

APPELLATE PROCEDURE

KEVIN S. SMITH*

INTRODUCTION

This Article surveys opinions, orders, and other developments in the area of state appellate procedure in Indiana during the most recent reporting period.¹ Part I examines rule amendments affecting Indiana appellate practitioners. Part II discusses decisions and orders issued during the reporting period that affect or relate to matters of appellate procedure and practice. Part III discusses miscellaneous information relevant to Indiana appellate practice and procedure.

I. RULE AMENDMENTS

A. *Effective January 1, 2005*

During the reporting period, the Indiana Supreme Court completely overhauled Administrative Rule 9, which concerns the confidentiality of court records.² Like a pebble thrown into a still pond, the ripples from this overhaul quietly but forcefully made their way into Indiana's other practice and procedure rules, including the Rules of Appellate Procedure.³ The changes, discussed below, went into effect January 1, 2005.

The predecessor to the revised Administrative Rule 9 was relatively short. In accordance with Indiana's Access to Public Records Act,⁴ the Rule simply listed fourteen classes of documents "declared confidential."⁵ The revised Administrative Rule 9, however, not only expands the classes of "confidential" records,⁶ but also includes, among other things: a detailed explanation of the rule's purpose;⁷ an explanation of who has access to court records;⁸ a

* Administrator, Indiana Supreme Court. B.S., *high distinction*, 1992, Indiana University—Bloomington; J.D., *magna cum laude*, 1996, Indiana University—Bloomington. The author acknowledges with grateful appreciation Paula Cardoza, Staff Counsel, Indiana Supreme Court, without whose exhaustive research this Article would not have happened; and Greta Scodro, Deputy Administrator, Lynn Devine, Staff Counsel, Geoff Davis, Staff Counsel, and again Ms. Cardoza, whose editorial insights greatly aided the author with this Article.

1. This Article picks up where its predecessor, see Douglas E. Cressler, *Appellate Procedure*, 37 IND. L. REV. 907, 907 n.1 (2004) [hereinafter Cressler 2004], left off, covering the time period from October 1, 2003, through September 30, 2004.

2. See Order Amending Administrative Rules (Ind. Feb. 25, 2004) (No. 94S00-0402-MS-94); Order Amending Administrative Rules, at 17 (Ind. Sept. 30, 2004) (No. 94S00-0402-MS-94).

3. See Order Amending Rules of Appellate Procedure (Ind. Sept. 30, 2004) (No. 94S00-0402-MS-94) (revising IND. APP. R. 2 & 9).

4. IND. CODE § 5-14-3-4 (2004).

5. Order Amending Administrative Rules, *supra* note 2, at 1-2.

6. Compare *id.* at 1-2 (showing former rule), with *id.* at 9-13 (showing "records excluded from public access" under new rule); see also IND. ADMIN. R. 9(G).

7. IND. ADMIN. R. 9(A).

8. IND. ADMIN. R. 9(B).

“Definitions” section;⁹ a request for courts to make certain court records, when available in electronic form, “remotely accessible”;¹⁰ procedures related to bulk distribution of court records and acquisition of compiled information derived from information contained in more than one court record;¹¹ procedures for persons seeking to prohibit otherwise publicly accessible court records from public access;¹² procedures for seeking information excluded from public access;¹³ explanations concerning how and when accessible court records may be procured;¹⁴ a section discussing contracts with vendors providing information technology services pertaining to court records;¹⁵ and a provision granting immunity from liability to certain persons (namely clerks, court personnel, and court agents) who unintentionally or unknowingly disclose confidential or erroneous information.¹⁶ The new Administrative Rule 9 also contains detailed commentary following each of the new rule’s subsections.¹⁷

The new rule

is the culmination of an intense ten-month effort of a special Task Force on Access to Court Records organized by the Supreme Court Records Management Committee in January 2003. The task force was chaired by Justice Brent Dickson of the Indiana Supreme Court and included a broad representation of numerous constituencies, including the media, victim advocacy groups, judges, private attorneys, clerks, the Indiana Attorney General’s office, and the Indiana Civil Liberties Union.¹⁸

The sweeping changes to Administrative Rule 9 were so extensive that they prompted the Indiana Supreme Court’s Division of State Court Administration to publish a fifty-two-page “Public Access to Court Records Handbook” explaining the new rule.¹⁹

Administrative Rule 9 most dramatically affects Indiana litigators through a contemporaneous amendment to Rule 5 of the Indiana Rules of Trial Procedure. Commensurate with the amendment of Administrative Rule 9, Trial Rule 5 added subsection G, which states:

(G) Filing of Documents and Information Excluded from Public Access

9. IND. ADMIN. R. 9(C).

10. IND. ADMIN. R. 9(E).

11. IND. ADMIN. R. 9(F).

12. IND. ADMIN. R. 9(H).

13. IND. ADMIN. R. 9(I).

14. IND. ADMIN. R. 9(J).

15. IND. ADMIN. R. 9(K).

16. IND. ADMIN. R. 9(L).

17. *See generally* IND. ADMIN. R. 9.

18. INDIANA SUPREME COURT, DIVISION OF STATE COURT ADMINISTRATION, PUBLIC ACCESS TO COURT RECORDS HANDBOOK 4 (Dec. 2004 ed.), *available at* www.in.gov/judiciary/admin/accesshandbook.pdf. In addition, questions pertaining to Administrative Rule 9 may be directed to the Division of State Court Administration by calling (317) 232-2542.

19. *See id.*

and Confidential Pursuant to Administrative rule 9(G)(1). Every document prepared by a lawyer or party for filing in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:

- (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper, marked “Not for Public Access.”
- (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked “Not For Public Access” and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.
- (3) With respect to documents filed in electronic format, the trial court, by order or local rule, may provide for compliance with this rule in a manner that separates and protects access to information excluded from public access.
- (4) This rule does not apply to a record sealed by the court pursuant to IC 5-14-3-5.5 or otherwise, nor to records to which public access is prohibited pursuant to Administrative Rule 9(H) [sic].²⁰

Of note for appellate practitioners is that Trial Rule 5’s “separate identification” requirement is not limited to trial court filings. To incorporate the changes brought about by Administrative Rule 9’s amendments, the supreme court amended Indiana’s Rules of Appellate Procedure by adding new subsections to Rules 2 and 9. Rule 2, the “Definitions” section, now contains a new subsection “N,” which states, “[t]he term ‘Case Record’ shall mean a record defined by Administrative Rule 9(C)(2). ‘Case Records Excluded from Public Access’ shall mean records identified in Administrative Rule 9(G)(1).”²¹ Rule 9, concerning the initiation of the appeal, now contains a new subsection “J,” which states, “[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G).”²² Accordingly, documents filed by attorneys with the Indiana Court of Appeals and Indiana Supreme Court will be subject to Trial Rule 5(G)’s identification/redaction requirements if those documents contain any information excluded from public access pursuant to Administrative Rule 9(G)(1).

Comparatively, the changes brought about by Administrative Rule 9 affect appellate lawyers much less than their trial lawyer counterparts. Both trial and appellate lawyers will have to review the documents they themselves create, such

20. IND. TRIAL R. 5(G) (effective Jan. 1, 2005). IND. TRIAL R. 5(G)(4) actually cites “Administrative Rule 9(H).” This is a scrivener’s error and should read “Administrative Rule 9(G).”

21. IND. APP. R. 2(N).

22. IND. APP. R. 9(G).

as motions and briefs, to insure compliance with Trial Rule 5(G). The bigger potential problem is with documentary evidence not created by an attorney. Every page will have to be reviewed and confidential material culled out and placed on green paper before documentary evidence can be filed with the trial court. Unlike trial lawyers, appellate lawyers, except when seeking an original action before the supreme court,²³ typically are not responsible for assembling and filing evidentiary materials. Rather, that responsibility typically falls on the trial court clerk or administrative agency from which the appeal is sought.²⁴ Appellate practitioners still should be careful in those few instances where they, and not the trial court clerk or administrative agency, are responsible for filing documents they themselves did not create, such as attachments to the Appellant's Case Summary;²⁵ materials filed in lieu of or outside of the Clerk's Record (such as a statement of the evidence,²⁶ an agreed statement of the record,²⁷ or a verified motion of facts outside the record on appeal²⁸); or when filing appendices.²⁹

B. Proposed Rule Changes to Watch for

In May 2004, the Indiana State Bar Association's Appellate Practice Section ("Appellate Practice Section") sent a letter to the Indiana Supreme Court Committee on Rules of Practice and Procedure proposing certain changes to the current Indiana Rules of Appellate Procedure. The letter was the culmination of extensive work by the Appellate Practice Section, which involved a survey sent to appellate practitioners, court clerks, court reporters, law clerks, faculty, and judges across Indiana; reports and recommendations drafted by two subcommittees that reviewed more than 100 responses to the survey; an executive committee's review of the subcommittee reports and recommendations; and creation of a final report and recommendations by the executive committee to the Section's council and officers.³⁰ Those proposed rule changes follow.

1. *Appellate Rule 12(A)*.—The Appellate Practice Section proposes adding the following emphasized language to Appellate Rule 12(A):

Clerk's Record. Unless the Court on Appeal orders otherwise, the trial

23. See generally IND. ORIGINAL ACTION R. 3(C).

24. See IND. APP. R. 10-13.

25. See IND. APP. R. 15(D). Notice that some of the documents listed in Rule 15(D) are those created by the trial court, such as the judgment or order from which the party is appealing. IND. APP. R. 15(D)(1)-(2). Even if a trial court failed to comply with the requirements of Administrative Rule 9 when issuing its judgment or order, the appellate practitioner would still be required by Appellate Rule 9(J) to file the trial court's order in a manner that complies with the requirements of Trial Rule 5(G).

26. IND. APP. R. 31.

27. IND. APP. R. 33.

28. IND. APP. R. 34(F).

29. IND. APP. R. 49-51.

30. Letter from Carol Sparks Drake, Indiana State Bar Association Appellate Practice Section Chair, to Lilia G. Judson, Executive Secretary, Indiana Supreme Court Committee on Rules of Practice and Procedure 1 (May 12, 2004) (on file with author) [hereinafter Drake Letter].

court clerk shall retain the Clerk's Record throughout the appeal. A party may request that the trial court clerk copy the Clerk's Record, and the clerk shall provide the copies within thirty (30) days, subject to the payment of any usual and customary copying charges.³¹

This proposal arose from comments voiced by "practitioners and court clerks regarding continuing confusion over whether the clerk can charge for copies of the Clerk's Record."³²

2. *Appellate Rule 34(C)*.—The Appellate Practice Section proposes changing the time for filing a response to non-routine motions from ten to fifteen days, and therefore proposes amending Rule 34(C) in the following manner: "C. Response. Any party may file a response to a motion within ~~ten (10)~~ fifteen (15) days after the motion is served."³³ The Appellate Practice Section finds this change necessary because: (1) other responsive deadlines in the Appellate Rules are at least fifteen days; therefore, the ten-day response time "potentially serves as a trap for the occasional appellate practitioner;" and (2) ten days is insufficient because "the motions covered by [Rule 34(C)] often involve significant questions of jurisdiction or factual issues."³⁴

3. *Appellate Rule 44*.—The Appellate Practice Section proposes changing Rule 44 as it relates to the length of intervenor and amicus briefs/petitions on transfer or rehearing and the length of reply briefs in response to a petition to transfer.³⁵ Concerning the former, the Appellate Practice Section finds it inequitable that intervenors and amicus receive fifteen pages or 7000 words when submitting a brief or petition regarding transfer or rehearing while the parties themselves are limited to ten pages or 4200 words.³⁶ Concerning the latter, the Appellate Practice Section asserts the transfer reply brief limitation of three pages or 1000 words is too low.³⁷ Accordingly, it proposes the following changes to subsections (D) and (E) of Rule 44:

D. Page Limits. Unless a word count complying with Section E is provided, a brief or Petition may not exceed the following number of pages:

...

Brief of intervenor or amicus curiae (except as provided below):
fifteen (15) pages

...

31. *Id.* at 2.

32. *Id.*

33. *Id.*

34. *Id.*

35. *See* IND. APP. R. 44(E).

36. Drake Letter, *supra* note 30, at 2.

37. *Id.*

Reply brief to brief in response to a Petition seeking Transfer or Review: ~~three (3)~~ five (5) pages

Brief of intervenor or amicus curiae on transfer or rehearing:
seven (7) pages

...

E. Word Limits. A brief or Petition exceeding the page limit of Section D may be filed if it does not exceed, and the attorney or the unrepresented party preparing the brief or Petition certifies that, including footnotes, it does not exceed, the following number of words:

...

Brief of intervenor or amicus curiae (except as provided below):
7,000 words

...

