

A YEAR OF TRANSITION IN APPELLATE PRACTICE

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INTRODUCTION

The year 2001 was a time of transition for the appellate lawyer in Indiana. An entirely new set of Rules of Appellate Procedure went into effect, governing all appeals initiated on or after January 1, 2001. Most of the published opinions during the reporting period, having already been initiated under the former rules, were governed by those now-superseded rules. However, by the end of 2001, many of the pending appeals had been initiated under the newer rules, and some interpretative case law was being published.

By the end of 2001, the Indiana Supreme Court began to experience the benefits of a change in the rules governing its jurisdiction. For the first time in its history, the court had almost complete discretionary control over its appellate docket. The court also adopted several noteworthy amendments to the new appellate rules. Finally, the year ended with the implementation of two innovative Internet applications of particular interest and benefit to the appellate practitioner.

This Article examines recent developments in the area of state appellate procedure during this important transitional year.¹

I. A FEW WORDS ABOUT THE NOT-SO-NEW RULES

The Rules of Appellate Procedure that went into effect at the start of the year 2001 have been written about elsewhere, and there is no need to reexamine their genesis or significance in detail.² However, at least a rudimentary overview of how and why the new rules came into being is warranted.

The rules of procedure governing the appellate process in this state were rewritten and replaced after a significant effort by committees made up of members of the Indiana State Bar Association's Appellate Practice Section, by the Indiana Supreme Court Rules Committee, and by the Indiana Supreme Court itself.³ The new rules became effective for all appeals initiated on or after

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1. This Article includes discussions of significant opinions handed down by the Indiana Court of Appeals before October 1, 2001, or by the Indiana Supreme Court before November 1, 2001, plus information concerning other important developments that occurred in 2001.

2. See, e.g., Douglas E. Cressler & Paula F. Cardoza, *A New Era Dawns in Appellate Procedure*, 34 IND. L. REV. 741, 744-747 (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. See generally George T. Patton, Jr., *Appellate Rules Proposal Before Rules Committee*, RES GESTAE, Apr. 1999, at 10, 10-11.

January 1, 2001.⁴ The goals of the complete revision included making the appellate process easier to understand, more streamlined, and more uniform in practice.⁵ Although there was considerable carryover of language and general operation, there were many substantive changes. The rules governing appellate procedure were reorganized and renumbered. Changes were made to the nomenclature of appeals work, in the timing for many aspects of taking an appeal, in motions practice, and in the procedures for seeking transfer to the Indiana Supreme Court. The greatest changes brought about by the new rules, however, were in how the record on appeal is prepared and presented to the appellate court.

II. RULE AMENDMENTS

As expected, the Indiana Supreme Court determined that a number of minor amendments to the newly-promulgated Rules of Appellate Procedure were warranted after their first year in operation. The court's order, issued December 21, 2001, included changes to forty-seven different sections of the appellate rules.⁶ Although many of the changes were cosmetic, a few of the amendments provided important clarification and improvement to the operation of the appellate rules. The rule amendments were made effective April 1, 2002.⁷

A. The New "Addendum to Brief"

One amendment of particular interest to appellate practitioners was the addition of new Appellate Rule 46(H). That new provision states:

H. Addendum to Brief. Any party or any entity granted *amicus curiae* status may elect to file a separately-bound Addendum to Brief. An Addendum to Brief is not required and is not recommended in most cases. An Addendum to Brief is a highly selective compilation of materials filed with a party's brief at the option of the submitting party. Note that only one copy of the Appendix is filed (see Rule 23(C)(5)), but an original and eight copies of any Addendum to Brief must be filed, in accordance with Rule 23(C)(3). If an Addendum to Brief is submitted, it must be filed and served at the time of the filing and service of the brief it accompanies. An Addendum to Brief may include, for example, copies of key documents from the Clerk's Record or Appendix (such as contracts), or exhibits (such as photographs or maps), or copies of critically important pages of testimony from the Transcript, or full text copies of statutes, rules, regulations, etc. that would be helpful to the

4. See Order Amending Indiana Rules of Appellate Procedure (Ind. Feb. 4, 2000) (No. 94S00-0002-MS-77), available at <http://www.in.gov/judiciary/opinions/archive/11090001.ad.html>.

5. See Patton, *supra* note 2, at 1275-76.

6. See Order Amending Indiana Rules of Appellate Procedure WL IN ORDER 01-24 (Dec. 21, 2001) (No. 94S00-0101-MS-67) [hereinafter Order].

7. *Id.*

Court on Appeal but which, for whatever reason, cannot be conveniently or fully reproduced in the body of the brief. An Addendum to Brief may not exceed fifty (50) pages in length and should ordinarily be much shorter in length. The first document in the Addendum to Brief shall be a table of contents, and documents contained in the Addendum to Brief should be indexed or numbered in some manner that facilitates finding the documents referred to therein, preferably with indexed tabs. The Addendum to Brief shall be bound in book form along the left margin, preferably in a manner that permits the volume to lie flat when opened. The Addendum to Brief shall have a cover that is the same color and similarly styled as the brief it accompanies (see Form App. 43-1), except that it shall be clearly identified as an Addendum to Brief. An Addendum to Brief may not contain argument.⁸

The “addendum to brief” is an appropriate new name for an old idea. The superseded rules permitted parties to accompany their briefs with a separately bound “appendix.”⁹ The appendix could contain “significant parts of the record or other material deemed useful.”¹⁰ Because a party would file an original and eight copies of the appendix along with the party’s briefs,¹¹ the old rule provided a useful vehicle for making certain that each judge or justice reviewing the appeal had ready access to key documents from the record. In a contract dispute, for example, the filing of an appendix containing a complete copy of the contract at issue would ensure that all the members of the reviewing court could examine the whole contract without having to look for it elsewhere in the single set of bound volumes of the record of proceedings.

When the new rules went into effect, however, the term “appendix” was appropriated to designate something that is now more properly thought of as being part of the appellate record than as a supplement to a brief.¹² The appendix is generally a bound compilation of the documents filed in the trial court.¹³ Only one copy of an appendix is filed,¹⁴ thus minimizing its value as an instrument for conveniently placing key documents in front of each reviewing judge or justice. Moreover, the appendix as currently defined generally would be too large and inclusive to serve the narrow, specific purpose of the old appendix rule. For example, in a criminal appeal, the appellant’s appendix consists, *inter alia*, of *all* the documents that had been filed with the clerk of the trial court.¹⁵ Even in civil appeals, the appendix contains any “pleadings and other documents” filed in the

8. *Id.* (amending IND. APPELLATE RULE, 46 effective Apr. 1, 2002).

9. APP.R. 8.2(A)(4) (repealed Jan. 1, 2001).

10. *Id.*

11. *See* APP.R. 9(B)(1) (repealed Jan. 1, 2001).

12. *See* APP.R. 2(C).

13. *See id.*

14. APP.R. 23(C).

15. *See* APP.R. 50(B)(1).

trial court that are “necessary for resolution of the issues raised on appeal.”¹⁶

It was clear, therefore, that the old appendix was something very different from the new appendix, and that there was nothing in the new rules to take its place. The occasionally useful function previously performed by the old appendix was lost in the new rules, as initially adopted. The adoption of new Appellate Rule 46(H) corrects that omission by creating an “addendum to brief.” The new rule also gives greater definition to the function than was ever provided in the past.

