 616 N.E.2d 8, 9 (Ind. 1993)); *see also Beech v. State*, 702 N.E.2d 1132 (Ind. Ct. App. 1998).

82. 771 N.E.2d at 649.

83. 772 N.E.2d 449 (Ind. Ct. App. 2002).

challenge to the appeals process in Indiana. Jesse Wright was convicted of public intoxication.<sup>84</sup> He wanted to appeal the conviction and was not indigent, so he had to pay for his own transcript.<sup>85</sup> Wright apparently purchased a transcript of the trial testimony, but the court reporter did not include a transcript of the *voir dire* of the jury or opening and closing statements. The court reporter would not prepare the additional transcripts without being further compensated and the court of appeals denied a pre-briefing motion asking that the court reporter be compelled to do so.<sup>86</sup>

On appeal, Wright argued that the actions of the court reporter and the court of appeals violated his right to an appeal guaranteed in the Indiana Constitution.<sup>87</sup> He also claimed that Indiana Appellate Rule 9(H), which requires parties to make satisfactory arrangements for the payment of transcription fees, violates the provision of the Indiana Constitution requiring all court to be open and justice administered freely and without purchase.<sup>88</sup> In an opinion that is a model of judicial patience, the court of appeals declined to find any defects of constitutional dimension in the handling of Wright's appeal.<sup>89</sup>

### G. Rehearing Revisited

The Indiana Supreme Court reminded appellate practitioners that a petition for rehearing is a vehicle by which an appellate court may correct its own omissions or errors, but that a proper petition does not ask the court to generally re-examine all the issues decided against the petitioning party.<sup>90</sup> The court cited one-hundred-year-old precedent for this fundamental principal.<sup>91</sup>

## IV. OTHER DEVELOPMENTS

The past year brought with it a typical assortment of appeal-related problems and diversions.

### A. Problem Areas in Appellate Briefing

The briefing problems documented by the appellate courts included attempts to raise a new issue in the reply brief,<sup>92</sup> failure to provide a recitation of the lower

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84. *Id.* at 454.

85. *Id.* at 462.

86. *Id.* at 460-62.

87. *Id.*; IND. CONST. art. VII, § 6.

88. 772 N.E.2d at 461; IND. CONST. art. I, § 12.

89. 772 N.E.2d at 461-62.

90. *Griffin v. State*, 763 N.E.2d 450, 450-51 (Ind. 2002) (on rehearing).

91. *Id.* at 451 (citing *Goodwin v. Goodwin*, 48 Ind. 584, 596 (1874); BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, APPELLATE PROCEDURE AND TRIAL PRACTICE INCIDENTAL TO APPEALS § 557 (1892)).

92. *Holt v. Quality Motor Sales, Inc.*, 776 N.E.2d 361, 367 n.6 (Ind. Ct. App. 2002); *In re Annexation Proposed by Ordinance No. X0195*, 774 N.E.2d 58, 67 n.6 (Ind. Ct. App. 2002); *Unger*

court's judgment,<sup>93</sup> putting the whole transcript in the appendix,<sup>94</sup> failure to include necessary documents in the appendix,<sup>95</sup> other appendix problems,<sup>96</sup> generally defective briefing,<sup>97</sup> asserting facts outside the record,<sup>98</sup> failing to number the pages of the appendix,<sup>99</sup> argumentative brief or statement of facts,<sup>100</sup> other problems with the statement of facts,<sup>101</sup> improvident attacks on a court,<sup>102</sup>

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v. FFW Corp., 771 N.E.2d 1240, 1244 n.2 (Ind. Ct. App. 2002); Blackwell v. Dykes Funeral Homes, Inc., 771 N.E.2d 692, 697 n.2 (Ind. Ct. App. 2002); Crossman Communities, Inc. v. Dean, 767 N.E.2d 1035, 1044 (Ind. Ct. App. 2002); Bunch v. State, 760 N.E.2d 1163, 1167 n.3 (Ind. Ct. App.), *vacated on other grounds* 2002 WL 31656566 (Ind. 2002); Bradshaw v. State, 759 N.E.2d 271, 273 n.2 (Ind. Ct. App. 2001); Leslie v. State, 755 N.E.2d 1147, 1148 n.1 (Ind. Ct. App. 2001); Felsher v. Univ. of Evansville, 755 N.E.2d 589, 593 n.6 (Ind. 2001).