Reply brief to brief in response to a Petition seeking Transfer or Review: ~~1,000~~ 1,500 words

Brief of intervenor or amicus curiae on transfer or rehearing:
3,000 words³⁸

4. *Appellate Rule 50*.—Finally, the Appellate Practice Section proposes changing Rule 50 concerning Appendices. First, it notes that the Rule does not explicitly require counsel to serve the Appendix on opposing parties and believes the parties should be required to do so.³⁹ Second, it notes comments made by several practitioners that some of the documents required in the Appendix in criminal cases may be irrelevant.⁴⁰ Accordingly, the Appellate Practice Section proposes the following changes to Rule 50:

B. Appendices in Criminal Appeals

(1) Contents of Appellant's Appendix. The appellant's Appendix

38. *Id.* at 2-3.

39. *Id.* at 3. The question of whether service of an Appendix on opposing counsel in criminal cases is necessary or desirable, at least where the State is the appellee, seems already to have been considered by the supreme court. In *Theobald v. Hartford Casualty Insurance Co.*, 762 N.E.2d 785, 786 (Ind. Ct. App. 2002), the court of appeals wrote "that the Supreme Court of Indiana by an order issued by that court on September 24, 2001, has provided that in criminal appeals, copying of the Appendix and service thereof serves no useful purpose and that the Attorney General's Office is in a position to simply 'check out' the Appendix from the Clerk's Office in the same manner as it currently checks out the transcript."

40. Drake Letter, *supra* note 30, at 3.

in a Criminal Appeal shall contain a table of contents and copies of the following documents, if they exist:

(a) the Clerk's Record, including the chronological case summary but excluding notices of depositions, motions for extensions of time, notices of settings, subpoenas, documents related solely to the attendance of witnesses or the defendant, documents related to the selection of jurors, and orders related to such matters, unless such documents relate to an issue on appeal;

...

F. Certificate of Service. The Appendix shall be served pursuant to Rule 24. In pauper cases or for good cause shown, the court may, upon motion, relieve the party of the service requirement.⁴¹

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

II. DEVELOPMENTS IN THE CASE LAW

A. *Supreme Court Clarifies Proper Procedure for Correcting Sentencing Errors*

An erroneous criminal sentence can be corrected through a motion to correct error under Trial Rule 59, through a direct appeal under Appellate Rule 9(A), or through an appropriate petition for post-conviction relief under Indiana Post-Conviction Rule 1, section 1(a)(3).⁴² In addition, Indiana Code section 35-38-1-15 permits a person erroneously sentenced to file a "motion to correct sentence."⁴³ During the survey period, the Indiana Supreme Court in *Robinson v. State*⁴⁴ clarified the circumstances under which erroneous sentences should be corrected through a motion to correct sentence verses the other, more traditional means. Specifically, it held:

[A] motion to correct sentence may only be used to correct sentencing errors that are clear from the face of the judgment imposing the sentence in light of the statutory authority. Claims that require consideration of the proceedings before, during, or after trial may not be presented by way of a motion to correct sentence.⁴⁵

Claims requiring consideration of matters outside the face of the sentencing

41. *Id.* at 3-4.

42. *See Robinson v. State*, 805 N.E.2d 783, 786 (Ind. 2004).

43. IND. CODE § 35-38-1-15 (2004).

44. 805 N.E.2d 783.

45. *Id.* at 787.

judgment, it held, “are best addressed promptly on direct appeal and thereafter via post-conviction relief proceedings where applicable.”⁴⁶

In so holding, the court expressly disapproved prior precedent in which it had considered motions to correct sentences that required review of matters outside the face of the sentencing judgment.⁴⁷ *Robinson* also held that because motions to correct sentences “based on clear facial error are not in the nature of post-conviction petitions, . . . they may . . . be filed after a post-conviction proceeding without seeking the prior authorization necessary for successive petitions for post-conviction relief under Indiana Post-Conviction Rule 1(12),” expressly overruling prior court of appeals precedent to the contrary.⁴⁸

B. Failure to Request Transcript Not Necessarily Fatal to Appeal

Appellate Rule 9(F)(4) states in relevant part:

The Notice of Appeal shall designate all portions of the Transcript necessary to present fairly and decide the issues on appeal. If the appellant intends to urge on appeal that a finding of fact or conclusion thereon is unsupported by the evidence or is contrary to the evidence, the Notice of Appeal shall request a Transcript of all the evidence.⁴⁹

Does Appellate Rule 9(F)(4) require the appellant to request preparation of a trial transcript in all circumstances? Not always, according to *Pabey v. Pastrick*.⁵⁰ In *Pabey* an election fraud case, the appellant did not request preparation of a transcript. The court of appeals summarily dismissed his appeal. On transfer, the appellee defended the dismissal by contending Appellate Rule 9(F)(4) requires the appellant to present a complete record, including a transcript, which the appellant failed to do. The appellant countered that Appellate Rule 9(F) makes the transcript mandatory only when the appellant challenges a finding of fact or claims a conclusion based thereon is unsupported by the evidence or is contrary to the evidence. Because *Pabey* was not making such claims and his specifications of error did not rely on evidence outside the court’s findings, he contended the transcript was unnecessary.⁵¹

The specific holding in *Pabey* was that “[e]ven if Appellate Rule 9(F)(4) required *Pabey* to submit a transcript, dismissal with prejudice was not the appropriate remedy for his noncompliance with the rule.”⁵² The opinion did not specifically approve *Pabey*’s argument (although it suggested his argument found support in prior precedent applying the predecessor to our current appellate

46. *Id.*

47. *Id.* at 786-87 (disapproving *Mitchell v. State*, 726 N.E.2d 1228, 1243 (Ind. 2000); *Reffett v. State*, 571 N.E.2d 1227, 1228-29 (Ind. 1991); *Jones v. State*, 544 N.E.2d 492, 496 (Ind. 1989)).

48. *Id.* at 788 (overruling *White v. State*, 793 N.E.2d 1127, 1132 (Ind. Ct. App. 2003); *Waters v. State*, 703 N.E.2d 688, 689 (Ind. Ct. App. 1998)).

49. IND. APP. R. 9(F)(4).

50. 816 N.E.2d 1138 (Ind. 2004).

51. *Id.* at 1142.

52. *Id.*

rules),⁵³ and therefore probably cannot be cited as an affirmative holding that Appellate Rule 9(F)(4) does not require submission of the transcript when the appellant is not challenging a finding of fact or claiming a conclusion based thereon is unsupported by the evidence or is contrary to the evidence. However, the opinion certainly supports such a notion in both its discussion of prior precedent and the fact that the court did not order Pabey to go back and cause a transcript to be prepared (which was presented as an alternative to dismissal in the appellee's Response To Appellant's Petition To Transfer).⁵⁴

*C. Failure to Seek Order Compelling Completion of Clerk's Record
Not Fatal Where Appellee Not Prejudiced and Failure Did
Not Result in Long Delay*

Within thirty days after the filing of a Notice of Appeal, the trial court clerk or administrative agency is required to assemble the Clerk's Record and serve a Notice of Completion of Clerk's Record ("Notice of Completion").⁵⁵ If the trial court clerk or administrative agency fails to do so, then the appellant, within fifteen days after the Notice of Completion was due, must "seek an order from the Court on Appeal compelling the trial court clerk or Administrative Agency to . . . issue, file, and serve its Notice of Completion."⁵⁶ According to Appellate Rule 10, the appellant's failure to do so "shall subject the appeal to dismissal."⁵⁷

In *State v. Moore*,⁵⁸ the clerk did not file the Notice of Completion within thirty days after the Notice of Appeal was filed, and the State did not seek an order compelling the issuance of the Notice of Completion within fifteen days thereafter.⁵⁹ However, on the sixteenth day after the Notice of Completion deadline, the trial court clerk provided the Notice of Completion without any order compelling such action.⁶⁰ In ruling on the appellee's motion to dismiss, the court acknowledged Appellate Rule 10 could "be read to state that an appeal must be dismissed if an appellant fails to seek an order of the appellate court to compel a trial court clerk to complete the clerk's record."⁶¹ However, it declined to do so, finding such a reading would not "coincide[] with the preference that [the court] apply an ameliorative approach to remedy failures by the parties to provide a complete record upon appeal."⁶² Finding neither prejudice to the appellee nor a "long delay . . . result[ing] from the State's failure to take action," the court declined to dismiss the appeal.⁶³ In doing so, however, the court

53. *Id.* (discussing *In re Walker*, 665 N.E.2d 586, 588 (Ind. 1996)).

54. *Id.*

55. IND. APP. R. 10(B), (C).

56. IND. APP. R. 10(F).

57. *Id.*

58. 796 N.E.2d 764 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 791 (Ind. 2004).

59. *Id.* at 766.

60. *Id.*

61. *Id.*

62. *Id.* (citing *Johnson v. State*, 756 N.E.2d 965, 967 (Ind. 2001)).

63. *Id.* at 767.

“caution[ed] . . . [that] [h]ad a long delay resulted because of the State’s failure to act, dismissal may have been warranted.”⁶⁴

D. Interlocutory Appeals

During the survey period, the court of appeals issued some important decisions interpreting the parameters and limits of interlocutory appeals.

1. Order to Produce Documents Does Not Give Rise to Interlocutory Appeal, Even if Would Cost \$12 Million.—In *Allstate Insurance Co. v. Scrogan*,⁶⁵ Allstate sought interlocutory appeal of a discovery order requiring it to produce documents that, Allstate claimed, would cost it approximately \$12 million to produce.⁶⁶ The court of appeals dismissed the appeal for lack of jurisdiction. First, it determined Appellate Rule 14(A)(1)⁶⁷ did not apply because the order “[did] not pertain directly to the payment of money,”⁶⁸ and Appellate Rule 14(A)(3)⁶⁹ did not apply, because the delivery of documents under the order did not “import[] a surrender.”⁷⁰ Second, it found that, although *State v. Hogan*⁷¹ states, “[t]he matters which are appealable as of right under Appellate Rule 4(B)(1)⁷² involve the trial court orders which carry financial and legal consequences akin to those more typically found in final judgments,” that language simply “categorizes those orders that already are appealable as of right under the rule” rather than creating “a new exception” for appeals as a matter of right.⁷³ Third, the court declined to follow previous cases that “suggest[ed] the court of appeals] may find jurisdiction to hear an interlocutory appeal outside of Rule 14,”⁷⁴ ruling that the only bases for interlocutory appeals are found in Rule 14.⁷⁵

64. *Id.*

65. 801 N.E.2d 191 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 807 (Ind. 2004).

66. *Id.* at 192.

67. Appellate Rule 14(A)(1) gives the court of appeals jurisdiction over appeals of interlocutory orders compelling “the payment of money.” IND. APP. R. 14(A)(1).

68. *Scrogan*, 801 N.E.2d at 192; *see also id.* at 194.

69. Appellate Rule 14(A)(3) gives the court of appeals jurisdiction over appeals of interlocutory orders compelling “the delivery or assignment of any securities, evidence of debt, documents, or things in action.” IND. APP. R. 14(A)(3).

70. *Scrogan*, 801 N.E.2d at 192, 194.

71. 582 N.E.2d 824 (Ind. 1991). In *Hogan*, the supreme court “held that discovery orders involving the production of documents were not appealable as of right but only as discretionary interlocutory appeals, which require certification by the trial court and acceptance by the court of appeals.” *Scrogan*, 801 N.E.2d at 194 (discussing *Hogan*, 582 N.E.2d at 825).

72. Appellate Rule 4(B)(1) was the predecessor to what is now Appellate Rule 14(A).

73. *Scrogan*, 801 N.E.2d at 195 (quoting *Hogan*, 582 N.E.2d at 825 (emphasis in *Scrogan*)).

74. *Id.* (citing *Nass v. State ex rel. Unity Team*, 718 N.E.2d 757 (Ind. Ct. App. 1999); *Northwestern Mut. Life Ins. Co. v. Stinnett*, 698 N.E.2d 339 (Ind. Ct. App. 1998)).

75. *Id.* at 195-96 (following *INB Nat’l Bank v. 1st Source Bank*, 567 N.E.2d 1200, 1202 (Ind. Ct. App. 1991)). *See also* *Young v. Estate of Sweeney*, 808 N.E.2d 1217, 1219 (Ind. Ct. App.