As was the practice under the old rule,¹⁷ parties file an original and eight copies of each addendum to brief at the time of the filing of the brief itself.¹⁸ The rule expressly states that an addendum should be a “highly selective compilation” of not more than fifty pages and “ordinarily . . . much shorter in length.”¹⁹ The rule expressly states that an addendum “is not required and is not recommended in most cases.”²⁰ In other words, addenda should be very thin in physical dimension, and only filed in appeals where the reviewing court would be aided by having multiple copies of key documents available. The rule articulates examples of the types of documents that may be included with an addendum and also details the required format.²¹ If record materials are included in an addendum, then citations to those materials in an appellate brief must include citation to both the record and the addendum.²² This amendment heralds the return, with a new name, of a useful tool of appellate advocacy.

B. Appendices

The Indiana Supreme Court also adopted some important changes affecting the form and filing of appendices. As noted above, the appendix serves the function of providing the appellate court with a record of the filings made in the trial court.²³ A seemingly minor, but potentially significant, clarifying amendment was made to the rule governing the contents of the appellant’s appendix. In both civil and criminal appeals, the applicable rule had required that the appendix include “any record material relied on in the brief.”²⁴ Because parties also rely on portions of the *transcript* in their briefs, the rule as initially adopted could have been read to require that copies of any portion of the transcript relied on in a brief be included in the appendix.

Those same rules, as amended, now state that the appendix must include “any record material relied on in the brief *unless the material is already included in*

16. APP.R. 50(A)(2)(f).

17. *See* APP.R. 9(B)(1) (repealed Jan. 1, 2001).

18. Order, *supra* note 6 (amending APP.R. 23(C)(3)).

19. *Id.* (amending APP.R. 46).

20. *Id.*

21. *See id.*

22. *Id.* (amending APP.R. 22(C)).

23. *See supra* note 12 and accompanying text.

24. APP.R. 50(A)(2)(h), (B)(1)(e) (amended Apr. 1, 2002).

*the Transcript.*²⁵ In other words, there is no need to include those sections of the transcript referenced in the brief in the appendix. So long as any record material relied on in the brief can be found in *either* the appendix or the transcript, then the rules have been satisfied.

Another amendment affecting appendices was specifically directed to appellants in criminal cases. The rule governing required service of documents, as now amended, provides that appendices filed in criminal appeals need not be copied and served on the Attorney General.²⁶ This amendment helps reduce unnecessary copying. The Attorney General has ready access to the filed appendices through the appellate court clerk's office. If there was any doubt about that availability, the rules as amended now expressly state that parties may have access to transcripts and appendices during the period that they are working on their briefs, subject to internal rules the appellate court clerk might use to ensure accountability and fairness.²⁷

C. Transcripts, Exhibits, and the Duties of the Court Reporter

The amended appellate rules clarify that preparation of the separately-bound volumes of exhibits from trial are part of the transcript preparation process and, thus, the responsibility of the court reporter.²⁸ Also, the court reporter is required to prepare an index of exhibits, to "be placed at the front of the first volume of exhibits."²⁹ In addition, the rules require the court reporter to serve the parties with copies of any motions requesting additional time to file the transcript.³⁰

One of the appellate rules requires the court reporter to annotate each page of a transcript with information "where a witness's direct, cross, or redirect examination begins."³¹ Previously, those annotations had to be placed as headers at the top of the page, but the amendment now alternatively allows the annotations to be placed as footers at the bottom of the page.³² The requirement that the court reporter format the transcript to an electronic disk has been changed to requiring "an electronically formatted medium (such as disk, CD-ROM, or zip drive)."³³

D. Duties of the Trial Court Clerk

A criminal appellant will typically have appointed local counsel who will need access to the transcript while working on the appellant's brief. Accordingly, the rules state that the transcript in criminal appeals is generally not

25. Order, *supra* note 6 (amending APP.R. 50(A)(2)(h), (B)(1)(e)).

26. *Id.* (amending APP.R. 24(A)).

27. *Id.* (amending APP.R. 12(C)).

28. *Id.* (amending APP.R. 2(K), 11(A)).

29. *Id.* (amending APP.R. 29(A)).

30. *Id.* (amending APP.R. 11(C)).

31. APP.R. 28(A)(4).

32. Order, *supra* note 6 (amending APP.R. 28(A)(4)).

33. *Id.* (amending APP.R. 30(A)(2)).

transmitted by the trial court clerk to the appellate court clerk (in Indianapolis) until after the appellant's brief has been filed.³⁴

A new amendment changes this rule in situations where the appellant is represented by the State Public Defender, rather than local counsel. Under the rule as amended, when a criminal appellant is represented by the State Public Defender, the transmission of the transcript by the trial court clerk to the appellate court clerk is to occur immediately on completion and certification of the transcript.³⁵ This amendment is one of administrative convenience because the offices of both the State Public Defender and the Attorney General are in Indianapolis. Thus, the transcript is sent immediately to the location where the interested attorneys are located.

Moreover, an addition to the rules makes clear that any party may file a motion with the appellate court seeking an order directing "the trial court clerk to transmit the [t]ranscript at a different time than provided for in the rules."³⁶

The amendments also state that the copies of the chronological case summary accompanying the notice of completion of clerk's record "served on the parties need not be individually certified."³⁷ Further, only one original notice of completion of clerk's record and one original notice of completion of transcript need be filed with the appellate court clerk.³⁸

In addition, the trial court clerk is now required to serve the parties with any motions seeking an extension of time to assemble the record.³⁹

E. Rehearing Practice

The new amendments corrected an apparently unintentional change in rehearing practice associated with the rewriting of the rules. The superseded rules permitted a party an automatic extension of time within which to respond to a brief or other document served via mail or carrier *by a party*.⁴⁰ However, the automatic extension did not apply to petitions that were responsive to filings made by the appellate court itself.⁴¹ For example, a party filing a petition for rehearing or transfer following the issuance of an opinion by the court of appeals had to file the petition within the thirty days allotted by rule, without the benefit of the automatic extension rule.⁴² However, the party *responding* to the petition was allowed the benefit of the automatic extension if service was by mail or courier.⁴³

34. See APP.R. 12(B) (amended Apr. 1, 2002).

35. Order, *supra* note 6 (amending APP.R. 12(B)).

36. *Id.*

37. *Id.* (amending APP.R. 10(C)).

38. *Id.* (amending APP.R. 23(C)(6)).

39. *Id.* (amending APP.R. 10(E)).