93. Grabarczyk v. State, 772 N.E.2d 428, 430 n.2 (Ind. Ct. App. 2002); Carter v. KCOFC, 761 N.E.2d 431, 433 n.1 (Ind. Ct. App. 2001); SLR Plumbing & Sewer, Inc. v. Turk, 757 N.E.2d 193, 195 n.1 (Ind. Ct. App. 2001); Chaja v. Smith, 755 N.E.2d 611, 612 n.1 (Ind. Ct. App. 2001).

94. *In re D.J.*, 755 N.E.2d 679, 681 n.1 (Ind. Ct. App. 2001).

95. Jones v. State, 774 N.E.2d 957, 960 n.3 (Ind. Ct. App. 2002), *same case reported at* 775 N.E.2d 322 *and* 777 N.E.2d 1; Ingram v. State, 761 N.E.2d 883, 885 n.1 (Ind. Ct. App. 2002); Jaco v. State, 760 N.E.2d 176, 180 n.6 (Ind. Ct. App. 2001); L.M.A. v. M.L.A., 755 N.E.2d 1172, 1173-74 nn.2-4 (Ind. Ct. App. 2001).

96. Cox v. Town of Rome City, 764 N.E.2d 242, 245 n.1 (Ind. Ct. App. 2002).

97. Wright v. State, 772 N.E.2d 449, 453 n.1 (Ind. Ct. App. 2002); Nicholson v. State, 768 N.E.2d 1043, 1045-47 nn.2,3,6 (Ind. Ct. App. 2002); Fulk v. Allied Signal, Inc., 755 N.E.2d 1198, 1203-05 nn.4,6,9-10 (Ind. Ct. App. 2001).

98. Allstate Ins. Co. v. Hammond, 759 N.E.2d 1162, 1166 n.3 (Ind. Ct. App. 2001); Rothschild v. Devos, 757 N.E.2d 219, 221 n.2 (Ind. Ct. App. 2001); Bowling v. Poole, 756 N.E.2d 983, 987 n.3 (Ind. Ct. App. 2001).

99. Jones, 774 N.E.2d at 966 n.8, *same case reported at* 775 N.E.2d 322 *and* 777 N.E.2d 1; Murdock Construction Mgmt., Inc. v. Eastern Star Missionary Baptist Church, Inc., 766 N.E.2d 759, 761 n.1 (Ind. Ct. App. 2002); Blocher v. DeBartolo Properties Mgmt., Inc., 760 N.E.2d 229, 232 n.2 (Ind. Ct. App. 2001); South Haven Sewer Works, Inc. v. Jones, 757 N.E.2d 1041, 1043 n.1 (Ind. Ct. App. 2001).

100. Jones, 774 N.E.2d at 960 n.2, *same case reported at* 775 N.E.2d 322 *and* 777 N.E.2d 1; Montgomery v. Trisler, 771 N.E.2d 1234, 1239 (Ind. Ct. App. 2002); Scoleri v. Scoleri, 766 N.E.2d 1211, 1213 n.1 (Ind. Ct. App. 2002).

101. Martin v. Martin, 771 N.E.2d 650, 657 n.3 (Ind. Ct. App. 2002); Quigg Trucking v. Nagy, 770 N.E.2d 408, 413 (Ind. Ct. App. 2002); Oliver v. Pinnacle Homes, Inc., 769 N.E.2d 1188, 1190 n.1 (Ind. Ct. App. 2002); *In re Paternity of V.A.M.C.*, 768 N.E.2d 990, 991 n.1 (Ind. Ct. App. 2002); Craun v. State, 762 N.E.2d 230, 232 n.4 (Ind. Ct. App. 2002).