2. *Trial Court's Incorrect Designation of Order Denying Partial Summary Judgment as a "Final Appealable Judgment" Is Not Binding on Court of Appeals.*—In *Cardiology Associates of Northwest Indiana, P.C. v. Collins*,⁷⁶ the trial court incorrectly wrote at the end of its order denying a motion for partial summary judgment and subsequent motion to correct errors, “[t]he Court further finds no just reason for delay, and hereby enters this Order . . . as [a] final and appealable judgment.”⁷⁷ The court of appeals dismissed the appeal sua sponte because an order denying a motion for summary judgment is not a “final appealable order” and “the parties did not follow the proper procedure for bringing an interlocutory appeal.”⁷⁸

3. *Error in Interlocutory Order Can Be Raised on Appeal from Final Judgment.*—Last year this article stated the supreme court’s grant of transfer in *Bojrab v. Bojrab*⁷⁹ provided the court “the opportunity to give a final and definitive answer to the question of waiver in interlocutory orders that qualify as appealable of right pursuant to Appellate Rule 14(A).”⁸⁰ The court lived up to its billing, conclusively holding that “[a] claimed error in an interlocutory order is not waived for failure to take an interlocutory appeal but may be raised on appeal from the final judgment.”⁸¹

4. *Court of Appeals Certifies Interlocutory “Orders,” Not Interlocutory “Issues.”*—In *Infectious Disease of Indianapolis, P.S.C. v. Toney*,⁸² the court of appeals clarified that when a trial court certifies a matter for interlocutory appeal under Appellate Rule 14(B), it is certifying *its interlocutory order* for review by the court of appeals, rather than certifying a particular question that the trial court wants the court of appeals to answer.⁸³ “[T]here is nothing prohibiting the trial court from identifying the specific question of law presented by its order,” the court noted, but the appellate court “is under no obligation to accept the issue as framed by the trial court or to answer it.”⁸⁴

5. *CHINS Permanency Plan Order Not “Final Appealable Order.”*—Finally, in *In re K.F.*,⁸⁵ the court of appeals dismissed an interlocutory appeal sua sponte involving a permanency plan order made pursuant to CHINS action, finding it was not a “final appealable order” because it did dispose of all claims

2004) (dismissing interlocutory appeal sua sponte for lack of subject matter jurisdiction because the appeal failed to satisfy Appellate Rule 14, stating, “[o]ur Rules of Appellate Procedure provide that we have jurisdiction over interlocutory orders only under the conditions described in Appellate Rule 14”).

76. 804 N.E.2d 151 (Ind. Ct. App. 2004).

77. *Id.* at 153.

78. *Id.* at 154-55 (citing IND. APP. R. 14).

79. 786 N.E.2d 713 (Ind. Ct. App. 2003), *vacated on grant of trans.*

80. *See* Cressler 2004, *supra* note 1, at 925.

81. *Bojrab v. Bojrab*, 810 N.E.2d 1008, 1014 (Ind. 2004).

82. 813 N.E.2d 1223 (Ind. Ct. App. 2004).

83. *Id.* at 1227 n.4.

84. *Id.*

85. 797 N.E.2d 310 (Ind. Ct. App. 2003).

as to all parties.⁸⁶

E. Waiver

During the survey period, Indiana's appellate courts considered many important issues involving the proper preservation of issues for appeal.

1. *New Appellate Rule 5 Does Not Require Potential Litigants to Intervene in Utility Regulatory Administrative Proceedings to Preserve Appellate Arguments.*—In 1991, the supreme court interpreted Indiana Code section 8-1-3-1⁸⁷ to permit litigants appealing an Indiana Utility Regulatory Commission decision, who were not parties below, to raise issues before the court of appeals that were not raised before the Commission.⁸⁸ In *Citizens Action Coalition of Indiana, Inc. v. Northern Indiana Public Service Co.*,⁸⁹ the defendant (“NIPSCO”) argued that the new Appellate Rule 5, which went into effect January 1, 2001, overrides the supreme court's previous interpretation of section 8-1-3-1 because the rule expressly states, “[a]ll issues and grounds for appeal appropriately preserved before an Administrative Agency may be initially addressed in the appellate brief.”⁹⁰ The court of appeals rejected NIPSCO's argument, distinguishing cases in which a party appealing the Commission's decision, were found to have failed to “sufficiently preserve[]” an issue by raising it before the Commission because in those cases the parties had been involved at the administrative stage.⁹¹

2. *Contemporaneous Objection to Instruction When Jury Charged Is Unnecessary if Previous “Informal” Objection Made.*—Failure to object to a jury instruction before the jury retires waives any claim of error based on that

86. *Id.* at 315.

87. IND. CODE § 8-1-3-1 (2004) states:

Any person, firm, association, corporation, limited liability company, city, town, or public utility adversely affected by any final decision, ruling, or order of the [Indiana Utility Regulatory Commission] may, within thirty (30) days from the date of entry of such decision, ruling, or order, appeal to the court of appeals of Indiana for errors of law under the same terms and conditions as govern appeals in ordinary civil actions, except as otherwise provided in this chapter and with the right in the losing party or parties in the court of appeals to apply to the supreme court for a petition to transfer the cause to said supreme court as in other cases. An assignment of errors that the decision, ruling, or order of the commission is contrary to law shall be sufficient to present both the sufficiency of the facts found to sustain the decision, ruling, or order, and the sufficiency of the evidence to sustain the finding of facts upon which it was rendered.

88. See *Citizens Action Coalition of Ind. Inc. v. N. Ind. Pub. Serv. Co.*, 804 N.E.2d 289, 295-96 (Ind. Ct. App. 2004) (discussing *Citizens Action Coalition of Ind., Inc. v. Pub. Serv. Co. of Ind.*, 582 N.E.2d 330, 334 (Ind. 1991)).

89. *Id.*

90. *Id.* (quoting IND. APP. R. 5(C)(2) (emphasis added)).

91. See *id.* at 296-97.

instruction.⁹² In *Wohlwend v. Edwards*,⁹³ the appellant “did not formally record his objection until after the jury had been charged;” however, he had objected to the instruction “earlier off the record, ‘in accordance with customary practice in courts across Indiana.’”⁹⁴ Noting that such a “practice was given tacit approval” by the court of appeals in 1980⁹⁵ and that the record supported the appellant’s contention that the objection had been previously made but not formally recorded until later, the court of appeals held the appellant had preserved his claim of error concerning the instruction.⁹⁶

3. *Express Citation to Foreign Statutory Scheme Not Necessary to Preserve Issue When Applicability of Foreign Law Was “Part And Parcel” of Plaintiff’s Claim.*—In *United Farm Family Mutual Insurance Co. v. Michalski*,⁹⁷ the plaintiffs/appellees brought a replevin action against a theft victim’s property insurer to recover possession of a boat titled in the name of one of the plaintiffs after the boat was sold to foreclose a storage lien.⁹⁸ A necessary part of the plaintiffs’ claim was establishing they had acquired a lien pursuant to Illinois law and had complied with the requirements of the Illinois Labor and Storage Lien (Small Amount) Act (“the Act”) to enforce the lien.⁹⁹ The plaintiffs never specifically referred to the Act before the trial court, however. The court of appeals refused to find the plaintiffs waived their claim by failing to cite the Act specifically, because “the issue of [the plaintiffs’] lien pursuant to Illinois law . . . was . . . before the [trial] court as part and parcel of their claim for replevin,” and because opposing counsel had specifically cross-examined a witness in a manner apparently designed for “no other reason . . . [than] to cast doubt on [the plaintiffs’] claim of a lien under Illinois law and the use of that lien to obtain their purported superior title to [the boat].”¹⁰⁰

4. *Issues Considered on Appeal That Were Not Raised in Trial Court.*—“A party generally waives appellate review of an issue or argument unless that party presented that issue or argument before the trial court.”¹⁰¹ During the survey period, the court of appeals noted two exceptions to this general rule.

92. IND. TRIAL R. 51(C).

93. 796 N.E.2d 781 (Ind. Ct. App. 2003).

94. *Id.* at 790 (quoting Appellant’s Reply Br. at 8).

95. *Id.* at 790-91 (discussing *Manning v. Allgood*, 412 N.E.2d 811 (Ind. Ct. App. 1980); *Piwowar v. Wash. Lumber & Coal Co.*, 405 N.E.2d 576 (Ind. Ct. App. 1980)).

96. *Id.* at 791.

97. 814 N.E.2d 1060 (Ind. Ct. App. 2004).

98. *Id.* at 1062-63.

99. *Id.* at 1066.

100. *Id.* at 1067. Further, the court of appeals held that the plaintiffs’ failure to give notice of their intent to rely on foreign law, as required by the Uniform Judicial Notice of Foreign Law Act, Indiana Code chapter 34-38-4, did not result in waiver for the same reasons. *Id.* at 1066.

101. *Dedelow v. Pucalik*, 801 N.E.2d 178, 183 (Ind. Ct. App. 2003) (citing *GKC Ind. Theatres, Inc. v. Elk Retail Investors, LLC*, 764 N.E.2d 647, 652 (Ind. Ct. App. 2002)); *see also* *Midwestern Indem. Co. v. Sys. Builders, Inc.*, 801 N.E.2d 661, 671 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 804 (Ind. 2004).

In *Dedelow v. Pucalik*,¹⁰² the court of appeals held that if the trial court rules on an issue the parties themselves overlooked and did not argue below, then the parties are not precluded from addressing that issue on appeal.¹⁰³ As the court of appeals observed, “were we to apply waiver to [such a situation], the aggrieved party would be unable to challenge the judgment upon appeal, effectively insulating the victorious party.”¹⁰⁴

In *Midwestern Indemnity Co. v. Systems Builders, Inc.*,¹⁰⁵ the defendant/appellee moved for summary judgment based on certain arguments, but on appeal attempted to advance a different argument in support of the trial court’s summary judgment decision.¹⁰⁶ Although “[f]ailure to make a claim or argument to the trial court ordinarily precludes making it on appeal,”¹⁰⁷ the court of appeals considered the otherwise waived argument in part because the appellant “did not, in its reply brief, challenge [the appellee’s] expansion of its . . . argument.”¹⁰⁸ In contrast, the appellant in *McGill v. Ling*¹⁰⁹ was not so fortunate. She failed to present a statute of limitations tolling argument during summary judgment proceedings, but attempted to make the argument on appeal.¹¹⁰ She contended the matter was not waived because “matters designated to the trial court at summary judgment contained facts underlying the . . . tolling issue.”¹¹¹ The court of appeals rejected her argument, noting, “[i]f we were to adopt McGill’s assertion that a party does not waive a new argument raised for the first time on appeal simply because there are facts in the summary judgment record to support that argument, that would create an exception which swallows the waiver rule.”¹¹²

5. “Mootness” Cannot Be Waived by Failing to Raise It Below.—The appellees in *Sherrell v. Northern Community School Corp.*,¹¹³ a school expulsion case, argued the case was moot because the student’s expulsion “ha[d] long since

102. 801 N.E.2d 178.

103. *Id.* at 184-85.

104. *Id.* at 185 n.6.

105. 801 N.E.2d at 661.

106. *Id.* at 671.

107. *Id.*

108. *Id.*

109. 801 N.E.2d 678 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 807 (Ind. 2004).

110. *Id.* at 687.

111. *Id.*

112. *Id.* at 688. *See also* *Westfield Cos. v. Knapp*, 804 N.E.2d 1270, 1276 n.10 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 975 (Ind. 2004) (setting forth facts supporting argument in “Facts and Procedural History” section of summary judgment brief, without making argument directly in “Argument” section of brief, does not bring that matter to trial court’s attention sufficient to preserve argument on appeal); *Johnson v. Parkview Health Sys., Inc.*, 801 N.E.2d 1281, 1287-88 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 804 (Ind. 2004) (claim under Medical Malpractice Act waived on appeal when only theory of recovery advanced in trial court was under Child Wrongful Death Statute).

113. 801 N.E.2d 693 (Ind. Ct. App. 2004).

ended.”¹¹⁴ The appellant responded by asserting the appellees had failed to raise the mootness issue before the trial court and therefore had waived that claim on appeal. The court of appeals responded by “observ[ing] that ‘the determination of mootness is not a matter which can be waived.’”¹¹⁵ Rather, “[i]t is the prerogative of [the court of appeals] to determine whether to address an issue when [it is] informed that the matter is no longer live or has become moot as between the parties.”¹¹⁶

6. *Failure to Object to Admission of Parol Evidence Does Not Result in Waiver.*—In *Krieg v. Hieber*,¹¹⁷ the appellant contended the appellee waived his ability to make a parol evidence argument on appeal by failing to object to the admission of the evidence at trial.¹¹⁸ The court of appeals disagreed, citing precedent from the 1980s for the proposition that “[t]he parol evidence rule is a rule of preference and of substantive law’ which prohibits both the trial court and appellate court from considering such evidence even though it was admitted to trial without objection.”¹¹⁹

7. *Mere Listing of Contention in Complaint Insufficient to Preserve Issue for Appeal.*—In *Endres v. Indiana State Police*,¹²⁰ the appellant had listed certain constitutional claims in his complaint, but the first arguments he made in support of those contentions were in a motion to correct errors.¹²¹ Citing “notice pleading,” the court of appeals determined the issue was sufficiently preserved for appellate consideration.¹²² In a per curiam opinion, the supreme court disagreed, stating:

We find that the mere listing of a contention in a party’s complaint, with no further attempt to press the contention in the trial court, is insufficient effort to preserve the matter for appellate review. At a minimum, a party must show that it gave the trial court a bona fide opportunity to pass upon the merits of the claim before seeking an opinion on appeal. The policy reasons behind this requirement—preservation of judicial resources, opportunity for full development of the record, utilization of trial court fact-finding expertise, and assurance of a claim being tested by the adversary process—apply with particular force where, as here, the claim is a constitutional one. We therefore decline to address this issue because the record and arguments have not been sufficiently developed

114. *Id.* at 701.