40. APP.R. 12(D) (repealed Jan. 1, 2001).

41. See APP.R. 11 (repealed Jan. 1, 2001).

42. See *id.*

43. See APP.R. 12(D) (repealed Jan. 1, 2001).

When the new rules went into effect January 1, 2001, they operated in much the same way, with one exception. The new rules contained a provision stating that the automatic extension rule did *not* apply to the filing of a brief in response to a petition for rehearing.⁴⁴ The new rules created an apparently unintended variance from traditional practice and a discrepancy between rehearing and transfer practice.⁴⁵ The court amended the rule to comport with traditional practice and to make the transfer and rehearing rules uniform. The appellate rule governing the filing of a response to a petition for rehearing, as amended, now states in relevant part, “Rule 25(C), which provides a three-day extension for service by mail or third-party carrier, may extend the due date; however, no other extension of time shall be granted.”⁴⁶

The amendments also clarify the form and content requirements for the petition for rehearing. Specifically, as amended, the rule expressly states that not all the content requirements of Appellate Rule 46(A) must be met, only some of them.⁴⁷

F. Petitions Seeking Review of a Decision of the Indiana Tax Court

The appellate rules, as adopted effective January 1, 2001, contained no provision expressly stating the content requirements for a petition seeking review of a decision of the Indiana Tax Court. As amended, the rules now include a content requirement, modeled along the lines of a petition to transfer.⁴⁸ The amended rule also makes clear that a petition for review is available when the tax court is sitting as an appellate court, reviewing a decision of a trial court with probate jurisdiction.⁴⁹

G. Other Miscellaneous Changes of Note

The rules now expressly codify what had been an unwritten rule since 1997, when the court first adopted word limit restrictions on brief size, as opposed to page restrictions.⁵⁰ Under the amended rules, a motion seeking leave to file an oversize brief or petition must express the total number of *words* desired for the oversize brief, not the number of pages.⁵¹

The rules now clarify the standard practice on the timing for filing a request for oral argument. The motion is due within seven days after any reply brief

44. See APP.R. 54(C) (amended Apr. 1, 2002).

45. See APP.R. 57(D) (permitting an automatic extension of time to file a response to a petition to transfer served by mail or carrier).

46. Order, *supra* note 6 (amending APP.R. 54(C)).

47. See *id.* (amending APP.R. 54(F)).

48. See *id.* (amending APP.R. 63(A)); see also APP.R. 57(G) (stating the form and content requirements for a petition to transfer).

49. *Id.* (amending APP.R. 63(A)).

50. Compare APP.R. 8.2(A)(4) (repealed Jan. 1, 1997) (imposing page restrictions on brief length), with APP.R. 8.2(A)(4) (repealed Jan. 1, 1998) (word restrictions on brief length).

51. Order, *supra* note 6 (amending APP.R. 44(B)).

would be due before the court in which the motion is to be filed.⁵²

In addition to being served on all parties, the notice of appeal must now be filed with the clerk of the appellate court.⁵³

III. DEVELOPMENTS IN THE CASELAW

The courts issued a few cases of general significance during the reported period, regardless of which set of rules under which parties are operating. One of the few opinions to develop new law from the new rules, *Johnson v. State*,⁵⁴ is the first decision discussed below.

A. Failure to Provide an Appendix Not Automatic Grounds for Dismissal

When an appeal is taken in a criminal proceeding under the new rules, documents that were filed with the trial court are to be assembled by the appellant into an "appendix" that is to be filed with the appellant's brief.⁵⁵ A criminal defendant, acting *pro se*, attempted to appeal a trial court order. He failed to submit an appendix with his brief, as required by the appellate rules. On motion from the State, the Indiana Court of Appeals dismissed the appeal for failing to comply with required appendix rule.⁵⁶

The Indiana Supreme Court granted transfer to clarify "a specific point of appellate procedure."⁵⁷ The court noted the compulsory nature of the appendix filing requirement, but stated that ordering compliance with the rule, rather than dismissing the appeal, is the "better practice for an appellate court to follow."⁵⁸

The court found support for this view in the new rules, specifically Appellate Rule 49(B), which expressly states that "[a]ny party's failure to include any item in an Appendix shall not waive any issue or argument."⁵⁹ The court also noted that the rules permit the appellee to file its own appendix, "containing materials not found in the appellant's appendix," and permit either party to file a supplemental appendix.⁶⁰

Significantly, the court noted that Appellate Rule 49(B) represents a departure from prior case law under the old rules, wherein the appellate courts decided that issues were waived due to appellant's failure to provide an adequate

52. *See id.* (amending APP.R. 52(B)).

53. *Id.* (amending APP.R. 9(A)(1)).

54. 756 N.E.2d 965 (Ind. 2001) [hereinafter *Johnson II*].

55. *See* APP.R. 49(A), 50(B).

56. *Johnson v. State*, 756 N.E.2d 508 (Ind. Ct. App.), *vacated by* 756 N.E.2d 965 (Ind. 2001).

57. *Johnson II*, 756 N.E.2d at 966-67.

58. *Id.* The court did state, however, that if an appellant is given an opportunity to cure a problem with the appendix and inexcusably fails to do so, "dismissal of the appeal . . . would be available as the needs of justice might dictate." *Id.* at 967.

59. *Id.* (quoting APP.R. 49(B)).

60. *Id.* (citing APP.R. 50(A), 50(B)(2), 50(D)).

record for appellate review.⁶¹ The new rules “signal[] a preference for an ameliorative approach toward failures by the parties to provide a complete record.”⁶² The appeal was reinstated and remanded to the court of appeals for further proceedings consistent with the court’s opinion.⁶³

It is important to note that if the appellant’s appendix fails in a significant manner to include parts of the record necessary for appellate review, thereby requiring the appellee to submit his own appendix, there is recent authority for the proposition that the appellant might be compelled to pay the cost of preparing the filing.⁶⁴

B. Two Out-of-the-Ordinary Applications of the “Law of the Case” Doctrine

Two cases decided during the reporting period are noteworthy for their new interpretations of the law of the case doctrine. In one decision, the court of appeals found an unusual exception to the doctrine;⁶⁵ in the other, the court found the doctrine inapplicable.⁶⁶ “The doctrine of the law of the case is a discretionary tool by which appellate courts decline to revisit legal issues already determined on appeal in the same case and on substantially the same facts.”⁶⁷ The U.S. Supreme Court has held that there are exceptions to the rule, but they are limited to “extraordinary circumstances such as where the initial decision was ‘clearly erroneous and would work a manifest injustice.’”⁶⁸

In *Turner v. State*,⁶⁹ the Indiana Court of Appeals recognized one of those extraordinary circumstances in which the law of the case doctrine would not bar relitigation of an issue previously decided by another panel of the court. Forrest Turner and co-defendant David McCarthy were tried together and both were convicted of murder and attempted murder.⁷⁰ They separately appealed, and both claimed error in the failure of the trial court to give jury instructions on lesser-included offenses.⁷¹

In Turner’s original appeal,⁷² the court of appeals affirmed, finding “no

61. *Id.* (citing *Lee v. State*, 694 N.E.2d 719, 721 n.6 (Ind. 1998)).

62. *Id.*

63. *Id.*

64. *See, e.g., Scott v. Crussen*, 741 N.E.2d 743, 745 n.1 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 413 (Ind. 2001).

65. *See Turner v. State*, 751 N.E.2d 726 (Ind. Ct. App. 2001).

66. *See Humphreys v. Day*, 735 N.E.2d 837, 841 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 16 (Ind. 2001).

67. *Cutter v. State*, 725 N.E.2d 401, 405 (Ind. 2000) (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817-18 (1998); *State v. Lewis*, 543 N.E.2d 1116, 1118 (Ind. 1989)).

68. *See Christianson*, 486 U.S. at 817 (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)).

69. 751 N.E.2d 726 (Ind. Ct. App. 2001).

70. *See id.* at 728-29.