102. Reed Sign Services, Inc. v. Reid, 760 N.E.2d 1102, 1103 (Ind. Ct. App. 2001) (on rehearing); Kirk v. Kirk, 759 N.E.2d 265, 266 n.1 (Ind. Ct. App. 2001); Outlaw v. Erbrich Prods. Co., 758 N.E.2d 65, 67 n.2 (Ind. Ct. App. 2001).

name-calling,<sup>103</sup> “kitchen sink” advocacy,<sup>104</sup> misidentification of party status,<sup>105</sup> mischaracterization of evidence,<sup>106</sup> improper form on rehearing,<sup>107</sup> no argument headings,<sup>108</sup> failure to include the standard of review,<sup>109</sup> and lack of pinpoint citations.<sup>110</sup>

As reported last year, difficulties in properly presenting the statement of facts continue to be a leading problem in appellate briefs.<sup>111</sup> However, the more obscure problem of attempting to raise new issues in the reply brief made a strong bid for the most recurrent briefing error this past year, with nine admonitions in the reported cases.<sup>112</sup>

### B. Unusual Cases

A few of the appellate opinions issued during the reporting period merited special recognition not for their teachings in the area of appellate procedure, but for other reasons, as noted below.

**The Anti-Steve McQueen Award for Least Great Escape.** While incarcerated in the Madison County Jail, the two defendants in *Nicholson v. State*<sup>113</sup> tried to get an accomplice to smuggle a hacksaw blade to them, hidden within the pages of a religious magazine.<sup>114</sup> Surprisingly, the plan didn't work and the two were convicted of attempted escape. No word on whether they'll try baking the blade into a cake next time.

**The Palsgraf Award for Most Attenuated Causation.** The plaintiff in *Johnston v. O'Bannon*<sup>115</sup> was injured when she fell off her motor scooter. She sued the Governor and various state officials. Her theory was that the state wrongfully denied her application for a motor vehicle plate

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103. *Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 668 n.8 (Ind. Ct. App. 2002). *But see* 764 N.E.2d at 669 (Sullivan, J. dissenting).

104. *Martin v. State*, 760 N.E.2d 597, 601 n.3 (Ind. 2001).

105. *Martinez v. Belmonte*, 765 N.E.2d 180, 185 n.6 (Ind. Ct. App. 2002).

106. *Baxter v. State*, 774 N.E.2d 1037, 1043 n.4 (Ind. Ct. App. 2002); *Stewart v. State*, 768 N.E.2d 433, 435 n.1 (Ind. 2002); *Mortgage Credit Services, Inc. v. Equifax Credit Info. Services, Inc.*, 766 N.E.2d 810, 811 n.1 (Ind. Ct. App. 2002).

107. *Farm Bureau Ins. Co. v. Allstate Ins. Co.*, 770 N.E.2d 859, 860 n.1 (Ind. Ct. App. 2002) (on rehearing).

108. *Schwartz v. Schwartz*, 773 N.E.2d 348, 352 n.5 (Ind. Ct. App. 2002).

109. *In re Paternity of Baby W.*, 774 N.E.2d 570, 575 n.2 (Ind. Ct. App. 2002).

110. *Cox v. State*, 774 N.E.2d 1025, 1028 n.2 (Ind. Ct. App. 2002); *Reed Sign Serv., Inc. v. Reid*, 755 N.E.2d 690, 695 n.4 (Ind. Ct. App. 2001).

111. *See* Cressler, *supra* note 2, at 1151.

112. *See supra* note 92.

113. 768 N.E.2d 1043 (Ind. Ct. App. 2002).

114. *Id.* at 1045-46.

115. 768 N.E.2d 510 (Ind. Ct. App. 2002).

simply because she refused to present proper identification. As a result of being unable to license her vehicle, she was forced to ride a motor scooter, thus “causing” her accident and the resulting injuries.<sup>116</sup>

The Ogden Nash Award for Most Meaningful Brevity. The *Estate of Hamblen v. Jewell*<sup>117</sup> involved two daughters contesting the will(s) of their deceased father. In seventy-four words, the court of appeals summarized a procedural history that involved two trial courts, three different trial judges, two separate appeals, an original action, and countless and repetitive motions.<sup>118</sup> The summary was then punctuated with one word: “ENOUGH!”<sup>119</sup> Indeed.