115. *Id.* (internal citations omitted).

116. *Id.* (internal citations omitted).

117. 802 N.E.2d 938 (Ind. Ct. App. 2004).

118. *Id.* at 943 n.2.

119. *Id.* (quoting *Hancock v. Ky. Cent. Life Ins. Co.*, 527 N.E.2d 720, 725 (Ind. Ct. App. 1988) (quoting *Franklin v. White*, 493 N.E.2d 161, 165-66 (Ind. 1986))).

120. 809 N.E.2d 320 (Ind.) (per curiam), *aff’d in part, vacated in part*, 809 N.E.2d 320 (Ind. 2004).

121. *Id.* at 321-22.

122. *Id.* at 322.

for us to decide this important issue of Indiana constitutional law.¹²³

8. *Failure to Assist Trial Court with Wording of Jury Admonishment Waives Ability to Challenge the Admonishment.*—In *Strack & Van Til, Inc. v. Carter*,¹²⁴ the appellant challenged the effectiveness of a trial court's sua sponte jury admonishment concerning the limited purpose for which the jury should consider a particular piece of photographic evidence.¹²⁵ The court of appeals held the appellant could not now challenge the content of the admonishment because the trial court had asked appellant's counsel to assist it with the admonishment's wording but counsel chose not to do so.¹²⁶

9. *Invited Error Doctrine.*—

a. *Invited error waives subject matter jurisdiction issue on appeal.*—In *Batterman v. Bender*,¹²⁷ Father filed a motion for modification of a Wisconsin child support order in the Knox Circuit Court after Mother and Child moved from Wisconsin to Indiana.¹²⁸ Things did not go as Father had hoped, as under Indiana law he ended up having his support obligations increased, not decreased.¹²⁹ On appeal, Father argued the action had to be dismissed for lack of subject matter jurisdiction because he had failed to register the Wisconsin child support order as required by Indiana law.¹³⁰ Citing the “invited error” doctrine,¹³¹ the court of appeals rejected his argument, finding “the filing of the Wisconsin order was entirely in the hands of [Father], and any problem with the registration of the order is directly attributable to him.”¹³²

b. *Defense counsel's sentencing recommendation did constitute invited error when defendant himself objected to the recommendation during his testimony.*—In *Chism v. State*,¹³³ defense counsel proposed Chism be placed on GPS monitoring and, consequently, did not object to GPS monitoring during the sentencing hearing.¹³⁴ Accordingly, the State, citing the “invited error” doctrine, argued Chism could not contest the GPS monitoring portion of his sentence on appeal.¹³⁵ The court of appeals rejected the State's argument and found the issue viable on appeal because despite defense counsel's proposal, Chism himself had

123. *Id.* (internal citations omitted) (citing *Troxel v. Troxel*, 737 N.E.2d 745, 752 (Ind. 2000); *Chidester v. City of Hobart*, 631 N.E.2d 908, 913 (Ind. 1994)).

124. 803 N.E.2d 666 (Ind. Ct. App. 2004).

125. *Id.* at 673.

126. *Id.*

127. 809 N.E.2d 410 (Ind. Ct. App. 2004).

128. *Id.* at 411.

129. *Id.* at 411-12.

130. *See id.* at 412 (discussing Interstate Family Support Act, IND. CODE § 31-18-6-11).

131. *Id.* Under the “invited error doctrine,” an appellate court will not review trial court error the party asserting the error has committed, invited, or that was the natural consequence of his own neglect or misconduct.

132. *Id.* at 413.

133. 813 N.E.2d 402 (Ind. Ct. App. 2004), *vacated by* 824 N.E.2d 334 (Ind. 2005).

134. *Id.* at 408 n.1.

135. *Id.*

objected to GPS monitoring during his testimony.¹³⁶

F. Jurisdiction

During the survey period, the court of appeals provided further guidance in the oft-confusing area of trial versus appellate court jurisdiction.

1. *Trial Court's Order Not Void for Lack of Jurisdiction, Even Though Petition to Modify Child Support Was Filed Before Case Was Certified Back to Trial Court from Supreme Court, Because Trial Court Did Not Act on Petition Until After Certification.*—In *Harris v. Harris*,¹³⁷ a marital dissolution appeal, Husband filed a Petition to Transfer on November 29, 2000. While his transfer petition was pending, on April 10, 2001, Husband filed in the trial court a Supplemental Petition to Modify Child Support (“Supplemental Petition”). On April 11, 2001, the supreme court denied transfer and on April 16, 2001, certified the case back to the trial court. Thereafter, the trial court conducted an evidentiary hearing on Husband’s Supplemental Petition, after which the court modified Husband’s support obligations.¹³⁸ Wife appealed, arguing inter alia that the trial court’s modification order was “void” for lack of jurisdiction because the Supplemental Petition on which it was based had been filed while Husband’s transfer petition remained pending.¹³⁹ The court of appeals rejected Wife’s argument. Although it acknowledged that “once an appeal is perfected, the trial court is divested of jurisdiction to alter or amend the judgment,”¹⁴⁰ the court found the jurisdictional defect “cured” by the trial court’s inaction on the Supplemental Petition until after the supreme court had denied transfer and certified the case back to the trial court.¹⁴¹ Also important was the fact that Wife had failed to demonstrate how the Supplemental Petition’s premature filing prejudiced her.¹⁴²

2. *When Is a Final Judgment “Entered” for Purposes of Appellate Rule 9(A)?*—In *Schaefer v. Kumar*,¹⁴³ the court of appeals indirectly touched on another interesting procedural issue concerning when a final judgment is “entered” for purposes of the thirty-day deadlines expressed in Appellate Rule

136. *Id.* The Indiana Supreme Court’s opinion on transfer did not address the “invited error” issue. See generally *Chism*, 824 N.E.2d 334.

137. 800 N.E.2d 930, 935–37 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 798 (Ind. 2004).

138. *Id.*

139. *Id.* at 935.

140. *Id.* at 936 (citing *Elbert v. Elbert*, 579 N.E.2d 102, 114 (Ind. Ct. App. 1991)).

141. *Id.* at 937.

142. *Id.* (citing *Haverstick v. Banat*, 331 N.E.2d 791, 794 (Ind. Ct. App. 1975)). However, the court did reverse the portion of the trial court’s order requiring retroactive support modification to the file date of the Supplemental Petition, stating the date on which the supreme court certified the case back to the trial court was the earliest date to which the trial court could order retroactive modification. To hold otherwise, the court wrote, “would be to validate without qualification” the defect caused by the premature filing of the Supplemental Petition. *Id.*

143. 804 N.E.2d 184 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 808 (Ind. 2004).

9(A).¹⁴⁴ The Notice of Appeal was filed on March 20, 2002, twelve days *after* the summary judgment hearing at which the trial court “indicated [it] was going to grant summary judgment in favor of [the appellee]”¹⁴⁵ and the judgment was entered on court’s chronological case summary (“CCS”), but twelve days *before* the trial court actually signed and filed its order granting summary judgment.¹⁴⁶ The court of appeals ruled the Notice of Appeal was not premature because the judgment had been entered on the court’s CCS prior to the filing of the Notice of Appeal. In other words, the court of appeals appears to have found the final judgment was “entered” for purposes of Appellate Rule 9(A) when the trial court entered the judgment on its CCS, rather than when the court’s written order was signed and filed. Such a determination may comport with prior precedent stating the trial court officially “speaks” through its order book, docket, or CCS.¹⁴⁷ However, if the appellant had calculated his thirty days from the file-stamp date appearing on the court’s written order, rather than the date on which the court entered the judgment on the CCS, would his appeal therefore have been untimely? Interesting question.

3. *Court Interprets Appeal Bond Provision of Indiana Code Section 32-24-1-8*.—Finally, in *Lake County Parks & Recreation Board v. Indiana-American Water Co.*,¹⁴⁸ the court of appeals interpreted Indiana Code section 32-24-1-8 concerning the filing of an appeal bond. Section 32-24-1-8

provides in relevant part that if the objections to a complaint in condemnation are overruled, a defendant “may appeal the interlocutory order overruling the objections and appointing appraisers in the manner that appeals are taken from final judgments in civil actions upon filing with the circuit court clerk a bond. . . . The appeal bond must be filed not later than ten (10) days after the appointment of the appraisers.”¹⁴⁹

The appellee sought to have the appeal dismissed for lack of jurisdiction because the appellant had not filed an appeal bond within ten days after the appointment of appraisers. The court of appeals declined, noting the trial court had failed to set a bond amount when it issued its order overruling the Board’s objections; the appellant had filed, within the ten-day period, a motion to waive the bond or set the matter for a hearing to determine the bond; and the appellant had later posted

144. Appellate Rule 9(A) provides that to initiate an appeal, the appellant must file a Notice of Appeal with the trial court clerk within thirty days: (1) “after the entry of a Final Judgment”; or (2) after the trial court rules upon a Motion To Correct Error or such motion is “deemed denied under Trial Rule 53.3.” IND. APP. R. 9(A).

145. *Schaefer*, 804 N.E.2d at 189 n.7.

146. *Id.*

147. See, e.g., *State ex rel. Sargent v. Vigo Superior Court*, 296 N.E.2d 785, 787 (Ind. 1973); *Woolley v. Washington Township Marion County Small Claims Court*, 804 N.E.2d 761, 766 (Ind. Ct. App. 2004); *Young v. State*, 765 N.E.2d 673, 681 n.6 (Ind. Ct. App. 2002); *State v. Suggs*, 755 N.E.2d 1099, 1103 n.4 (Ind. Ct. App. 2001); *Staples v. State*, 553 N.E.2d 141, 143 (Ind. Ct. App. 1990).

148. 812 N.E.2d 1118 (Ind. Ct. App. 2004).

149. *Id.* at 1121-22 n.2 (quoting IND. CODE § 32-4-1-8 (2004)).

the bond “in a timely manner” after the trial court set the bond amount.¹⁵⁰

G. “Law of the Case” Doctrine

“The law of the case doctrine is a discretionary tool by which appellate courts decline to revisit legal issues already determined on appeal in the same case and on substantially similar facts.”¹⁵¹ During the survey period, the court of appeals issued some notable decisions involving the “law of the case” doctrine.

1. *Motions Panel’s Denial of Motion to Dismiss Not Necessarily “Law of the Case” When Basis for Ruling Unclear.*—In *Rosby Corp. v. Townsend, Yosha, Cline & Price*,¹⁵² the appellant argued the doctrine prevented the appellee from asserting the applicability of a certain key precedent because the court’s motions panel, in a prior appeal of the case, had rejected a motion to dismiss filed by the appellees premised on that particular key precedent.¹⁵³ The court of appeals rejected the appellant’s claim, primarily because the appellant failed to provide the court with a copy of the appellee’s previous motion to dismiss. “[T]o invoke the law of the case doctrine,” the court stated, “the matters decided in the prior appeal clearly must appear to be the only possible construction of an opinion, and questions not conclusively decided in the prior appeal do not become the law of the case.”¹⁵⁴ Without the ability to review the appellee’s previous motion to dismiss, the court was “unable to review the nature of the claim that was made in it.”¹⁵⁵ Further, even if the issue had been raised in the previous motion, the motion panel’s order “simply refused to grant relief” and was “unclear on [its] face . . . whether the issue was conclusively litigated and decided.”¹⁵⁶

2. *“Law of the Case” Doctrine Prevents Submission of New Evidence on Remand When Remand Order Makes Definitive Ruling.*—In *American Family Mutual Insurance Co. v. Federated Mutual Insurance Co.*,¹⁵⁷ the court of appeals addressed the applicability of the “law of the case” doctrine to a party’s attempt to introduce new evidence in the trial court after remand by the court of appeals. In the first appeal, the court of appeals reversed an award of summary judgment in favor of the appellee, ordered the appellee to “honor its policy of insurance and provide uninsured motorist coverage to [Patricia and Daniel Brown],” and remanded the case “for proceedings not inconsistent with this opinion.”¹⁵⁸ On remand, the appellee filed a document, which had not been filed when the case

150. *Id.*

151. *Rosby Corp. v. Townsend, Yosha, Cline & Price*, 800 N.E.2d 661, 664 (Ind. Ct. App. 2003) (citing *Learman v. Auto-Owners Ins. Co.*, 769 N.E.2d 1171, 1175 (Ind. Ct. App. 2002), *trans. denied*, 812 N.E.2d 801 (Ind. 2004)).