71. *Id.*

72. *Turner v. State*, 691 N.E.2d 516 (Ind. Ct. App. 1998) (unpublished table decision), *post*

serious evidentiary dispute concerning the element of intent” and thus no error in refusing to give the lesser-included offense instructions on reckless homicide and criminal recklessness.⁷³ McCarthy, on the other hand, successfully obtained relief raising the same issues. In his direct appeal⁷⁴ a different panel of the court of appeals concluded that the trial court should have given a reckless homicide instruction as a lesser-included offense of murder and a criminal recklessness instruction as a lesser-included offense to attempted murder.⁷⁵ McCarthy was ultimately retried with the new instructions, and the second jury convicted him of reckless homicide and criminal recklessness rather than murder and attempted murder.⁷⁶

Turner, having been denied relief on appeal, also filed a petition for post-conviction relief, but his request for relief was denied.⁷⁷ On appeal of that denial, the court of appeals determined that the failure to give the instruction on the lesser-included offenses was error, and that the contrary decision of the original panel of that court was “clearly erroneous and would work manifest injustice.”⁷⁸ The denial of post-conviction relief was reversed, and the cause was presumably remanded for a new trial. The disparity of the outcomes between McCarthy and Turner was a factor considered by the court of appeals in determining that an inequity justifying extraordinary relief existed.⁷⁹

In *Humphreys v. Day*,⁸⁰ the court of appeals did not find an exception to the law of the doctrine. Instead, the court found the doctrine legally inapplicable under the circumstances presented.⁸¹ Although the appeal involved a somewhat complex interpretation of Medicaid regulations, the teachings of the case regarding the law of the case doctrine are straightforward. In an earlier appeal involving the same parties, the court of appeals had decided two questions of law.⁸² One of the parties petitioned for transfer to the supreme court, and the petition was granted.⁸³ In its opinion, the supreme court adopted the holding of

conviction relief granted, 751 N.E.2d at 728-29.

73. *Turner*, 751 N.E.2d at 728-29.

74. *McCarthy v. State*, 703 N.E.2d 199 (Ind. Ct. App. 1998) (unpublished table decision).

75. *Turner*, 751 N.E.2d at 729. The court of appeals also held that the error in refusing the criminal recklessness instruction had been waived because McCarthy’s counsel had not joined in the request for such an instruction during trial. However, McCarthy successfully obtained relief in a post-conviction proceeding, successfully asserting that his trial counsel had been constitutionally ineffective for failing to join in the request. *Id.* at 729 n.1.

76. *Id.* at 729.

77. *Id.*

78. *Id.* at 734.

79. *See id.* at 729, 734.

80. 735 N.E.2d 837 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 16 (Ind. 2001).

81. *Id.* at 841.

82. *See Sullivan v. Day*, 661 N.E.2d 848 (Ind. Ct. App. 1996), *vacated in part by* 681 N.E.2d 713 (Ind. 1997).

83. *See Humphreys*, 735 N.E.2d at 840.

the court of appeals on one issue (Issue X).⁸⁴ As to the second issue (Issue Y), which the court of appeals had addressed *sua sponte*, the high court determined the parties should have been given the opportunity to develop a record and obtain a ruling from the trial court.⁸⁵ The court therefore vacated that part of the opinion addressing Issue Y and remanded the case to the trial court for further proceedings.⁸⁶

On remand, the trial court entered a judgment on Issue Y, and the *Humpheys v. Day* appeal on that issue ensued.⁸⁷ One of the parties argued that the question had already been decided by the court of appeals in its earlier opinion and had therefore become the law of the case.⁸⁸ The court of appeals rejected this contention. The court noted in particular the application of an appellate rule providing generally that when the supreme court grants transfer, the opinion of the court of appeals is vacated except for those portions “expressly adopted” or “summarily affirmed.”⁸⁹ The earlier holding of the court of appeals on Issue Y had been neither adopted nor summarily affirmed by the supreme court. Thus, the court of appeals concluded that on this issue, “the previous opinion is not the law of the case because it is a nullity.”⁹⁰

C. Revisiting Motions Already Addressed in the Same Appeal

The parties to an appeal will occasionally file substantive motions before an appeal has been fully briefed.⁹¹ Such motions are ruled on by a rotating panel of court of appeals’ judges referred to as the “motions panel.” The motions panel will almost certainly be composed of a different set of judges from those assigned to vote on and author the final opinion.

No rule prevents the party whose pre-briefing motion is denied from raising the issue again in that party’s brief on appeal. However, the question arises whether the authoring panel is bound by the earlier decision of the motions panel. This issue might be thought of as a cousin to the law of the case doctrine.⁹² Four opinions issued during the reporting period addressed this question.

84. *Sullivan v. Day*, 681 N.E.2d 713, 716 (Ind. 1997).

85. *Id.* at 716-17.

86. *Id.* at 717.

87. 735 N.E.2d at 840-41.

88. *Id.* at 841.

89. *Id.* The opinion references former APP.R. 11(B)(3). That older rule was repealed on January 1, 2001 and was replaced by APP.R. 58(A), which contains essentially the same language.

90. *Id.*

91. The most common example would probably be a motion to dismiss involuntarily an appeal due to alleged procedural or jurisdictional defects, filed pursuant to APP.R. 36(B).

92. The law of the case doctrine is generally thought of as applying to issues arising in subsequent appeals as opposed to issues arising twice within the same appeal. *See supra* note 67 and accompanying text; *see also* *CNA Ins. Cos. v. Vellucci*, 596 N.E.2d 926, 927 (Ind. Ct. App. 1992).

In *Walker v. McTague*,⁹³ the court refused to address an issue that had been raised earlier by motion, stating, "The Motions Panel issued an order allowing the case to proceed on its merits Therefore, we need not reconsider the procedural issue here" ⁹⁴ The appellate courts took similar stances in *Mahone v. State*,⁹⁵ *Snider v. State*,⁹⁶ and *In re Estate of Inlow*.⁹⁷

These opinions imply that the court of appeals either will not reconsider matters earlier decided by that court by order⁹⁸ or that it should only do so "in the case of extraordinary circumstances."⁹⁹ However, there is ample precedent for courts overruling prior orders issued in the appeal.¹⁰⁰ As the court of appeals has previously stated, "[B]ecause we could change our decision pursuant to a petition for rehearing, it would make no sense to refuse to do so at an earlier stage before we have expended further resources."¹⁰¹

In short, recent opinions have demonstrated an appropriate reluctance on the part of the court of appeals to overrule orders already decided by its rotating motions panels. Nevertheless, these decisions do not hold that the authoring court is absolutely precluded from reconsidering issues previously decided on a motion. Indeed, such a holding would be contrary to the court's traditional practice. If a party fails to obtain requested relief from a pre-briefing motion to dismiss (assuming the motion has colorable merit), the best practice is to raise that issue again in that party's brief on the merits. Similarly, the issue should be available for a petition to transfer. Professionally responsible advocacy would dictate that the prior unsuccessful motion also be brought to the appellate court's attention.

*D. Lost Appeal of a Deemed Denied Motion to Correct Error
Not Salvageable Through Alleged Cross-Error*

A motion to correct error is deemed denied if not ruled on within certain time limits.¹⁰² Thus, the clock for initiating an appeal begins to run once the motion to correct error is deemed denied. Any subsequent ruling on the motion after it has been denied by operation of rule is not necessarily void, but is considered

93. 737 N.E.2d 404 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 8 (Ind. 2001).

94. *Id.* at 406 n.1.

95. See 742 N.E.2d 982, 985 n.3 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 11 (Ind. 2001).

96. See 753 N.E.2d 721, 724 n.2 (Ind. Ct. App.), *trans. denied*, 761 N.E.2d 421 (Ind. 2001).

97. 735 N.E.2d 240, 243 n.2 (Ind. Ct. App. 2000).