The Hangover Award for Most Severe Party After-Effect. At the invitation of a friend, the defendants in *Dominiack Mechanical, Inc. v. Dunbar*<sup>120</sup> attended a catered party in a skybox at a Chicago Bulls game. Unfortunately, the party was paid for by funds their friend had embezzled. There was no allegation that party guests were in any way implicit in the embezzlement scheme.<sup>121</sup> Nevertheless, the defrauded company sued the party-goers, asking that each person be required to pay a *pro rata* share of the cost of the party, about \$1100 each.<sup>122</sup>

### C. Miscellaneous Matters of Note

The new jurisdictional rule that began being phased in on January 1, 2001, gave the Indiana Supreme Court almost complete discretionary control over its docket.<sup>123</sup> The change allowed the court to take on more civil cases and the early indications are that the court has followed through. During the fiscal year ending June 30, 2001, the high court issued thirty-eight opinions where jurisdiction had arisen from the granting of a petition to transfer in a civil or tax case.<sup>124</sup> In the year ending June 30, 2002, that number rose to sixty.<sup>125</sup> Only in 1992, when the court issued sixty-two civil opinions, has that number been surpassed during a twelve-month period.<sup>126</sup>

The high court has also displayed a substantially increased interest in oral argument. In recent years, the court has been able to average about twenty-four

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116. *Id.* at 511.

117. 772 N.E.2d 1003 (Ind. Ct. App. 2002).

118. *Id.* at 1004 (beginning “In the seventeen months . . .” and ending “wills is valid”).

119. *Id.*

120. 757 N.E.2d 186 (Ind. Ct. App. 2001).

121. *Id.* at 191.

122. *Id.* at 187.

123. See Cressler, *supra* note 2, at 1152-53.

124. See INDIANA SUPREME COURT, 2001 ANNUAL REPORT, at A-2 (2001).

125. See INDIANA SUPREME COURT, 2002 ANNUAL REPORT, at A-3 (2002).

126. See SUPREME COURT OF INDIANA PROGRESS REPORT 1992, at 2 (1993).

oral arguments per year. The court had already conducted twenty-seven arguments during the three-month period between September 19 and December 19, 2002.<sup>127</sup>

During the preceding year, thousands of attorneys, students, and citizens have watched all or part of an oral argument on their computers through the Indiana Supreme Court's website with its "Oral Arguments Online" and "Courts In the Classroom" feature.<sup>128</sup>

The Indiana Court of Appeals continued its remarkable record for efficiency and output. Measuring from the date an appeal is fully briefed and transmitted for opinion, the average age of the cases in the offices of the judges of the appellate court is about forty-two days.<sup>129</sup> During 2001, the fifteen judges on the Indiana Court of Appeals averaged 125 majority opinions per judge, and the senior judges added another 128 opinions to the court's majority opinion total of 2003 for the year.<sup>130</sup>

The court of appeals reversed the trial court's judgment about 15% of the time in criminal cases and around 35% of the time in civil cases.<sup>131</sup> Approximately 28% of its opinions are published.<sup>132</sup>

#### CONCLUSION

The Indiana Court of Appeals issues its opinions in a remarkably timely manner. The likelihood of getting a civil appeal heard by the Indiana Supreme Court has never been better and the prospects look good for continued attention to the jurisdictional transfer process. In addition, thanks to technology and a far-sighted state high court, unprecedented public access to the appellate system has been made available. Finally, the merit system of appellate judge selection in place in Indiana since 1970 has created an appellate judiciary composed of remarkably well-qualified and dedicated individuals. In short, Indiana is a great place to practice appellate law.

The rewritten Rules of Appellate Procedure also contribute significantly to making Indiana appeal-friendly. These rules provide the most complete procedural roadmap to handling an appeal that has ever been available in the Indiana state court system. The rules appear to be working well as they have settled into everyday use. Perhaps the time has come to say that the modern Rules of Appellate Procedure are officially no longer new.

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127. Statistics on file with the Division of Supreme Court Administration.

128. *Id.*; see also Cressler, *supra* note 2 at 1154.

129. See INDIANA COURT OF APPEALS, 2001 ANNUAL REPORT 1 (2002).

130. *Id.* at 2.

131. *Id.* at 1.

132. *Id.* at 4.