152. *Id.* at 661.

153. *See id.* at 664.

154. *Id.*

155. *Id.*

156. *Id.*

157. 800 N.E.2d 1015 (Ind. Ct. App. 2004).

158. *Id.* at 1018.

initially was before the trial court, arguably showing uninsured motorist coverage had been waived.¹⁵⁹ Based on this new evidence, the trial court again granted summary judgment to the appellees.

On appeal, the appellee claimed the “law of the case” doctrine did not apply, citing prior cases that did not apply the doctrine when the parties had submitted new evidence on remand.¹⁶⁰ The court of appeals rejected the appellee’s contentions and again reversed the trial court. In the prior cases, observed the court of appeals, the presentation of new evidence was not inconsistent with the court’s remand order and did not alter what the court had already “finally determined.”¹⁶¹ Here, the court’s prior opinion “unequivocally ordered [the appellee] to provide uninsured motorist coverage to the Browns” and its “multifaceted approach—on statutory, public policy, contract, and evidentiary grounds—to the broad issue whether [the appellee] was required to provide uninsured motorist coverage for the Browns left no gap to be filled by the presentation of additional evidence on remand to the trial court.”¹⁶²

H. Appellate Standard of Review For Summary Judgment Awards

It has long been held that the appellate standard of review of summary judgment awards is *de novo*.¹⁶³ A seemingly contradictory notion, however, also often appears in Indiana’s summary judgment jurisprudence, namely that the trial court’s summary judgment decision enters the appellate court “clothed [or cloaked] with a presumption of validity.”¹⁶⁴ The phrase may simply be a

159. *Id.*

160. *Id.* at 1020-21 (discussing *Estate of Martin v. Consolidated R. Corp.*, 667 N.E.2d 219 (Ind. Ct. App. 1996); *Watters v. Dinn*, 666 N.E.2d 433 (Ind. Ct. App. 1996)).

161. *Id.* at 1021.

162. *Id.*

163. *See, e.g.,* *LCEOC, Inc. v. Greer*, 735 N.E.2d 206, 208 (Ind. 2000) (“On appeal from summary judgment, the reviewing court analyzes the issues in the same fashion as the trial court, *de novo*.”); *Bosecker v. Westfield Ins. Co.*, 724 N.E.2d 241, 243 (Ind. 2000) (“The parties’ arguments turn on the construction of the policy language, and there is no factual dispute. Accordingly, this is a proper case for summary judgment and our standard of review is *de novo*.”); *Crum v. City of Terre Haute ex rel. Dep’t of Redev.*, 812 N.E.2d 164, 166 (Ind. Ct. App. 2004) (“In reviewing a grant of summary judgment, where the facts are undisputed and the issue presented is a pure question of law, we review the matter *de novo*.”); *Henrichs v. Pivarnik*, 588 N.E.2d 537, 543 (Ind. Ct. App. 1992) (“We believe that every review of a summary judgment is, in effect, a *de novo* review.”).

164. *See, e.g.,* *Becker v. Kreilein*, 770 N.E.2d 315, 317 (Ind. 2002); Ind. Dep’t of State Rev. v. *Bethlehem Steel Corp.*, 639 N.E.2d 264, 266 (Ind. 1994); *May v. Frauhiger*, 716 N.E.2d 591, 594 (Ind. Ct. App. 1999). This statement appears to have first been made in 1992 in *Indiana Department of State Revenue v. Caylor-Nickel Clinic, P.C.*, 587 N.E.2d 1311, 1312-13 (Ind. 1992), which stated, “[t]his summary judgment, as all trial court judgments, enters the process of appellate review clothed with a presumption of validity.” A search on Premise for opinions containing the phrases “summary judgment” and “clothed with a presumption of validity” within the same paragraph garnered 153 published opinions issued between March 6, 1992, and December 17,

reference to the notion that the appealing party bears the burden of persuasion.¹⁶⁵ Whatever its meaning, however, the court of appeals in *Johnson v. Hoosier Enterprises III, Inc.*¹⁶⁶ expressly stated it does *not* denote a more deferential standard of review than de novo.¹⁶⁷

I. Timeliness

1. *Clerk's Failure to Mail Court's Ruling to Plaintiff's Lead Counsel Justified Extending Notice of Appeal Deadline Under Trial Rule 72(E), Even Though Clerk Had Mailed Ruling to Plaintiff's Other Counsel of Record.*—To initiate an interlocutory appeal of right,¹⁶⁸ the appellant must file a Notice of Appeal with the trial court clerk within thirty days of the entry of the interlocutory order.¹⁶⁹ Upon an “application for good cause,” Trial Rule 72 permits a trial court to extend this deadline in instances where: (1) the Chronological Case Summary (“CCS”) does not contain a notation from the clerk evidencing the order was mailed; and (2) “*the party*” requesting the extension was without actual knowledge of the order or relied on incorrect representations by court personnel concerning the order.¹⁷⁰ In *Lake Holiday Conservancy v. Davison*,¹⁷¹ the trial court clerk failed to note the mailing of the trial court’s order denying the appellant’s change of venue motion¹⁷² on the CCS, and the appellant’s lead counsel submitted an affidavit asserting he did not receive notice of the ruling until five weeks after it was made.¹⁷³ However, another attorney from a different law firm, who had entered an appearance on behalf of the appellant at the outset of the case but had not participated in the litigation nor

2004. Such a search would not, of course, pick up any additional unpublished opinions issued by the court of appeals during that same time period that contain the search criteria. The supreme court most recently made this statement during the survey period in *Kennedy v. Guess, Inc.*, 806 N.E.2d 776, 779 (Ind. 2004).

165. See, e.g., *Drake ex rel. Drake v. Mitchell Community Schs.*, 649 N.E.2d 1027, 1029 (Ind. 1995) (“Although a summary judgment on appellate review is clothed with a presumption of validity and the appealing party bears the burden of persuasion, we consider the same issues and follow the same process as did the trial court and will uphold such judgment only if the pleadings and materials properly presented, construed in the light most favorable to the non-moving party, show the absence of a genuine issue of material fact.”); *Stephenson v. Ledbetter*, 596 N.E.2d 1369, 1371 (Ind. 1992) (“The trial court’s decision on a motion for summary judgment enters the process of appellate review clothed with a presumption of validity. The party appealing from the grant of summary judgment must persuade the appellate tribunal that the judgment was erroneous.”).

166. 815 N.E.2d 542 (Ind. Ct. App. 2004), *trans. denied* (Ind. Feb. 24, 2005).

167. *Id.* at 548.

168. See generally IND. APP. R. 14(A).

169. IND. APP. R. 9(A)(1).

170. IND. TRIAL R. 72(E) (emphasis added).

171. 808 N.E.2d 119 (Ind. Ct. App. 2004).

172. An interlocutory appeal of such a ruling is taken “as a matter of right.” IND. APP. R. 14(A)(8).

173. *Lake Holiday Conservancy*, 808 N.E.2d at 121.

signed any pleadings or motions on the appellant's behalf, was mailed notice of the ruling but did not inform lead counsel of it.¹⁷⁴ Even though the appellant's other lawyer, and thus by extension the appellant, had received notice of the ruling, and even though the Rule 72 speaks in terms of "the party" (and not "lead counsel") not receiving actual notice, the court of appeals affirmed the trial court's grant of a Trial Rule 72 extension of time to file the Notice of Appeal.¹⁷⁵

2. *Order Denying Appellant's Objections to Estate Reopening, Rather Than Initial Order Reopening Estate, Was Order from Which Appellant Could Seek Interlocutory Appeal.*—In *Butler University v. Estate of Verdak*,¹⁷⁶ the probate court granted the appellee's petition to reopen an estate on September 25, 2002.¹⁷⁷ On October 3, 2002, the appellant, who had not been a party to the estate proceeding, filed objections to the appellee's petition.¹⁷⁸ The probate court eventually overruled the appellant's objections by order issued June 18, 2003. Upon the appellant's motion, the trial court certified its June 18, 2003 order for interlocutory appeal.¹⁷⁹

On appeal, the appellee contended the appeal was untimely, claiming that because the issue addressed in the probate court's September 25, 2002 order (namely whether the estate should be reopened) was the same issue addressed in the June 18, 2003 order, the appellant's October 3, 2002 objection was nothing more than a motion to reconsider¹⁸⁰ and therefore the time for seeking interlocutory certification expired thirty days after September 25, 2002.¹⁸¹ The court of appeals rejected the appellee's timeliness argument, noting: (1) "courts certify *orders* for interlocutory appeal, not *issues*"; (2) "[a] trial court has inherent power to reconsider any of its previous rulings so long as the action remains in fieri"; and (3) the appellee had not been a party to the case until it filed its objections on October 2, 2002.¹⁸²

J. Appellate Performance

During the survey period, the court of appeals provided statements of commendation and/or appreciation for quality appellate performances before it.¹⁸³

174. *Id.* at 121 & n.2. The court of appeals' opinion does *not* indicate the appellant's attorney who received the notice had withdrawn his appearance in the case.

175. *Id.*

176. 815 N.E.2d 185 (Ind. Ct. App. 2004).

177. *Id.* at 192.

178. *Id.* at 190, 192.

179. *Id.* at 192.

180. "[M]otions to reconsider do not extend the time for appeal." *State ex rel. Hulse v. Montgomery Circuit Court*, 561 N.E.2d 497, 498 (Ind. 1990).

181. *Estate of Verdak*, 815 N.E.2d at 192 & n.3.

182. *Id.* at 192 (emphasis in original).

183. *See, e.g.,* *Kruse v. Nat'l Bank of Indianapolis*, 815 N.E.2d 137, 140 n.1 (Ind. Ct. App. 2004) ("thank[ing] counsel for their commendable presentations, which assisted [the court] in the determination of this case"); *Clinic for Women, Inc. v. Brizzi*, 814 N.E.2d 1042, 1045 n.1 (Ind. Ct. App. 2004), *trans. granted* (Ind. Jan. 27, 2005) ("thank[ing] counsel for their commendable