98. See *supra* notes 95-97 and accompanying text.

99. *Id.* (citing *In re Train Collision at Gary, Ind.*, 654 N.E.2d 1137, 1140 n.1 (Ind. Ct. App. 1995)).

100. See, e.g., *St. Amand-Zion v. Review Bd. of Ind. Dep't of Employment & Training Servs.*, 635 N.E.2d 184, 185 n.2 (Ind. Ct. App. 1994); *Phipps v. First United Sav. Bank*, 601 N.E.2d 13, 15 n.1 (Ind. Ct. App. 1992).

101. *CNA Ins. Cos. v. Vellucci*, 596 N.E.2d 926, 927 (Ind. Ct. App. 1992).

102. See IND. TRIAL RULE 53.3.

voidable.¹⁰³

In *Carter v. Jones*,¹⁰⁴ the plaintiff filed a mandatory motion to correct error, seeking addittur to the damage award.¹⁰⁵ By operation of Trial Rule 53.3(A), the motion was deemed denied thirty days after the final hearing held on the motion. About three weeks after the motion to correct error was deemed denied, the trial court entered an order purporting to grant the motion and ordering an eleven-fold increase in the jury's verdict on damages.¹⁰⁶ The plaintiff took no action to initiate an appeal of the deemed denial that had already occurred.

The defendant, however, did initiate a timely appeal of the order granting the motion to correct error. The defendant argued on appeal that the motion to correct error had already been deemed denied and that the subsequent order granting relief should not be given effect.¹⁰⁷ The plaintiff then attempted to appeal the deemed denial of her motion to correct error by raising the issue as cross-error in her brief of the appellee. The plaintiff relied procedurally on the language of Trial Rule 59(G).¹⁰⁸ Specifically, that rule says that "if a notice of appeal rather than a motion to correct error is filed by a party in the trial court, the opposing party may raise any grounds as cross-errors"¹⁰⁹

The court of appeals rejected this method of attempting to revive an otherwise lost right to an appeal.¹¹⁰ The court held that the plaintiff forfeited her ability to take an appeal when she failed to take the proper steps to initiate an appeal within thirty days of the date the motion to correct error was deemed denied.¹¹¹ Concluding it lacked jurisdiction to review the merits of the deemed denial of the motion to correct error, the court dismissed the appeal, noting the trial court's obligation simply to enter judgment on the jury's original verdict.¹¹²

If the result in *Carter* seems somewhat at odds with the language of Trial Rule 59(G), it is nevertheless completely consistent with a 1996 supreme court opinion. In *Cavinder Elevators, Inc. v. Hall*,¹¹³ the high court specifically cautioned that when a motion to correct error is deemed denied, the moving party must take the steps necessary to perfect an appeal from the deemed denial or be

103. *Cavinder Elevators, Inc. v. Hall*, 726 N.E.2d 285, 288 (Ind. 2000).

104. 751 N.E.2d 344 (Ind. Ct. App.), *clarified on reh'g*, 757 N.E.2d 224 (Ind. Ct. App. 2001).

105. *Id.* at 345. A motion to correct error is a prerequisite to an appeal on a claim that the jury verdict is inadequate or excessive. IND. TRIAL RULE 59(A)(2).

106. *Carter*, 751 N.E.2d at 345.

107. *Id.* at 346.

108. *Id.* at 346-47.

109. IND. TRIAL RULE 59(G).

110. *Carter*, 751 N.E.2d at 346-47.

111. *Id.* Because the events relating to this appeal took place in the year 2000, the plaintiff would have initiated an appeal by filing a praecipe within thirty days. *See* IND. APPELLATE RULE. 2(A) (repealed Jan. 1, 2001). Under the current rules, an appeal is initiated with the filing of a notice of appeal. *See* APP.R. 9(A).

112. *Carter*, 751 N.E.2d at 347 & n.3.

113. 726 N.E.2d 285 (Ind. 2000).

precluded from raising the issue as cross-error.¹¹⁴

E. Appealing Summary Disposition in Favor of a Codefendant

One of the key issues in *U-Haul International, Inc. v. Nulls Machine & Manufacturing Shop*¹¹⁵ was whether a defendant in a civil action has standing to appeal the dismissal of a codefendant from the action.

Before the Comparative Fault Act¹¹⁶ was enacted in 1983, this question was generally answered in the negative.¹¹⁷ In order to have standing to litigate in Indiana, a party generally must show a “demonstrable injury.”¹¹⁸ Under pre-comparative fault law, there was “no right to contribution among joint tortfeasors.”¹¹⁹ Therefore, a defendant would generally not be able to show any prejudice or injury resulting from the dismissal of a codefendant from the case.

In 1996, the court of appeals recognized that the adoption of comparative fault altered the analysis for determining the standing of a codefendant to take an appeal.¹²⁰ In the recent *U-Haul International* case, the court of appeals more thoroughly analyzed this question and its holdings are worth noting to the appellate practitioner.

Various U-Haul corporations, referred to collectively as U-Haul, were a few of the forty-five defendants named in a wrongful death action.¹²¹ Another group of defendants, referred to collectively as the Valve defendants, were granted summary judgment by the trial court.¹²² U-Haul appealed the entry of summary judgment in favor of the Valve defendants. The plaintiff estate did not participate in the appeal.

The Valve defendants argued that U-Haul lacked standing to take an appeal, asserting that U-Haul could show no demonstrable injury from their dismissal from the suit. The court of appeals stated that it could find “no Indiana case that is directly on point,”¹²³ but ultimately disagreed with the defendants, finding that U-Haul did indeed have standing to appeal.¹²⁴

114. *Id.* at 289.

115. 736 N.E.2d 271 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 8 (Ind. 2001).

116. Pub. L. No. 317-1983 (codified as amended at IND. CODE §§ 34-6-2-45, -88, 34-51-2-1 to -19 (1998)).

117. *See, e.g.*, Ind. State Highway Comm’n v. Clark, 371 N.E.2d 1323, 1325-26 (Ind. App. 1978) (holding that Defendant State of Indiana had no standing on appeal to challenge judgment on the evidence entered in favor of co-defendants).

118. *Hammes v. Brumley*, 659 N.E.2d 1021, 1029-30 (Ind. 1995).

119. *Clark*, 371 N.E.2d at 1326.

120. *See Shand Mining, Inc. v. Clay County Bd. of Comm’rs*, 671 N.E.2d 477, 479-80 (Ind. Ct. App. 1996).

121. *U-Haul Int’l, Inc. v. Nulls Mach. & Mfg. Shop*, 756 N.E.2d 271, 273 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 8 (Ind. 2001).

122. *Id.* at 274.

123. *Id.* at 275.

124. *Id.* at 280.

The court recognized that under the comparative fault principles governing current negligence law, fault (and the accompanying liability for damages) is allocated among those who may be culpable to the plaintiff.¹²⁵ Therefore, under comparative fault, the removal of a party against whom fault could be allocated creates the potential for prejudice to a codefendant by increasing that codefendant's potential share of fault and liability.¹²⁶

The court of appeals further noted that preservation of error is a part of the applicable analysis.¹²⁷ According to the *Bloemker* and *Rausch* opinions, the failure to object to a codefendant's dismissal from a suit generally will waive the right to later name that former codefendant as a non-party.¹²⁸ The court of appeals found cases like *Bloemker* and *Rausch* instructive in that they "established the principle that a defendant may not sit idly as its interests are subjected to possible prejudice when other co-defendants seek dismissal from the case, and then, at a later stage in the proceedings, seek to protect that interest after dismissal has occurred."¹²⁹

The court of appeals ultimately held that in cases involving application of the Comparative Fault Act, the dismissal of a defendant from a case subjects remaining codefendants to greater potential liability, thus creating "sufficient prejudice to confer standing upon a codefendant" who wants to appeal the dismissal.¹³⁰ However, the codefendant "must do something at the trial court level to preserve" the right to a later challenge to the dismissal through the appeal process.¹³¹ Having preserved the claim of error by objecting to the summary judgment motion, and because the case was governed by comparative fault principles, the court concluded that U-Haul could take the appeal.¹³²

U-Haul makes an important procedural point: a defendant must properly object to any motion that would eliminate a codefendant from the pool of potentially liable parties, not only to preserve any available non-party defense, but also to preserve the right to appeal an adverse decision.

F. Procedural Guidance on Certified Questions from Federal Courts

Appellate Rule 64 sets out the procedures a federal court should follow in certifying a question of state law to the Indiana Supreme Court. In terms of party procedure, however, the rule states simply that if the question is accepted, "the Supreme Court may establish by order a briefing schedule on the certified

125. *See id.* at 275.

126. *Id.* at 280.

127. *See id.* at 278-80 (citing *Bloemker v. Detroit Diesel Corp.* 687 N.E.2d 358 (Ind. 1997); *Rausch v. Reinhold*, 716 N.E.2d 993 (Ind. Ct. App. 1999)).

128. *See id.*

129. *Id.* at 279.

130. *Id.* at 280.

131. *Id.*

132. *Id.* However, the court of appeals ultimately affirmed the entry of summary judgment in favor of the Valve defendants. *Id.* at 285.

question.”¹³³

An example of a typical order establishing a briefing schedule was published by the supreme court during the reporting period.¹³⁴ In addition to establishing a briefing schedule, the order identified the certified question, consolidated the briefing to avoid duplicative arguments, set up procedures for placing key documents from the federal court record before the court, and established length restrictions on the briefing.¹³⁵

This published order should be reviewed by any attorney involved in a certified question from a federal court. Of particular note is the simultaneous briefing approach used by the court. The two consolidated sides were given approximately six weeks from the date of the order, within which both sides were to file principal briefs not to exceed 8400 words.¹³⁶ Both sides were then given approximately four more weeks within which they could file a brief in response to their opponent’s principal brief.¹³⁷ The court’s order stated that extensions of time would be granted only under extraordinary circumstances.¹³⁸

G. Motion for Judgment on the Evidence Held Not a Prerequisite to Appeal on Sufficiency of the Evidence in a Civil Case

The first four subparts of Trial Rule 50(A) identify junctures during a trial when a motion for judgment on the evidence may be made.¹³⁹ “The purpose of [a Trial Rule 50] motion for judgment on the evidence is to test the [legal] sufficiency of the evidence” presented by a party with the burden of proof on a particular claim.¹⁴⁰ The fifth subpart of Trial Rule 50(A), however, is not written in parallel with the first four. In an apparent reference to when parties may raise the sufficiency issue, the fifth subpart states that a party “may raise the issue upon appeal for the first time in criminal appeals but not in civil cases.”¹⁴¹

In *Walker v. Pillion*,¹⁴² Walker appealed a civil judgment entered against him, asserting that it was contrary to the evidence. However, he had not moved for judgment on the evidence pursuant to Trial Rule 50(A).¹⁴³ The appellees, the Pillions, asserted on appeal that any claim of error had been waived by the failure of Walker to raise the issue in the trial court. The Pillions relied on the express language of Trial Rule 50(A)(5), arguing that the sufficiency of the evidence can

133. IND. APPELLATE RULE 64(B).

134. *Livingston v. Fast Cash USA, Inc.*, 737 N.E.2d 1155 (Ind. 2000), *certified question answered by* 753 N.E.2d 572 (Ind. 2001).

135. *See id.* at 1155-56.

136. *See id.*

137. *See id.*

138. *Id.* at 1156.

139. *See* IND. TRIAL RULE 50 (A)(1)-(4).

140. *First Bank of Whiting v. Schuyler*, 692 N.E.2d 1370, 1372 (Ind. Ct. App. 1998).

141. IND. TRIAL RULE 50(A)(5).

142. 748 N.E.2d 422 (Ind. Ct. App. 2001).

143. *Id.* at 424.

be raised for the first time on appeal in criminal cases but not in civil.¹⁴⁴

The court of appeals acknowledged that “[a] reading of subsection (5) in isolation suggests that the Pillions are correct.”¹⁴⁵ The court nevertheless went on to hold that the appellant was not required to move for judgment on the evidence in the civil trial before raising the sufficiency issue on appeal.¹⁴⁶ The court of appeals found that requiring a motion for judgment on the evidence would be inconsistent with Trial Rule 59(A), which states that a post-trial motion to correct error is only mandatory when a party seeks to address newly discovered evidence or claims of inadequacy or excessiveness of the verdict.¹⁴⁷

Apart from being counterintuitive to the express language of Trial Rule 50(A), the holding of *Walker* runs somewhat contrary to the general principle that issues not raised in the trial court are not preserved for appellate review.¹⁴⁸ Although *Walker* holds that no motion for judgment on the evidence is required to preserve the sufficiency of the evidence issue in a civil trial, the best practice does not change. Trial Rule 50(A) sets out specific junctures in a jury trial when motions for judgment on the evidence may be made. If the sufficiency of the evidence is legitimately in dispute, counsel should consider making Trial Rule 50(A) motions at all the appropriate times allowed by the rule.¹⁴⁹ In addition to assuring that no claim of waiver can be made on appeal, making the motions creates the possibility of being the appellee, rather than the appellant, in any ensuing appeal.

H. Effect of Bankruptcy Stay Issued During Pendency of Appeal

When an entity files a bankruptcy petition, the federal court will issue an order staying all state court proceedings involving the debtor.¹⁵⁰ In two opinions issued during the reporting period, the supreme court determined that such stays would generally not prevent it from handing down an opinion involving a bankrupt entity. In *Forte v. Connorwood Healthcare, Inc.*,¹⁵¹ one of the defendant-appellees declared bankruptcy while the appeal was pending and a stay of all state court proceedings was issued.¹⁵² The supreme court nevertheless handed down its opinion in the appeal, stating that the opinion was rendered “with respect to the non-bankrupt parties only.”¹⁵³ In *Owens Corning Fiberglass*

144. *Id.* at 424-25.

145. *Id.* at 425.

146. *Id.* at 426.

147. *Id.* at 425-26.

148. *See* *Clarkson v. Dep’t of Ins.*, 425 N.E.2d 203, 206 (Ind. Ct. App. 1981).

149. *See, e.g.*, 3 WILLIAM F. HARVEY, INDIANA PRACTICE § 50.1, at 463 (3d 2002) (referring to the filing of a Trial Rule 50(A) motion at the conclusion of one party’s submission of evidence and again at the conclusion of the submission of all the evidence as a “sound practice”).

150. *See* 11 U.S.C. § 362(a)(1) (2000).

151. 745 N.E.2d 796 (Ind. 2001).