presentations, which assisted [the court] in the determination of this case”); *Lumbard v. Farmers State Bank*, 812 N.E.2d 196, 198 n.1 (Ind. Ct. App. 2004) (“commend[ing] counsel for their arguments and able presentations”); *Avemco Ins. Co. v. State ex rel. McCarty*, 812 N.E.2d 108, 110 n.2 (Ind. Ct. App. 2004) (“commend[ing] each party for their preparation and presentation”); *Sadler v. State ex rel. Sanders*, 811 N.E.2d 936, 938 n.1 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 982 (Ind. 2004) (“commend[ing] counsel for the quality of their oral and written appellate advocacy”); *Millennium Club, Inc. v. Avila*, 809 N.E.2d 906, 908 n.2 (Ind. Ct. App. 2004) (“thank[ing] . . . appellate counsel for their presentations”); *Forty-One Assocs., LLC v. Bluefield Assocs., L.P.*, 809 N.E.2d 422, 424 n.3 (Ind. Ct. App. 2004) (“thank[ing] counsel for their able presentations, which assisted [the court] in the determination of this case”); *BP Amoco v. Szymanski*, 808 N.E.2d 683, 684 n.1 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 982 (Ind. 2004) (“congratulat[ing] and thank[ing] counsel for their excellent presentations”); *Herron v. State*, 808 N.E.2d 172, 175 n.5 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 968 (Ind. 2004) (“commend[ing] counsel for the quality of their oral advocacy”); *Washington v. State*, 807 N.E.2d 793, 796 n.4 (Ind. Ct. App. 2004) (“thank[ing] counsel for their able presentations”); *Carson v. State*, 807 N.E.2d 155, 157-58 n.1 (Ind. Ct. App. 2004) (“thank[ing] counsel for their advocacy”); *Northrop Corp. v. Gen. Motors Corp.*, 807 N.E.2d 70, 76 n.1 (Ind. Ct. App. 2004) (“thank[ing] counsel for their presentations”); *Borth v. Borth*, 806 N.E.2d 866, 869 n.2 (Ind. Ct. App. 2004) (denying appellant’s request for oral argument because “the parties’ excellent briefs adequately address[ed] the issues before [the court]”); *Denton v. State*, 805 N.E.2d 852, 854 n.2 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 969 (Ind. 2004) (“commend[ing] appellate counsel for their most able and insightful presentations”); *Montgomery v. State*, 804 N.E.2d 1217, 1219 n.3 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 976 (Ind. 2004) (“thank[ing] counsel for their advocacy”); *Adams v. State*, 804 N.E.2d 1169, 1171 n.3 (Ind. Ct. App. 2004) (“commend[ing] appellate counsel for their most able presentations”); *McClure v. State*, 803 N.E.2d 210, 212 n.1 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 800 (Ind. 2004) (“commend[ing] counsel on their presentations and preparation”); *McCarty v. State*, 802 N.E.2d 959, 961 n.2 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 803 (Ind. 2004) (“commend[ing] counsel for the quality of their appellate advocacy”); *PSI Energy, Inc. v. Home Ins. Co.*, 801 N.E.2d 705, 712 n.2 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 805 (Ind. 2004) (“commend[ing] counsel for the quality of their written and oral appellate advocacy”); *Alexander v. Cottey*, 801 N.E.2d 651, 653 n.1 (Ind. Ct. App. 2004) (“commend[ing] counsel for their able presentations”); *Alexander v. PSB Lending Corp.*, 800 N.E.2d 984, 987 n.4 (Ind. Ct. App. 2003) (“commend[ing] counsel on the quality of their presentations, especially in light of the complicated procedural and factual nature of the case”); *Borsuk v. Town of St. John*, 800 N.E.2d 217, 218 n.1 (Ind. Ct. App. 2003) (“thank[ing] counsel for their preparation and able advocacy”); *Andrianova v. Ind. Family & Soc. Servs. Admin.*, 799 N.E.2d 5, 7 n.2 (Ind. Ct. App. 2003) (“commend[ing] both counsel for the quality of their participation at [oral argument]”); *Brabandt v. State*, 797 N.E.2d 855, 858 n.1 (Ind. Ct. App. 2003) (“commend[ing] counsel on the quality of their written and oral advocacy”); *McHenry v. State*, 797 N.E.2d 852, 853 n.3 (Ind. Ct. App. 2003), *vacated by* 820 N.E.2d 124 (Ind. 2005) (“commend[ing] counsel on their able presentations”); *Gunkel v. Renovations, Inc.*, 797 N.E.2d 841, 842 n.1 (Ind. Ct. App. 2003), *vacated by* 822 N.E.2d 150 (Ind. 2005) (“thank[ing] counsel for their capable presentation in a situation where these ‘Rolling Stones’ could have made a complicated matter even more complicated”); *Citizens Action Coalition of Ind., Inc. v. NIPSCO*, 796 N.E.2d 1264, 1266 n.1 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 799 (Ind. 2004) (expressing “gratitude for the excellent briefs and oral argument in what [was] for [it] a rather complicated case”); *S.H. v. D.H.*, 796 N.E.2d 1243, 1247 n.1 (Ind. Ct. App. 2003) (“commend[ing]

However, this survey period, as in previous years,¹⁸⁴ had its cadre of appeal-related problems that the appellate tribunals determined serious enough to warrant published comment. Many of those instances are discussed below, not to draw attention to those who made the mistakes but rather to the mistakes themselves, so future practitioners can learn from and avoid them.

1. *Contents of Briefs and Petitions.*—The survey period saw repeated problems with appellate briefs, particularly concerning improper Statements of Facts and/or Statements of the Case (argumentativeness, failure to state the facts in the manner commensurate with the applicable standard of review, lack of record citations, etc.),¹⁸⁵ arguing facts not supported by the record evidence,¹⁸⁶ failing to attach the appealed order to the appellant's brief,¹⁸⁷ burying substantive

counsel on their professional manner and workmanship, especially given the time constraints"). We have attempted to gather all the cases in which the court of appeals provided such statements. If we missed some, the author apologizes to those whose cases are not mentioned. The author also acknowledges there are many outstanding appellate performances that for one reason or another are not expressly acknowledged in published opinions.

184. See Douglas E. Cressler, *Appellate Procedure*, 36 IND. L. REV. 935, 948-50 (2003) [hereinafter Cressler 2003]; Douglas E. Cressler, *A Year of Transition In Appellate Practice*, 35 IND. L. REV. 1133, 1151 (2002) [hereinafter Cressler 2002]; Douglas E. Cressler & Paula F. Cardoza, *A New Era Dawns in Appellate Procedure*, 34 IND. L. REV. 741, 774-78 (2001).

185. See, e.g., *Carter-McMahon v. McMahon*, 815 N.E.2d 170, 173 (Ind. Ct. App. 2004) (granting motion to strike various statements in Appellant's Brief that were "unsupported by citations to the transcript/appendix and/or are irrelevant factual assertions"); *Montgomery v. Trisler*, 814 N.E.2d 682, 686 (Ind. Ct. App. 2004) (noting: (1) appellant's failure to file an "amended table of contents, amended statutes and trial rules and correction page" following court's grant of appellant's motion seeking such leave; (2) inappropriate argument in the Statement of the Case and Statement of Facts; (3) and failure to provide record citations for some factual assertions); *Beall v. Mooring Tax Asset Group*, 813 N.E.2d 778, 779 n.1 (Ind. Ct. App. 2004); *Dunn v. Meridian Mut. Ins. Co.*, 810 N.E.2d 739, 739 n.1 (Ind. Ct. App. 2004), *trans. pending*; *Reeder Assocs. II v. Chicago Belle, Ltd.*, 807 N.E.2d 752, 757 n.2 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 972 (Ind. 2004); *Kelley v. Vigo County Sch. Corp.*, 806 N.E.2d 824, 832 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 983 (Ind. 2004) (noting the appellant's improper Statement of Facts "required the expenditure of additional time by both the [appellee], to provide missing information, and this court, upon which it was incumbent to verify certain matters"); *Schaefer v. Kumar*, 804 N.E.2d 184, 196 n.13 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 808 (Ind. 2004) ("The Statements of the Facts and of the Case both counsel provided were . . . transparent attempts to discredit either the judgment or the opponent's argument and were clearly not intended to be a vehicle for informing this court."); *Rea v. Shroyer*, 797 N.E.2d 1178, 1179 n.1 (Ind. Ct. App. 2003).

186. See *Med. Assurance of Ind. v. McCarty*, 808 N.E.2d 737, 746 n.1 (Ind. Ct. App. 2004); *Schaefer*, 804 N.E.2d at 187 n.3; *Saler v. Irick*, 800 N.E.2d 960, 970-71 n.7 (Ind. Ct. App. 2003); *Carr v. State*, 799 N.E.2d 1096, 1097 (Ind. Ct. App. 2003); *Naumoski v. Bernacett*, 799 N.E.2d 58, 63 n.1 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 800 (Ind. 2004).

187. *Wilkerson v. Harvey*, 814 N.E.2d 686, 689 n.1 (Ind. Ct. App. 2004), *trans. denied* (Ind. Mar. 3, 2005); *Airgas Mid-Am., Inc. v. Long*, 812 N.E.2d 842, 843 n.2 (Ind. Ct. App. 2004); *Orban v. Krull*, 805 N.E.2d 450, 456 n.1 (Ind. Ct. App. 2004).

arguments in footnotes,¹⁸⁸ failing to state the applicable standard of review,¹⁸⁹ and mischaracterization of an opposing party's argument.¹⁹⁰

2. *Appendices.*—There were also an inordinately large number of problems with appellate appendices,¹⁹¹ including failing to file appendices,¹⁹² filing too much material in appendices,¹⁹³ filing the entire trial transcript either in¹⁹⁴ or in lieu of¹⁹⁵ the appendix, filing appendices without tables of contents,¹⁹⁶ failing to number appendix pages,¹⁹⁷ and failing to include documents in the appendices critical to the trial courts' rulings.¹⁹⁸

The latter appendix problem resulted in harsh penalties for some litigants. In *Kelley v. Vigo County School Corp.*, the court found the Appellant's Appendix omission so problematic that it awarded appellate attorneys fees to the opposing party.¹⁹⁹ In *Hughes v. King*, the Appellant's Appendix included only the trial court's order (and not the designated evidence upon which the trial court's summary judgment decision had been based); therefore, the court of appeals dismissed the appeal.²⁰⁰ In *Yoquelet v. Marshall County*,²⁰¹ another appeal from an award of summary judgment, the court of appeals ruled that by failing to provide the summary judgment materials designated to the trial court by the parties, the appellant had "failed to prove . . . the trial court erred" and therefore

188. *Tippecanoe Assocs. II, LLC v. Kimco Lafayette 671, Inc.*, 811 N.E.2d 438, 41-42 n.1 (Ind. Ct. App. 2004), *trans. pending*.

189. *Beall*, 813 N.E.2d at 779 n.1; *Roberts v. ALCOA, Inc.*, 811 N.E.2d 466, 473 n.1 (Ind. Ct. App. 2004); *Supervised Estate of Williamson v. Williamson*, 798 N.E.2d 238, 241 n.1 (Ind. Ct. App. 2003).

190. *Huffman v. Office of Environ. Adjudication*, 811 N.E.2d 806, 813 n.6 (Ind. 2004).

191. *See generally* IND. APP. R. 49-50.

192. *Glass v. State*, 801 N.E.2d 204, 206 n.3 (Ind. Ct. App. 2004).

193. *Evans v. Buffington Harbor River Boats, LLC*, 799 N.E.2d 1103, 1107 n.2 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 804 (Ind. 2004).

194. *Burge v. Teter*, 808 N.E.2d 124, 127 n.3 (Ind. Ct. App. 2004).

195. *Robinson v. State*, 799 N.E.2d 1202, 1203 n.1 (Ind. Ct. App. 2003).

196. *Id.*; *In re Estate of Goldman*, 813 N.E.2d 784, 786 n.1 (Ind. Ct. App. 2004) ("admonish[ing] appellant's counsel] to provide a table of contents in any future appendix filed with [the court of appeals]," stating "[h]er failure to do so impeded [the judges'] review, as [they] had to thumb through the appendix to determine which documents she had provided and where [they] could find them"); *Messer v. Cerestar USA, Inc.* 803 N.E.2d 1240, 1243 n.2 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 807 (Ind. 2004) (noting "[t]he failure to include the table of contents, such as occurred in this case, hinders our ability to review the appeal"); *Star Wealth Mgmt. Co. v. Brown*, 801 N.E.2d 768, 772 n.5 (Ind. Ct. App. 2004).

197. *Carter-McMahon v. McMahon*, 815 N.E.2d 170, 173 (Ind. Ct. App. 2004); *Reeder Assocs. II v. Chicago Belle, Ltd.*, 807 N.E.2d 752, 757 n.2 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 972 (Ind. 2004).

198. *See, e.g.*, *Trail v. Boys & Girls Club of Northwest Ind.*, 811 N.E.2d 830, 834 n.5 (Ind. Ct. App. 2004), *trans. pending*; *Star Wealth Mgmt Co.*, 801 N.E.2d at 772.

199. 806 N.E.2d 824, 832-33 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 983 (Ind. 2004).

200. 808 N.E.2d 146, 147-48 (Ind. Ct. App. 2004).

201. 811 N.E.2d 826, 827-28 (Ind. Ct. App. 2004).

affirmed partial summary judgment against the appellants.²⁰² In reaching this result, the *Yoquelet* majority distinguished *Johnson v. State*,²⁰³ a criminal appeal in which the supreme court held that

[t]he better practice for an appellate tribunal to follow in criminal appeals where an Appendix is not filed or where an Appendix is missing documents required by rule is to order compliance with the rules within a reasonable period of time, such as thirty days. If an appellant inexcusably fails to comply with an appellate court order, then more stringent measures, including dismissal of the appeal, would be available as the needs of justice might dictate.²⁰⁴

Judge Mathias dissented, believing the procedure set out in *Johnson* should not be limited to criminal appeals because “[a]ll cases . . . are too important to resolve other than on their merits, except in unusual circumstances which are not present here.”²⁰⁵

3. *Candor to the Tribunal*.—As in years past,²⁰⁶ the highly improper practice of making claims about the record that the record does not support was brought up again by the court of appeals during the survey period.²⁰⁷ The recurrence of this particular problem is baffling. There is no better way, at least in the author’s opinion, for a party to have its argument and assertions viewed with a jaundiced eye than to be caught citing the record or an authority for a proposition that the record or authority does not support. At best such behavior represents lazy, sloppy lawyering; at worst it demonstrates a lack of integrity and honesty that discredits the bar generally and the individual practitioner specifically. Either way, the client’s interests can be substantially hindered by the cloud of untrustworthiness and suspicion cast over the remainder of the advocate’s representations, which is exactly the opposite of what the appellate practitioner ultimately is trying to achieve.

4. *Performance That Warranted Appellate Attorney Fees and/or Strong Public Censure by the Appellate Tribunal*.—There were some appellate performances that drew particularly strong denunciation from the court and/or an

202. *Id.* See also *Thomas v. N. Cent. Roofing*, 795 N.E.2d 1068, 1069 (Ind. Ct. App. 2003) (denying appellee’s “motion to supplement the record” to include evidence that had not been submitted to the trial court, which effectively resulted in the trial court being reversed for lack of evidence supporting its judgment).