152. *Id.* at 798 n.1.

153. *Id.* (citing *Seiko Epson Corp. v. Nu-Kote Int’l, Inc.*, 190 F.3d 1360, 1364-65 (Fed. Cir.

Corp. v. Cobb,¹⁵⁴ a federal stay was issued during the pendency of the appeal as a result of the bankruptcy filing of the sole defendant-appellant.¹⁵⁵ The supreme court was not constrained by the stay from issuing its opinion, stating simply that the decision was “subject to applicable rules of bankruptcy law.”¹⁵⁶

I. Appellate Standard of Review Established in Counsel Disqualifications Cases

The defendant in *Robertson v. Wittenmyer*¹⁵⁷ filed a motion seeking to disqualify the plaintiff’s attorney due to an alleged conflict of interest. The trial court granted the motion and an appeal ensued.¹⁵⁸ On a question of first impression in Indiana, the court of appeals held that it would apply an abuse of discretion standard of review in determining whether error occurred.¹⁵⁹

J. Law Firm Name a Necessary Part of Brief Captioning

In *Stone v. Stakes*,¹⁶⁰ the court of appeals admonished counsel about failing to include the name of their law firm in the captioning of the briefs filed.¹⁶¹ The court noted that the failure to include the firm name gives the sometimes-misleading impression of being a solo practitioner,¹⁶² in contradiction of the spirit of the supreme court’s opinion in *Cincinnati Insurance Co. v. Wills*.¹⁶³

K. Miscellanies of Note During the Reporting Period

1. *The Least and the Most at Stake*.—The Damon Corporation (successfully) appealed a judgment entered against it in the total amount of \$121.14 plus costs.¹⁶⁴ The Kroger Company (unsuccessfully) appealed a compensatory damage judgment entered against it in the amount of \$55 million.¹⁶⁵

2. *Best Use of a Pop Culture Reference*.—During a dispute about a vehicle blocking traffic, Jaron Johnson made vulgar comments to the driver of another vehicle. The offended driver started to get out of his car, possibly to explain why

1999)).

154. 754 N.E.2d 905 (Ind. 2001).

155. *See id.* at 916.

156. *Id.*

157. 736 N.E.2d 804 (Ind. Ct. App. 2000).

158. *Id.* at 805.

159. *Id.* at 805-06. The trial court judgment was ultimately affirmed. *Id.* at 809.

160. 749 N.E.2d 1277 (Ind. Ct. App.), *aff’d on reh’g*, 755 N.E.2d 220 (Ind. Ct. App. 2001), *trans. denied*, 2002 Ind. LEXIS 182 (Feb. 15, 2002).

161. *See id.* at 1282 n.7.

162. *Id.*

163. 717 N.E.2d 151, 165 (Ind. 1999).

164. *Damon Corp. v. Estes*, 750 N.E.2d 891 (Ind. Ct. App. 2001).

165. *Ritter v. Stanton*, 745 N.E.2d 828 (Ind. Ct. App. 2001), *trans. denied*, 2002 Ind. LEXIS 100 (Ind. Jan. 31, 2002), *cert. denied*, 70 U.S.L.W. 3642 (U.S. 2002).

it was unlikely he was going to comply with Johnson's explicit suggestions. Johnson lifted his jacket to show the driver an automatic weapon he was carrying and coolly stated, "Don't even think it."¹⁶⁶ A majority of a panel of the court of appeals reversed Johnson's conviction for intimidation, holding that Johnson's vague remark did not communicate a threat within the meaning of the applicable statute.¹⁶⁷ In his dissent, the Honorable James Kirsch wrote: "In the *Dirty Harry* movies, Clint Eastwood's famous 'Go on . . . make my day' line was equally vague, but neither the derelicts invited to make Harry's day in the movie, nor the millions of movie goers who viewed it, had any doubts as to whether Harry was communicating a threat."¹⁶⁸ The supreme court unanimously agreed with the dissent, granting transfer and affirming the trial court.¹⁶⁹ The high court also credited Judge Kirsch's *Dirty Harry* analogy in its opinion.¹⁷⁰

3. *Appellate Brief-Writing Shortcoming of the Year.*—The most frequently occurring problem with appellate briefs during the reporting period was improprieties in the statement of facts section, particularly, appellants' failures to prepare a concise but complete statement of facts in narrative form that is not argumentative, stated in a manner consistent with the applicable standard of review.¹⁷¹ No fewer than twelve published opinions made specific reference to this problem.¹⁷² Doubtless, many such problems occurred without comment from the court of appeals or occurred in cases in which the opinion was unpublished. These documented reminders to counsel in the reported decisions probably represent the tip of an iceberg.

166. 725 N.E.2d 984, 986 (Ind. Ct. App.), *vacated and trans. granted*, 741 N.E.2d 1254 (Ind. 2000), *trial court aff'd* by 743 N.E.2d 755 (Ind. 2001).

167. *Id.* at 987.

168. *Id.* at 988 (Kirsch, J., dissenting).

169. *Johnson*, 743 N.E.2d at 755.

170. 743 N.E.2d at 756 n.1.

171. See IND. APPELLATE RULE 46(A)(6); APP.R. 8.3(A)(5) (repealed Jan. 1, 2001).

172. See *Boczar v. Meridian St. Found.*, 749 N.E.2d 87, 92 (Ind. Ct. App. 2001); *Walker v. Pillion*, 748 N.E.2d 422, 424 n.3 (Ind. Ct. App. 2001); *Elliott v. Sterling Mgmt. Ltd.*, 744 N.E.2d 560, 562 n.1 (Ind. Ct. App. 2001); *Burrell v. Lewis*, 743 N.E.2d 1207, 1209 (Ind. Ct. App. 2001); *Dunson v. Dunson*, 744 N.E.2d 960, 962 n.2 (Ind. Ct. App.), *trans. granted and vacated* by 761 N.E.2d 415 (Ind. 2001); *S.E. v. State*, 744 N.E.2d 536, 538 n.1 (Ind. Ct. App. 2001); *Buchanan v. State*, 742 N.E.2d 1018, 1021 n.2 (Ind. Ct. App.), *trans. granted*, 753 N.E.2d 13 (Ind. 2001), *aff'd in part and vacated in part*, 767 N.E.2d 967 (Ind. 2002); *Kanach v. Rogers*, 742 N.E.2d 987, 988 n.1 (Ind. Ct. App. 2001); *Major v. OEC-Diasonics, Inc.*, 743 N.E.2d 276, 278 n.3 (Ind. Ct. App.), *trans. denied*, 753 N.E.2d 15 (Ind. 2001); *Speed v. Old Fort Supply Co.*, 737 N.E.2d 1217, 1218 n.1 (Ind. Ct. App. 2000); *Rogers ex rel. Rogers v. Cosco, Inc.*, 737 N.E.2d 1158, 1161 n.1 (Ind. Ct. App. 2000), *trans. denied*, 761 N.E.2d 419 (Ind. 2001); *Walker v. McTague*, 737 N.E.2d 404, 406 n.2 (Ind. Ct. App. 2000), *trans. denied*, 753 N.E.2d 8 (Ind. 2001).