203. 756 N.E.2d 965 (Ind. 2001).

204. *Yoquelet*, 811 N.E.2d at 829 (quoting *Johnson*, 756 N.E.2d at 967).

205. *Id.* at 830 (Mathias, J., dissenting).

206. See Cressler 2003, *supra* note 184, at 949 & n.106; Cressler & Cardoza, *supra* note 184, at 776 & n.374.

207. See *Shepherd v. Carlin*, 813 N.E.2d 1200, 1202 n.1 (Ind. Ct. App. 2004) (“admonish[ing] [the appellee’s] counsel for taking opposing counsel’s remark out of context and for mischaracterizing her interpretation of the statute” and “remind[ing] [the appellant’s] counsel of their duty of candor toward the tribunal under Indiana Professional Conduct Rule 3.3”); *Star Wealth Mgmt. Co. v. Brown* 801 N.E.2d 768, 772 n.7 (Ind. Ct. App. 2004) (“We caution counsel to honor the line between persuasive advocacy and distortion of the record.”).

award of appellate attorney fees. Some of these cases involved pro se litigants who frustrated the courts either by their incoherent arguments and/or numerous failures to abide by the appellate rules,²⁰⁸ or by their vexatious abuse of the judicial process.²⁰⁹ Many, however, involved licensed attorneys.

In *Schaefer v. Kumar*,²¹⁰ the court of appeals criticized “both counsels’ numerous violations of our rules and numerous arguments and motions by both parties, which arguments and motions delayed the proceedings, often obscured the issues and otherwise impaired our ability to review the proceedings below, and in some cases could be characterized as wholly trivial in nature.”²¹¹ *Schaefer* serves as reminder that, because appellate courts are busy enough deciding cases on the procedural and/or substantive merits, appellate counsel will rarely advance their clients’ interests by forcing appellate judges to referee petty collateral squabbles.

In *Lasater v. Lasater*,²¹² the court of appeals used two-and-a-half pages of the Northeast (Second) Reporter to reproach the appellant’s counsel for “the inflammatory nature of [her] Appellant’s Brief,” which was replete with statements impugning the integrity of opposing counsel and the trial court.²¹³ The opinion concludes its reprimand with the following, which all appellate practitioners would do well to remember:

[S]uch comments do little to advance [the appellant’s] position as to why the trial court committed reversible error and, therefore, do not promote responsible advocacy on her behalf. Significant parts of her brief are permeated with sarcasm and disrespect. *WorldCom Network Services, Inc. v. Thompson*, 698 N.E.2d 1233, 1236-37 (Ind. Ct. App. 1998) (“Righteous indignation is no substitute for a well-reasoned argument. We remind counsel that an advocate can present his cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.”), *trans. denied*. *Such a brief reflects a lack of professional responsibility on the part of counsel and does little to serve the interest of the client to whom counsel is responsible in this appeal*. See *Moore v. Liggins*, 685 N.E.2d 57, 66-67 (Ind. Ct. App. 1997).²¹⁴

Although the court noted its “plenary power to order a brief stricken from [its] files and to affirm the trial court without further ado” “[f]or the use of

208. See *Thacker v. Wentzel*, 797 N.E.2d 342, 345-48 (Ind. Ct. App. 2003) (finding appellant’s “non-compliance with our appellate rules of procedure is substantial, permeates his entire brief, and precludes our review of his allegation of error on appeal”).

209. *Sumbry v. Misc. Docket Sheet for Year 2003*, 811 N.E.2d 457, 458-61 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 980 (Ind. 2004); *Sims v. Scopelitis*, 797 N.E.2d 348, 352 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 800 (Ind. 2004).

210. 804 N.E.2d 184 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 808 (Ind. 2004).

211. *Id.* at 196 n.13.

212. 809 N.E.2d 380 (Ind. Ct. App. 2004).

213. *Id.* at 402-04.

214. *Id.* at 403-04 (emphasis added).

impertinent, intemperate, scandalous, or vituperative language in briefs on appeal impugning or disparaging this court, the trial court, or opposing counsel,”²¹⁵ it chose not to do so “in the interest of evaluating the merits of [the appellant’s] issues on appeal.”²¹⁶ It quickly added, however:

Because we choose not to exercise our discretion to strike the brief, however, counsel should not confuse this with approval or condoning of *the unprofessional, disrespectful, and at times outrageous remarks and allegations made in the body of the brief. We appreciate vigorous advocacy, but we will not countenance the sort of lawyering exhibited here. We admonish counsel to advocate more professionally in future matters before this court.*²¹⁷

Despite the problematic behavior noted in *Lasater*,²¹⁸ this year’s “What Was Counsel Thinking?! Award” unquestionably goes to the appellant’s counsel in *Butrum v. Roman*,²¹⁹ a case involving a mother’s petition to modify child support and for contributions to the parties’ eighteen-year-old daughter’s (“Daughter’s”) college expenses. The court of appeals had previously affirmed the trial court’s ruling against Father.²²⁰ Thereafter, Father’s attorney filed a petition for rehearing in the attorney’s own name written as a first-person narrative from the perspective of Daughter. The brief began, “Hello, my name is [Daughter],” and continued with that type of narrative, including what purported to be Daughter’s recitation of the facts and argument on how the court of appeals had reached the wrong conclusion.²²¹ The court of appeals understandably found the rehearing petition quite problematic, so much so that it published an opinion denying Father’s petition for rehearing. The court wrote:

We find the petition for rehearing to be inappropriate for two reasons. First, the brief neither cites authority nor makes legal argument. Second, Kesler represents [Father]. [Daughter] is not a party in this case. In fact, in the trial court, [Father]’s interests were adverse to those of [Daughter]. There is no indication that [Daughter] has now authorized [Father’s counsel] to speak for her. Thus, it appears that [Father’s counsel] is trying to do one of two things, both of which are unacceptable. Either he is trying to introduce additional evidence on rehearing by way of [Daughter]—which he is prohibited from doing at this stage—or he is using [Daughter] as a mouthpiece to voice his criticisms about our opinion. Although lawyers “are completely free to

215. *Id.* at 404 (citing *Wright v. State*, 772 N.E.2d 449, 463 (Ind. Ct. App. 2002)).

216. *Id.*

217. *Id.* (emphasis added).

218. Amazingly, such lack of civility and professionalism seems to be another recurrent problem the court of appeals notes again and again. *See, e.g.*, Cressler 2003, *supra* note 184, at 949-50 & nn.102-03; Cressler & Cardoza, *supra* note 184, at 774-75 & nn.362-72.

219. 806 N.E.2d 66 (Ind. Ct. App.), *trans. denied*, 822 N.E.2d 968 (Ind. 2004).

220. *Id.* (citing *Butrum v. Roman*, 803 N.E.2d 1139 (Ind. Ct. App. 2004)).

221. *Id.* at 67.

criticize the decisions of judges,” *In re Wilkins*, 782 N.E.2d 985, 986 (Ind. 2003), *cert. denied*, 540 U.S. 813, 124 S. Ct. 63, 157 L.Ed.2d 27 (2003), we find it inappropriate to hide behind a client’s child to do so. Accordingly, we strike the petition for rehearing under Appellate Rule 42 as inappropriate.²²²

5. *More Practice Pointers.*—The previous examples of problematic appellate performances serve as practice pointers. Here are a few more.

a. *Use pinpoint citations.*—In *Haddock v. State*,²²³ the court of appeals discussed its desire for practitioners to use pinpoint citations because they “help [the court] determine where, within a decision, support for [the advocate’s] contentions may be found, or whether support can be found in that decision at all.”²²⁴ The court “direct[ed] Haddock’s counsel to Ind. Appellate Rule 22, which provides that citations to decisions in briefs are to follow the format put forth in the current edition of a Uniform System of Citation (Bluebook),” and further explained:

When referring to specific material within a source, a citation should include both the page on which the source begins and the page on which the specific material appears. Uniform System of Citation Rule 3.3 (17th ed. 2000). As we have often noted, we will not, on review, sift through the record to find a basis for a party’s argument. Nor will we search through the authorities cited by a party in order to try to find legal support for its position.²²⁵

Practitioners should also realize that failure to use pinpoint citations may cause a reviewing judge to question whether the attorney may intentionally be “hiding the ball” because the opinion may not support what the attorney claims it supports. Again, the overall intent in legal writing should be to engender confidence, rather than uncertainty, in both the advocate and the position advocated.

b. *Accurately argue precedent.*—Of course, if you are going to provide pinpoint citations, then you better make sure you accurately discuss the precedent cited. In *L.W. v. State*,²²⁶ the court of appeals, after observing that the Appellee’s Brief inaccurately discussed an important distinction in key precedent, expressly “remind[ed] counsel that careful perusal of precedent is an integral part of superior appellate practice.”²²⁷

c. *Petitions to transfer.*—In a rare published order denying transfer, the supreme court provided guidance concerning the proper content of the “Argument” section of the transfer petition.²²⁸ The entirety of the transfer

222. *Id.*

223. 800 N.E.2d 242 (Ind. Ct. App. 2003).

224. *Id.* at 245 n.5.

225. *Id.* (citing *Wright v. Elston*, 701 N.E.2d 1227, 1231 (Ind. Ct. App. 1998)).

226. 798 N.E.2d 904 (Ind. Ct. App. 2003).

227. *Id.* at 907 n.3.

228. *See Lockridge v. State*, 809 N.E.2d 843 (Ind. 2004).

petition at issue's argument consisted of the following: "Ms. Lockridge relies on the issues as presented in his [*sic*] original brief in support of her Appeal."²²⁹ The court wrote:

In a Petition to Transfer, mere reference to argument and/or authorities presented in brief to [the court of appeals], without an explanation of the reasons why transfer should be granted, does not satisfy Rule 57(G).

At the same time, Appellate Rule 57(G)(4) should not be read to require a party to repeat all of the arguments made in the brief to the Court of Appeals. A Petition to Transfer constitutes a request to our court to review a decision of the Court of Appeals in its entirety; the request is that the entire appeal be transferred to our court and be before us as though it had not been reviewed by the Court of Appeals. . . . Given this system, the "argument" contained in a brief in support of a petition to transfer should primarily be an argument as to why the Supreme Court should grant transfer and, in a brief in opposition, as to why the Court should not. (Principal considerations governing the Supreme Court's decision whether to grant transfer are set forth in App. R. 57(H).) It is appropriate in a transfer brief to cross-reference the analysis of the merits of the underlying legal argument contained in the brief to the Court of Appeals. The Court observes, however, that the most helpful transfer briefs combine argument as to why the court should (or should not) grant transfer and argument on the merits.²³⁰

d. Appeals from motions to correct errors.—"[T]he filing of a motion to correct error is a procedural matter about which [the court of appeals] should be informed," the court of appeals noted in *Supervised Estate of Williamson v. Williamson*.²³¹ In *Williamson*, the appellant failed "to acknowledge anywhere in its brief that it filed a motion to correct error that was denied."²³² Instead, the court "happened upon the order denying the motion in the appellant's appendix."²³³ This was an important mistake, because, the court of appeals noted, "[t]he appellate standard of review differs based on whether [the court is] reviewing the denial of a motion to correct error or a judgment on the merits."²³⁴

e. Citation to foreign authority.—In *Steiner v. Bank One Indiana, N.A.*,²³⁵ "[t]he trial court and Steiner cite[d] to several cases from other jurisdictions."²³⁶ Applying Indiana Court of Appeals precedent from 1966, the court of appeals stated, "[w]e need not look to other jurisdictions . . . because there is Indiana case

229. *Id.* at 844 (typographical error in transfer petition).

230. *Id.*

231. 798 N.E.2d 238, 241 n.1 (Ind. Ct. App. 2003).

232. *Id.*

233. *Id.*

234. *Id.*

235. 805 N.E.2d 421 (Ind. Ct. App. 2004).