IV. OTHER NOTEWORTHY DEVELOPMENTS

A. *Some Change, Some Constancy in Leadership*

Every five years, the Indiana Judicial Nominating Commission must appoint a new chief justice for the state.¹⁷³ The seven members of the Commission unanimously voted in December of 2001 to retain the Honorable Randall T. Shepard in the job he has held since 1987.¹⁷⁴ Shepard has now begun his fourth term as chief justice.¹⁷⁵ No other jurist has served as chief justice of Indiana for so long.¹⁷⁶ Shepard initially joined the court as an associate justice in 1985.¹⁷⁷

The former chief judge on the Indiana Court of Appeals decided that his nine-year tenure was long enough. Effective January 1, 2002, the Honorable John Sharpnack voluntarily relinquished the reins of appellate court leadership.¹⁷⁸ The fifteen-member court of appeals elected the Honorable Sanford Brook to the position of chief judge of the court.¹⁷⁹ Chief Justice Randall T. Shepard stated, "I've always thought Judge Brook was one of the best and brightest the Indiana judiciary has to offer."¹⁸⁰ Judge Brook hopes to follow in the well-respected footsteps of Judge Sharpnack, who will now be free to focus on opinion writing. With regard to his predecessor, Judge Brook stated: "We're in wonderful shape in terms of how we manage our caseloads and how we go about writing our opinions."¹⁸¹

B. *Phasing in of New Jurisdictional Rule*

On November 7, 2000, the voters of Indiana gave final approval to an amendment to the Indiana Constitution, limiting the obligatory criminal appellate jurisdiction of the Indiana Supreme Court to only those cases in which a sentence of death has been imposed.¹⁸² Previously, the state constitution required the State's highest court to assume direct jurisdiction over any case in which the appellant received a sentence in excess of fifty years on any one count.¹⁸³ The purpose of the amendment was to free up the supreme court's docket to accept a broader range of civil and criminal cases based upon the importance of the legal questions presented through its discretionary authority to transfer jurisdiction

173. IND. CONST. art. VII, § 3.

174. Denise G. Callahan, *Commission Confirms Chief Justice Shepard*, IND. LAW., Dec. 19, 2001, at 5; *Shepard to Continue as Chief Justice*, RES GESTAE, Dec. 2001, at 29, 29.

175. *Shepard to Continue as Chief Justice*, *supra* note 174, at 29.

176. *Id.*

177. *Id.*

178. Denise G. Callahan, *New Chief Judge Takes Over on CA*, IND. LAW., Jan. 2, 2002, at 3.

179. *Id.*

180. *Id.*

181. *Id.*

182. See Certification of Ratification (Nov. 7, 2000) (on file with the Indiana Secretary of State) (amending IND. CONST. art. VII, § 4).

183. IND. CONST. art. VII, § 4 (amended 2000).

from the court of appeals.¹⁸⁴

Once the constitutional amendment became effective, the court immediately changed its jurisdictional rule to route all criminal cases in which a fixed term of years has been imposed to the court of appeals.¹⁸⁵ However, the new jurisdictional rule only became effective as to cases initiated with the filing of a notice of appeal on or after January 1, 2001.¹⁸⁶ All the cases already pending in the appellate courts, those being briefed, and those still in the record preparation process remained in their existing appellate pipeline. Therefore, despite the rule change, cases involving sentences in excess of fifty years continued to be sent to the supreme court at the usual rate throughout most of the year 2001.

Table 1 documents the number of direct criminal appeals transmitted to the supreme court over an eighteen-month time period ending January 1, 2002.¹⁸⁷ Transmission to the court does not occur until the appeal is fully briefed. The table illustrates the effect of the court's phased-in approach to the jurisdictional change.

Table 1.

Direct Appeals Transmitted to the Indiana Supreme Court for Opinion

Two-Month Period	Criminal Appeals Transmitted to the Supreme Court for Opinion
July-Aug. 2000	21
Sept.-Oct. 2000	21
Nov.-Dec. 2000	25
Jan.-Feb. 2001	23
Mar.-Apr. 2001	19
May-June 2001	20
July-Aug. 2001	20
Sept.-Oct. 2001	6
Nov.-Dec. 2001	2

As Table 1 demonstrates, the number of transmitted new cases over which the supreme court exercised mandatory jurisdiction dropped off significantly in September 2001. Depending on the number of new capital and life without parole cases, the number of direct appeals transmitted to the supreme court for

184. See Randall T. Shepard, *Equal Access to the Supreme Court Requires Amending the Indiana Constitution*, RES GESTAE, Sept. 2000, at 12, 13.

185. See IND. APPELLATE RULE 4(A)(1)(a) (amended Nov. 9, 2000).

186. Order Amending Indiana Rules of Appellate Procedure (Ind. Nov. 9, 2000) (No. 94S00-0002-MS-77), available at <http://www.in.gov/judiciary/opinions/archive/11090001.ad.html>.

187. The information used to compile this table is on file with the Division of Supreme Court Administration, 315 State House, 200 W. Washington Street, Indianapolis, IN 46204.

opinion as a matter of primary jurisdiction should remain at a fairly stable low number. Of course, the court will be required to vote and write on all the cases already transmitted under the old jurisdictional rule. However, once those cases have worked their way through the system, the supreme court can, for the first time in its history, fully realize its role as the court of last resort in Indiana.

C. Appellate Dockets Online

Checking the status of a pending appeal has been significantly easier since October 2001. During that month, the chronological case summaries (dockets) of appeals before the Indiana Supreme Court, Indiana Court of Appeals, and Indiana Tax Court became available over the Internet.¹⁸⁸ In addition to currently active appeals, the website includes docket information dating back many years.

The website permits the user to search for appellate dockets by the appellate cause number, the trial court cause number, litigant name, or attorney name. Once an individual case is identified, a listing of all the filings and orders entered in the appeal is available, along with party and counsel information. This information is of great value in determining the status of a pending appeal, especially whether a petition to transfer jurisdiction to the supreme court has been filed, is pending, or may have been granted in a particular case.

D. Webcasts of Oral Arguments

Since September of 2001, the supreme court has been broadcasting its oral arguments live over the Internet. In addition, all the video and audio recordings of the oral arguments that have been previously "webcasted" are being archived and may be viewed at any time via the Internet.¹⁸⁹ Only a few states produce their oral arguments for broadcast in this manner.

CONCLUSION

The early indications are that the new Rules of Appellate Procedure are working well following this year of transition. By the end of their first year in operation, only minor clarifying amendments to the rules were necessary. Court reporters and trial court clerks seem to be handling their new duties, and attorneys are learning to use the new rules. The Indiana Court of Appeals continues to issue its opinions within a short time period from when each appeal is fully briefed.¹⁹⁰ In the coming years, the Indiana Supreme Court will become

188. As of this writing, access to the online appellate docket is achieved by logging on to the Indiana Judicial System webpage located at <http://www.in.gov/judiciary> and clicking on the words "Online Docket: Case Search."

189. As of this writing, access to the live webcasts and archived arguments is achieved by logging on to the webpage located at <http://www.in.gov/judiciary/education> and clicking on the graphic labeled "Watch Oral Arguments." Certain software is needed to view the arguments.

190. See COURT OF APPEALS OF INDIANA, 2000 ANN. REP. 1 (2001) (stating that the average age of appeals pending before the court, measured from the date the appeal was fully briefed, was

more active in the civil arena. Information about the status of cases pending on appeal is now available at the click of a button, and an attorney can watch an appellate oral argument from the comfort of her office. In sum, the rules and the tools are in place to make Indiana an accommodating place to practice appellate law.