236. *Id.* at 425 n.2.

law directly on point.”²³⁷ The fact that the court of appeals took the time to make this comment in its opinion serves as a reminder to appellate practitioners (and trial court judges) of the importance of looking to Indiana precedent first and foremost before seeking guidance from other jurisdictions.

f. “Those who live in glass houses . . .”—In *Imre v. Lake States Insurance Co.*,²³⁸ the appellee argued the appellant had “forfeited appellate review” because the Appellant’s Brief contained “several material violations of the Indiana Rules of Appellate Procedure that render the brief difficult to comprehend and wastes this court’s time.”²³⁹ Any waste of the court’s time, however, appeared to stem from the “ten pages of [the] Appellee’s Brief . . . devoted to criticisms of [the] Appellant’s Brief”²⁴⁰ rather than from the appellant’s missteps. The court declined the appellee’s invitation to find the appeal forfeited and pointed out, without coming right out and saying, that “those who live in glass houses should not throw stones”:

Indeed, we note that, after asserting [the appellant] failed to comply with Indiana Appellate Rule 46(A)(4) by failing to include a separate statement of the issue for her ‘setoff argument,’ [the appellee] failed to include a separate statement of the issue for its setoff argument. . . . In addition, [the appellee’s] attorney inaccurately characterized himself as ‘Attorney for Appellant’ on the cover page of Lake States’ Appellee’s Brief.²⁴¹

Good practice tips to take away from *Imre* are: (1) avoid picayunish nitpicking of the other side’s brief (which makes you look like a kindergartner tattling on a classmate and exasperates the judges whose time is wasted having to read and address such petty contentions) and only make such criticisms if the problems in opposing counsel’s brief significantly prejudiced you – if they did not, then they probably are not worth mentioning; (2) if you do make such criticisms, keep them short and concise—if (as in *Imre*) they comprise one-third of your brief, then it may appear you lack meritorious substantive points worth making with the space you fill up with non-substantive collateral attacks; and finally (3) take a close look at your own brief before launching an extended criticism of opposing counsel’s brief to avoid “the pot calling the kettle black.”

K. Unusual Cases

1. Appellate Rule 31.—Ask any practitioner, even one who routinely

237. *Id.* (citing *Smith v. Beneficial Fin. Co.*, 218 N.E.2d 921, 922 (1966)).

238. 803 N.E.2d 1126 (Ind. Ct. App.), *trans. denied*, 812 N.E.2d 806 (Ind. 2004).

239. *Id.* at 1129.

240. According to the opinion, the alleged deficiencies concerned: “(1) grammatical, quotation, and formatting errors, (2) the lack of more precise subheadings, (3) material misrepresentations, (4) failure to provide adequate citation, (5) failure to argue cogently, (6) failure to include a more precise statement of the issues, (7) failure to include the word “we” in a quote, and (8) minor technical errors.” *Id.* (footnote omitted).

241. *Id.* at 1129 n.1.

practices in our appellate courts, what Appellate Rule 31 says, and most probably could not give you a definitive answer without opening their rule books. The rule addresses the procedure used when “no Transcript of all or part of the evidence is available,” permitting a party to “prepare a verified statement of the evidence from the best available sources” and then filing a moving to certify the statement with the trial court or Administrative Agency.²⁴² Given the ease with which trial courts can generate a transcript from an audio recording, Rule 31 is rarely used. It came up, however, in *Roberts v. State*,²⁴³ a case in which “[t]he recording equipment typically used to record trials failed to function at Roberts’ trial.”²⁴⁴ Applying Appellate Rule 31, “the trial court certified as the Statement of the Evidence for Appeal affidavits from the court reporter, the public defender, the prosecutor and the judge.”²⁴⁵

2. *Failure of Trial Court to Rule on Acceptance of Belatedly Designated Evidence Prevents Consideration of Evidence on Appeal.*—In *Bourbon Mini Mart, Inc. v. Commissioner, Indiana Department of Environmental Management*,²⁴⁶ the appellant on appeal attempted to rely on an affidavit it had not designated to the trial court when responding to the appellee’s motion for summary judgment but instead had submitted belatedly.²⁴⁷ During the summary judgment hearing, the appellant asked the trial court to deem the affidavit timely submitted, but the trial court never ruled on the issue, thus preventing the court of appeals from knowing whether the trial court had ever considered the affidavit “properly designated.”²⁴⁸ Accordingly, because the court of appeals “may only consider that evidence which has been specifically designated to the trial court” when reviewing a motion for summary judgment, the court refused to consider the affidavit on appeal.²⁴⁹

3. *Court Permits Appeal to Be Revived Following Voluntary Dismissal “Without Prejudice” Even Though, in Hindsight, It Should Not Have Permitted the Dismissal.*—Appellate Rule 37 provides that the court of appeals can dismiss an appeal without prejudice upon a verified motion from a party that demonstrates “remand will promote judicial economy or is otherwise necessary

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

243. 799 N.E.2d 549 (Ind. Ct. App. 2003).

244. *Id.* at 550.

245. *Id.* The court of appeals rejected Roberts’s constitutional challenge to the lack of a transcript, finding the “evidence . . . relatively straightforward and not significantly in dispute,” thereby permitting “the parties to argue the issues upon appellate review and for [the court of appeals] to make informed decisions.” *Id.* at 551. In so holding, the court expressly distinguished *Emmons v. State*, 492 N.E.2d 303, 305 (Ind. 1986), in which the supreme court determined the lack of a voir dire transcript, the reconstruction of which would have provided “a ‘Herculean task due to the numerous questions generally posed to a prospective jury panel,’” required the defendant receive a new trial. *Roberts*, 799 N.E.2d at 550.

246. 806 N.E.2d 14 (Ind. Ct. App. 2004).

247. *Id.* at 23 n.5.

248. *Id.*

249. *Id.*

for the administration of justice.”²⁵⁰ In *Evans v. Buffington Harbor River Boats, LLC*,²⁵¹ the court of appeals opined that its motion panel’s decision to dismiss a previous appeal in the case without prejudice under Rule 37 had not promoted judicial economy or served the administration of justice.²⁵² The question now before the court was what to do about it. It concluded that, despite Rule 37’s parameters not being met, it could not find the appellants had waived their ability to pursue a subsequent appeal because its previous order had dismissed the prior appeal “without prejudice.”²⁵³

III. MISCELLANEOUS DEVELOPMENTS

A. Data From the Indiana Supreme Court

The Indiana Supreme Court conducted seventy-six oral arguments during its fiscal year ending June 20, 2004 (up from fifty-eight in fiscal year 2003), while disposing of 1050 cases that required a vote from each justice.²⁵⁴ Of these 1050 dispositions, fifty-five percent were criminal cases (a six percent increase from fiscal year 2003) and thirty percent were civil, tax, or other cases not involving attorney discipline, judicial discipline, or original actions (a one percent decrease from fiscal year 2003).²⁵⁵ However, 154 of the 1050 dispositions were resolved by majority opinion or published dispositive order,²⁵⁶ thirty-four percent of which were criminal cases²⁵⁷ (a one percent decrease from fiscal year 2003), and thirty-five percent of which were civil, tax, or other cases not involving attorney discipline, judicial discipline, or original actions (a nine percent increase over fiscal year 2003).²⁵⁸ These numbers demonstrate the court’s continued commitment to developing the civil law in Indiana, as they show that although the percentage of total criminal dispositions increased and civil dispositions slightly decreased, the percentage of published civil opinions appreciably increased while the percentage of published criminal cases slightly decreased.

B. Data From the Indiana Court of Appeals

During calendar year 2004, the Indiana Court of Appeals continued its frenetic pace to keep up with the overwhelming number of cases filed with it. It

250. IND. APP. R. 37.

251. 799 N.E.2d 1103 (Ind. Ct. App. 2003), *trans. denied*, 812 N.E.2d 804 (Ind. 2004).

252. *See id.* at 1114-15.

253. *Id.* at 1115.

254. *See* INDIANA SUPREME COURT ANNUAL REPORT JULY 1, 2003-JUNE 30, 2004, at 31 (2004) [hereinafter 2004 ANNUAL REPORT], and other figures available at the Division of Supreme Court Administration, 313 Statehouse, 200 W. Washington St., Indianapolis, Indiana.

255. *Compare id. with* INDIANA SUPREME COURT ANNUAL REPORT JULY 1, 2002-JUNE 30, 2003, at 31 (2003) [hereinafter 2003 ANNUAL REPORT].

256. *See* 2004 ANNUAL REPORT, *supra* note 254, at 31.

257. *Id.*

258. *Compare id. with* 2003 ANNUAL REPORT, *supra* note 255, at 31.

disposed of 2302 cases,²⁵⁹ an increase of sixty dispositions over 2003,²⁶⁰ and heard sixty-seven oral arguments.²⁶¹ Once fully briefed, the average age of a case in chambers of a judge was 1.8 months, a slight increase over 2003.²⁶² The court reversed the judgment of the trial court in about thirty-five percent of the civil appeals and in about fifteen percent of the criminal (non post-conviction relief) appeals,²⁶³ and about twenty-seven percent of its opinions were published.²⁶⁴ During this time period, the Chief Judge handed down 7293 orders,²⁶⁵ 2599 of which pertained to various extensions of time (only twenty-seven of which were denied), and 295 of which pertained to permissive interlocutory appeals (185 of which were denied).²⁶⁶

C. *The McHenry Experiment*

Although outside the survey period, the Indiana Supreme Court's opinion in *McHenry v. State*,²⁶⁷ deserves mention. In that opinion, Justice Brent Dickson "experiment[ed]" with a new style of opinion writing, namely the placement of "all citations unessential to the text . . . in footnotes, and substantive matter that otherwise might appear in footnotes . . . in the text."²⁶⁸ Recognizing that such a "format does not meet with universal approval,"²⁶⁹ the *McHenry* opinion expressly invites "[t]he public, the bench, and the bar . . . to comment to the Supreme Court Administrator, 315 State House, Indianapolis, IN, 46204."²⁷⁰ The author has received several thoughtful and well-reasoned written responses and desires more of the same. The author hopes to discuss the results of the "*McHenry* experiment" in next year's Appellate Procedure survey article, so please send in your thoughts.

D. *A Farewell to Cressler*

Finally, the author would be remiss if he failed to mention a bitter-sweet development in Indiana appellate practice. Doug Cressler, the well-respected Administrator of the Indiana Supreme Court, resigned his position in June 2004 to pursue an opportunity as Chief Deputy Clerk of the United States Court of Appeals for the Tenth Circuit located in Denver, Colorado. While "bitter" for Hoosiers, this change was "sweet" for Cressler, who loves the Rocky Mountains and spent regular time in them during well-earned vacations throughout his nine-

259. See INDIANA COURT OF APPEALS, 2004 ANNUAL REPORT 1 (2005).

260. Compare *id.* with INDIANA COURT OF APPEALS, 2003 ANNUAL REPORT 1 (2004).

261. See INDIANA COURT OF APPEALS, 2004 ANNUAL REPORT, *supra* note 259, at 1.

262. See *id.*

263. See *id.*

264. See *id.* at 4.

265. See *id.* at 12.

266. See *id.*

267. 820 N.E.2d 124 (Ind. 2005).

268. *Id.* at 126 n.2.

269. *Id.* (citing Richard A. Posner, *Against Footnotes*, 38 CONST. REV. 24 (Summer 2001)).

270. *Id.*

year tenure as Indiana's Supreme Court Administrator.

During his tenure as Administrator, Doug served as an adjunct professor at the Indiana University School of Law—Indianapolis, teaching courses in both Appellate Procedure and Professional Responsibility, and has been a prolific author.²⁷¹ He also was extensively involved in the Indiana State Bar Association, serving as Secretary of its Appellate Practice Section and chairing a subcommittee on the groundbreaking Indiana Ethics 2000 Task Force. Besides these noted accomplishments, Mr. Cressler likely will be remembered most by Indiana's appellate practitioners as the fount of knowledge about Indiana Supreme Court practice and procedure, with a kind word for all, the patience of Job, and an inexhaustible willingness to provide prompt and thorough answers to practitioner's questions. The Division of Supreme Court Administration wishes Doug all the best in his new endeavor and hopes the Tenth Circuit's practicing bar realizes what an asset it gained in June 2004.

271. See, e.g., Cressler 2004, *supra* note 1; Cressler 2003, *supra* note 184; Cressler 2002, *supra* note 184; Cressler & Cardoza, *supra* note 184; Douglas E. Cressler, *An Old Tort with a Unique Hoosier History Finds New Life—Seduction*, RES GESTAE, June 2004, at 26; Douglas E. Cressler, *Appellate Practice from Inside The Indiana Supreme Court Administrator's Office*, THE APPELLATE ADVOCATE, Spring 1998, at 5; Douglas E. Cressler, *Mandated Rebriefing: A Judicial Mechanism For Enforcing Quality Control in Criminal Appeals*, RES GESTAE, July 2000, at 20; Douglas E. Cressler, *Requiring Proof Beyond A Reasonable Doubt In Parental Rights Termination Cases*, 32 U. LOUISVILLE J. FAM. L. 785 (1994); Douglas E. Cressler, *Spoilation of Evidence*, 36 RES GESTAE 510 (1993); Douglas E. Cressler, Note, *Medicare Provider Reimbursement Disputes: Mapping the Contorted Borders of Administrative and Judicial Review*, 21 IND. L. REV. 705 (1988), reprinted at 26 SOC. SEC. REP. SERV. 741 (1989).